UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14-A

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seized of an appeal from the judgement rendered by the Trial Chamber on 3 March 2000 in the case of *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T ("Trial Judgement").

2. The events giving rise to this appeal took place during the conflict between the Croatian Defense Council ("HVO") and the Bosnian Muslim Army in the Lašva Valley region of Central Bosnia in the period from May 1992 until January 1994. The Appellant Tihomir Blaškić was the Commander of the HVO Armed Forces in Central Bosnia at the time the crimes at issue were committed.

3. The Trial Chamber convicted the Appellant on the basis of nineteen counts set forth in the Indictment, in relation to crimes occurring in the Vitez, Busovača, and Kiseljak municipalities.[1] These counts encompassed violations of Articles 2, 3, and 5 of the Statute of the International Tribunal ("Statute"). The Appellant was convicted on the basis of Article 7(1) of the Statute for ordering the crimes at issue in this appeal. The Trial Chamber also stated in the disposition of the judgement that "[i]n any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished..."[2] Therefore, the Trial Chamber also convicted the Appellant under Article 7(3) of the Statute. The Trial Chamber imposed a single sentence of 45 years' imprisonment.

4. The Appellant filed his notice of appeal on 17 March 2000.[3] This long appeal has, in part, been characterized by the filing of an enormous amount of additional evidence. This was *inter alia* due to the lack of cooperation of the Republic of Croatia at the trial stage[4] and to the delay in the

[1] Second Amended Indictment, Case No.: IT-95-14, filed on 26 Mar. 1999 ("Indictment" or "Second Amended Indictment"). The Appellant was indicted for persecutions as a violation of Article 5 of the Statute, unlawful attacks on civilians and civilian objects as violations of Article 3, wilful killing and causing serious injury as violations of Articles 2, 3, and 5, the destruction and plunder of property as violations of Articles 2 and 3, the destruction of institutions dedicated to religion or education as a violation of Article 3, and inhumane treatment, the taking of hostages, and the use of human shields as violations of Articles 2 and 3. The indictment contained 20 counts, each count alleging responsibility under both Articles 7(1) and 7(3) of the International Tribunal's Statute. On 30 July 1999, Count 2 was withdrawn by the Prosecution. In relation to counts 3 and 4, the Appellant was found not guilty of the shelling of the town of Zenica.

[2] Trial Judgement, p. 269.

[3] The Procedural History of this appeal is set out in greater detail in Annex A to this Judgement.

[4] *See Prosecutor v. Blaskic*, Case No.: IT-95-14-T, Subpoena Duces Tecum, 15 Jan. 1997; *Prosecutor v. Blaskic*, Case No.: IT-95-14-T, Order of a Judge Suspending *Subpoena Duces Tecum*, 20 Feb. 1997 (which considered the Government of the Republic of Croatia's refusal to comply with the *subpoena duces tecum* before a legal clarification on the authority of the International Tribunal to issue a subpoena to a sovereign state was given by the Security Council); *Prosecutor v. Blaskic*, Case No.: IT-95-14-T, Decision on the Objection of the Republic of Croatia to the

opening of its archives, which only occurred following the death of former president Franjo Tuđjman on 10 December 1999, thus preventing the parties from availing themselves of the materials contained therein at trial. During the appeal proceedings, the Appellant filed four motions pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"). In these motions, he sought to admit over 8,000 pages of material as additional evidence on appeal. The first of these additional evidence motions was filed on 19 January 2001, and the last, on 12 May 2003.

5. On 31 October 2002, the Appeals Chamber issued a Scheduling Order in relation to the first three Rule 115 Motions that had been filed by the Appellant by that time. It deemed clearly admissible certain of the additional evidence sought to be admitted by the Appellant, and ordered the parties to present oral argument limited to the issue of whether that evidence justified a new trial by a Trial Chamber, on some or all of the counts. On 21 November 2002, oral arguments were heard pursuant to this order. On 22 November 2002, a Scheduling Order was issued by the Appeals Chamber allowing the Prosecution to file its rebuttal material.

6. Following the filing of the fourth and final Rule 115 motion by the Appellant, and rebuttal material by the Prosecution in relation to this motion, the Appeals Chamber rendered its decisions on evidence on 31 October 2003. It found that in the circumstances of this case, a re-trial was not warranted. It decided which items of additional evidence and rebuttal material were admitted into the record. A total of 108 items were admitted, and as a consequence, several witnesses were heard in the evidentiary portion of the hearing on appeal, which took place from 8-11 December 2003, and was followed by final arguments on 16-17 December 2003.

7. Having considered the written and oral submissions of the Appellant and the Prosecution, the Appeals Chamber hereby renders its Judgement.

Issuance of *Subpoenae Duces Tecum*, 18 July 1997; *Prosecutor v. Blaskic*, Case No.: IT-95-14-T, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct. 1997.

II. STANDARD OF REVIEW ON APPEAL

8. While precedents setting out the standard of appellate review abound in the jurisprudence of the International Tribunal,[5] the Appeals Chamber considers that this appeal necessitates a further examination of the existing standards.

9. At the outset, the Appeals Chamber notes that the Appellant does not address this issue in his Appellant's Brief. The Appellant does, however, address this issue in his Brief in Reply, where he argues that when a conviction is based either on insufficient evidence or on a "wholly erroneous" evaluation of the evidence by a Trial Chamber, the Appeals Chamber will overturn the conviction as a miscarriage of justice.[6] He also submits that, where additional evidence has been admitted on appeal, a miscarriage of justice should be found where the evidence relied on by the Trial Chamber is exposed as unreliable in light of the additional evidence.[7] He claims that the overwhelming majority of "crucial evidence" in this case has entered the record following his conviction, and that the Appeals Chamber "is sitting as a court of first impression with respect to the new evidence accepted on appeal."[8]

10. During the appeal hearing, the Appellant submitted that the record on appeal was "a mix of trial evidence and a very substantial body of new evidence that was not available to the Trial Chamber below."[9] Commenting on the "no reasonable tribunal of fact" standard set out by the Appeals Chamber in the *Kupreškić* Appeal Judgement,[10] he submitted that, as there were no findings by the Trial Chamber as to the credibility or the weight to be given to the new evidence admitted on appeal in this case, the Appeals Chamber had no trial findings to defer to in relation to the new evidence.[11] He suggested that the Appeals Chamber review the mix of evidence *de novo*,[12] for several reasons. First, the Trial Chamber could not have reviewed the new evidence admitted on appeal.[13] Second, international standards of due process of law require either a new trial or, at a minimum, *de novo* review.[14] Third, the standard of "no reasonable tribunal of fact" could reward alleged Rule 68 violations by the Prosecution by permitting the Prosecution to prevail on a lower

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[5] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, paras. 34-40; *Čelebići* Appeal Judgement, paras. 434-435; *Kunarac* Appeal Judgement, paras. 35-48; *Vasiljević* Appeal Judgement, paras. 4-12.
[6] Brief in Reply, para. 4.
[7] Brief in Reply, para. 5.
[8] Brief in Reply, para. 6.
[9] AT 570 (16 Dec. 2003).
[10] That is, "no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings." *Kupreškić* Appeal Judgement, para. 76.
[11] AT 571 (16 Dec. 2003).
[12] AT 572 (16 Dec. 2003).
[13] *Ibid.*
[14] *Ibid.*

standard of proof on appeal.[15] The Appellant also submitted that doubts in assessing the mix of evidence should be considered by the Appeals Chamber in his favour, since there would be no appeal from the decision of the Appeals Chamber.[16]

11. The Prosecution submits that:

> [a]n appellant must establish that an error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[17]

The Prosecution further submits that arguments similar to those advanced by the Appellant were raised in the *Kupreškić* case, yet in that case the Appeals Chamber determined that the "burden is on the appellant to establish that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber, together with the additional evidence admitted during the proceedings."[18] The Prosecution further submitted that it was not for the Appeals Chamber to look at all the evidence on the trial record *de novo* since it would be difficult for the Appeals Chamber to determine issues of credibility in relation to the witnesses who testified at trial.[19]

12. Article 25 of the Statute provides for appeals on grounds of an error of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice. The standards to be applied in both cases are well established in the jurisprudence of the International Tribunal[20] and the International Criminal Tribunal for Rwanda (ICTR).[21]

13. The Appeals Chamber reiterates that an appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal. In setting out its contentions on appeal, a party cannot merely repeat arguments that did not succeed at trial, unless that party can demonstrate that rejecting them occasioned such error as to warrant the intervention of the Appeals Chamber.[22] Arguments of a

[15] AT 573 (16 Dec. 2003).
[16] AT 573-574 (16 Dec. 2003).
[17] Respondent's Brief, para. 2.5 (citing *Furundžija* Appeal Judgement, para. 37).
[18] AT 719 (16 Dec. 2003).
[19] AT 719-720 (16 Dec. 2003).
[20] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, para. 434.
[21] *Akayesu* Appeal Judgement, para. 178; *Kayishema/Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.
[22] *Rutaganda* Appeal Judgement, para. 18.

party which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately by the Appeals Chamber and need not be considered on the merits.[23] With regard to requirements as to form, an appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the judgement being challenged.[24] The Appeals Chamber will not give detailed consideration to submissions which are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies.[25] Thus, in principle, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions which are evidently unfounded.[26]

14. The Appeals Chamber recalls, as a general principle, that in respect of an alleged error of law:

> …the Appeals Chamber […] is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. The case-law recognises that the burden of proof on appeal is not absolute with regard to errors of law. The Appeals Chamber does not review the Trial Chamber's findings on questions of law merely to determine whether they are reasonable but rather to determine whether they are correct. Nevertheless, the party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision.[27]

However, if a party's arguments do not support its contention, that party does not automatically lose its point since the Appeals Chamber may intervene and, for other reasons, find in favour of the contention that there is an error of law.[28]

15. If the Appeals Chamber finds that an alleged error of law arises from the application of a wrong legal standard by a Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record, in the absence of additional evidence, and must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defense, before that finding is confirmed on appeal.

16. As to errors of fact, the standard applied by the Appeals Chamber has been that of reasonableness, namely, whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached.[29]

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[23] *Rutaganda* Appeal Judgement, para. 18.
[24] *Kunarac* Appeal Judgement, para. 44; *Rutaganda* Appeal Judgement, para. 19.
[25] *Kunarac* Appeal Judgement, para. 43.
[26] *Rutaganda* Appeal Judgement, para. 19.
[27] *Krnojelac* Appeal Judgement, para. 10.
[28] *Furundžija* Appeal Judgement, para. 35; *Vasiljević* Appeal Judgement, para. 6. *See also Kambanda* Appeal Judgement, para. 98: "in the case of errors of law, the arguments of the parties do not exhaust the subject, and that it is

17. The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[30] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić*, wherein it was stated that:

> [p]ursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[31]

18. The Appeals Chamber concurs with the *Kupreškić* Appeal Judgement's finding that:

> …where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was "wholly erroneous", it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.[32]

19. The Appeals Chamber considers that there are no reasons to depart from the standard set out above, in relation to grounds of appeal alleging pure errors of fact and when no additional evidence has been admitted on appeal. That standard shall be applied where appropriate in the present Judgement.

20. When factual errors are alleged on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules provides that the Appeals Chamber shall pronounce judgement "on the basis of the record on appeal together with such additional evidence as has been presented to it."

21. The Appeals Chamber in *Kupreškić* established the standard of review when additional evidence has been admitted on appeal, and held:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.[33]

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open to the Appeals Chamber, as the final arbiter of the law of the International Tribunal, to find in favour of an Appellant on grounds other than those advanced: *iura novit curia*."

[29] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Čelebići* Appeal Judgement, paras. 434-435; *Akayesu* Appeal Judgement, para. 178; *Musema* Appeal Judgement, para. 17.

[30] *Tadić* Appeal Judgement, para. 35; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Krnojelac* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.

[31] *Kupreškić* Appeal Judgement, para. 30.

[32] *Kupreškić* Appeal Judgement, para. 41.

[33] *Kupreškić* Appeal Judgement, para. 75.

22. The standard of review employed by the Appeals Chamber in that context was whether a reasonable trier of fact could have been satisfied beyond reasonable doubt as to the finding in question, a deferential standard. In that situation, the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself*, beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.

23. However, if in a given case, the outcome were that a reasonable trier of fact could reach a conclusion of guilt beyond reasonable doubt, the Appeals Chamber considers that, when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal. The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt.

24. In light of the foregoing, the Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal, as in the present case.

(a) The Appeals Chamber is confronted with an alleged error of fact, but the Appeals Chamber has found no error in the legal standard applied in relation to the factual finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will determine whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the finding of guilt.

(b) The Appeals Chamber is confronted with an error in the legal standard applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt.

(c) The Appeals Chamber is confronted with an alleged error of fact, and – contrary to the scenario described in (a) – additional evidence has been admitted on appeal. There is no error in the legal standard applied in relation to the factual finding. There are two steps involved.

(i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.

(d) The Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and – contrary to the scenario described in (b) – additional evidence has been admitted on appeal. There are two steps involved.

(i) The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt.

III. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 7 OF THE STATUTE

25. The Appellant submits that the Trial Chamber erred in its definition of the specific elements of criminal responsibility under Article 7(1) and Article 7(3) of the Statute, and in its failure to draw a clear distinction between these two forms of responsibility.[34] The Appellant maintains that by doing so, the Trial Chamber wrongfully convicted the Appellant; provided the Appellant with insufficient notice of the legal basis of his conviction; and thus impeded his ability to appeal the Trial Judgement.[35]

26. As a general response to the Appellant's arguments, the Prosecution agrees that responsibility under Article 7(1) and Article 7(3) of the Statute must in principle be distinguished, but submits that this difference should not be overstated.[36] It claims that both forms of responsibility are "a means of evaluating the linkage of an accused to a particular crime base" and the chosen theory of liability essentially plays its role at the sentencing stage.[37] It further asserts that both modes may be charged concurrently and convictions could, conceivably, be entered under both modes in relation to the same conduct.[38] The Prosecution submits that the Trial Chamber made three different types of findings in this case: (i) in relation to some incidents, it deemed that the Appellant could be found guilty on the basis of both Articles 7(1) and 7(3) of the Statute;[39] however, the Trial Chamber decided in those instances that the primary mode of liability under which he should be held responsible was Article 7(1); (ii) in relation to one instance, violence committed in the detention centres, the Trial Chamber found that the Appellant could only be convicted under Article 7(3);[40] and (iii) concerning the shelling of Zenica, the Trial Chamber found that the evidence was insufficient to sustain a conviction under either mode.[41]

A. Individual Criminal Responsibility under Article 7(1) of the Statute

1. Planning, Instigating, and Ordering

27. According to the Appellant, the standards set forth in the Trial Judgement concerning the forms of criminal participation consisting of planning, instigating, and ordering under Article 7(1) of the Statute deviate from those established by the jurisprudence of the International Tribunal and

[34] This ground of appeal was the Seventh Ground in the Appellant's Brief.
[35] Appellant's Brief, p. 124.
[36] Respondent's Brief, paras. 5.4-5.7.
[37] Respondent's Brief, paras. 5.6 and 5.14.
[38] Respondent's Brief, paras. 5.7, 5.12, 5.13.
[39] Respondent's Brief, paras. 5.18-5.19.
[40] Respondent's Brief, para. 5.20.
[41] Respondent's Brief, paras. 5.21-5.22.

the ICTR, customary international law, and national legislation.[42] The Appellant submits that the correct standard of *mens rea* for these three forms of criminal participation is "direct or specific intent," rather than the "indirect" or recklessness standard adopted by the Trial Chamber in this case.[43] In addition, he alleges that the Trial Chamber failed to differentiate between the recklessness standard and that of *dolus eventualis*, and improperly applied these concepts.[44]

28. The Appellant further claims that his conviction has been erroneously based on a strict liability theory.[45] He submits that the Trial Chamber erroneously considered that a lawful order can become unlawful circumstantially "because unlawful acts have occurred in its implementation."[46] He also claims that, under that standard, a commander may be held responsible for "anything that takes place once his order has begun," regardless of whether these acts were within the scope of actions intended by the commander himself. In doing so, the Appellant argues, the Trial Chamber committed a legal error by concluding, as it must have, that a commander may be convicted purely on the basis of implicitly illegal orders.

29. In addition, and contrary to the Trial Chamber's finding, the Appellant submits that liability for planning, instigating, or ordering requires proof of causation between the acts of the accused and the actual perpetrator of the crime, which has not been established in this case.[47] He states that the circumstantial evidence presented by the Prosecution on that point did not reach the beyond reasonable doubt threshold necessary for conviction.[48] The Appellant points out that "in the Judgement's analysis of the events in Vitez, Stari Vitez, and the villages in the municipalities of Kiseljak and Busovača, the Trial Chamber uses selective circumstantial evidence, such as the non-consecutive numbering of the orders entered into evidence at trial, to infer that Appellant had to have issued illegal orders which the Chamber did 'not *strictu sensu* have in its possession.'"[49] The Appellant also asserts that "[t]he Trial Chamber's legal finding that planning, instigating and ordering under [Article] 7(1) could be predicated on a *mens rea* of recklessness (or in the case of aiding and abetting, on acceptance of the mere "possibility" of an unspecified crime) was set out at the beginning of the [Trial] Judgement and pervades the entire analysis that followed."[50]

[42] Appellant's Brief, p. 124.
[43] Appellant's Brief, p. 125.
[44] Appellant's Brief, pp. 126-127.
[45] Appellant's Brief, pp. 128-129.
[46] Appellant's Brief, p. 132.
[47] Appellant's Brief, pp. 129-131.
[48] Appellant's Brief, pp. 130-131.
[49] Appellant's Brief, p. 134.
[50] Brief in Reply, para. 116.

30. In response, the Prosecution states that the Appellant has generally failed to establish any instance where the Trial Chamber committed an error "invalidating the decision."[51] On many occasions, it claims, the Appellant has not even attempted to do so, simply offering particular re-interpretations of the International Tribunal's case law.[52] Although the existence of a volitive component must be present in all forms of responsibility under Article 7(1) of Statute, the Prosecution submits that the proposition of the Appellant, based on his reading of the *Akayesu* Trial Judgement, that this component must take the form of conscious desire, specific intent, or some other qualified form of intent, is both unsupported by the *Akayesu* decision and incorrect as a legal proposition.[53] It submits that recent decisions of the International Tribunal have shown that *dolus eventualis* or indirect intent could be an acceptable standard.[54] The Appellant's review of domestic and international jurisprudence is not more convincing, the Prosecution says.[55] Nor is his argument that the Trial Chamber misinterpreted the concept of *dolus eventualis* and/or recklessness.[56]

31. Moreover, the Prosecution submits that the Appellant's argument that he may only be responsible if he has anticipated the physical perpetrator's acts with enough specificity to make him aware of six elements[57] is simply not supported by the cases he refers to.[58] The Prosecution contends that the liability of the Appellant was not based on his "vague belief in the mere possibility of certain future events" or on a strict liability theory as he claims, but on the knowledge and acceptance of a risk.[59] The Prosecution further points out that the Appellant's general suggestion that "planning, instigating and ordering" contain a requirement of causation has actually been upheld by the Trial Chamber in the present case.[60] The Prosecution finally rejects the Appellant's suggestion that the existence of a plan or an order could not have been established circumstantially.[61]

32. At the outset, the Appeals Chamber notes that the Appellant was not convicted for planning or instigating crimes. As a result, it declines to consider the issues raised in this ground of appeal in relation to these two modes of participation. The issue which the Appeals Chamber will address is

[51] Respondent's Brief, para. 5.25.
[52] Respondent's Brief, para. 5.25.
[53] Respondent's Brief, para. 5.28.
[54] Respondent's Brief, paras. 5.30-5.32.
[55] Respondent's Brief, paras. 5.33-5.35 and 5.39-5.48.
[56] Respondent's Brief, paras. 5.36-5.37.
[57] Respondent's Brief, para. 5.49. The six elements are: "(i) the commission of a crime is likely to occur (or is in the process of being committed); (ii) the accused is contributing to or has caused a crime to be committed; (iii) the type of crime which is being or going to be committed; (iv) the unlawfulness of the act; (v) the manner in which the direct perpetrator is committing that crime; and (vi) the manner in which the accused caused the crime or otherwise contributed to the commission of the crime."
[58] Respondent's Brief, paras. 5.54-5.56.
[59] Respondent's Brief, paras. 5.56-5.58.
[60] Respondent's Brief, paras. 5.59-5.62.
[61] Respondent's Brief, paras. 5.63-5.65.

whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, and if so, how it should be defined.

33. The Appeals Chamber has not had the occasion to pronounce on this issue in previous decisions. In the *Vasiljević* Appeal Judgement, the Appeals Chamber considered the issue of *mens rea*, but in relation to the extended form of joint criminal enterprise. The Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. In the *Vasiljević* Appeal Judgement, it stated:

> With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*" – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.[62]

In relation to the responsibility for a crime other than that which was part of the common design, the lower standard of foreseeability — that is, an awareness that such a crime was a possible consequence of the execution of the enterprise — was applied by the Appeals Chamber. However, the extended form of joint criminal enterprise is a situation where the actor already possesses the intent to participate and further the common criminal purpose of a group. Hence, criminal responsibility may be imposed upon an actor for a crime falling outside the originally contemplated enterprise, even where he only knew that the perpetration of such a crime was merely a possible consequence, rather than substantially likely to occur, and nevertheless participated in the enterprise.

34. In further examining the issue of whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, the Appeals Chamber deems it useful to consider the approaches of national jurisdictions. In common law systems, the *mens rea* of recklessness is sufficient to ground liability for serious crimes such as murder or manslaughter. In the United States, for example, the concept of recklessness in criminal cases has been defined in the Model Penal Code[63] as follows:

> a conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from [the actor's] conduct. The risk must be of such a nature and degree that, considering

[62] *Vasiljević* Appeal Judgement, para. 101 (quoting *Tadić* Appeal Judgement, para. 228).

[63] In his Foreword to the Model Penal Code, Herbert Wechsler (Director of the American Law Institute from 1963 to 1984) writes: "The Model Penal Code of the American Law Institute, completed in 1962, played an important part in the widespread revision and codification of the substantive criminal law of the United States that has been taking place in the last twenty years. […] It is fair to say that [the] thirty-four [state] enactments were all influenced in some part by the positions taken in the Model Code, though the extent to which particular formulations or approaches of the Model were adopted or adapted varied extensively from state to state." Foreword, May 30, 1985.

> the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[64]

According to the Model Penal Code, therefore, the degree of risk involved must be substantial and unjustifiable; a mere possibility of risk is not enough.

35. In the United Kingdom, the House of Lords in the case of *R v. G and another* considered the ambit of recklessness within the meaning of section 1 of the Criminal Damage Act of 1971.[65] Lord Bingham's opinion, with which his colleagues agreed, was that

> [A] person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to-(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk…[66]

According to this opinion, the risk involved must be unreasonable; furthermore, with respect to a particular result, the actor in question must be aware of a risk that such a result will occur, not merely that it may occur.

36. In the Australian High Court decision of *R v. Crabbe,* the Court considered "whether the knowledge which an accused person must possess in order to render him guilty of murder when he lacks an actual intent to kill or to do grievous bodily harm must be knowledge of the probability that his acts will cause death or grievous bodily harm (…) or whether knowledge of a possibility is enough."[67] The High Court determined that:

> The conclusion that a person is guilty of murder if he commits a fatal act knowing that it will probably cause death or grievous bodily harm but (absent an intention to kill or do grievous bodily harm) is not guilty of murder if he knew only that his act might possibly cause death or grievous bodily harm is not only supported by a preponderance of authority but is sound in principle. The conduct of a person who does an act, knowing that death or grievous bodily harm is *a probable consequence*, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm.[68]

37. The High Court in *R v. Crabbe* also considered the situation where a person's knowledge of the probable consequence of his act is accompanied by indifference, finding that:

> A person who does an act causing death knowing that it is probable that the act will cause death or grievous bodily harm is…guilty of murder, although such knowledge is accompanied by indifference whether death or grievous bodily harm might not be caused or not, or even by a wish

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[64] Model Penal Code, § 2.02(c).
[65] *R v G and another*, [2004] 1 A.C. 1034, [2003] 4 All ER 765. The Appeals Chamber notes, however, that this case was decided approximately 10 years after the crimes at issue in this case.
[66] *R v G and another*, [2004] 1 A.C. 1034, 1057 (quoting the Criminal Code Bill annexed to the Law Commission Report on Criminal Law: A Criminal Code for England and Wales Draft Criminal Bill, Vol. 1 (Law Comm. No. 177, Apr. 1989)).
[67] *R v. Crabbe* (1985) 58 ALR 417, 468.
[68] *R v. Crabbe* (1985) 58 ALR 417, 469 (emphasis added).

> that death or grievous bodily harm might not be caused. That does not mean that reckless indifference is an element of the mental state necessary to constitute the crime of murder. It is not the offender's indifference to the consequences of his act but his knowledge that those consequences will probably occur that is the relevant element.[69]

38. In the common law jurisdictions examined above, the *mens rea* of recklessness incorporates the awareness of a risk that the result or consequence will occur or will probably occur, and the risk must be unjustifiable or unreasonable. The mere possibility of a risk that a crime or crimes will occur as a result of the actor's conduct generally does not suffice to ground criminal responsibility.[70]

39. In civil law systems, the concept of *dolus eventualis* may constitute the requisite *mens rea* for crimes. In French law, for example, this has been characterized as the taking of a risk and the acceptance of the eventuality that harm may result. Although the harm in question was not desired by the actor, it was caused by his dangerous behaviour, which was carried out deliberately and with the knowledge that harm may occur.[71] In Italian law, the principle is expressed as follows: the occurrence of the fact constituting a crime, even though it is not desired by the perpetrator, is foreseen and accepted as a possible consequence of his own conduct.[72] The German Federal Supreme Court (Bundesgerichtshof, BGH) has found that acting with *dolus eventualis* requires that the perpetrator perceive the occurrence of the criminal result as possible and not completely remote, and that he endorse it or at least come to terms with it for the sake of the desired goal.[73] It has further stated that in the case of extremely dangerous, violent acts, it is obvious that the perpetrator takes into account the possibility of the victim's death and, since he continues to carry out the act, accepts such a result. The volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence.

40. In the present case, the Trial Chamber in paragraph 474 of the Trial Judgement articulated the following standard:

> Even if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article

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[69] *R v. Crabbe* (1985) 58 ALR 417, 470.

[70] The Appeals Chamber does not consider those offenses, specifically regulated by statute in certain national jurisdictions, which may involve lower culpable mental states.

[71] Le Gunehec, F. "Elément moral de l'infraction," éditions techniques, Juris-Classeur, fascicule 20, vol. 1, 2002.

[72] Commentario Breve al Codice Penale, Cedam, Padua (1986), p. 103.

[73] BGHSt 36, 1-20 [9-10]: "According to the established jurisprudence of the Federal Supreme Court on the delimitation of *dolus eventualis* and conscious/advertent negligence, the perpetrator is acting intentionally if he recognizes as possible and not entirely unlikely the fulfilment of the elements of an offence and agrees to it in such a way that he approves the fulfilment of the elements of the offence or at least reconciles himself with it in order to reach the intended result, even if he does not wish for the fulfilment of the elements of the crime; conscious negligence means that the perpetrator does not agree with the fulfilment of the elements of the crime – which he recognizes as possible – and seriously – not only vaguely – trusts that the fulfilment will not come about." Confirmed in BGH v. 7. 6. 1994 – 4 StR 105/94, reproduced in *Strafverteidiger* (StV) 1994, 654 (and BGH v. 22. 2. 2000 – 5 StR 573/99, reproduced in *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* [NStZ-RR] 2000, 165).

> 7(1) of the Statute for ordering the crimes. As has been explained above, any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) [*le dol éventuel* in the original French text] so as to incur responsibility for having ordered, planned or incited the commitment of the crimes.[74]

Although the Trial Chamber, citing in a footnote its "above, discussion on Article 7 of the Statute,"[75] indicated that the standard it was articulating in paragraph 474 had already been explained earlier in the Trial Judgement, an examination of previous paragraphs pertaining to the legal elements of Article 7 demonstrates that the Trial Chamber did not actually do so. Other paragraphs in the Trial Judgement articulated the standard set out in paragraph 474 using different expressions. These paragraphs are quoted below:

> 562. The Trial Chamber concludes that General Blaškić is responsible for the crimes committed in the three villages on the basis of his negligence [*dol éventuel* in the French text], in other words for having ordered acts which he could only reasonably have anticipated would lead to crimes.
>
> 592. The Trial Chamber is also convinced beyond any reasonable doubt that by giving orders to the Military Police in April 1993, when he knew full well that there were criminals in its ranks[], the accused intentionally took the risk that very violent crimes would result from their participation in the offensives….
>
> 653. The Trial Chamber maintains that even though General Blaškić did not explicitly order the expulsion and killing of the civilian Muslim populations, he deliberately ran the risk of making them and their property the primary targets of the "sealing off" and offensives launched on 18 April 1993….
>
> 661. The Trial Chamber is of the view that the content of the military orders sent to the Ban Jelacic Brigade commander, the systematic and widespread aspect of the crimes perpetrated and the general context in which these acts fit permit the assertion that the accused ordered the attacks effected in April and June 1993 against the Muslim villages in the Kiseljak region. It also appears ["Il appert également" in the French text] that General Blaškić clearly had to have known that by ordering the Ban Jelačić Brigade to launch such wide-ranging attacks against essentially civilian targets extremely violent crimes would necessarily result. Lastly, it emerges from those same facts that the accused did not pursue a purely military objective but that by using military assets he also sought to implement the policy of persecution of the Muslim civilian populations set by the highest HVO authorities and that, through these offensives, he intended to make the populations in the Kiseljak municipality take flight.
>
> 738. With particular regard for the degree of organisation required, the Trial Chamber concludes that General Blaškić ordered the use of detainees to dig trenches, including under dangerous conditions at the front. The Trial Chamber also adjudges that by ordering the forced labour Blaškić knowingly took the risk that his soldiers might commit violent acts against vulnerable detainees, especially in a context of extreme tensions.
>
> 741. The Trial Chamber concludes that although General Blaškić did not order that hostages be taken, it is inconceivable that as commander he did not order the defence of the town where his headquarters were located. In so doing, Blaškić deliberately ran the risk that many detainees might be taken hostage for this purpose.

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[74] Trial Judgement, para. 474 (footnote omitted). In the original French text, paragraph 474 of the Trial Judgement reads as follows: "Quand bien même on mettrait malgré tout encore en doute que l'accusé ait ordonné l'attaque avec la claire intention que le massacre soit commis, sa responsabilité pour avoir ordonné les crimes devrait malgré tout être engagée conformément à l'article 7 1) du Statut. Ainsi qu'il a été expliqué précédemment, toute personne qui, en ordonnant un acte, sait qu'il y a un risque que des crimes soient commis et accepte de prendre ce risque, manifeste le niveau d'intention nécessaire (le dol éventuel) pour voir sa responsabilité engagée pour avoir ordonné, planifié ou incité à commettre les crimes." (footnote omitted)

[75] Trial Judgement, para. 474, n. 991.

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[76]

2. Aiding and Abetting

43. The Appellant submits that liability for aiding and abetting requires, at a minimum, actual knowledge.[77] He submits that not only must the aider and abettor know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Recklessness or negligence on his part is not sufficient, he asserts, contrary to the Trial Chamber's alleged finding on that point.[78] Furthermore, the Appellant submits that the *actus reus* of aiding and abetting includes a causation requirement which the Trial Chamber failed to acknowledge and to apply.[79] In other words, the contribution must "have a direct and important impact on the commission of the crime."[80] Instead, the Appellant maintains, the Trial Chamber erroneously applied a strict liability standard to find the Appellant guilty as an aider and abettor and reiterates that the Trial Chamber's conclusion that "he could be found guilty if he accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of military action effectively eliminates the 'actual knowledge' *mens rea* of aiding and abetting, and is thus erroneous as a matter

[76] The French translation of this legal standard reads as follows:
> Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la *mens rea* requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime.

[77] Appellant's Brief, p. 131.
[78] Appellant's Brief, pp. 131-133.
[79] Appellant's Brief, pp. 133-135.
[80] Appellant's Brief, p. 134.

of law."[81] He states that this standard was set out at the beginning of the Trial Judgement and pervades the entire analysis that followed.[82]

44. The Prosecution submits that the Appellant's claim that the *mens rea* adopted by the Trial Chamber in relation to aiding and abetting — "possible and foreseeable consequence of the conduct" — was too low is unsupported by any "standard" or authority. Nor did the Appellant, according to the Prosecution, indicate any instance where the application of such a standard would have impacted upon his conviction thereby possibly enabling him to claim prejudice.[83] The Prosecution further submits that the Trial Chamber did not apply a negligence standard in the instant case but that, if it had, it would have been completely appropriate to do so.[84] Finally, the Prosecution rejects the Appellant's unsupported assertion that aiding and abetting liability requires an element of causation between the act of the accused and the act of the principal.[85]

45. In *Vasiljević*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:

> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. […]
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. […][86]

The Appeals Chamber considers that there are no reasons to depart from this definition.

46. In this case, the Trial Chamber, following the standard set out in *Furundžija*, held that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[87] It further stated that the *mens rea* required is "the knowledge that these acts assist the commission of the offense."[88] The Appeals Chamber considers that the Trial Chamber was correct in so holding.

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[81] Brief in Reply, para. 115.
[82] Brief in Reply, para. 116.
[83] Respondent's Brief, para. 5.67.
[84] Respondent's Brief, paras. 5.68-5.69.
[85] Respondent's Brief, paras. 5.71-5.75.
[86] *Vasiljević* Appeal Judgement, para. 102.
[87] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).
[88] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).

47. The Trial Chamber further stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*."[89] It considered:

> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.[90]

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.

48. The Trial Chamber in this case went on to state:

> Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required. Furthermore, participation may occur before, during or after the act is committed and be geographically separated therefrom.[91]

The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime.

49. In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."[92] However, as previously stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation.[93] In this respect, the Trial Chamber erred.

50. The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor…know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed,

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[89] Trial Judgement, para. 284 (footnote omitted).
[90] Trial Judgement, para. 284 (footnote omitted).
[91] Trial Judgement, para. 285 (citing *Furundžija* Trial Judgement, para. 233; *Aleksovski* Trial Judgement, para. 61).
[92] Trial Judgement, para. 286.
[93] *Vasiljević* Appeal Judgement, para. 102.

and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[94] The Appeals Chamber concurs with this conclusion.

51. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber was correct in part and erred in part in setting out the legal requirements of aiding and abetting.

52. The Appeals Chamber notes that in this case, the Trial Chamber did not hold the Appellant responsible for aiding and abetting the crimes at issue. In addition, the Appeals Chamber considers that this form of participation was insufficiently litigated on appeal.[95] Furthermore, the Appeals Chamber does not consider that this form of participation was fairly encompassed by the Indictment.[96] In these circumstances, the Appeals Chamber declines to consider this form of participation any further.

B. Command Responsibilty under Article 7(3) of the Statute

53. In this section,[97] the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered.

1. Actual knowledge of a superior

54. The Appellant claims that the *mens rea* under Article 7(3) of the Statute is actual knowledge or "information which, if at hand, would oblige the commander to conduct further inquiry."[98] Regarding actual knowledge, the Appellant submits that it requires more than proof of a person's rank as a military commander, and that the Trial Chamber failed to look beyond the Appellant's status to establish his knowledge, thus relying "almost exclusively" on the Appellant's rank and status. This, the Appellant contends, is an unacceptable form of strict liability which in effect shifts the burden of proof.[99]

55. The Prosecution responds that the Appellant has failed to make a single reference to any paragraph of the Trial Judgement that would lend credence to this allegation. On the contrary, it

[94] Trial Judgement, para. 287 (quoting *Furundžija* Trial Judgement, para. 246). *See,* for example, in German law, "Risikoerhöhungstheorie" ("theory of added peril"), BGH St. 42, 135-139.
[95] It was discussed primarily as an error of law in the parties' briefs, and there was no discussion concerning aiding and abetting during the appeal hearing. Compare *Krstić* Appeal Judgement, p. 47, n. 228; *Vasiljević* Appeal Judgement, para. 133.
[96] *See* below Chapter VI (A); compare *Krstić* Appeal Judgement, para. 137.
[97] In this Judgement, the expressions "command responsibility" and "superior responsibility" are synonymous.
[98] Appellant's Brief, p. 136.

submits, this argument has been contradicted by the findings of the Trial Chamber in relation to the events in Ahmići, the offence of trench-digging, and the maltreatment of detainees.[100]

56. The Appeals Chamber notes that the Appellant has not taken issue with the requirements set out by the Trial Chamber with regard to the circumstantial evidence to be used in support of the finding of a superior's actual knowledge. Rather, he challenges the statement of the Trial Chamber in paragraph 308 of the Trial Judgement that:

> [t]hese indicia must be considered in light of the accused's position of command, if established. Indeed, as was held by the *Aleksovski* Trial Chamber, an individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates.

The Appellant contends that this statement applies the standard of strict liability by founding his actual knowledge on the basis of his position of command.

57. The Appeals Chamber disagrees with this interpretation of the Trial Judgement. The Trial Chamber referred to the Appellant's position of command in addition to the indicia it set out in paragraph 307 of the Trial Judgement,[101] and regarded the position of command not as the criterion for, but as indicia of the accused's knowledge. Given that paragraph 308 appears in the section of the Trial Judgement discussing Article 7(3) of the Statute, and given the fact that the Trial Chamber recognised, at the beginning of its discussion of Article 7(3), that to establish responsibility under that article, proof was required of, among other things, the accused's knowledge,[102] there is no merit in the Appellant's allegation of the application of strict liability by the Trial Chamber to his case. This aspect of the appeal is dismissed.

2. The standard of "had reason to know"

58. The Appellant next submits that the "had reason to know" standard is not a mere negligence standard and does not imply a general duty to know on the part of the commander.[103] He argues that the Trial Chamber's view that the Appellant's negligence in informing himself may serve as a basis for establishing his liability under Article 7(3) of the Statute is contrary to the role, function, and interpretation of that provision and creates in effect a form of strict liability which infringes upon the presumption of innocence of the Appellant by focusing exclusively on his position.[104] He

[99] Appellant's Brief, p. 136.
[100] Respondent's Brief, paras. 5.78-5.79.
[101] These indicia are: "the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time." Trial Judgement, para. 307 (footnote omitted).
[102] Trial Judgement, para. 307.
[103] Appellant's Brief, pp. 136-139.
[104] Appellant's Brief, p. 139.

submits that even if it were admitted that command responsibility is a form of liability based on negligence, all of the underlying offences with which the Appellant was charged require more than negligence as the *mens rea*, and that offences such as "negligent murder" or "negligent persecutions" simply do not exist under international law.[105] He concludes that what the Trial Judgement does by allegedly lowering the *mens rea* standard of command responsibility is to create new criminal offences such as "negligent murder," thereby violating the principle of *nullum crimen sine lege*.[106]

59. The Prosecution concedes that, to the extent that the Trial Chamber stated that the "had reason to know" standard encompassed a "should have known" standard, the Trial Chamber was in error.[107] However, the Prosecution adds that such a theoretical allowance would not enable the conclusion that such an error would invalidate the Trial Judgement.[108] No showing to that effect has been made by the Appellant, and none could be made since, according to the Prosecution, none of the Trial Chamber's findings rests solely on the Appellant's alleged breach of his duty to know.[109]

60. In reply, the Appellant contends that the Prosecution's concession that the Trial Chamber committed an error in relation to the required *mens rea* should "for this reason alone" lead to a reversal of his conviction.[110] It is not sufficient for the Prosecution to say that in any case the point was rendered harmless because of the Trial Chamber's finding of "actual" or "constructive" knowledge. Further, the Appellant contends that the imputation of knowledge to him by the Trial Chamber was based solely on his position.[111]

61. The Appeals Chamber notes that the Trial Chamber concluded that:

> …if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.[112]

At another place in the Trial Judgement, the Trial Chamber "holds, again in the words of the Commentary, that '[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this

[105] Appellant's Brief, p. 139.
[106] Appellant's Brief, p. 139.
[107] Respondent's Brief, para. 5.80.
[108] AT 694 (16 Dec. 2003).
[109] Respondent's Brief, paras. 5.82-5.83. *See also* AT 694 (16 Dec. 2003).
[110] Brief in Reply, para. 117.
[111] Brief in Reply, para. 122.

purpose.'"[113] One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

62. The Appeals Chamber considers that the *Čelebići* Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[114] Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[115] There is no reason for the Appeals Chamber to depart from that position.[116] The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.

63. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law."[117] It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...."[118] The Appeals Chamber expressly endorses this view.

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[112] Trial Judgement, para. 332.
[113] Trial Judgement, para. 329 (quoting the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz et al. (eds.), ICRC, 1986), para. 3545).
[114] *Čelebići* Appeal Judgement, para. 241 (emphasis added) (footnote omitted). The standard as interpreted in the *Čelebići* Appeal Judgement has been applied in the *Bagilishema* Appeal Judgement, para. 42, and in the *Krnojelac* Appeal Judgement, para. 151.
[115] *Čelebići* Appeal Judgement, para. 226.
[116] *Aleksovski* Appeal Judgement, para. 107. The Appeals Chamber has previously stated in the *Aleksovski* Appeal Judgement that "a previous decision of the Chamber should be followed unless there are cogent reasons in the interests of justice for departing from it." *Aleksovski* Appeal Judgement, para. 128. Elaborating on this principle, the Appeals Chamber stated that: "[i]nstances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law." *Aleksovski* Appeal Judgement, para. 108.
[117] *Bagilishema* Appeal Judgement, para. 34.
[118] *Bagilishema* Appeal Judgement, para. 35.

64. The appeal in this respect is allowed, and the authoritative interpretation of the standard of "had reason to know" shall remain the one given in the *Čelebići* Appeal Judgement, as referred to above.

3. When does effective control exist and in what form?

65. The Appellant submits that it was not established that he had effective control over the perpetrators at the time of the commission of their acts.[119] He insists that this control must be established at the time of the incidents charged in the Indictment.[120] He also argues that he would only have had effective control over the special purpose units at the time of the incidents charged in the Indictment, if at that time "he not only had been able to give orders to these units but if, in addition, those orders had actually been followed."[121] He contends that the submission of reports on atrocities does not in itself enable the conclusion that effective control existed, as the commander does not have the authority to confront the situation himself but must await the steps taken by competent authorities.[122] He adds that the vagueness of the Trial Judgement on that point requires a reversal of the conviction.[123]

66. The Prosecution responds that the Appellant's argument that the Trial Chamber erred insofar as it concluded that "effective control" could be established on the basis of evidence that a person had the material ability to submit reports about atrocities to higher authorities should be rejected.[124] The Prosecution considers that the Appellant appears to suggest that his effective control over special units could only have been established if his orders had been shown to have been followed by them, but that he has failed to identify the Trial Chamber's findings to which this aspect of his ground of appeal relates and has failed to establish that the Trial Chamber's finding that his orders were indeed followed by such units was unreasonable.[125] The Prosecution further rejects the Appellant's limited interpretation of what may constitute "effective control" and submits that, on the basis of the evidence, the Trial Chamber could reasonably conclude that he was in control of certain units which did not form parts of the regular HVO troops.[126] In its view, where subordinates are under more than one superior, every such superior may be held responsible for the crimes committed by the subordinates.[127]

[119] Appellant's Brief, pp. 140-142.
[120] Appellant's Brief, p. 141.
[121] Appellant's Brief, p. 141.
[122] Appellant's Brief, p. 142.
[123] Appellant's Brief, p.142.
[124] AT 696-697 (16 Dec. 2003).
[125] Respondent's Brief, paras. 5.86-5.88.
[126] Respondent's Brief, paras. 5.88-5.99.
[127] AT 695-696 (16 Dec. 2003).

67. The Appeals Chamber takes note that the Trial Chamber concurred with the *Čelebići* Trial Judgement, which endorsed the view that a superior must have effective control over "the persons *committing* the underlying violations of international humanitarian law."[128] The Trial Chamber also stated that "a commander may incur criminal responsibility for crimes *committed* by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them."[129] Both conclusions of the Trial Chamber fall within the terms of Article 7(3) of the Statute, and both are not challenged by the Appellant.

68. With regard to the position of the Trial Chamber that superior responsibility "may entail" the submission of reports to the competent authorities,[130] the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.

69. The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I.[131] The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law,[132] and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[133] The appeal in this regard is therefore rejected.

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[128] Trial Judgement, paras. 300-301 (emphasis added) (quoting *Čelebići* Trial Judgement, para. 378).
[129] Trial Judgement, para. 301 (emphasis added) (footnote omitted).
[130] Trial Judgement, para. 302.
[131] Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
[132] *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.
[133] *Aleksovski* Appeal Judgement, para. 76.

4. "Reasonable and necessary measures" and the nexus between the failure of a superior to act and subordinates' crimes

(a) Reasonable and necessary measures

70. The Appellant contends that the Trial Chamber did not set any standards for determining the "reasonable and necessary measures" required of the commander, and that the example of submitting reports by the commander is insufficient to define the measures.[134]

71. The Prosecution responds that the Appellant has failed to establish that the Trial Chamber erred in its reasoning as to what constituted "reasonable and necessary measures" in the present instance.[135]

72. The Appeals Chamber notes that the Trial Chamber held that:

> …it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator…this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.[136]

It appears from this statement that necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates. The measure of submitting reports is again an example, applicable "under some circumstances." The Appeals Chamber considers that it was open to the Trial Chamber not to list measures that might vary from case to case,[137] since it had made it clear that such measures should be necessary and reasonable to prevent subordinates' crimes or punish subordinates who had committed crimes. What constitutes such measures is not a matter of substantive law but of evidence, whereas the effect of such measures can be defined by law,[138] as has been so defined by the Trial Chamber in this case. The appeal in this regard is rejected.

(b) The nexus between the failure of a superior to act and subordinates' crimes

73. The Appellant argues that an element of causation is required to establish a commander's responsibility under Article 7(3) of the Statute,[139] and that the Trial Chamber failed to establish the required causal nexus between the Appellant's failure to act and the commission of crimes on his

[134] Appellant's Brief, pp. 144-145.
[135] Respondent's Brief, paras. 5.105-5.107.
[136] Trial Judgement, para. 335.
[137] *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.
[138] *Čelebići* Appeal Judgement, para. 198.
[139] Appellant's Brief, pp. 143-144.

subordinates' part.[140] The Appellant argues that "the Trial Chamber, in not requiring causation even on a co-contributory level, again imposes strict liability on the Appellant, who is held responsible for his subordinates' crimes, regardless of whether it was impossible for him to prevent these crimes from being committed,"[141] and that by presuming a causal effect between the Appellant's passivity and his subordinates' unlawful acts, the Trial Chamber reversed the burden of proof and violated the principle of presumption of innocence.[142]

74. The Prosecution responds that there is no requirement of causality between the commander's failure to act and the commission of criminal acts by his subordinates.[143]

75. The Appeals Chamber understands the contention of the Appellant to be that the Trial Chamber obviated proof of causation linking the commander's failure to act and subordinates' crimes,[144] and that it should have asked the Prosecution to prove the existence of causation, rather than presumed the nexus which the Appellant was then required to disprove. The issue is whether the nexus exists in the doctrine of command responsibility. In support of the existence of a nexus between the commander's failure to act and subordinates' crimes, the Appellant relies, as did the Trial Chamber, on a statement made by the *Čelebići* Trial Chamber that:

> the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.[145]

The Trial Chamber was of the view that a causal link might be considered inherent in the requirement that the superior failed to prevent the subordinates' crimes,[146] thus endorsing the submission to that effect made by the Appellant during his trial.

76. However, the *Čelebići* Trial Judgement does not cite any authority for that statement on the existence of the nexus. On the contrary, it states clearly that:

> Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offence committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.[147]

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[140] Appellant's Brief, pp. 143, 144.
[141] Appellant's Brief, p. 145.
[142] Appellant's Brief, p. 145.
[143] Respondent's Brief, paras. 5.100-5.104.
[144] Appellant's Brief, p. 145.
[145] *Čelebići* Trial Judgement, para. 399.
[146] Trial Judgement, para. 339.
[147] *Čelebići* Trial Judgement, para. 398.

That Trial Chamber later concluded that the very existence of the principle of superior responsibility for the failure to punish, recognised under Article 7(3) of the Statute and in customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.[148]

77. The Appeals Chamber is therefore not persuaded by the Appellant's submission that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. Once again, it is more a question of fact to be established on a case by case basis, than a question of law in general.

5. Is "failure to punish" another form of "failure to prevent"?

78. The Appellant claims that the failure to punish is not a separate theory of liability but merely a sub-category of the commander's responsibility for failing to prevent his subordinates' unlawful acts.[149] The jurisdiction *ratione materiae* of the International Tribunal is circumscribed by customary international law, and the International Tribunal cannot impose criminal responsibility for acts which, prior to their being committed, did not entail such responsibility under customary international law. The Appellant also submits that when the acts were committed, international law did not provide for a commander's criminal responsibility for the mere failure to punish his subordinates' unlawful acts. He argues that the creation of responsibility as a principal for failing to punish a subordinate's unlawful acts, without any nexus to the prevention of the commission of future crimes, exceeds the scope of the Statute.[150]

79. The Prosecution points out that the Trial Chamber's finding in this respect only relates to the mistreatment of detainees. The Prosecution argues that the duties of a commander to prevent and to punish crimes of subordinates are two independent duties and that the commander may be found responsible for the violation of either or both.[151] The Prosecution concludes that the Trial Chamber was correct in finding that "command responsibility for failure to punish subordinates who committed crimes referred to in Articles 2 to 5 [of the Statute] is thus expressly provided for."[152]

[148] *Čelebići* Trial Judgement, para. 400.
[149] Appellant's Brief, pp. 146-147.
[150] Appellant's Brief, pp. 146-147.
[151] Respondent's Brief, paras. 5.108-5.5.119.
[152] Respondent's Brief, para. 5.118.

80. The Appeals Chamber notes that this argument of the Appellant was raised in a preliminary motion which he filed before the Trial Chamber in 1996.[153] The Trial Chamber, dismissing the preliminary motion in a decision on 4 April 1997, stated the following:

> In conclusion, since in its motion the Defence failed to show that, according to international case-law, conventions and national military manuals – accepting that the United States manual places liability for war crimes on the shoulders of the commander who fails to punish the violators of the laws of war (motion, p. 15, footnote 9) – command responsibility is not ascribed to a commander who fails to punish his subordinates who committed crimes, the argument based on a violation of the principle of *nullem crimen sine lege* is likewise inoperative.[154]

81. On appeal, the Appellant relies on two precedents referred to by the Trial Chamber in its 4 April 1997 decision. The first is the part of the judgement by the International Military Tribunal for the Far East in 1948 concerning the case against the former Prime Minister Hideki Tojo. The Appellant quotes the statement of the tribunal that Tojo "took no adequate steps to punish offenders and to prevent the commission of similar offences in the future."[155] However, the judgement then sets out Tojo's failure to call for a report on a past incident known as the Bataan Death March and his failure to punish anyone in relation to the incident.[156] This is followed by another finding that he failed to take proper care of prisoners of war camps during his term of office, despite his knowledge of their poor conditions and high death rate. None of the factual findings in that case related to future events.[157] Tojo was also found guilty for the failure to punish, in addition to his being found guilty for the failure to prevent. Thus, the International Military Tribunal regarded the failure to punish as an independent basis of criminal responsibility. The case does not, therefore, support the Appellant's submission in this regard.

82. The second precedent relied on by the Appellant is the judgement in the *Hostage* case. The Appellant cites the words of the military tribunal regarding the responsibility of Field Marshal von List that "his failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility."[158] However, the judgement rendered by the military tribunal in that case goes on to state that "a commanding

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[153] Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging "Failure to Punish" Liability, Case No. IT-95-14-PT, 4 April 1997.
[154] *Ibid*., para. 13.
[155] Appellant's Brief, p. 147 (citing the judgement by the International Military Tribunal as reported in *The Tokyo War Crimes Trial* (The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes) (A Garland Series) (eds. by R. John Garland and S. Zaide, Garland Publishing Inc., 1981), at p. 49,845) (hereinafter "Tokyo War Crimes Trial").
[156] Tokyo War Crimes Trial, pp. 49,845-49,846.
[157] Tokyo War Crimes Trial, p. 49,847.
[158] U.S. v. Wilhelm von List et al., *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (*United States Government Printing Office, 1950), vol. xi, p. 1272 (hereinafter "*U.S. v. von List et al*").

general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command."[159] It then adds:

> The reports made to the defendant List as Armed Forces Commander Southeast charged him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.[160]
>
> …in his capacity as commanding general of occupied territory, he was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups…The primary responsibility for the prevention and punishment of crime lies with the commanding general….[161]

It is clear that the military tribunal regarded the punishment of crime as one of the several duties imposed on a commander in an occupied territory.

83. The Appellant also makes a brief reference to Articles 86 and 87 of Additional Protocol I which he considers "embody the same principles as the findings in these cases."[162] However, Article 87(3) of Additional Protocol I reads:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Disciplinary or penal action can only be initiated *after* a violation is discovered, and a violator is one who has already violated a rule of law. Further, it is illogical to argue both that "a superior's responsibility for the failure to punish is construed as a sub-category of his liability for failing to prevent the commission of unlawful acts," and that "failure to punish only led to the imposition of criminal responsibility if it resulted in a failure to prevent the commission of future crimes."[163] The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.

84. The Appeals Chamber also takes note of the *Regulations concerning the Application of International Law to the Armed Forces of SFRY* (1988), referred to in the *Čelebići* Trial Judgement

[159] *U.S. v. von List et al*, p. 1271.
[160] *U.S. v. von List et al*, pp. 1271-1272.
[161] *U.S. v. von List et al*, p. 1272.
[162] Appellant's Brief, p. 147.
[163] Appellant's Brief, p. 146.

and relied on by the Trial Chamber in the present case,[164] which clearly sets out command responsibility for the failure to punish as a separate head of responsibility. The regulations should have put a commander such as the Appellant on notice of his duty under international law as recognised in the domestic law of the State in whose territory he was to serve as a commander of the armed forces of one of the parties to the armed conflict.

85. In the view of the Appeals Chamber, the Trial Chamber did not err in finding to the effect that the responsibility of a commander for his failure to punish was recognised in customary law prior to the commission of crimes relevant to the Indictment. The arguments of the Appellant in this respect are not persuasive and are therefore rejected.

C. The blurring of responsibility under Article 7(1) and Article 7(3) of the Statute

86. The Appellant contends that the Trial Judgement blurs the respective requirements of Article 7(1) responsibility and Article 7(3) responsibility, contravening the principle of *nullum crimen sine lege* which, in addition to prohibiting a conviction without a concise definition of an alleged crime, also prohibits a conviction entered in excess of the statutory or generally accepted parameters of the definition.[165] In relation to his responsibility for "ordering" under Article 7(1) of the Statute, the Appellant submits that while Article 7(3) of the Statute imposes criminal responsibility on a commander for certain omissions, provided that he was under a specific duty to act, "[a]n omission, however, cannot constitute the *actus reus* of ordering the commission of an unlawful act, the form of participation for which the Trial Chamber holds the Appellant primarily responsible under Article 7(1)."[166] The failure of the Trial Chamber to set forth the respective requirements for the two forms of criminal responsibility, the Appellant submits, is erroneous in law and violates his right to due process.[167] The Appellant also argues that the Trial Judgement failed to establish a precise definition of the superior-subordinate relationship required for the proof of responsibility for ordering an unlawful act under Article 7(1) of the Statute, but instead relied on an erroneous definition of effective control in terms of Article 7(3).[168] He also contends that insofar as the Trial Chamber held that a commander's failure to punish unlawful acts can be synonymous with aiding and abetting, he argues that this holding, coupled with the Trial Chamber's finding of

[164] *Čelebići* Trial Judgement, para. 341.
[165] Appellant's Brief, pp. 147-150.
[166] Appellant's Brief, pp. 147-148.
[167] Appellant's Brief, p. 148.
[168] Appellant's Brief, p. 148.

liability for aiding and abetting without proof of causation, amounts to the imposition of strict liability.[169]

87. The Prosecution submits that in all but one instance – the violence committed in detention centres – when the Trial Chamber was satisfied that both the requirements of Article 7(1) and Article 7(3) were met, it opted for Article 7(1) responsibility. Consequently, any legal errors made by the Trial Chamber in its analysis of Article 7(3) would not necessarily invalidate the Trial Judgement, other than in relation to the violence committed in detention centres.[170] The Prosecution submits that "insofar as the appellant seeks to show that he did not exercise effective control over all HVO troops, there can be no impact on the verdict,"[171] since the Prosecution only needs to show that "he occupied a position of authority and used that position to convince another one to commit an offence."[172] The Prosecution therefore suggests that "the passages where the Trial Chamber uses the terms 'effective control,' 'command and control,' and 'superior responsibility' must be read in that light."[173]

88. The Appeals Chamber notes that the Prosecution made submissions during the appeal hearing that the Appeals Chamber would be competent to revise a conviction and to find the Appellant guilty "under Article 7(3) of the Statute for all counts," where it deemed that the Trial Chamber erred in finding the Appellant guilty for ordering the crimes charged in the Indictment.[174] The Appeals Chamber also notes that the Appellant was charged in the Indictment under both Article 7(1) and Article 7(3) of the Statute, and that the Trial Chamber conducted the trial on that basis.[175] From the conclusions drawn by the Trial Chamber in relation to certain events and in view of the Disposition, it is clear to the Appeals Chamber that the Trial Chamber considered the merits of the case in terms of both Article 7(1) and Article 7(3) in relation to those events. Contrary to the Prosecution's submission on appeal, therefore, the question of effective control was in issue in this case and did have an impact upon the verdict.

89. The Appeals Chamber notes that in paragraph 337 of the Trial Judgement, the Trial Chamber considered that:

> It will be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, as submitted by the Prosecution[], the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the

[169] Appellant's Brief, p. 149.
[170] Respondent's Brief, para. 5.77.
[171] AT 680 (16 Dec. 2003).
[172] AT 682 (16 Dec. 2003).
[173] AT 682 (16 Dec. 2003).
[174] AT 693 (16 Dec. 2003).
[175] Trial Judgement, para. 9.

> fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of future crimes.

For this proposition, the Trial Chamber relied on the *Regulations concerning the Application of International Law to the Armed Forces of SFRY* (1988), referred to above. The Appeals Chamber recognises that paragraph 337 of the Trial Judgement did not enunciate a concurrent application of Article 7(1) and Article 7(3) of the Statute. In other passages of the Trial Judgement, however, the Trial Chamber may have fostered confusion in this regard by making conflicting statements such as: "at the time of the facts, the accused held a command position which made him responsible for the acts of his subordinates,"[176] as well as the "command position is more of an aggravating circumstance than direct participation."[177] But the Appeals Chamber has to express concern at the Disposition of the Trial Judgement wherein the Trial Chamber, having found the Appellant guilty for *ordering* persecutions and for *having committed* other offences on the basis of the same factual findings, further finds:

> In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished….[178]

This statement, which refers to Article 7(3) responsibility, reveals a case of concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute, in contradiction with the view expressed in paragraph 337 of the Trial Judgement.

90. The Appeals Chamber recalls that in the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[179] in relation to those offenses of which he was convicted for his direct participation.[180] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3)

[176] Trial Judgement, para. 790.
[177] Trial Judgement, para. 791.
[178] Trial Judgement, p. 269.
[179] *Aleksovski* Appeal Judgement, para. 183.
[180] *See Čelebići* Appeal Judgement, para. 745.

> responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[181]

91. The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers[182] that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.[183]

92. The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard.

93. At this juncture, the Appeals Chamber also points out that where the Trial Chamber in this case, in relation to particular incidents, did not make any factual findings on the basis of Article 7(3) of the Statute, the Appeals Chamber will not consider this mode of responsibility, notwithstanding the sweeping statement concerning Article 7(3) responsibility contained in the Disposition of the Trial Judgement.

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[181] *Čelebići* Appeal Judgement, para. 745 (emphasis added). In a footnote, the Appeals Chamber also stated that this observation "applies only if the two types of responsibility are not independently charged under different counts, with separate offences imposed on each. A different situation may arise of two separate counts against an accused, one alleging Article 7(1) responsibility for direct or accessory participation in a particular criminal incident, and another alleging Article 7(3) responsibility for failure to prevent or punish subordinates for their role in the same incident. If convictions and sentences are entered on both counts, it would not be open to aggravate the sentence on the Article 7(3) charge on the basis of the additional direct participation, nor the sentence on the Article 7(1) charge on the basis of the accused's position of authority, as to do so would impermissibly duplicate the penalty imposed on the basis of the same conduct." *Čelebići* Appeal Judgement, p. 265, n. 1261.

[182] In line with paragraph 337 of the Trial Judgement, cited in paragraph 89 above.

[183] *Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745.

IV. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 5 OF THE STATUTE

A. Common Statutory Elements of Crimes against Humanity

94. The Appellant submits that the Trial Chamber "erred in several significant respects in construing and applying the substantive legal standards of Article 5."[184] Generally, he claims that:

> [the] Trial Chamber deviated from established principles of Tribunal and/or customary law by: (1) failing to require that [the] Appellant possessed the requisite knowledge of the broader criminal attack necessary to establish a crime against humanity; (2) failing to define the *actus reus* of the crime of persecution in a sufficiently narrow fashion in accordance with the principles of legality and specificity; and (3) failing to require that [the] Appellant possessed the requisite specific discriminatory intent necessary to establish the crime of persecution.[185]

The Appellant claims that the Trial Chamber erred in that there is insufficient evidence as a matter of law to support its findings.[186] He submits that the following common statutory elements of crimes against humanity are required to sustain a conviction under Article 5 of the Statute: (i) the acts of the accused must take place in the context of a widespread or systematic attack; (ii) the attack must be directed against a civilian population; (iii) the attack and the acts of the accused must be pursuant to a pre-existing criminal policy or plan; and (iv) the accused must have knowledge that his acts formed part of the broader criminal attack.[187]

95. The Prosecution contends that none of these claims come within the purview of Article 25 of the Statute, in that no allegations of legal errors invalidating the Trial Judgement or of factual errors occasioning a miscarriage of justice have been made.[188] As such, the Prosecution submits that there is no reason for the Appeals Chamber to consider the claims falling under sub-heading A of Section IX of the Appellant's Brief.[189]

1. Requirement that the acts of the accused must take place in the context of a widespread or systematic attack

96. The Appellant states that the acts of the accused, which must constitute an enumerated crime, must also be committed "as part of a widespread or systematic attack and not as just a random act of violence."[190] This element, the Appellant adds, requires a nexus between the acts of the accused and the broader attack which elevates the underlying offences to crimes against

[184] Appellant's Brief, p. 150. This ground of appeal was the Ninth Ground in the Appellant's Brief.
[185] Appellant's Brief, p. 150.
[186] Appellant's Brief, p. 150.
[187] Appellant's Brief, pp. 150-153.
[188] Respondent's Brief, para. 6.4.
[189] Respondent's Brief, para. 6.4.

humanity.[191] In response, the Prosecution affirms that it is settled law that the acts of the accused must form part of an attack that must be either widespread or systematic in character, and points out that the Appellant did not suggest that the Trial Chamber erred in this respect.[192]

97. The Appeals Chamber observes that the Appellant does not appear to identify an error in the Trial Judgement in relation to this argument. Nevertheless, it goes on to consider the Trial Chamber's articulation of this element of crimes against humanity.

98. It is well established in the jurisprudence of the International Tribunal that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population.[193] This was recognized by the Trial Chamber, which stated: "…there can be no doubt that inhumane acts constituting a crime against humanity must be part of a systematic or widespread attack against civilians."[194]

99. The Trial Chamber then stated that the "systematic" character:

> refers to four elements which for the purposes of this case may be expressed as follows:
>
> - the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
>
> - the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
>
> - the preparation and use of significant public or private resources, whether military or other;
>
> - the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[195]

The Trial Chamber went on to state that the plan "need not necessarily be declared expressly or even stated clearly and precisely"[196] and that it could be surmised from a series of various events, examples of which it listed.[197]

100. The Appeals Chamber considers that it is unclear whether the Trial Chamber deemed the existence of a plan to be a legal element of a crime against humanity. In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant, but is not a legal element of the crime. This is further discussed below.

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[190] Appellant's Brief, p. 150.
[191] Appellant's Brief, pp. 150-151.
[192] Respondent's Brief, para. 6.7.
[193] *See Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, para. 85.
[194] Trial Judgement, para. 202.
[195] Trial Judgement, para. 203 (footnotes omitted).
[196] Trial Judgement, para. 204.
[197] Trial Judgement, para. 204.

101. In relation to the widespread or systematic nature of the attack, the Appeals Chamber recalls the jurisprudence of the International Tribunal according to which the phrase "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.[198] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.[199] Only the attack, not the individual acts of the accused, must be widespread or systematic.[200] The Appeals Chamber underscores that the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.[201]

102. In sum, the Appeals Chamber concludes that the Trial Chamber was correct in stating that acts constituting crimes against humanity must be part of a widespread or systematic attack against civilians.

2. Requirement that the attack be directed against a civilian population

103. The Appellant further submits that the Prosecution must establish that there was an attack directed against a civilian population of which the acts of the accused formed a part.[202] He asserts that this requirement hinges on the intent of the attack rather than on its physical result,[203] and that the expression "directed against" requires that the civilian population be the primary object of the attack.[204] At a minimum, the Appellant alleges, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian, and that he could not reasonably have believed that the victim was a member of the armed forces or other legitimate combatant.[205] The Appellant further submits that he never ordered attacks directed against a civilian population, and reiterates that civilian casualties were the unfortunate consequence of an otherwise legitimate and proportionate military operation, not an attack targeting a civilian population.[206]

104. The Prosecution suggests that the Appellant defines the phrase "civilian population" too restrictively in light of the settled law of the International Tribunal and that he confuses the issue of whether there was a widespread or systematic attack on the one hand, with which particular

[198] *Kunarac* Appeal Judgement, para. 94.
[199] *Kunarac* Appeal Judgement, para. 94.
[200] *Kunarac* Appeal Judgement, para. 96.
[201] *Kunarac* Appeal Judgement, para. 96.
[202] Appellant's Brief, p. 151.
[203] Appellant's Brief, p. 151.
[204] Appellant's Brief, p. 151.
[205] Appellant's Brief, p. 152.
[206] Brief in Reply, paras. 124-128.

individuals can be considered to be among the victims of this attack, on the other.[207] In particular, the Prosecution submits that the Trial Chamber was correct in concluding that the presence of resistance fighters and those placed *hors de combat* does not alter the civilian character of a population.[208] The Prosecution further submits that reference in paragraph 435 of the *Kunarac* Trial Judgement to the perpetrator's knowledge of the victim's status relates more to the issue of which individuals may be said to be the victims of crimes against humanity. The reference should be understood as "guidance to the trier of fact in the sense that an accused's knowledge cannot be assessed *in abstracto* but must be evaluated in relation to the particular crime against humanity the perpetrator is accused of."[209] The Prosecution also insists that in situations of uncertainty as to an individual's status, he or she must be presumed to be a civilian.[210] As the Appellant has not even attempted to demonstrate that the conclusions reached by the Trial Chamber on the composition of the victim group in this case were so unreasonable that no reasonable trier of fact could have reached similar conclusions, the Prosecution says, the findings of the Trial Chamber should be left undisturbed.[211]

105. The Appeals Chamber considers that the Appellant seems to be alleging an error of law in the Trial Judgement in relation to this issue, as well as an error of fact. Only the alleged legal error will be addressed here. The legal requirement under Article 5 of the Statute that the attack in question be directed against a civilian population was elaborated upon in the *Kunarac* Appeal Judgement, wherein the Appeals Chamber stated that:

> … the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[212]

106. The Appeals Chamber in *Kunarac* further stated:

> … the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course

[207] Respondent's Brief, paras. 6.9-6.12.
[208] Respondent's Brief, para. 6.14.
[209] Respondent's Brief, paras. 6.16-6.17.
[210] Respondent's Brief, para. 6.18.
[211] Respondent's Brief, para. 6.19.
[212] *Kunarac* Appeal Judgement, para. 90 (footnotes omitted).

> of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.[213]

107. In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that "the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed."[214] The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.

108. The Trial Chamber concluded:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear (*sic*) uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.[215]

109. Before determining the scope of the term "civilian population," the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "[t]argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.

110. In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed.[216] In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts."[217] Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.

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[213] *Kunarac* Appeal Judgement, para. 91 (footnote omitted).
[214] Trial Judgement, para. 208.
[215] Trial Judgement, para. 214 (footnote omitted).
[216] *Hadžihasanović* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* 16 July 2003 Decision"), para. 44. *See also* on a more general note, Report of the Secretary General, (S/25704, 3 May 1993), paras. 29, 34.
[217] Report of the Secretary General, (S/25704, 3 May 1993), para. 37.

111. Article 50, paragraph 1, of Additional Protocol I states that a civilian is "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.

112. As the ICRC Commentary to the Additional Protocol explains, the following categories of persons, derived from Article 4A of the Third Geneva Convention, are excluded from civilian status:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[218]

In addition, Article 43 of Additional Protocol I sets out a new definition of armed forces "covering the different categories of the above-mentioned Article 4 of the Third Convention."[219]

113. Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups,

[218] ICRC Commentary, p. 611, para. 1915.
[219] ICRC Commentary, p. 611, para. 1916.

or former combatants, who have laid down their arms, does not alter its civilian characteristic.[220] The Trial Chamber was correct in this regard.

114. However, the Trial Chamber's view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states:

> All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).[221]

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

115. The Trial Chamber also stated that the "presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population." The ICRC Commentary on this point states:

> …in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.[222]

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.

116. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 of the Statute.

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[220] Common Article 3 of the Geneva Conventions provides that "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." That these persons are protected in armed conflicts reflects a principle of customary international law.
[221] ICRC Commentary, p. 515, para. 1676.
[222] ICRC Commentary, p. 612, para. 1922.

3. Requirement that the acts of the accused and the attack itself must have been committed in pursuance to a pre-existing criminal policy or plan

117. According to the Appellant, the Prosecution must establish that the criminal attack was committed pursuant to an official state, organizational, or group policy or plan which pre-dated the acts of the accused.[223] This policy, the Appellant adds, must be official and must constitute a collective agreement at the highest level of the relevant State, organisation or group, rather than "isolated statements made by individual representation alone."[224] The Appellant maintains that the disjunctive nature of the widespread or systematic attack requirement does not eliminate the policy element, which is an independent requirement for crimes against humanity and is implicit in the "directed against any civilian population" element.[225]

118. The Prosecution submits that this particular limb of the Appellant's ground of appeal should be rejected because factually, there was abundant evidence of the existence of a persecutory policy or plan against the Bosnian Muslims,[226] and the Trial Chamber found that the Appellant subscribed to this plan, shared its aims, and executed it.[227] The Prosecution concludes that there is thus no need for the Appeals Chamber to decide this aspect of the Appellant's ground of appeal.

119. Furthermore, the Prosecution argues that legally, Article 5 of the Statute does not require proof of the existence of a policy as a "formal legal ingredient."[228] It submits that the Trial Chamber "was correct in framing the notion of policy as a means of establishing that the broader attack against a civilian population is systematic in character."[229] The Prosecution adds that such an approach is in keeping with the jurisprudence of the International Tribunal and of the ICTR, World War II case law, and the International Law Commission draft codes on the subject.[230] It states that this conclusion is also a logical one since, if it were a general requirement for all crimes against humanity, the requirements of widespread or systematic would stop being genuine alternatives.[231] Concerning the Appellant's suggestion that the policy in question must further be a pre-existing and official one, adopted at the highest level by a State or organisation or group, the Prosecution submits that nothing in the Statute supports such a proposition.[232] In the alternative, the Prosecution submits that this need not in any case be a pre-existing official, State, organisational or

[223] Appellant's Brief, pp. 152-153.
[224] Appellant's Brief, p. 153.
[225] Brief in Reply, paras. 131-132.
[226] Respondent's Brief, para. 6.21.
[227] Respondent's Brief, para. 6.21.
[228] Respondent's Brief, para. 6.22.
[229] Respondent's Brief, para. 6.25.
[230] Respondent's Brief, paras. 6.26-6.29.
[231] Respondent's Brief, para. 6.30.
[232] Respondent's Brief, para. 6.34.

group plan or policy.[233] The requirement would be met "by a showing that a State, government or entity tolerated the crimes in question."[234] Nor, as pointed out by the Trial Chamber, would such a policy need to be explicitly formulated or expressed or come from a high hierarchical level.[235]

120. The Appeals Chamber considers that, as noted above, it is not clear whether the Trial Chamber deemed the existence of a plan to be a legal element of a crime against humanity. In relation to this issue, the Appeals Chamber has stated, on a previous occasion:

> …neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[236]

The Appeals Chamber agrees that a plan or policy is not a legal element of a crime against humanity, though it may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic.

4. Requirement that the accused has knowledge that his acts formed part of the broader criminal attack

121. The Appellant submits that the Prosecution must establish that the accused knew of the existence of a widespread or systematic attack against a civilian population and that his acts form part of the attack.[237] According to the Appellant, the Trial Chamber failed to determine whether and to what extent he may have known of the attack and the fact that his acts were a part thereof.[238] Instead, he claims, the Trial Chamber applied a standard of recklessness which is not supported in law,[239] and limited its consideration to the extent to which the Appellant may have been aware of the political context in which his acts fit, a standard below that required by the definition of crimes against humanity.[240]

122. The Prosecution responds that the Appellant's contention that the accused must have knowledge of the broader context, that is, that his acts fit into the widespread or systematic attack,

[233] Respondent's Brief, para. 6.35.
[234] Respondent's Brief, para. 6.35.
[235] Respondent's Brief, paras. 6.38-6.39.
[236] *Kunarac* Appeal Judgement, para. 98 (footnote omitted).
[237] Appellant's Brief, pp. 153-154.
[238] Appellant's Brief, pp. 154-157.
[239] Appellant's Brief, pp. 154-155.
[240] Appellant's Brief, p. 157.

is uncontroversial, but rejects the extent of knowledge suggested by the Appellant.[241] The Prosecution points out that the Appellant has put forward no arguments in support of his submission that the Trial Chamber failed to determine whether and the extent to which he may have known of the attack, and the fact that his acts were a part thereof.[242] On the contrary, it claims, the Trial Chamber found this element to have been established beyond reasonable doubt. In relation to his argument that the Trial Chamber mis-stated the applicable legal standards for determining the requisite *mens rea* for crimes against humanity, the Prosecution submits that the Trial Chamber's articulation of the *mens rea* is in fact legally sound.[243] It further points out that the Trial Chamber was correct, *inter alia*, in finding that an accused need not share the broader goals of the plan, or even be aware of its precise details.[244] It asserts that it is sufficient that an accused knows that there is an attack directed against the civilian population and that he knows that his acts are part of that attack, or at least takes the risk that they are part thereof.[245]

123. The Appellant is also incorrect, the Prosecution says, when he suggests that the Trial Chamber found that mere knowledge of the prevailing political context in which the offences occurred suffices to establish the requisite *mens rea*; this simply does not correspond to the Trial Chamber's finding on that point.[246] Concerning the Trial Chamber's statement that a commander who participates in the commission of mass crimes must question the malevolent intentions of those defining the ideology, policy, or plan in whose name the crime is perpetrated, the Prosecution says that in doing so, "the Trial Chamber did no more than interpret the spirit of the Statute as encouraging a climate of responsible command and individual self-reflection and restraint."[247]

124. The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.[248] Moreover, the Appeals Chamber further considers that:

> [f]or criminal liability pursuant to Article 5 of the Statute [to attach], "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons." Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.

[241] Respondent's Brief, para. 6.41.
[242] Respondent's Brief, para. 6.41.
[243] Respondent's Brief, para. 6.45.
[244] Respondent's Brief, para. 6.50.
[245] Respondent's Brief, para. 6.51.
[246] Respondent's Brief, para. 6.53.
[247] Respondent's Brief, paras. 6.55-6.56.
[248] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras. 99, 102.

> At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[249]

125. In this case, the Trial Chamber referred to the *Tadić* Appeal Judgement, according to which "the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern."[250] It then stated the following:

> The accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.[251]
>
> Moreover, the nexus with the institutional or *de facto* regime, on the basis of which the perpetrator acted, and the knowledge of this link, as required by the case-law of the Tribunal and the ICTR and restated above, in no manner require proof that the agent had the intent to support the regime or the full and absolute intent to act as its intermediary so long as proof of the existence of direct or indirect malicious intent or recklessness is provided. Indeed, the Trial Chambers of this Tribunal and the ICTR as well as the Appeals Chamber required only that the accused "knew" of the criminal policy or plan, which in itself does not necessarily require intent on his part or direct malicious intent ("… the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective"). There may also be indirect malicious intent (the agent did not deliberately seek the outcome but knew that it would be the result) or recklessness, ("the outcome is foreseen by the perpetrator as only a probable or possible consequence"). In other words, knowledge also includes the conduct "of a person taking a deliberate risk in the hope that the risk does not cause injury".[252]
>
> It follows that the *mens rea* specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that:
>
> - the accused willingly agreed to carry out the functions he was performing;
>
> - that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes;
>
> - that he received orders relating to the ideology, policy or plan; and lastly
>
> - that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.[253]

126. In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required.[254] The Trial Chamber, in stating that it "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable

[249] *Kunarac* Appeal Judgement, para. 103 (footnotes omitted).
[250] Trial Judgement, para. 250 (citing *Tadić* Appeal Judgement, para. 248).
[251] Trial Judgement, para. 251.
[252] Trial Judgement, para. 254 (footnotes omitted).
[253] Trial Judgement, para. 257.
[254] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras. 99, 103.

to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard. Furthermore, the Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused.

127. The Appeals Chamber further observes that the Trial Chamber's list of four points which may serve as proof of the *mens rea* suffers from a number of defects. The first point, that the accused "willingly agreed to carry out the functions he was performing," is vague and does not necessarily relate to the *mens rea* applicable to crimes against humanity. The second[255] and third[256] points, as well as the first part of the fourth point,[257] may be misleading because they could be interpreted as suggesting that an ideology, policy, or plan is required. Further, they too do not relate with sufficient precision to the requirement that the accused must know that his acts form part of the criminal attack. Finally, the second part of the fourth point[258] seems to relate to command responsibility under Article 7(3), rather than Article 7(1) responsibility for crimes against humanity.

128. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity.

B. Elements of Persecutions as a Crime against Humanity

129. The Appellant argues that the Trial Chamber erred in defining the *actus reus* and *mens rea* of persecutions as a crime against humanity, and that he is innocent of all charges of persecutions. The Appellant submits that three basic requirements for persecutions are generally recognized: (i) the occurrence of a persecutory act or omission; (ii) a discriminatory basis for that act or omission on one of the enumerated grounds, namely, race, religion, or politics; and (iii) the specific intent to cause an infringement of an individual's enjoyment of a basic or fundamental right.[259] The Appellant claims, furthermore, that an act of persecution must constitute a gross or blatant denial on discriminatory grounds of a fundamental right, laid down in international customary or treaty law,

[255] Namely, "that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes." Trial Judgement, para. 257.
[256] Namely, "that he received orders relating to the ideology, policy or plan…" Trial Judgement, para. 257.
[257] The first part of the fourth point is: "that he contributed to its commission through intentional acts[.]" Trial Judgement, para. 257.
[258] The second part of the fourth point is that he contributed to its commission "by simply refusing of his own accord to take the measures necessary to prevent their perpetration." Trial Judgement, para. 257.
[259] Appellant's Brief, pp. 157-158.

reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.[260]

130. The Prosecution submits that the elements of persecutions may be summarised as follows: (i) the accused committed conduct against a victim or victim population violating a basic or fundamental human right; (ii) the accused intended to commit the violation; (iii) the accused's conduct was committed on political, racial or religious grounds; and (iv) the accused's conduct was committed with discriminatory or persecutory intent.[261]

131. The Appeals Chamber considers that persecutions as a crime against humanity is defined as:

> (…) an act or omission which:
>
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
>
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[262]

These two elements of the crime will be considered separately.

1. *Actus reus* of persecutions

132. The Appellant submits that the Trial Chamber erred in that it adopted an expansive definition of the *actus reus* of persecutions, and impermissibly included acts such as the destruction of private dwellings and businesses.[263] He further submits that the Trial Chamber improperly defined the *actus reus* of persecutions solely in terms of the perpetrator's state of mind, without regard to the gravity or criminality of the underlying act.[264] He claims that both the persecutory policy and the acts of the accused must have "as their aim the removal from society of the targeted population or, in the case of property crimes, the aim to deprive the targeted population of its livelihood."[265] He maintains that the Trial Chamber does not specify the circumstances justifying the elevation of acts causing physical and mental injury to the international crime of persecutions.[266]

133. The Prosecution points out that persecutions may encompass acts which are listed in the Statute, as well as acts which are not. It accepts that all persecutory acts must reach the same level

[260] Appellant's Brief, pp. 158-160.
[261] Respondent's Brief, para. 6.60.
[262] *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.
[263] Appellant's Brief, p. 164 (citing Trial Judgement, paras. 227, 233).
[264] Appellant's Brief, p. 164 (citing Trial Judgement, para. 235)
[265] Appellant's Brief, p. 165. According to the Appellant, "[i]n further finding that the confiscation and destruction of private dwellings and businesses constitute persecution, however, the Trial Chamber expanded the definition of persecution to include acts rendered more serious by virtue of their discriminatory nature alone." Appellant's Brief, p. 164.

of gravity as acts enumerated in Article 5 of the Statute, and claims that the acts should not be considered in isolation, but in their context and with due consideration to their cumulative effect.[267]

134. The Prosecution claims that the Appellant's suggestion that the Trial Chamber impermissibly expanded the definition of persecutions (in particular, by including acts rendered sufficiently serious by virtue of their discriminatory nature only) is duly contradicted by the Trial Chamber's findings.[268] It adds that, concerning property crimes, detention crimes, and deportation, the Trial Chamber merely held that, all other conditions being met, they could amount to persecutions.[269] The Prosecution suggests that the Appellant conflates the *mens rea* and *actus reus* when claiming that the Trial Chamber improperly defined the *actus reus* of persecutions solely on the basis of his state of mind, and further points out that the gravity requirement relates to the latter, whereas the finding of the Trial Chamber at paragraph 235 of the Trial Judgement to which the Appellant referred is "principally a finding with regard to the *mens rea.*"[270]

135. The Appeals Chamber considers that "although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds."[271] Furthermore, the acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute.[272]

136. In this case, the Trial Chamber stated:

> There is no doubt that serious bodily and mental harm and infringements upon individual freedom may be characterized as persecution when, as will be indicated below, they target the members of a group because they belong to a specific community. The Trial Chamber considers that infringements of the elementary and inalienable rights of man, which are "the right to life, liberty and the security of person", the right not to be "held in slavery or servitude", the right not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and the right not to be "subjected to arbitrary arrest, detention or exile" as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may constitute persecution when committed on discriminatory grounds.[273]

In this paragraph, the Trial Chamber set out parameters for acts that may constitute persecutions, including acts that cause "serious bodily and mental harm" and "infringements upon individual freedom" in circumstances where members of a particular group are targeted on discriminatory grounds. The Trial Chamber set forth a definition of persecutions that characterizes the *actus reus*

[266] Appellant's Brief, p. 166.
[267] Respondent's Brief, para. 6.67.
[268] Respondent's Brief, paras. 6.77-6.78.
[269] Respondent's Brief, paras. 6.79-6.82.
[270] Respondent's Brief, paras. 6.83-6.86.
[271] *Vasiljević* Appeal Judgement, para. 113.
[272] *Krnojelac* Appeal Judgement, paras. 199, 221.

as encompassing infringements upon fundamental human rights. It also reviewed jurisprudence from Nuremberg, World War II trials, and of the International Tribunal, in determining whether the violations covered in the Indictment may constitute persecutions, and under what circumstances.[274] It then held that persecutions may take other forms than injury to the human person and referred to "those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind."[275]

137. In adopting a standard for acts which may constitute the crime of persecutions, the Trial Chamber then held that:

> the crime of "persecution" encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.[276]

The Trial Chamber further held, in a sub-section entitled "Discrimination":

> It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property. In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.[277]

138. The Appeals Chamber considers that the Trial Chamber failed to mention that acts of persecutions, considered separately or together, should reach the level of gravity of other crimes listed in Article 5 of the Statute. It appeared to consider, erroneously, that underlying acts are rendered sufficiently grave if they are committed with a discriminatory intent.

139. The Appeals Chamber notes that the Prosecution is required to charge particular acts as persecutions.[278] The Trial Chamber must then consider whether such acts, either individually or jointly, amount to persecutions. In this regard, it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law at the time the accused is alleged to have committed the offense. As stated above, these acts must constitute a denial of or infringement upon a fundamental right laid down in international customary law. It is not the case that any type of act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity.

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[273] Trial Judgement, para. 220.
[274] *See* Trial Judgement, paras. 220-234.
[275] Trial Judgement, para. 227.
[276] Trial Judgement, para. 233.
[277] Trial Judgement, para. 235.
[278] *See Kupreškić* Appeal Judgement, para. 98.

140. The Trial Chamber concluded that the acts alleged to constitute persecutions as a crime against humanity in Count 1 of the Indictment, referred to below,[279] did amount to such a crime.[280] The issue is whether this conclusion is correct and adheres to the principle of legality, or *nullum crimen sine lege*.

141. The principle of *nullum crimen sine lege* is, inter alia, enshrined in Article 15 of the International Covenant on Civil and Political Rights adopted on 16 December 1966 (ICCPR) and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR).[281] In a decision on an interlocutory appeal in the *Hadžihasanović* case, the Appeals Chamber stated that "it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed."[282] Thus, while the Statute of the International Tribunal lists offences over which the International Tribunal has jurisdiction, the Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission.

142. The Indictment in this case charged the Appellant under Count 1, with a crime against humanity for the persecution of the Muslim civilian population of Bosnia, throughout the municipalities of Vitez, Busovača, Kiseljak, and Zenica, on political, racial or religious grounds, during the period from May 1992 to January 1994.[283] The Indictment alleged that the persecution

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[279] *See* para. 142 of this Judgement.
[280] *See* Disposition in Trial Judgement, p. 267.
[281] Article 15 of the ICCPR states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

See also Art. 11(2) of the Universal Declaration of Human Rights, adopted on 10 December 1948; Art. 9 of the American Convention on Human Rights of 22 November 1969; and Art. 7(2) of the African Charter on Human and Peoples' Rights of 27 June 1981.
[282] *Hadžihasanović* 16 July 2003 Decision, para. 44. The Appeals Chamber in a decision in the *Ojdanić* case stated that "[t]he scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed." *See Prosecutor v. Ojdanić*, Case No.: IT-99-37-AR72-Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 9. The Secretary General, in his Report to the Security Council, stated: "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law." Report of the Secretary-General, para. 34.
[283] Indictment, para. 6.

was implemented through the widespread and systematic attack on the cities, towns, and villages, inhabited by Bosnian Muslims civilians.[284] The acts of persecutions charged were attacks on cities, towns and villages,[285] killing and causing serious injury,[286] the destruction and plunder of property,[287] the inhumane treatment of civilians,[288] and the forcible transfer of civilians.[289] These acts generally formed the basis of the conviction under Count 1 for persecutions, as is evident from the Disposition of the Trial Judgement.[290] The Appeals Chamber will consider whether the acts underlying the conviction for persecutions in this case constituted such a crime under customary international law at the time of their commission.

(i) Killing (Murder) and Causing Serious Injury

143. With respect to the charges of killing and causing serious injury, the Trial Chamber stated that "there is no doubt that serious bodily and mental harm (…) may be characterised as persecution when (…) they target the members of a group because they belong to a specific community."[291] The Appeals Chamber considers that the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognized in customary international law and is embodied in Articles 6 and 7 of the ICCPR, and Articles 2 and 3 of the ECHR. It is clear in the jurisprudence of the International Tribunal that acts of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions. As concluded by *inter alia* the *Kupreškić* Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include "murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5."[292]

(ii) Destruction and Plunder of Property

144. The Trial Chamber considered that persecutions may "take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind."[293] The Trial Chamber held that "persecution

[284] Indictment, para. 6.1.
[285] Indictment, para. 6.1.
[286] Indictment, para. 6.2.
[287] Indictment, para. 6.3.
[288] Indictment, paras. 6.4-6.5.
[289] Indictment, paras. 6.7-7.0.
[290] The Disposition lists the following acts in relation to the Count 1 conviction: attacks on towns and villages; murder and serious bodily injury; the destruction and plunder of property and, in particular, of institutions dedicated to religion or education; inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields; and the forcible transfer of civilians. Trial Judgement, p. 267.
[291] Trial Judgement, para. 220.
[292] *Kupreškić* Trial Judgement, para. 615.
[293] Trial Judgement, para. 227.

may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina."[294] The Trial Chamber defined the destruction of property as "the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily." Plunder of property was defined as "the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it be the property of private individuals or of state or "quasi-state" public collectives."[295]

145. The Appeals Chamber notes that various legal instruments protect the right to property.[296] Geneva Convention IV, an expression of customary international law,[297] prohibits the destruction of property under Article 53, which provides:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[298]

Article 147 of Geneva Convention IV further prohibits the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Civilian objects are protected in Articles 51 and 52 of Additional Protocol I to the Geneva Conventions. Moreover, Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. This provision is obviously addressed to militaries about to launch an attack, but it does not absolve the Prosecution, in a criminal case, of the duty of proving that an object was indeed dedicated to civilian purposes. Cultural objects and places of worship are protected in Article 53 of Additional Protocol I. The Statute of the International Tribunal incorporates prohibitions on the destruction of property in Article 2(d), as a grave breach of the Geneva Conventions,[299] and Article 3(b), as a violation of the laws or customs of war.[300]

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[294] Trial Judgement, para. 227.
[295] Trial Judgement, para. 234.
[296] *See* Article 17(2), UDHR; Article 1 of Protocol I to the ECHR; Art. 21 of the American Convention on Human Rights; and Art. 14 of the African Charter on Human and Peoples' Rights.
[297] *Čelebići* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, para. 220. *See* Report of the Secretary General, para. 35.
[298] Art. 53, Geneva Convention IV.
[299] Art. 2(d) of the Statute refers to "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly[.]"
[300] The offence of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity", contained in Art. 3(b) of the Statute, was also proscribed in Article 6(b) of the Nuremberg Charter.

146. The destruction of property has been considered by various Trial Chambers of the International Tribunal to constitute persecutions as a crime against humanity.[301] The Trial Chamber in *Kupreškić* considered that whether such attacks on property constitute persecutions may depend on the type of property involved, and that "certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone's car (unless the car constitutes an indispensable and vital asset to the owner)."[302] The *Kupreškić* Trial Chamber held, however, that in the circumstances of that case, which concerned the comprehensive destruction of homes and property, this constituted "a destruction of the livelihood of a certain population," and may have the "same inhumane consequences as a forced transfer or deportation."[303] The Trial Chamber concluded that the act "may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution."[304] The Appeals Chamber agrees with this assessment.

147. Acts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law.[305] Pillage is explicitly prohibited in Article 33 of Geneva Convention IV, and Article 4, para. 2(g), of Additional Protocol II. In addition, Articles 28 and 47 of the Hague Regulations of 1907 expressly forbid pillage.[306]

148. The prohibition against pillage may therefore be considered to be part of customary international law. In addition, it may be noted that the Nuremberg Charter[307] and Control Council Law No. 10[308] prohibited the war crime of "plunder of public and private property," and the crime of pillage was the subject of criminal proceedings before the International Military Tribunal at Nuremberg and other trials following the Second World War, where in certain cases, it was charged both as a war crime and a crime against humanity.[309] There may be some doubt, however, as to

[301] *See Obrenović* Sentencing Judgement, para. 64, n. 95; *Momir Nikolić* Sentencing Judgement, para. 104, n. 148; *Kvočka* Trial Judgement, para. 186; *Kordić* Trial Judgement, para. 205.
[302] *Kupreškić* Trial Judgement, para. 631.
[303] *Kupreškić* Trial Judgement, para. 631.
[304] *Kupreškić* Trial Judgement, para. 631.
[305] *Čelebići* Trial Judgement, para. 591.
[306] *See* Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.
[307] Article 6(b) (Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement)), London, 8 Aug. 1945, 85 U.N.T.S. 251.
[308] Law No. 10 of the Control Council of Germany, Art. 2(1)(b) (Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, *Journal Officiel du Commandement en Chef Francais en Allemagne,* No. 12 of 11 Jan. 1946).
[309] *See The Pohl Case,* Vol. V TWC, p. 958 ff; *The IG Farben Case,* Vol. VIII TWC, p. 1081 ff; *The Krupp Case,* Vol. IX TWC, p. 1327 ff; *The Flick Case,* Vol. VI TWC, p. 1187 ff.

whether acts of plunder, in and of themselves, may rise to the level of gravity required for crimes against humanity.[310]

149. The Appeals Chamber finds that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute.

(iii) Deportation, Forcible Transfer, and Forcible Displacement

150. The Trial Chamber considered that "deportation[311] or forcible transfer of civilians means 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'".[312] The Trial Chamber reviewed various judgements of the Supreme National Tribunal of Poland[313] and the Netherlands Special Court in Amsterdam,[314] acting in accordance with Control Council Law No. 10, and the Supreme Court of Israel in the *Eichmann* case,[315] which characterized deportations as persecution.

151. The Appeals Chamber notes that the Trial Chamber appears to use the terms deportation and forcible transfer interchangeably. The Geneva Conventions prohibit forcible transfers and deportation. Article 49 of Geneva Convention IV provides that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their

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[310] In *The Flick Case*, the Nuremberg Military Tribunal found that the compulsory taking of industrial property did not constitute crimes against humanity. The Tribunal stated:

> The "atrocities and offenses" listed [in Law No. 10] "murder, extermination," etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category.

The Flick Case, Trials of War Criminals Before the Nürnberg Military Tribunals Under Control Council Law No. 10, Vol. 6, p. 1215.

In the *Eichmann* case, the Israeli District Court held that the plunder of property could only be considered to constitute a crime against humanity if it was committed "by pressure of mass terror against a civilian population, or if it [was] linked to any of the other acts of violence defined by the [Nazi and Nazi Collaborators Punishment Law, 5710/1950] as a crime against humanity or as a result of any of those acts, i.e. murder, extermination, starvation, or deportation of any civilian population, so that the plunder is only part of a general process…" The Individual in International Law, in *International Law Reports*, E. Lauterpacht, ed., vol. 36, London (1968), p. 241.

However, the Rome Statute is expansive in its definition of crimes which may fall under persecution; Art. 7(1)(h)(4) states that "The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court." Pillaging constitutes a war crime under Art. 8(2)(e)(v) of the Rome Statute. The Appeals Chamber is aware, however, that the Rome Statute entered into force after the crimes at issue in this case took place.

[311] The French version of Art. 5(d) of the Statute uses the word "expulsion". However, the Trial Chamber in paragraph 234 of the Trial Judgement used the French word "déportation."

[312] Trial Judgement, para. 234 (quoting the definition in Art. 7(2)(d) of the Rome Statute).

[313] *LRTWC*, vol. XIII, 1949, p. 105, in Trial Judgement, para. 223.

[314] *LRTWC,* vol. XIV, 1949, p. 141, in Trial Judgement, para. 223.

[315] *Eichmann* Case, 29 May 1962, 36, *ILR,* 1968, Count 5, p. 277, cited in Trial Judgement, para. 224.

motive." Article 147 of Geneva Convention IV, listing grave breaches to which Article 146 relates, refers to "unlawful deportation or transfer or unlawful confinement of a protected person." Article 85 of Additional Protocol I prohibits "the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention." In addition, Article 17 of Additional Protocol II provides:

> 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

152. The Appeals Chamber in the *Krnojelac* case held that:

> Forcible displacements, taken separately or cumulatively, can constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the Statute. […]
>
> The Appeals Chamber concludes that displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute.[316]

153. In light of the foregoing analysis and jurisprudence, the Appeals Chamber considers that at the time relevant to the Indictment in this case, deportation, forcible transfer, and forcible displacement constituted crimes of equal gravity to other crimes listed in Article 5 of the Statute and therefore could amount to persecutions as a crime against humanity.

(iv) Inhumane Treatment of Civilians

154. The Trial Chamber does not indicate whether all of the specific acts charged as "inhumane treatment against civilians," which include the detention of Bosnian Muslim civilians where they were "killed, used as human shields, beaten, forced to dig trenches, were subjected to physical or psychological abuse and intimidation, inhumane treatment, and were deprived of adequate food and water,"[317] may constitute persecutions, apart from references to the case law of the Nuremberg Tribunal, where the judgement on the trial of the major war criminals held that forced labor constituted a form of persecutions,[318] and a brief mention that the unlawful detention of civilians is a form of the crime of persecutions which deprives "a group of discriminated civilians of their

[316] *Krnojelac* Appeal Judgement, paras. 221-222. The separate opinion of Judge Schomburg appended to that judgement calls for the direct application of "deportation", punishable under Article 5(d) of the Statute.
[317] Indictment, paras. 6.4-6.5.
[318] Trial of Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Judgement (1947), pp. 249-253, cited in para. 222 of the Trial Judgement.

freedom."[319] In the Disposition contained in the Trial Judgement, the conviction for persecutions is based in part on the "inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields."[320]

155. The Appeals Chamber considers that the acts charged in the Indictment which encompass the detention of Bosnian Muslim civilians who were killed, used as human shields, beaten, subjected to physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate food and water,[321] all rise to the level of gravity of the other crimes enumerated in Article 5.

(v) Attack on Cities, Towns, and Villages

156. The Trial Chamber made no legal finding as to whether or not an attack on cities, towns, and villages may constitute an act of persecution, as charged in the Indictment, although it is discernible that, when making a finding of persecutions, the Trial Chamber took into account these attacks.[322] The Indictment at Count 1, paragraph 6.1, charges attacks on cities, towns, and villages as persecution and states: "The widespread and systematic attack of cities, towns and villages, inhabited by Bosnian Muslims, in the municipalities of Vitez, Busovača, Kiseljak, and Zenica." A widespread and systematic attack against the civilian population is a *chapeau* requirement for a crime against humanity, but the Prosecution charged attacks on cities, towns, and villages as separate acts of persecution as a crime against humanity in Count 1 of the Indictment.[323]

157. The Appeals Chamber has recourse to Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, which both provide that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." The protection of civilians reflects a principle of customary international law that is applicable in internal and international armed conflicts,[324] and the prohibition of an attack on civilians, outlined in the above Protocols, reflects the current status of customary international law.[325] Among the customary rules that have developed is the protection of civilians against indiscriminate attacks.[326] As stated in Article 51(3), (4) and (5) of Additional Protocol I:

> (3) Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

[319] Trial Judgement, para. 234.
[320] Disposition, p. 267 of Trial Judgement.
[321] Indictment, Count 1, paras. 6.4-6.5.
[322] Trial Judgement, paras. 591, 660-661.
[323] Unlawful attacks on civilians and civilian objects are also charged later in the Indictment in Counts 2-4, as violations of the laws or customs of war.
[324] *Tadić* Jurisdiction Decision, para. 127; *Kupreškić* Trial Judgement, para. 521.
[325] *Prosecutor v. Strugar et al*, Case No.: IT-01-42-AR72, Decision on Interlocutory Appeal, 22 Nov. 2002, para. 10; *Prosecutor v. Martić,* Case No.: IT-95-11-R61, Decision, 8 Mar. 1996, para. 10.
[326] *Tadić* Jurisdiction Decision, para. 127.

> (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are:
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> those which are not directed at a specific military objective;
>
> those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
>
> (5) Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
>
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

158. In addition, the Fourth Hague Convention of 1907 provided in Article 25 that "the attack or bombardment, by any means whatever, of undefended towns, villages, dwellings or building, is forbidden." Evidence of the existence of *opinio juris* is demonstrated in the General Assembly Resolution 2444 (1968), which states that: "the following principles for observance by all governmental and other authorities responsible for action in armed conflicts: […] that it is prohibited to launch attacks against the civilian populations as such,"[327] and in Resolution 2675 (1970), which outlines the basic principle for protection of the civilian population in armed conflicts, providing that "civilian populations as such should not be the object of military operations."[328] The *travaux préparatoires* of the Additional Protocols also provide further confirmation of the customary status of this prohibition.[329]

159. In light of the customary rules on the issue, the Appeals Chamber holds that attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity.[330]

(vi) Conclusion

160. The Appeals Chamber considers that a Trial Chamber, when making a determination on a charge of persecutions, is obliged to assess whether the underlying acts amount to persecutions as a crime against humanity in international customary law. Upon consideration of the Trial Chamber's outline of the applicable law on persecutions, it is evident that the Trial Chamber did not consider

[327] G.A. Res. 2444, U.N. GAOR, 23rd Session, Supp. No. 18 U.N. Doc A/7218 (1968).
[328] G.A. Res. 2675, U.N. GAOR, 25th Session, Supp. No. 28 U.N. Doc A/8028 (1970).
[329] *See* 6 Official Records, p. 164, 201, 179.
[330] *Kupreškić* Trial Judgement, para. 627; *Krnojelac* Trial Judgement, para. 434.

the requirement that acts of persecutions must be of an equal gravity or severity as the other acts enumerated under Article 5 of the Statute; it is not enough that the underlying acts be perpetrated with a discriminatory intent. The Trial Chamber erred in this regard.

2. *Mens rea* of persecutions

161. The Appellant submits that the Trial Chamber erred by failing to require that: (i) the Appellant possessed persecutory, rather than merely discriminatory, intent; and (ii) that he subjectively shared the specific discriminatory intent behind the alleged persecutory plan or policy, namely, the removal of targeted persons from the society in which they live alongside the perpetrators, or from humanity itself. The Appellant alleges that the Trial Chamber erred by not applying the more stringent and "clearly defined" substantive standard set forth *inter alia,* by the Trial Chamber in *Kupreškić*. He submits that a requirement of mere recklessness, or even knowledge, with respect to the existence of, and his participation in, a persecutory policy or plan, is erroneous. He asserts that to require only a showing of discrimination without more eliminates the distinction between persecution and other crimes against humanity.

162. In response, the Prosecution submits that the Trial Chamber found that there was evidence of a policy to persecute the Muslim population, that the Appellant shared the aims of this policy, that his conduct formed part of this policy and that, to achieve it, he used all military forces on which he could rely.[331] In the alternative, the Prosecution submits that there is no requirement for the crime of persecution that a discriminatory policy exist or, in the event that such a policy is shown to have existed, that the accused need to have taken part in the formulation of such discriminatory policy or practice by a governmental authority; it maintains that although persecutions usually comprises a series of acts, a single act could, all other conditions being met, amount to persecution.[332] The Appellant has failed, the Prosecution says, to show that the Trial Chamber committed an error of law.[333]

163. With respect to the *mens rea* of the crime of persecutions, the Trial Chamber stated that:

> The underlying offence of persecution requires the existence of a *mens rea* from which it obtains its specificity. As set down in Article 5 of the Statute, it must be committed for specific reasons whether these be linked to political views, racial background or religious convictions. It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example,

[331] Respondent's Brief, para. 6.88.
[332] Respondent's Brief, paras. 6.89-6.97, 6.104-6.115.
[333] Respondent's Brief, para. 6.92.

> attacks on property. In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.[334]

164. The Appeals Chamber reiterates that the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions as a crime against humanity requires evidence of a "specific intent to discriminate on political, racial, or religious grounds."[335] The requisite discriminatory intent may not be "inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity."[336] However, the Appeals Chamber considers that the "discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[337]

165. Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions. The Appeals Chamber further dismisses the Appellant's allegation that a discriminatory purpose alone is insufficient to establish the *mens rea* for the crime of persecutions. The Trial Chamber was correct when it held at paragraph 235 of the Trial Judgement that the *mens rea* for persecutions "is the specific intent to cause injury to a human being because he belongs to a particular community or group." The Appeals Chamber stresses that there is no requirement in law that the actor possess a "persecutory intent" over and above a discriminatory intent.

166. The Appeals Chamber has also examined the Appellant's argument that the Trial Chamber erred in applying a recklessness standard in relation to the *mens rea* requirement for persecutions. In paragraph 235 of the Trial Judgement, reproduced above, there is no reference to recklessness. Paragraph 254 of the Trial Judgement outlines a standard of indirect malicious intent, or recklessness, for the knowing participation in the attack, as a *chapeau* requirement of crimes against humanity, and not for the crime of persecution. However, the Appeals Chamber is cognizant of the fact that in making its factual findings relating to the ordering of crimes under Article 7(1) of the Statute, the Trial Chamber frequently employed language such as "took the risk" or "deliberately ran the risk."[338] As stated above, the correct legal standard in relation thereto is that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under

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[334] Trial Judgement, para. 235 (footnotes omitted).
[335] *Krnojelac* Appeal Judgement, para. 184; *Vasiljević* Appeal Judgement, para. 113.
[336] *Krnojelac* Appeal Judgement, para. 184.
[337] *Krnojelac* Appeal Judgement, para. 184.
[338] *See*, for example, Trial Judgement, paras. 474, 562, 592, 653, and 738.

Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. Thus, an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order's execution, may be liable under Article 7(1) for the crime of persecutions. Whether the facts in this case support a finding that the Appellant is responsible for ordering persecutions as a crime against humanity will be considered in the factual chapters of this Judgement.

V. ALLEGED ERRORS OF LAW IN APPLICATION OF ARTICLE 2 OF THE STATUTE

A. Alleged error in finding that nationality alone does not determine "protected person" status for the purposes of Article 2

167. The Appellant submits that the Trial Chamber, by relying on the *Tadić* Appeal Judgement and finding that victims could be "protected" from persons of the same nationality, ignored the express language of that provision.[339] He argues that the very nature of Article 4 of Geneva Convention IV is premised upon the perpetrator and the victim having different nationalities.[340] Second, the Appellant submits that the Trial Chamber disregarded the express provisions of Article 4 of Geneva Convention IV and its Commentary, "which plainly provide that nationality constitutes the sole decisive factor in determining the status of protected persons."[341] The Appellant submits that the reliance on allegiance and ethnicity to prove differing nationalities between perpetrator and victim is unprecedented in pre-Tribunal law, and that this violated the principles of legality and specificity.[342] He argues that, because the Bosnian Muslims were held captive by the HVO, each possessing Bosnian nationality, they could not be deemed protected persons in terms of the Geneva Conventions.[343] Third, the Appellant submits that the Trial Chamber impermissibly collapsed the two distinct jurisdictional requirements of Article 2 of the Statute by "holding that an international armed conflict suffices to satisfy the protected persons requirement".[344] He contends that the fact "that a conflict may be internationalized by virtue of third-party foreign State intervention does not, without more, convert the supported entity into that third-party State."[345] Fourth, the Appellant submits that the Trial Chamber's use of an "allegiance test" gives rise to serious issues of unequal treatment between Bosnian Muslim victims and Bosnian Croat victims as the latter would not attract protected persons status absent a corresponding foreign State captor.[346]

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[339] Appellant's Brief, pp. 176-178. The Appellant also attempts to distinguish the *Tadić* Appeal Judgement on the grounds that that case concerned Bosnian Serbs who were trying to create a new State by seceding. Appellant's Brief, p. 177, n. 490. This ground of appeal was the Tenth Ground in the Appellant's Brief.
[340] Appellant's Brief, p. 177.
[341] Appellant's Brief, p. 177.
[342] Appellant's Brief, pp. 177-178.
[343] Appellant's Brief, pp. 176-177.
[344] Appellant's Brief, p. 178.
[345] Appellant's Brief, p. 178; *see also* Brief in Reply, para. 149 (restating "[t]hat a conflict may be international in character by virtue of third-party intervention, does not as a matter of law convert the supported entity into an Occupying Power for purposes of Article 4").
[346] Appellant's Brief, pp. 178-179.

168. In response, the Prosecution submits that, as a general matter, this ground of appeal can only be upheld if the Appeals Chamber departs from its previous decisions in the *Tadić, Aleksovski*, and *Čelebići* cases.[347] Specifically, with regard to the test for determining "protected person" status in internationalised internal armed conflicts, the Prosecution contends that "the only pertinent question in this case is whether the Bosnian Muslim civilians were in the hands of a Party to the conflict or Occupying Power 'of which they were not nationals'."[348] The Prosecution submits that the Trial Chamber correctly held that, although the victims in this case were *prima facie* in the hands of the HVO, because the armed conflict was internationalised by the direct and indirect participation of Croatia and because the HVO was acting on behalf of that State, the victims were constructively in the hands of Croatia and, therefore, protected under Geneva Convention IV.[349] Further, the Prosecution submits that, because the Trial Chamber found the armed conflict to be international and the victims to be "constructively in the hands of the State of Croatia", the different nationality requirement required by Article 4 of Geneva Convention IV was satisfied and any statements by the Trial Chamber beyond this conclusion were simply *obiter dicta*.[350] In the alternative, the Prosecution submits that the Appellant's immediate argument must fail as he has offered no cogent reason to depart from settled jurisprudence, in which the same arguments have "previously been considered *in extenso* by the Appeals Chamber."[351] Finally, the Prosecution submits that, contrary to the Appellant's assertion, there is no risk that Bosnian Muslims and Bosnian Croats would be treated unequally under the "allegiance test" as applied by the Trial Chamber, since "in the same way that the Bosnian Muslims owe no allegiance to the Bosnian Croats, the Bosnian Croats would owe no allegiance to the Bosnian Muslims" and, therefore, the Bosnian Croat victims would be "protected persons" *vis-à-vis* the Bosnian Muslims.[352]

169. In reply, the Appellant submits that, to the extent that any decision of the Appeals Chamber supports the Trial Chamber's interpretation of Article 4 of Geneva Convention IV, "it was wrongly

[347] Respondent's Brief, para. 7.2. The Appeals Chamber observes that, while there is some dispute as to whether the Appellant challenges the Trial Chamber's findings that the property referred to in the Article 2 charges was protected property under the Geneva Conventions, the Appellant has asserted no identifiable arguments on this issue. *See* Appellant's Brief, p. 178 (claiming "Bosnian Muslim civilian persons and property were not protected within the meaning of the Geneva Conventions", with no further explanation regarding property). The Appeals Chamber will not speculate as to what arguments the Appellant might have raised on this issue.
[348] Respondent's Brief, para. 7.4.
[349] Respondent's Brief, paras. 7.7-7.10 (citing *Tadić* Appeal Judgement, paras 163-169; *Aleksovski* Appeal Judgement, paras. 147-152; *Čelebići* Appeal Judgement, paras. 52-106). The Appeals Chamber notes that the Prosecution calls particular attention to the *Aleksovski* Appeal Judgement, which dealt with the same conflict as that addressed by the *Blaškić* Trial Chamber. The Appeals Chamber further notes, however, that the *Aleksovski* Appeal Chamber declined to makes its own determination of the facts as to either the international character of the conflict or the status of the Bosnian Muslim victims as protected persons. *Aleksovski* Appeal Judgement, para. 153(iii).
[350] Respondent's Brief, para. 7.11.
[351] Respondent's Brief, paras. 7.12-7.13.
[352] Respondent's Brief, para. 7.14.

decided and should not be followed here."[353] The Appellant further submits that the holdings in the *Tadić* and *Čelebići* Appeal Judgements do not apply in the present case because "[i]n this case, the Bosnian Croats did not secede, as did the Bosnian Serbs. Rather they joined the Bosnian Muslims in forming a new government and actively supported the development and preservation of a new State – Bosnia-Herzegovina."[354] Finally, he submits that, to the extent the *Aleksovski* Appeal Judgement followed the reasoning in the *Tadić* Appeal Judgement, the "Appeals Chamber wrongly extended that reasoning to the conflict at issue here, which did not involve the creation of a new State by secession."[355]

170. The Appeals Chamber considers that the jurisdictional prerequisites for the application of Article 2 of the Statute have been exhaustively considered in the jurisprudence of the International Tribunal and only the relevant aspects will be restated here. In order for the International Tribunal to prosecute an individual for grave breaches of the Geneva Conventions under Article 2 of the Statute, the offence must be committed, *inter alia*: (i) in the context of an international armed conflict; and (ii) against persons or property defined as "protected" under the Geneva Conventions.[356]

171. As to the first prerequisite, the Appeals Chamber considers that, although the Appellant does not challenge the Trial Chamber's findings regarding the international character of the conflict, existing principles governing that determination are nevertheless relevant. The *Tadić* Appeal Judgement, which first defined those principles, was concerned, *inter alia*, with the legal criteria for determining the circumstances in which the acts of a military group could be attributed to a State, such that the group could be treated as a *de facto* organ of that State, thereby making a *prima facie* internal armed conflict international.[357]

172. As to the second prerequisite, the offences covered by Article 2 of the Statute must be committed against persons or property protected under the provisions of the relevant Geneva Conventions. Article 4(1) of Geneva Convention IV defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals." The *Tadić* Appeals Chamber concluded that this provision, "if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does

[353] Brief in Reply, para. 147.
[354] Brief in Reply, para. 151.
[355] Brief in Reply, para. 152.
[356] *Tadić* Appeal Judgement, para. 80; *Aleksovski* Appeal Judgement, para. 113.
[357] *Aleksovski* Appeal Judgement, para. 129; *see also Čelebići* Appeal Judgement, para. 12.

not make its applicability dependant on formal bonds and purely legal relations."[358] The Appeals Chamber reasoned that:

> [w]hile previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[359]

With these considerations in mind, the Appeals Chamber concluded that:

> even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.[360]

173. Applying the same principles in the context of the conflict between the Bosnian Croats and the Bosnian Muslims, the Appeals Chamber in *Aleksovski* reasoned that if it were "established that the conflict was international by reason of Croatia's participation, it [would follow] that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable."[361]

174. The Appeals Chamber in *Čelebići* reaffirmed and elaborated upon these principles when considering their implications for Bosnian Serbs held by Bosnian Muslims. In interpreting Article 4 of Geneva Convention IV, the Appeals Chamber concluded that:

> In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadić* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable".[362]

The *Čelebići* Appeals Chamber agreed with the Trial Chamber's finding in that case that:

> the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they "were arrested and detained mainly on the basis of their Serb identity" and "they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State".[363]

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[358] *Tadić* Appeal Judgement, para. 168.
[359] *Tadić* Appeal Judgement, para. 166.
[360] *Tadić* Appeal Judgement, para. 169.
[361] *Aleksovski* Appeal Judgement, paras. 150-151.
[362] *Čelebići* Appeal Judgement, para. 83.
[363] *Čelebići* Appeal Judgement, para. 98.

175. The Appeals Chamber first considers that the Appellant's contention that the application of Geneva Convention IV turns upon the "differing nationalities between the perpetrator and victim" confuses the identity of the individual perpetrator with that of the State party to the conflict. The Appeals Chamber notes that the Trial Chamber found that Croatia was a Party to the conflict in question.[364] The Bosnian Muslims were held captive by the HVO and they owed no allegiance to Croatia. Given that the HVO was operating *de facto* as Croatia's armed forces, the Bosnian Muslim victims found themselves in the hands of a Party to the conflict of which they were not nationals.[365] The nationalities of the individuals comprising Croatia's *de facto* armed forces are not relevant to the inquiry.

176. Second, there is no merit in the Appellant's assertion that, under the "allegiance test", Bosnian Croats would not qualify as "protected" *vis-à-vis* Bosnian Muslim captors. As clearly stated in the *Čelebići* Appeal Judgement, "victims may be 'assimilated' to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically."[366]

177. Third, there is no merit in the Appellant's assertion that the present case can be distinguished from the *Tadić* and *Čelebići* cases on the basis that the Bosnian Serbs, unlike the Bosnian Croats, were attempting to secede from Bosnia-Herzegovina. Neither the *Tadić* Appeal Judgement nor the *Čelebići* Appeal Judgement turned on the secessionist activities of the Bosnian Serbs. In fact, the opposite is true. As the Appeals Chamber stated in *Čelebići*:

> [i]t is irrelevant to determine whether the activities with which the Bosnian Serbs were associated were in conformity with the right to self-determination or not. As previously stated, the question at issue is not whether this activity was lawful or whether it is in compliance with the right to self-determination. Rather, the issue relevant to humanitarian law is whether the civilians detained in the Čelebići camp were protected persons in accordance with Geneva Convention IV.[367]

178. Finally, because the conflict addressed in the *Tadić* and *Čelebići* Appeal Judgements cannot be distinguished on the basis of secessionist activities, the Appellant's argument – which is founded on those same grounds – that "the *Aleksovski* Appeals Chamber wrongly extended that reasoning to the conflict at issue here" likewise cannot stand.[368]

179. The Appellant's remaining arguments pertaining to the interpretation and application of Geneva Convention IV fall squarely within the precedents already established by the Appeals

[364] Trial Judgement, paras. 94 and 123.
[365] Geneva Convention IV, Art. 4(1); *see also Tadić* Appeal Judgement, para. 167.
[366] *Čelebići* Appeal Judgement, para. 83.
[367] *Čelebići* Appeal Judgement, para. 104.
[368] Compare *Aleksovski* Appeal Judgement, para. 125.

Chamber. Absent clear evidence that a previous decision was founded upon a wrong legal principle or was given *per incuriam*, the Appeals Chamber will not depart from the holdings of the *Tadić*, *Aleksovski*, and *Čelebići* Appeal Judgements.

180. As noted above and as correctly pointed out by the Prosecution, the Appeals Chamber has previously rejected arguments that the victims should be excluded from the status of "protected persons" according to a strict construction of the language of Article 4 of Geneva Convention IV. The Appellant himself acknowledges that these precedents should prevail, but he argues that the "expansive interpretation" given by the relevant Chambers amounts to creating new law and violates the principle of legality.[369] These assertions are unpersuasive.

181. The Appeals Chamber has already stated in the *Čelebići* Appeal Judgement that "the interpretation of the nationality requirement of Article 4 of the Geneva Convention IV in the *Tadić* Appeals Judgement does not constitute a rewriting of Geneva Convention IV or a 're-creation' of the law."[370] Likewise, the Appeals Chamber has previously rejected allegations that its interpretation of Article 4 violates the principle of legality.[371] There is nothing in that principle that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases.[372] When considering parallel arguments with respect to the *chapeau* requirements for Article 3 of the Statute, the Trial Chamber in *Čelebići*, as confirmed on appeal, reasoned that:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[373]

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[369] Appellant's Brief, pp. 177-178.
[370] *Čelebići* Appeal Judgement, para. 73 (footnotes omitted).
[371] *Aleksovski* Appeal Judgement, paras. 126-127; *see also Čelebići* Appeal Judgement, para. 173. The principle of legality is manifest in Article 15 of the ICCPR, which provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[372] *Aleksovski* Appeal Judgement, paras. 126-127 (finding the principle of *nullem crimen sine lege* is not violated with respect to crimes under Article 2 of the Statute).
[373] *Čelebići* Appeal Judgement, paras. 179-180.

The Appeals Chamber notes that, while the Appellant has chosen to invoke the principle of legality, he has not chosen to claim ignorance of the criminal nature of the acts alleged in the Indictment. The Appeals Chamber is satisfied, therefore, that the principle of legality has not been violated in this case.

182. In conclusion, the Appeals Chamber is not persuaded by the submissions of the Appellant that there exist cogent reasons in the interest of justice to depart from the precedents of this Chamber. The questions raised by the Appellant in this sub-ground have been previously considered and rejected by the Appeals Chamber. The Appeals Chamber sees no error in the Trial Chamber's determination in this respect. This sub-ground of appeal therefore fails.

B. Alleged error in finding that Croatia and Bosnia-Herzegovina were not co-belligerent States "with normal diplomatic relations"

183. The Appellant submits that the "protected persons" requirement is based upon Article 4(2) of Geneva Convention IV, which provides that "nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." He submits that, at the relevant time, Croatia and Bosnia-Herzegovina were co-belligerents, and, therefore, Bosnian Muslims could not be regarded as protected persons for the purpose of Article 2 of the Statute.[374] He claims that the Trial Chamber erred in concluding: (i) that Croatia and Bosnia-Herzegovina were not co-belligerents within the meaning of Geneva Convention IV; and (ii) that the Bosnian Muslims must be regarded as protected persons because, in practice, they did not enjoy diplomatic protection from their State.[375] In support of this contention, the Appellant cites evidence adduced at trial, which he contends demonstrates "beyond reasonable doubt that the BiH and the Republic of Croatia were co-belligerents that shared diplomatic relations within the meaning of the Fourth Geneva Convention."[376] Second, he submits that, even if the Bosnian Muslims were deemed to be constructively in the hands of Croatia, given that both Croatia and Bosnia-Herzegovina were united against the Bosnian Serbs at the relevant time, they could not qualify as protected persons as nationals of co-belligerent States are expressly excluded from such status by Article 4(2) of Geneva Convention IV.[377]

184. The Prosecution submits that the Appellant is merely reiterating arguments which he unsuccessfully made at trial, and that he makes "no effort at meeting the burden of proof for errors

[374] Appellant's Brief, p. 180.
[375] Appellant's Brief, pp. 179-181.
[376] Appellant's Brief, p. 180.
[377] Appellant's Brief, pp. 179-182.

of fact on appeal."[378] The Prosecution asserts that the conflict in question was that between the ABiH and the HVO, *not* that against the JNA and the VRS.[379] With respect to the conflict in question, the Prosecution submits that the Appellant has failed to demonstrate that the Trial Chamber's finding that Croatia and Bosnia-Herzegovina were not co-belligerents was so unreasonable that no reasonable trier of fact could have reached the same conclusion.[380] The Prosecution further notes that the Trial Chamber in the *Kordić and Čerkez* case also concluded that the two States could not be considered co-belligerents in relation to this conflict.[381] With regard to the Appellant's argument that Croatia and Bosnia-Herzegovina enjoyed normal diplomatic relations at the time, the Prosecution points out that the "Trial Chamber already decided that this proposition was wholly inaccurate in view of the evidence before it", and that any "observations", which followed the Trial Chamber's conclusion that the two States were not co-belligerents, were *obiter dicta*.[382]

185. The Appeals Chamber notes that the Appellant does not challenge the Trial Chamber's finding that the conflict was international. The Appellant submits that the Commentary to Geneva Convention IV suggests that the "nationals of a co-belligerent State … are not considered to be protected persons so long as the State whose nationals they are has normal diplomatic representation in the belligerent State or with the Occupying Power."[383] However, the Appellant omits the text which follows that states that "[i]t is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, *do not need protection under the Convention*."[384] The Commentary continues that, for diplomatic representations to be "normal", it is essential that "representations made by the diplomatic representative will be followed by results and that satisfactory replies will be given to him."[385]

186. It is, therefore, evident, both from the text of Article 4(2)[386] and the accompanying Commentary, that for Article 4(2) to be relevant, it must be demonstrated, first, that the States were allies, and second, that they enjoyed *effective* and *satisfactory* diplomatic representation with each other. In contrast, the Appellant submits that the Trial Chamber should have ignored the fact that "HVO and ABiH forces, at times, fought each other" and looked simply at the "formal diplomatic

[378] Respondent's Brief, para. 7.20.
[379] Respondent's Brief, para. 7.21.
[380] Respondent's Brief, paras. 7.21-7.22.
[381] Respondent's Brief, para. 7.22 (citing *Kordić* Trial Judgement, para. 157).
[382] Respondent's Brief, para. 7.25.
[383] Appellant's Brief, p. 179.
[384] Commentary to Geneva Convention IV, p. 49 (emphasis added).
[385] Commentary to Geneva Convention IV, p. 49.
[386] It provides: "Nationals of a State which is not bound by the Conventions are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not

relations" between the two States.[387] Such an approach is not only inconsistent with the object and purpose of Article 4 of Geneva Convention IV, that is, "the protection of civilians to the maximum extent possible",[388] but also conflates the distinction between co-belligerence and diplomatic representations.

187. The Appellant makes no attempt to reconcile the apparent contradiction between the status of belligerent and that of co-belligerent, but instead refers the Appeals Chamber to allegedly "uncontroverted evidence establishing co-belligerence and diplomatic relations" between the two States.[389] The language of Article 4 of Geneva Convention IV is not so elastic as to allow the conclusion that two States could simultaneously be allies *and* belligerents with each other. In this case, the States of Croatia and Bosnia-Herzegovina were engaged in a conflict against each other. This, in itself, establishes that they were not co-belligerents within the meaning Article 4(2) for the purpose of crimes arising out of that conflict.

188. Furthermore, although the Trial Chamber did recognize that there were formal relations between the States of Croatia and Bosnia-Herzegovina during the relevant time, it went beyond those "formal and superficial elements" to examine evidence of the "true situation".[390] To this end, it considered evidence of Croatia's involvement in the conflict in CBOZ and evidence of the acts of Croatia's *de facto* armed forces, the HVO, which demonstrated that, despite formal representations to the contrary, Croatia was not an ally of Bosnia-Herzegovina.[391] Such evidence included an order from the HV general, General Roso, outlawing the legitimate ABiH armed forces[392] and testimony that: (i) the HV committed an "unlawful armed intervention" against the ABiH;[393] (ii) the actions of the HVO amounted to a concerted plan against the ABiH;[394] and (iii) the Bosnian Croats who wished to co-operate with the ABiH faced internal opposition, including *inter alia* opposition in the form of troops sent to prevent Croatian leaders from co-operating with Muslims.[395] Perhaps most persuasive is the fact that the Trial Chamber looked to the sheer "number of casualties they inflicted on each other" to conclude that the parties were not co-belligerents.[396]

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be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

[387] Appellant's Brief, p. 181.
[388] *Tadić* Appeal Judgement, para. 168.
[389] Appellant's Brief, p. 181.
[390] Trial Judgement, paras. 137, 139.
[391] Trial Judgement, paras. 138-143.
[392] P584.
[393] Witness Degan, T 16181.
[394] Witness Vulliamy, T 7766-7769.
[395] Witness Vulliamy, T 7791, 8535-8539, and 8556-8557.
[396] D345 and P462.

189. The Appeals Chamber finds the Trial Chamber's analysis of these facts to be consonant both with the pragmatic considerations suggested by the Commentary to Geneva Convention IV and with the object and purpose of Article 4 of Geneva Convention IV. The Appeals Chamber finds that the Trial Chamber had ample evidence to conclude within the ambit of a reasonable trier of fact that the States of Croatia and Bosnia-Herzegovina were not co-belligerents within the meaning of Article 4(2) of Geneva Convention IV. The Appellant's arguments on this point fail. Finally, because the issue of "normal diplomatic representation" only arises if States are indeed co-belligerents, it is not necessary to consider the Appellant's contention that the Trial Chamber erred in finding that the Bosnian Muslims must be regarded as protected persons because, in practice, they did not enjoy diplomatic protection from their State. This sub-ground of appeal fails in its entirety.

VI. ALLEGED ERRORS CONCERNING DENIAL OF DUE PROCESS OF LAW

190. The Appellant claims that he was unfairly denied his right to a fair trial under Article 21 of the Statute of the International Tribunal in two principal ways: (i) he was tried and convicted on the basis of a "fatally vague" indictment; and (ii) the Prosecution failed to meet its disclosure obligations with respect to exculpatory evidence under Rule 68 of the Rules.[397] The Appellant contends that this deprived him of "the due process of law, and materially prejudiced his ability to prepare and present his defence".[398] He claims that "[b]oth violations contributed significantly to the erroneous findings of guilt made by the Trial Chamber" and "require [the] reversal" of his conviction.[399]

A. Vagueness of the Indictment

1. Procedural History

191. The Appellant was initially charged along with other accused in a single indictment, *The Prosecutor v. Dario Kordić, Tihomir Blaškić, Mario Čerkez, Ivica Šantić, Pero Skopljak and Zlatko Aleksovski,* confirmed on 10 November 1995. The indictment charged the Appellant with 13 counts. On 21 November 1996, this indictment was amended and charged the Appellant with 19 counts. The amended version was confirmed on 22 November 1996 and disclosed to the Appellant on 4 December 1996.[400]

192. The Amended Indictment set out the two bases of responsibility on which the Prosecution was relying concurrently in paragraphs 5.6 and 5.7, under the heading "General Allegations", as follows:

> 5.6. The accused is responsible for the crimes charged against him in this indictment, pursuant to Article 7 (1) of the Statute of the Tribunal. This criminal responsibility includes the planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of any of the acts or omissions set forth below.
>
> 5.7. The accused is also, or alternatively, criminally responsible as a superior for the acts of his subordinates, pursuant to Article 7 (3) of the Statute of the Tribunal. This criminal responsibility involves the responsibility of a superior officer for the acts of his subordinate if the superior knew or

[397] This ground of appeal was the Sixth Ground in the Appellant's Brief.
[398] Appellant's Brief, pp. 114-115.
[399] Appellant's Brief, pp. 114-115.
[400] Hereinafter "Amended Indictment."

> had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such further acts or to punish the perpetrators thereof.

Essentially, the paragraphs reproduced the language of Article 7 of the Statute, and were set out as being applicable to all the subsequent counts; each individual count then described the alleged crimes as having been committed on the Appellant's "order or with his knowledge."

193. The Appellant objected to the Amended Indictment on 16 December 1996, in a motion to dismiss, arguing that the indictment was impermissibly vague and that the Prosecution had failed to plead material facts to support his alleged responsibility under Articles 7(1) and 7(3) of the Statute of the International Tribunal.[401] The Appellant challenged, *inter alia*, the failure of the Prosecution to adequately particularise its allegations of Article 7(1) and 7(3) responsibility by neglecting to point to specific acts of, or omissions by the Appellant demonstrating either form of liability.[402]

194. On 4 April 1997, the Trial Chamber issued a decision granting the Appellant's Motion with respect to the allegations concerning the Appellant's responsibility under Articles 7(1) and 7(3) of the Statute.[403] According to the Trial Chamber, the Amended Indictment left the Appellant unable to distinguish between the count or counts based on individual responsibility and those based on command responsibility:

> …Yet, a thorough examination of the amended indictment by the Trial Chamber reveals that, as the case now stands, out of the present 19 charges alleged against the accused, the latter is not in a position to distinguish the count or counts charged under either Article 7(1) or Article 7(3) of the Statute. Can it be considered that each count may somehow fall under either type of responsibility? Such a question can, in theory, be answered in the affirmative since the concept of concurrent legal characterisations has been identified and is known in national criminal law.
>
> The Trial Chamber is, however, of the opinion that, in international humanitarian law, more than in any other area, it is incumbent upon the Prosecutor to specify the type of responsibility under which a criminal act falls as promptly and as far as may be practicable as soon as the indictment has been issued. […] The challenged indictment must therefore be reviewed in the light of whether or not the accused has been able to prepare his defence. Yet it must be noted that the Prosecutor merely stated the two types of individual criminal responsibility falling under Article 7(1) and Article 7(3) of the Statute respectively in paragraphs 5.6 and 5.7 of paragraph 5 of the indictment under the heading "General Allegations". All the counts then describe the alleged acts as having been committed by the accused "by his order or with his knowledge."
>
> When reviewed from this strict point of view, which is more than merely technical in respect of the rights of the Defence, the amended indictment, confirmed on 22 November 1996, has even been changed for the worse when compared to the initial indictment confirmed on 10 November 1995.

[401] *Prosecutor v. Blaškić,* Case No.: IT-95-14-PT, Motion to Dismiss the Indictment Based Upon Defects in the Form of the Indictment (Vagueness/Lack of Adequate Notice of Charges), 16 Dec. 1996 ("Motion to Dismiss"). The Trial Chamber in its decision refers to the former as "direct command responsibility" and the latter as "indirect command responsibility," para. 31.
[402] *Ibid.,* para. G at pp. 8-12.
[403] *Prosecutor v. Blaškić,* Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997.

> …In conclusion, the Trial Chamber is of the opinion that the indictment should be amended as to the nature and the legal basis of the criminal responsibility for which the accused is liable.[404]

195. The Trial Chamber recognised that the Defence would be placed in a different position depending on whether the accused was charged with individual responsibility pursuant to Article 7(1) or 7(3), or both. Accordingly, the Trial Chamber held:

> [n]othing prevents the Prosecutor from pleading an alternative responsibility (Article 7(1) or (7(3) of the Statute), but the factual allegations supporting either alternative must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives.[405]

The Trial Chamber ordered the Prosecution to amend "paragraphs 5.6 and 5.7 of the Amended Indictment relating to the accused's role in the acts charged by providing sufficient factual indications in support of the types of responsibility invoked pursuant to the provisions of Articles 7(1) and 7(3) of the Statute."[406]

196. The Prosecution accordingly filed the Second Amended Indictment on 25 April 1997, which charged the Appellant with 20 counts. This indictment sets out the following paragraphs under the heading "Superior Authority":

> 3. Tihomir BLAŠKIĆ, since the establishment of the HVO on 8 April 1992, was instrumental in the establishment and operation of the HVO in the Central Bosnia Operative Zone. He was a Colonel in the HVO and from 27 June 1992 he was the Commander of the Regional Headquarters of the HVO Armed Forces in Central Bosnia (HVO Armed Forces Region of Central Bosnia) and remained so at all times material to this indictment. Tihomir BLAŠKIĆ's authority and duties, as an HVO Commander, are set forth in the Decree on the Armed Forces of the Croatian Community of Herceg-Bosna, dated 17 October 1992. That Decree provides, inter alia, that a Commander has authority and responsibility for the combat readiness of troops under his command, the mobilisation of armed forces and police units, and the appointment of commanders.
>
> 4. Tihomir BLAŠKIĆ exercised his control in military matters in a variety of ways, including, but not limited to, negotiating cease-fire agreements, negotiating with United Nations officials; implementing the organisational structures of the Armed Forces of the HVO; appointing and relieving military commanders; deploying troops, artillery, and other units under his command; issuing orders to municipal HVO headquarters; and controlling HVO military units and detention centres that were operating within his area of command.

197. The Second Amended Indictment reproduced the wording used in former paragraphs 5.6 and 5.7 of the Amended Indictment but inserted the statutory formulation into the first paragraph pertaining to each count or group of counts, that is, paragraphs 6.0, 8, 9, 10, 11, 12, 15, and 16.

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[404] *Ibid.*, para. 32.
[405] *Ibid.*
[406] *Ibid.,* para. 39.

198. The Appellant challenged the Second Amended Indictment's compliance with the Trial Chamber's decision of 4 April 1997 in a Request for Enforcement of that decision.[407] On 10 June 1997, the Trial Chamber issued a second decision on the issue, in which it agreed with the Appellant that the Second Amended Indictment failed to provide sufficient factual indications in support of the invoked responsibility of the accused pursuant to Articles 7(1) and 7(3) of the Statute, but nonetheless dismissed the Appellant's request. The relevant paragraphs of the Trial Chamber's second decision are as follows:

> In its Decision of 4 April 1997, the Trial Chamber requested that the Prosecutor amend the indictment by providing sufficient factual indications in support of one or the other of the types of responsibility invoked pursuant to the provisions of Articles 7(1) and 7(3) of the Statute.
>
> The Trial Chamber notes that the Prosecutor's characterisation of the role of the accused in the alleged crimes as it appears in paragraphs 6, 8, 9, 10, 11, 12, 15 and 16 merely repeats the wording of Articles 7(1) and 7(3) without providing any further details about the acts alleged in respect of the type of responsibility incurred.
>
> The Trial Chamber will not repeat its orders and does not consider that, at this stage of the proceedings, it need grant any additional time to the Prosecutor to amend the indictment further.
>
> For this reason, *the Trial Chamber will not fail to draw all the legal consequences at trial of the possible total or partial failure to satisfy the obligations incumbent upon the Prosecutor* insofar as that failure *inter alia* might not have permitted the accused to prepare his defence pursuant to Article 21 of the Statute and the principles identified in its Decision.[408]

199. The Trial Chamber also stated that, "both for the reasons explained in this Decision and out of a concern that the trial begin without undue delay, the Trial Chamber will not grant the Prosecutor additional time to satisfy her obligations."[409] However, the Trial Chamber noted that the Appellant retained the right to raise the issue again at trial.[410]

200. On 26 March 1999, a slightly altered version of the Second Amended Indictment was filed and subsequently confirmed on 26 April 1999, incorporating an amendment made pursuant to a Corrigendum filed on 16 March 1999, which corrected a date contained in Count 14. The Indictment remained otherwise unchanged after the Trial Chamber's decision of 25 April 1997, although in its Final Brief the Prosecution withdrew Count 2.[411]

201. In paragraph 6 of the Trial Judgement, the Trial Chamber makes reference to its decisions of 4 and 25 April 1997 on the form of the indictment, but it does not discuss the matter further. In paragraph 19 of the Trial Judgement, it is merely stated that "[t]his chapter intended to recall the

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[407] *Prosecutor v. Blaškić,* Case No. IT-95-14-PT, Request for Enforcement of the Trial Chamber's Order of 4 April 1997, dated 2 May 1997, and filed on 10 June 1997.
[408] *Prosecutor v. Blaškić,* Case No. IT-95-14-PT, Decision on the Defence Request for Enforcement of an Order of the Trial Chamber, dated 23 May 1997, and filed on 10 June 1997, p. 5 (emphasis added).
[409] *Ibid.*, p. 6.
[410] *Ibid.*
[411] Summary of the Prosecutor's Final Brief, 22 July 1999 (filed on 30 July 1999), para. 8.2, p. 59.

various stages of the lengthy proceedings in brief and according to the issues. However, it will not deal with the issues relating to the indictment, which were examined in the previous chapter", presumably a reference to paragraph 6 of the Trial Judgement.

2. Defects in the Second Amended Indictment

202. The Appellant claims that, in both decisions on the form of the indictment, the Trial Chamber had agreed with the Appellant that the indictment was and remained "fatally defective."[412] The Trial Chamber did not use those terms, but reserved its right to draw "all the legal consequences at trial" if on a final determination of the issues, the Prosecution case was found deficient as a result of any *lacunae* in the indictment.[413] However, the Appellant relies on other, more specific arguments, to claim that the Second Amended Indictment lacked sufficient material facts to support the two forms of responsibility alleged by the Prosecutor, thereby prejudicing the Appellant and denying him a fair trial.

203. The Appellant argues that the Prosecution failed to plead the material facts needed to substantiate his alleged responsibility pursuant to Articles 7(1) and 7(3) of the Statute for the various crimes charged in the Second Amended Indictment. In particular, he claims that it failed to plead any facts "detailing which HVO or paramilitary units were alleged to have committed the crimes in question, no identification of any alleged orders given by the Appellant, and no identification of any individuals or units who were allegedly commanded by the Appellant."[414] He also claims that the Trial Judgement devotes "considerable attention" to establishing the chain of command which operated with respect to the various units stationed in Central Bosnia, and that the Second Amended Indictment is "devoid of particulars concerning alleged chains of command, and the Appellant's role within them."[415]

204. According to the Appellant, these defects in the Second Amended Indictment were then compounded by the Trial Chamber's failure to articulate a clear theory of responsibility in its judgement, which "conflates" the forms of responsibility under Articles 7(1) and 7(3) of the Statute, and relies instead on an "*ex post facto* selection" of a theory of responsibility to hold the Appellant accountable.[416] For all these reasons, the Appellant contends that both his right to be informed of the charges against him, and his right to a fair trial, have been violated.[417]

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[412] Appellant's Brief, p. 117.
[413] Respondent's Brief, para. 4.9.
[414] Appellant's Brief, p. 118.
[415] Appellant's Brief, p. 118.
[416] Appellant's Brief, pp. 119-20. *See also* AT 798 (17 Dec. 2003).
[417] During oral argument, Counsel for the Appellant suggested that the Prosecution may have been "reckless" in issuing the indictment without producing the basic documents on which the allegations were based. AT 800 (17 Dec. 2003).

205. The Prosecution submits that the burden is on the Appellant to show (i) that the Trial Chamber reached a verdict on the basis of material facts which were not pleaded in the Second Amended Indictment; and (ii) that his trial was rendered unfair as a result.[418] It argues that the Appellant has failed to discharge this burden for three main reasons: first, the Prosecution contends that, based on the relevant case law, the Second Amended Indictment did in fact contain sufficient material facts to allow the Appellant to respond to the charges; second, that the actual course of the trial reveals that the Appellant was able to, and did, respond to the two forms of responsibility alleged; and third, that, in any event, the Appellant has not shown how he was prejudiced by the form of charging in the Second Amended Indictment such that his trial was rendered unfair.[419]

206. The Prosecution contends that the indictment in the present case has met the standard of pleading required for allegations individual criminal responsibility under Articles 7(1) and 7(3) as established by the jurisprudence of the International Tribunal.[420] According to the Prosecution, only a concise summary of the material facts is required in the indictment; additional information, the evidence relied on to prove those material facts should be found in the "supporting material that accompanies the indictment … together with the material disclosed by the Prosecution under the Rules before trial."[421] The Prosecution asserts that the level of detail contained in the Second Amended Indictment was sufficient to ground the material facts of the crimes alleged, particularly in light of the fact that the Appellant was charged with "massive offences committed within an organised and co-ordinated campaign or conflict,"[422] covering "numerous sub-categories of violations in 25 villages across an extensive geographical area."[423] In relation to the specific facts which the Appellant claims should have been provided in the Second Amended Indictment, the Prosecution argues that such information "does not correspond to the notion of material facts but constitutes evidence" and therefore does not belong in the indictment at all.[424] In reply, the Appellant submits that the Prosecution has not in fact met the legal standard required by the International Tribunal's jurisprudence with respect to pleading Article 7(1) or 7(3) responsibility.[425]

3. General principles of pleading

207. The Appeals Chamber notes that, in its decision of 4 April 1997 concerning the Appellant's first challenge to the Amended Indictment, the Trial Chamber discussed Articles 18(4) and 21(4) of

[418] Respondent's Brief, para. 4.4.
[419] Respondent's Brief, paras. 4.5-4.7.
[420] The Prosecution refers to decisions rendered in the *Krnojelac*, *Brdanin and Talić, Kupreškić* and *Došen and Kolundžija* cases. Respondent's Brief, paras. 4.32-4.44.
[421] Respondent's Brief, para. 4.20.
[422] Respondent's Brief, para. 4.23.
[423] Respondent's Brief, para. 4.26.
[424] Respondent's Brief, para. 4.30.
[425] Brief in Reply, paras. 96-99.

the Statute, and held that, taken together, their purpose was to ensure that an accused is informed of the charges against him and is in a position to prepare his defence in due time.[426] However, the Trial Chamber drew a distinction between the time an accused is notified of the charges against him – namely, when the accused is informed of the indictment for the first time – and the subsequent phase devoted to the preparation of his defence prior to the commencement of the trial – namely, the pre-trial stage. The decision also drew a distinction between the accused's right to be informed of the nature and cause of the charges against him, and his right to the disclosure of evidence in order to be able to adequately prepare for his trial. According to the Trial Chamber, Article 21(4) of the Statute only becomes applicable in the pre-trial stage, more specifically to the disclosure of evidence, and the issuance of the indictment is governed solely by Article 18(4) and Rule 47(C).[427] The Trial Chamber appears to have regarded the wording of Article 21(4) ("nature and cause of the charge") as encompassing the Prosecution's disclosure of evidence in support of the indictment and thus applicable to the pre-trial stage. The Trial Chamber stated that Article 21(4)(a) of the Statute establishes the context for the accused's entitlement to disclosure as set forth in Rule 66 of the Rules.[428]

208. General principles of pleading are espoused in the following provisions. Article 21(4)(a) of the Statute provides that an accused is entitled, at a minimum, "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." Article 21(4)(b) requires that an accused be given "adequate time and facilities for the preparation of his defence…" With respect to the specific form of an indictment, Article 18(4) requires the Prosecutor to prepare an indictment containing "a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute." Rule 47(C) of the Rules further specifies that an indictment must "set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."[429]

209. Articles 18(4) and 21(4) of the Statute and Rule 47(C) of the Rules accord the accused an entitlement that translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is

[426] Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997, para. 10.
[427] *Ibid.,* para. 11.
[428] *Ibid.*
[429] When the Trial Chamber issued its decision on the Second Amended Indictment, the relevant rule was Rule 47(B). For the sake of simplicity, this Judgement will consistently refer to Rule 47(C) where the relevant provision being discussed is the identically worded provision, which was then numbered Rule 47(B).

dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[430]

210. There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery.[431] The Appeals Chamber reiterates that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged.[432] The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution.[433] The precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible.[434]

211. A distinction has been drawn in the International Tribunal's jurisprudence between the level of specificity required when pleading: (i) individual responsibility under Article 7(1) in a case where it is not alleged that the accused personally carried out the acts underlying the crimes

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[430] *Kupreškić* Appeal Judgement, para. 88. Where the Appeals Chamber referred to the following authority: *Furundžija* Appeal Judgement, para. 147; *Prosecutor v. Krnojelac,* Case No.: IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999 ("*Krnojelac* Decision 24 February 1999"), paras. 7, 12; *Prosecutor v. Krnojelac,* Case No.: IT-97-25-PT, Decision on Preliminary Motion on the Form of Amended Indictment, 11 Feb. 2000 ("*Krnojelac* Decision 11 February 2000"), paras. 17, 18; *Prosecutor v. Brdanin and Talić,* Case No.: IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb. 2001 ("*Brdanin and Talić* 20 February 2001 Decision"), para. 18. This view was subsequently adopted by the Appeals Chamber in the *Krnojelac* Appeal Judgement, para. 131.

[431] *Krnojelac* 24 February 1999 Decision, para. 12; *see also Prosecutor v. Došen and Kolundžija*, Case No.: IT-95-8-PT, Decision on Preliminary Motions, 10 Feb. 2000 ("*Kolundžija* 10 February 2000 Decision"), para. 21; *Krnojelac* Decision 11 February 2000, para. 17; *Prosecutor v. Naletilić and Martinović,* Case No.: IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 Feb. 2000, paras. 17, 18; *Furundžija* Appeal Judgement, para. 153; *Prosecutor v. Krajišnik,* Case No.: IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug. 2000 ("*Krajišnik* Decision"), para. 8; *Prosecutor v. Krajišnik,* Case No. IT-00-39-AR72, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, 13 Sept. 2000, p. 3.

[432] *Kupreškić* Appeal Judgement, para. 89; *Krnojelac* Appeal Judgement, para. 132.

[433] *Krnojelac* 11 February 2000 Decision, para. 18; *Prosecutor v. Brdanin and Talić,* Case No.: IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 Feb. 2001 ("*Brdanin and Talić* 23 February 2001 Decision"), para. 13; *Brdanin and Talić* 20 February 2001 Decision, para. 18; *Prosecutor v. Hadžihasanović et al,* Case No.: IT-01-47-PT, Decision on Form of the Indictment, 7 Dec. 2001 ("*Hadžihasanović* 7 December 2001 Decision"), para. 19; *Prosecutor v. Mrkšić et al,* Case No.: IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("*Mrkšić* Decision"), para. 8. *See also Kolundžija* 10 February 2000 Decision, para. 15. In that case, the Prosecution had provided additional information regarding the time and place of the alleged offences, and the identity of the victims and co-perpetrators, in a confidential attachment. The Trial Chamber also ordered the Prosecution to file an amended version of the confidential attachment as part of the amended indictment. *See Prosecutor v. Mrkšić et al,* Case No.: IT-95-13/1-PT, Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend, 23 Jan. 2004, para. 52.

[434] *Brđanin and Talić* 23 February 2001 Decision, para. 10; *Mrkšić* Decision, para. 8.

charged; (ii) individual responsibility under Article 7(1) in a case where it *is* alleged that the accused personally carried out the acts in question;[435] and (iii) superior responsibility under Article 7(3).

212. Depending on the circumstances of a case based on individual criminal responsibility under Article 7(1) of the Statute, the Prosecution may be required to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, to indicate the particular form of participation.[436] This may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused,[437] and to enable the accused to effectively and efficiently prepare his defence.[438] The material facts to be pleaded in an indictment may vary depending on the particular form of participation under Article 7(1).[439]

213. When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."[440] However, where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[441]

214. In the *Došen and Kolundžija* case, the Trial Chamber required the Prosecution to amend the indictment to specify which crimes the two accused were charged with having committed "directly" pursuant to Article 7(1), including "where possible, specifying the *form* of participation, such as "planning" *or* "instigating" *or* "ordering" etc"; which crimes they were charged with having committed pursuant to Article 7(3); and which crimes were based on both types of responsibility, specifying the *form* of participation with respect to Article 7(1) responsibility.[442] This approach was adopted by the Appeals Chamber in *Krnojelac*, wherein it was held that the *Krnojelac* Trial Chamber was correct to refuse to consider one particular form of participation (that of the extended

[435] This type of responsibility was described by the Trial Chamber in *Krnojelac* as "personal" responsibility and referred to as "direct" responsibility by the Appeals Chamber in *Krnojelac*. See *Krnojelac* 11 February 2000 Decision, para. 18 (C) and *Krnojelac* Appeal Judgement, para. 138.
[436] *Čelebići* Appeal Judgement, para. 350.
[437] *Aleksovski* Appeal Judgement, para. 171, n. 319 (referring to *Krnojelac* 11 February 2000 Decision, paras. 59-60).
[438] *Prosecutor v. Deronjić,* Case No.: IT-02-61-PT, Decision on Form of the Indictment, 25 Oct. 2002 (*Deronjić* Decision), para. 6; *Mrkšić* Decision, para. 9.
[439] *Ibid.*
[440] *Prosecutor v. Tadić,* Case No.: IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 11-13; *Krnojelac* 11 February 2000 Decision, para. 18; *Kupreškić* Appeal Judgement, para. 89. The Trial Chamber in the *Deronjić* case ordered the Prosecution to plead the identity of the murder victims with respect to each incident charged under Article 7(1) and Article 7(3) of the Statute. *Deronjić* Decision, para. 37.
[441] *Krnojelac* 24 February 1999 Decision, para. 13; *Krnojelac* 11 February 2000 Decision, para. 18; *Brdanin and Talić* 20 February 2001 Decision, para. 20.

form of joint criminal enterprise) after the Prosecution failed to amend the indictment following a decision by the Trial Chamber that the indictment only alleged a different form of participation (the basic form of joint criminal enterprise). The Appeals Chamber emphasised that the Prosecution should specify not only the statutory basis of responsibility, namely, Article 7(1) or 7(3), but also the form of participation alleged.[443]

215. The Appeals Chamber considers that the approach adopted by the Trial Chambers in the *Krnojelac* and *Došen and Kolundžija* cases is consistent with the jurisprudence of the International Tribunal and lends support to the conclusion that the alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that "[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."[444] The nature of the alleged responsibility of an accused should be unambiguous in an indictment.

216. In relation to an allegation of superior responsibility, the accused needs to know not only what is alleged to have been his own conduct giving rise to his responsibility as a superior, but also what is alleged to have been the conduct of those persons for which he is alleged to be responsible,[445] subject to the Prosecution's ability to provide those particulars.[446]

217. With respect to the particularity required in pleading superior responsibility, the Trial Chamber in *Krnojelac* held that the description of the accused in the indictment as the "commander" of the camp in which the crimes were committed was sufficient to ground the charge of command responsibility for those crimes.[447] In *Brđanin and Talić*, the Trial Chamber held that a reference to specific military duties (as set out in a named military order) was sufficient to identify the basis of the accused's alleged command responsibility.[448] A similar decision was also reached

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[442] *Kolundžija* 10 February 2000 Decision, para. 15.
[443] *Krnojelac* Appeal Judgement, para. 138. The *Krnojelac* Appeals Chamber also held: "However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment- for instance in a pre-trial brief- the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial." *Ibid.* The Appeals Chamber notes that in the case at hand, no pre-trial brief was filed since Rule 65*ter* was only adopted in July 2001.
[444] *Aleksovski* Appeal Judgement, para. 171, n. 319; *Krnojelac* Appeal Judgement, para. 134; *see also Čelebići* Appeal Judgement, paras. 350, 351.
[445] *Krnojelac* 24 February 1999 Decision, para. 38; *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 20.
[446] *Krnojelac* 24 February 1999 Decision, para. 40; *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 20.
[447] *Krnojelac* 24 February 1999 Decision, para. 19.
[448] *Prosecutor v Brđanin and Talić*, Case No IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin and Talić* 26 June 2001 Decision"), para. 19.

by the Trial Chamber in *Čelebići*.[449] The Trial Chamber in *Krnojelac* stated that the identification of subordinates who allegedly committed the criminal acts by their "category" or "as a group" was sufficient, if the Prosecution was unable to identify those directly participating in the alleged crimes by name.[450]

218. In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:

(a) (i) that the accused is the superior[451] of (ii) subordinates sufficiently identified,[452] (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct [453]– and (iv) for whose acts he is alleged to be responsible;[454]

(b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates,[455] and (ii) the related conduct of those others for whom he is alleged to be responsible.[456] The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision,[457] because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue;[458] and

[449] *Prosecutor v. Delalić et al*, Case No.: IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 Oct. 1996, para. 19.
[450] *Krnojelac* 24 February 1999 Decision, para. 46.
[451] *Deronjić* Decision, para. 15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges).
[452] *Deronjić* Decision, para. 19.
[453] *Čelebići* Appeal Judgement, para. 256.
[454] *Krnojelac* 11 February 2000 Decision, para. 18; *Brdanin and Talić* 20 February 2001 Decision, para. 19; *Krajišnik,* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, paras 11, 17; *Mrkšić* Decision, para. 10.
[455] *Krnojelac* 11 February 2000 Decision, para. 18; *Krajišnik* Decision, para. 9; *Brdanin and Talić,* 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[456] *Krnojelac* 24 February 1999 Decision, para. 38; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[457] *Krnojelac* 11 February 2000 Decision, para. 18; *Brdanin and Talić* 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[458] *Krnojelac* 11 February 2000 Decision, para. 18; *Brdanin and Talić* 20 February 2001 Decision, para. 19; *Prosecutor v. Kvočka et al,* Case No.: IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 17; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.

(c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[459]

219. With respect to the *mens rea,* there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.[460] Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication.[461] This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the legal pre-requisite.[462]

220. Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[463] The Appeals Chamber in *Kupreškić* examined a situation in which the necessary information to ground the alleged responsibility of an accused was not yet in the Prosecution's possession and stated that, in such circumstances, "doubt must arise as to whether it is fair to the accused for the trial to proceed."[464] The Appeals Chamber emphasised that the Prosecution is expected to inform the accused of the nature and cause of the case before it goes to trial. It is unacceptable for it to omit the material facts in an indictment with the aim of moulding its case against the accused during the course of the trial depending on how the evidence unfolds.[465] Where the evidence at trial turns out differently than expected, an amendment of the indictment may be required, an adjournment may be granted, or certain evidence may be excluded as being outside the scope of the indictment.[466]

221. If a trial verdict is found to have relied upon material facts not pleaded in an indictment, it is still necessary to consider whether the trial was thereby rendered unfair.[467] If the trial was rendered

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[459] *Brdanin and Talić* 20 February 2001 Decision, para. 19; *Krnojelac* 11 February 2000 Decision, para.18; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Deronjić* Decision, para. 7; *Mrkšić* Decision, para. 10.
[460] *Brdanin and Talić* 26 June 2001 Decision, para. 33; *Mrkšić* Decision, para. 11.
[461] *Brdanin and Talić* 20 February 2001 Decision, para. 48; *Prosecutor v. Brdanin and Talić,* Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; *Hadžihasanović* 7 December 2001 Decision, para. 10; *Deronjić* Decision, para. 9; *Mrkšić* Decision, para. 12.
[462] *Brdjanin and Talić* 20 February 2001 Decision, para. 48; *Hadžihasanović* 7 December 2001 Decision, para. 10; *Mrkšić* Decision, para. 12.
[463] *Kupreškić* Appeal Judgement, para. 114.
[464] *Kupreškić* Appeal Judgement, para. 92 (footnote omitted).
[465] *Ibid.,* at para. 92 (footnote omitted).
[466] *Ibid.*
[467] *Ibid.*, para. 87.

unfair, then an appropriate remedy must be found. The Appeals Chamber will turn to an analysis of the Second Amended Indictment to ascertain whether it was pleaded in accordance with the principles set out above.

4. Application of the general principles of pleading to the Second Amended Indictment

222. Before proceeding with the analysis of the Second Amended Indictment, it is necessary to address the preliminary issue of whether the Appellant has waived his right to argue this issue on appeal. As provided for in Article 25 of the Statute, the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. A party is under the obligation to formally raise before the Trial Chamber, either during trial or pre-trial,[468] any issues that require resolution. A party "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo.*"[469] If a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived his right to bring the issue as a valid ground of appeal.[470]

223. Normally, an allegation pertaining to the vagueness of an indictment is dealt with at the pre-trial stage by the Trial Chamber, or if certification has been granted to pursue an interlocutory appeal, pursuant to Rule 72(B)(ii) of the Rules, before the Appeals Chamber. In the present case, this stage has passed. Nevertheless, the Appeals Chamber is not of the view that the Appellant – who objected to the adequacy of the indictment before the Trial Chamber – has waived his right to do so on appeal. The Appellant raised the issue of the vagueness of the Amended Indictment before the Trial Chamber, and subsequently challenged the Second Amended Indictment's compliance with the Trial Chamber's ruling,[471] although he failed to raise the issue of the vagueness of the indictment on the question of the form of responsibility either at the Rule 98*bis* hearing in the case or in closing argument at trial.[472]

224. However, having raised the issue not once but twice before the Trial Chamber, and having received directly from the Trial Chamber a specific assurance that it would "*not fail* to draw all the

[468] *Furundžija* Appeal Judgement, para. 174.
[469] *Tadić* Appeal Judgement, para. 55; cited in *Kambanda* Appeal Judgement, para. 25, and *Akayesu* Appeal Judgement, para. 361.
[470] *Akayesu* Appeal Judgement, para. 361.
[471] The Appeals Chamber notes that in *Kupreškić*, the Prosecution advanced no waiver argument since the appellants (Zoran and Mirjan Kupreškić) had objected to the form of the indictment before the Trial Chamber, on the same grounds raised before the Appeals Chamber.
[472] The Appeals Chamber notes that in its decision on the Appellant's motion for dismissal of the indictment, the Trial Chamber considered: "a motion, like the one submitted to the Judges in the present case seeking the dismissal of some of the counts in the indictment against [the Appellant] amounts to a request for leave to amend the indictment, which

legal consequences at trial of the possible total or partial failure to satisfy the obligations incumbent upon the Prosecutor, insofar as that failure *inter alia* might not have permitted the accused to prepare his defence,"[473] the Appeals Chamber considers that the Appellant was entitled to assume that the Trial Chamber would adhere to its prior commitment and was not obliged to raise the issue again at every possible opportunity. The Appeals Chamber therefore concludes that the Appellant has not waived his right to raise the issue of the vagueness of the indictment on appeal.

(a) Was the Second Amended Indictment pleaded in accordance with the general principles of pleading?

225. The Second Amended Indictment essentially reproduced the wording of Articles 7(1) and 7(3) of the Statute in the first paragraph of each count or group of counts (paragraphs 6, 8, 9, 10, 11, 12, 15, and 16). Even though it states that the Appellant "together with the HVO…committed," for example, persecution as a crime against humanity,[474] the Second Amended Indictment does not mention that the Appellant personally carried out the acts underlying the crimes charged. It is clear that the word "committed" was not used to mean the personal perpetration of those acts underlying the crimes charged pursuant to Articles 2, 3, and 5 of the Statute, as the Appellant was neither charged nor convicted of this form of participation in relation to the crimes set out in the Second Amended Indictment. The Second Amended Indictment – with respect to each count or group of counts and, by implication, each of the incidents under each count or group of counts – pleads that the Appellant either "planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation or execution of," for example, persecution, "*and, or in the alternative*, knew or had reason to know that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." For instance, with respect to the persecutions count, the Second Amended Indictment states:

> 6.0 From May 1992 to January 1994 Tihomir BLAŠKIĆ, together with members of the HVO, *planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of* a crime against humanity by persecuting Bosnian Muslim civilians on political, religious or racial grounds, throughout the municipalities of Vitez, Busovača, Kiseljak, and Zenica,
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> *and, or in the alternative, knew or had reason to know that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*[475]

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the Defence, not wishing to base itself on the new Rule 98 *bis* recognises explicitly…" *Prosecutor v. Blaškić,* Case No.: IT-95-14-T, Decision of Trial Chamber I on the Defence Motion to Dismiss, 7 Sept. 1998, p. 4.

[473] *Prosecutor v. Blaškić,* Case No. IT-95-14-PT, Decision on the Defence Request for Enforcement of an Order of the Trial Chamber, dated 23 May 1997, filed on 10 June 1997, p. 5 ("*Blaškić* 10 June 1997 Decision").

[474] Second Amended Indictment, para. 6.0.

[475] Second Amended Indictment, para. 6.0 (emphasis added).

The following paragraphs plead the remaining counts in the same manner, and repeat the words indicated in italics above.

226. The Appellant was charged in the alternative with several forms of participation set out in Article 7(1) of the Statute, so arguably he was on notice that all such forms of participation were alleged before the trier of fact. The Prosecution was not required to choose between different forms of participation under Article 7(1); it was entitled to plead all of them. However, the Second Amended Indictment "merely repeats the wording of Articles 7(1) and 7(3) without providing any further details about the acts alleged in respect of the type of responsibility incurred."[476] This manner of pleading does not clearly inform the accused of the exact nature and cause of the specific allegations against him. The Prosecution should have pleaded the particular forms of participation under Article 7(1) with respect to each incident under each count. The Appeals Chamber notes that "instigation" is a distinct form of participation under Article 7(1), and thus when the Prosecution pleads such a case, the instigating acts, and the instigated persons or groups of persons, are to be described precisely.[477]

227. With respect to command responsibility under Article 7(3) of the Statute, the Second Amended Indictment sets out the Appellant's position in paragraphs 3 and 4, specifically identifying his role as the "Commander" of the HVO Armed Forces in Central Bosnia and articulating some of the specific duties and activities over which he had control, in particular, "deploying troops, artillery, and other units under his command; issuing orders to municipal HVO headquarters; and controlling HVO military units and detention centres that were operating within his area of command." The jurisprudence of the International Tribunal is clear with respect to the nature of the material facts which need to be pleaded in a case based on superior responsibility.[478] In principle, the description of the Appellant as the Commander of the HVO forces is a sufficient basis for asserting the material fact that he was in a position of superior authority for the purposes of an allegation under Article 7(3) of the Statute.

228. Nevertheless, the Appeals Chamber finds that while the Second Amended Indictment clearly identifies in paragraphs 3 and 4 the command position occupied by the Appellant, it does not set out the individuals and units subordinated to him, or the material facts regarding the acts committed and the individuals who committed them.[479] Moreover, the mere reproduction in the Second Amended Indictment of the text of Article 7(3) in each count or group of counts, without

[476] *Blaškić* 10 June 1997 Decision, p. 5.
[477] *Deronjić* Decision, para. 31.
[478] *See* para. 218 *supra.*
[479] *See Deronjić* Decision, para. 20; *Mrkšić* Decision, para. 65.

any further details, gives rise to ambiguity as to the exact nature and cause of the Prosecution's allegations against the Appellant.

229. In light of the foregoing, the Appeals Chamber finds that the Second Amended Indictment failed to plead the material facts with sufficient particularity, as required by the principles set out above.

(b) Whether the defects in the Second Amended Indictment rendered the trial unfair

230. The Appeals Chamber has concluded that the Second Amended Indictment does not comply with the principles of pleading set out in the present Judgement. The Appeals Chamber will therefore determine whether the defects in the Second Amended Indictment materially impaired the Appellant's ability to prepare his defence and thus rendered his trial unfair.

231. The Appellant argues that he was "forced" during the trial to attempt to conduct the case without knowing which theory of responsibility he should challenge with respect to each of the crimes with which he was charged.[480] During the appeal hearing, Counsel for the Appellant referred to the Appellant's conviction for the crimes committed in the village of Ahmići, and contended that the Prosecution "never committed" to either theory of responsibility at trial with respect to the crimes committed in Ahmići, and that the Appellant was therefore required to mount a defence against two, inconsistent bases of liability: the active mode of having "ordered" the commission of numerous crimes on the one hand, and the omission involved in "failing to prevent or punish" the same crimes on the other.[481]

232. The Appellant further asserts that the Prosecution in general failed to identify which theory of liability the individual pieces of evidence it adduced were intended to support. He claims, as an example, that the summaries of expected witness testimony ("routinely provided" to the Trial Chamber by the Prosecution) never identified whether the testimony would go towards proving either Article 7(1) or Article 7(3) responsibility, and that the Defence was therefore disadvantaged in cross-examination.[482] The Appellant also argues that the Trial Chamber not only failed to provide any guidance to the Appellant about the "core nature" of the charges against him (that is, the form of liability on which individual charges were grounded), but that it in fact *misled* him. He claims that the Trial Chamber:

> gave strong indication that it believed the trial to be purely about 'command responsibility', thus misleading the Appellant as to the possibility of his conviction under Article 7(1). The trial record is

[480] Appellant's Brief, para. 118.
[481] AT 606 (16 Dec. 2003).
[482] Appellant's Brief, pp. 118-119.

replete with examples of the Trial Chamber stating that the subject of the Appellant's trial was "command responsibility."[483]

233. The Prosecution contends that the Appellant was not prejudiced at trial by the form of the Second Amended Indictment, and emphasises that the jurisprudence of the International Tribunal permits *inter alia*, to cumulatively and concurrently charge an accused in relation to various forms of participation under Article 7 of the Statute.[484] It submits that the Appellant was clearly on notice that the Prosecution was proceeding on the basis of both modes of criminal responsibility, Article 7(1) and 7(3), and that the former included various forms of participation.[485] The Prosecution submits that neither the Statute nor the Rules prescribe an obligation on behalf of the Prosecution to provide witness summaries referencing Articles 7(1) and 7(3) and takes particular issue with the Appellant's claim that his case was prejudiced by the lack of information in the Prosecution's witness summaries.[486]

234. The Prosecution submits that "the core facts regarding the Appellant's involvement remained essentially consistent in the pre-trial documents," and that the Indictment should not be considered on its own but in the context of the Prosecution providing the Appellant with copies of witness statements, and its opening statement.[487] It refutes the Appellant's claim that his ability to cross-examine witnesses effectively was undermined, arguing that the Appellant has failed to give any specific examples of this alleged inability, and that by not taking any "remedial procedural action" at trial, he has waived his right to raise this issue now.[488] Finally, the Prosecution rejects the Appellant's claim that the Trial Chamber misled him as to the nature of the charges against him.[489] In its response and in oral argument at the appeal hearing, the Prosecution relied on *Colak v. Germany*,[490] a case interpreting Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which is similar to Article 21 of the Statute. The Prosecution claims that this case stands for the proposition that an accused can derive no rights from comments made during trial unless the comment involves a statement to the effect that a count against the accused will be withdrawn.[491]

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[483] Appellant's Brief, p. 119.
[484] Respondent's Brief, paras. 4.14-4.16.
[485] Respondent's Brief, paras. 4.17, 4.22.
[486] Respondent's Brief, paras. 4.63-4.70.
[487] Respondent's Brief, para. 4.47.
[488] Respondent's Brief, paras. 4.57-4.62; 4.71-4.72.
[489] Respondent's Brief, paras. 4.73-4.78.
[490] 11 EHRR 513 (1989). *See* Respondent's Brief, para. 4.78, n. 1003.
[491] Counsel for the Prosecution stated: "I would also refer you to the case of Colak v. Germany, before the European Court of Human Rights, which goes to a point which we have drawn attention to in our respondent's brief. In this case, the European Court of Human Rights confirmed that an accused can derive no rights from comments made during trial proceedings. If these comments are not accompanied by a statement that a certain charge or a count would be withdrawn…We rely on this case to state that likewise, to the extent that the appellant claims that the Presiding Judge

235. In reply, the Appellant submits first, that according to the *Kupreškić* Appeal Judgement, prejudice is effectively presumed where an indictment fails to include material facts,[492] and second, that prejudice is evident in the fact that he was *convicted* of both Articles 7(1) and 7(3) responsibility, without the Trial Chamber adequately distinguishing between the material facts supporting either mode of responsibility.[493] In addition, and contrary to the Prosecution's suggestion on that point, the Appellant submits that the form of his participation under Article 7 of the Statute is relevant not only in relation to sentence, but also in relation to his conviction.[494]

236. In support of the argument that prejudice is effectively presumed where an indictment fails to include material facts, the Appellant refers to the following finding of Appeals Chamber in the *Kupreškić* case, which emphasised that:

> [a] defective indictment, in and of itself, may, in certain circumstances, cause the Appeals Chamber to reverse a conviction.[495]

237. The Appeals Chamber notes that it has stated in the *Kupreškić* Appeal Judgement that:

> [t]he Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[496]

238. The Appeals Chamber is not persuaded by the argument that prejudice should be presumed. It recalls that in the *Kupreškić* Appeal Judgement, it held:

> [t]he Appeals Chamber emphasises that the vagueness of the Amended Indictment in the present case constitutes neither a minor defect nor a technical imperfection. It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet. *If such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupreškić's ability to prepare their defence was not materially impaired.* In the absence of such a showing here, the conclusion must be that such a fundamental defect in the Amended Indictment did indeed cause injustice, since the Defendants' right to prepare their defence was seriously infringed. The trial against Zoran and Mirjan Kupreškić was, thereby, rendered unfair.[497]

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would have misled him regarding the question of whether this was a 7(1) case or a 7(3) case, the comment cannot be relied upon." AT 715 (16 Dec. 2003).

[492] Brief in Reply, para. 101 (referring to *Kupreškić* Appeal Judgement, para. 114).

[493] Brief in Reply, paras. 102-104. During the hearing on appeal, Counsel for the Appellant stated: "It appears from the judgement [*sic*] appellant has already been convicted […] under both 7(1) and 7(3). The prejudice is: We were forced to try this case and respond to two inconsistent theories simultaneously, and that's a definition, the definition, the most basic definition, of a defective indictment. We also don't have a valid judgement document, because the judgement does not articulate a clear theory of liability. It conflates 7(1) and 7(3). There was no trial where appellant had fair and full notice of the charges." AT 797-798 (17 Dec. 2003).

[494] Brief in Reply, para. 105.

[495] *Kupreškić* Appeal Judgement, para. 114.

[496] *Kupreškić* Appeal Judgement, para. 114.

[497] *Ibid.*, para. 122.

239. The Appeals Chamber recognizes, as it did in the *Kupreškić* Appeal Judgement, that in certain circumstances, an indictment which fails to plead with sufficient detail an essential aspect of the Prosecution case, may result in the reversal of a conviction. Yet, it considers that the *Kupreškić* case is distinguishable from the present appeal.

240. In *Kupreškić*, Zoran and Mirjan Kupreškić were charged generally with crimes occurring in and around a particular village. At trial, the case against them was eventually narrowed to the point where it focused solely on an attack on two houses and the killing of six people, and it was for this attack that they were convicted. The Appeals Chamber described this process as a "radical transformation" of the charges against the accused, which occurred between the issuing of the indictment and the issuing of the judgement.[498] The Appeals Chamber found that the defects in the indictment were only compounded by the "extremely general" nature of the Prosecution's Pre-trial Brief, and its failure to disclose the statement of the key witness relied on to convict the two accused until only "one to one-and-a-half weeks prior to trial and less than a month prior to [the witness's] testimony in court."[499] For all these reasons, the Appeals Chamber found that the ability of the accused to prepare their defence had been "seriously infringed" and the fairness of their trial directly affected by the defective nature of the original indictment.[500]

241. The Appeals Chamber in the present case is faced with a distinct situation. In the case at hand, no verdict was delivered at trial on the basis of material facts which were *not* pleaded in the Indictment. Therefore, a finding that the trial was unfair would be necessarily dependent upon a showing that the Appellant's ability to prepare his defence was materially impaired by the defects in the Second Amended Indictment.

242. The Appeals Chamber is not persuaded by the Appellant's arguments that he was prejudiced by the Prosecution's alleged failure to "commit" to either theory of responsibility during the trial with respect to the crimes charged. It is apparent from the Prosecution's opening statement that the case against the Appellant relied on both theories of responsibility.[501] Immediately after the conclusion of the Prosecution's opening statement, Counsel for the Appellant did not raise any claims regarding the Prosecution's alleged failure to choose one theory of responsibility or the other, and did not make any preliminary statement.[502] The Prosecution remained obliged to indicate

[498] *Ibid.*, para. 121.
[499] *Ibid*, paras. 117, 120.
[500] *Ibid,* para. 122 (emphasis added).
[501] *See* T 9-19, 26, 31-35, 40, 43, 50 (24 June 1997).
[502] T 53 (24 June 1997). The Appeals Chamber notes that, with respect to the allegations pertaining to Ahmići, during its opening argument, the Prosecution addressed the issue of the Appellant's superior responsibility for the commission of crimes by his subordinates, and his individual criminal responsibility by reference to the Appellant's orders to attack villages mentioned in the indictment. *See* T 43, 50 (24 June 1997).

the particular type of responsibility alleged in order to enable the Appellant to defend himself. However, the Prosecution was not obliged to "commit" to one theory of responsibility, or choose between different heads of responsibility in the presentation of its case. The Appeals Chamber's review of the trial record suggests that the Prosecution did clearly present the necessary information to put the Appellant on notice of the nature of its case against him during the trial, by express reference to the precise time when the crimes charged in the Second Amended Indictment were committed, and the circumstances surrounding the commission of such crimes.[503]

243. During the Appellant's trial, there was no system in place by which the parties had to introduce the evidence presented through each witness by providing a summary. Indeed, no legal provision required the Prosecution to provide detailed summaries to the Defence making specific reference to Article 7(1) or Article 7(3) of the Statute in order to introduce a witness's testimony.[504] When the Appellant's trial took place, no legal provision imposed upon the Prosecution the obligation to file a document identifying in relation to *each* count, a summary of the evidence which it intended to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[505] The Appellant was expected to craft his cross-examination on the basis of the information elicited from the testimony of the witnesses called by the Prosecution during the presentation of its case. Whether the Appellant was prejudiced at trial in the conduct of his defence is not dependent on whether summaries, which made express reference to the form of responsibility attributable to him, were provided by the Prosecution, but on the relevance of the evidence to the question of his responsibility. For the foregoing reasons, the Appeals Chamber is not persuaded that the manner in which the Prosecution provided the said summaries to the Appellant compromised his ability to cross-examine Prosecution witnesses.

244. With respect to the Appellant's argument that the Trial Chamber misled the Appellant and that as a result he was unable to prepare his defence, the Appeals Chamber observes that the Trial Chamber never expressly indicated that it intended to restrict the scope of the Second Amended Indictment to responsibility pursuant to Article 7(3) either by way of an oral ruling or a written decision. After having identified the comments made by the presiding Judge of the Trial Chamber, and considered their impact, the Appeals Chamber is not persuaded by the Appellant's argument that these would have reasonably given the Appellant the impression that he claims they did, and

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[503] *See Krnojelac* 24 February 1999 Decision, para. 40.

[504] As noted by the Prosecution, it was not until after 20 November 1997, that it started providing summaries at the request of the Trial Chamber. *See* the following statement made by the Presiding Judge: "We are going to have a witness brought in, and we will try out a different system. What I mean is that before the witness comes in, whether it be for the Prosecution and then if it goes well this will apply to the Defence as well, which means that before the witness comes in, the Prosecutor might tell us very quickly what he expects from the witness." T 4063 (20 Nov. 1997).

[505] Rule 65*ter* was adopted during the twenty-fourth plenary session held from 11-13 July 2001 (26 July 2001) (IT/32/Rev.21).

led him to believe that the case against him was limited to one of command responsibility. The trial record shows that the Appellant was aware of the Prosecution's reliance on both heads of responsibility and mounted a defence that addressed both.[506]

245. Therefore, the Appeals Chamber is not persuaded by the arguments put forward by the Appellant in support of his claim that defects in the Second Amended Indictment hampered his ability to prepare his defence and thus rendered his trial unfair. As a result, the Appeals Chamber dismisses this aspect of the ground of appeal.

B. Alleged violations of Rule 68 of the Rules

246. The Appellant appeals his conviction on the basis that the Prosecution's failure to comply with its disclosure obligations pursuant to Rule 68 of the Rules[507] materially prejudiced his ability to present his defence and violated his rights as provided by Article 21(4)(b) and (e) of the Statute.[508]

1. Procedural History

247. On 4 April 2000, the Appellant filed the "Appellant's Motion for the Production by the Office of the Prosecutor of Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from Other Lašva Valley Cases" ("Production Motion"), whereby the Appellant submitted that in November and December 1999, he learned through media reports of trial hearings conducted in open session in the *Kordić and Čerkez* case, that the Prosecution presented evidence that was exculpatory to the Appellant.[509] Consequently, the Appellant sought an order from the Appeals Chamber directing the Prosecution to produce to the Appellant: (i) all statements of witnesses who testified in his trial in the form of trial transcripts from other cases and accompanying exhibits as required by Rule 66(A)(ii) of the Rules ("first request"); (ii) all exculpatory material and/or evidence affecting the credibility of Prosecution witnesses, including trial transcripts, witness statements, notes, and the substance of all other verbal information ("second request"); (iii) a signed certification by the Prosecution stating that it had complied with items (i) and (ii), and was aware of its continuing obligations under Rules 66 and 68 of the Rules ("third request"); and (iv) an order directing the Registrar to produce to the Appellant

[506] *Prosecutor v. Blaškić,* Case No.: IT-95-14-PT, Final Trial Brief (Under Seal), 22 July 1999, pp. 91-262; AT 606 (16 Dec. 2003).
[507] Hereinafter "Rule 68."
[508] Appellant's Brief, pp. 114, 120. This ground of appeal was the Sixth Ground in the Appellant's Brief.
[509] The motion refers to the testimony of Colonel Carter, General Džemal Merdan, and Nasiha Neslanović, as examples of evidence which in light of the allegedly conflicting arguments advanced by the Prosecution in the Appellant's case concerning the command of special military units responsible for the commission of criminal acts, should be deemed exculpatory under Rule 68. Production Motion, pp. 5-6.

any and all public transcripts and exhibits from the other Lašva Valley cases, *Kupreškić, Aleksovski, Furundžija*, and *Kordić and Čerkez*, as such transcripts became available in unofficial form, and to disclose all non-public transcripts and exhibits from those cases to the Appellant subject to any protective measures required ("fourth request").

248. On 26 September 2000, the Appeals Chamber issued the "Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings" ("*Blaškić* 26 September 2000 Decision"), whereby the Appeals Chamber denied the first and third requests; granted the second request; found that the Prosecution was under a continuing obligation under Rule 68 to disclose exculpatory evidence at the post-trial stage including the appellate stage; and denied the fourth request to the extent that, concerning public transcripts, the Appellant could contact the Registry and request the production of public documents, and concerning confidential transcripts, the Appellant could file a subsequent application with the Appeals Chamber requesting assistance to obtain materials from the Chamber which imposed protective measures.[510]

249. On 21 December 2000, the Prosecution disclosed to the Appellant 105 documents pursuant to Rule 68.[511] Eleven of those documents were proffered as Exhibits 3-13 to the Second Rule 115 Motion.[512]

250. On 11 January 2001, the Prosecution sent a letter to Counsel for the Appellant stating that it was reviewing material in its possession with the intention of providing further exculpatory evidence to the Appellant once steps were taken to ensure that such material could be released and that appropriate protective measures were in place.[513] On 23 January 2001, the Prosecution sent a letter to Counsel for the Appellant stating that it intended to continue to search closed session, "in-house existing," and further "incoming material" in order to comply with its Rule 68 obligations.[514]

251. On 24 January 2001, the Prosecution filed confidentially the "Prosecution Notice of Intention to Seek the Release of Non-Public Exculpatory Material from the Trial Chamber in Prosecutor v. Kordić and Čerkez for Disclosure in the Appeal of Prosecutor v. Blaškić." The

[510] On 28 December 2000, the Appellant filed the "Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits" whereby he requested that the Appeals Chamber confer with the Trial Chambers in the *Furundžija, Aleksovski, Kupreškić*, and *Kordić and Čerkez* cases, in order to grant the Appellant access to non-public transcripts and exhibits. This motion was the object of a number of decisions. *See* Annex A to this Judgement.
[511] Second Rule 115 Motion (Public redacted version), p. 5.
[512] None of these exhibits were admitted as additional evidence on appeal pursuant to Rule 115. *See Prosecutor v. Blaškić,* Case No.: IT-95-14-A, Decision on Evidence, 31 Oct. 2003.
[513] Second Rule 115 Motion (Public redacted version), p. 6, n. 4.
[514] Second Rule 115 Motion (Public redacted version), p. 6, n. 4.

Prosecution informed the Appeals Chamber that by 2 February 2001, all exculpatory non-public evidence would be identified and Trial Chamber III would be requested to authorize its release.

252. In February 2001, the Prosecution identified exculpatory material[515] for release to the Appellant.[516]

253. On 7 February 2001, the Prosecution produced two documents to the Appellant, one of which, the MUP Report, Exhibit 1 to the Second Rule 115 Motion, was admitted as additional evidence on appeal.

254. On 12 June 2001, the Prosecution produced Exhibit 2 to the Second Rule 115 Motion, an ABiH Security Report.

255. On 22 November 2001, the Prosecution filed before the *Hadžihasanović* Trial Chamber[517] the "Prosecution's Request for Protective Measures in Order to Release Confidential Supporting Material as Rule 68 Evidence in *Prosecutor v. Tihomir Blaškić*."

256. On 18 October 2002, the Prosecution filed before the Appeals Chamber the "Notice of the Present Status of Disclosure" whereby it informed the Appeals Chamber that it had disclosed a large quantity of material to the Appellant pursuant to Rule 68, and that the various collections of material and documents obtained from the Croatian national archives would be reviewed for the purposes of the Appellant's case, and disclosed within approximately one hundred and fifteen days.[518] Regarding logbooks originating from the archives of the Republic of Bosnia-Herzegovina, the Prosecution determined that 11 relevant logbooks would be provided to Counsel for the Appellant, who would be asked to identify relevant dates, military units, and relevant information for a Rule 68 review. The Prosecution also engaged in a review of all the material related to the Third Rule 115 Motion.

257. On 6 March 2003, the Prosecution filed the "Prosecution's Notice of Completion of Pending Rule 68 Reviews and Disclosure" whereby it informed the Appeals Chamber that it had disclosed 90 documents to the Appellant pursuant to Rule 68, on 25 and 28 February and 3 March 2003.[519] The Prosecution had already informed the Appellant that it would limit its "detailed" reviews

[515] The Prosecution sought the release of materials from another case.
[516] The Prosecution requested the Appeals Chamber to forward its request to a Trial Chamber.
[517] The composition of the bench was the following: Judge Hunt, Judge Mumba, and Judge Wald.
[518] The total volume of the material originating from the seized collections and the Croatian archives amounted to 1,421,753 pages and the total number of potentially relevant documents which required an initial review was 24,811.
[519] Sixty-five binders of material were identified as a result of the Rule 68 searches conducted by the Prosecution. The material was reviewed for the purposes of the *Blaškić* and *Kordić and Čerkez* cases simultaneously.

pursuant to Rule 68 in *Naletilić and Martinović*, to closed session transcripts. In addition, the Prosecution directed the Appellant to the pages of open session transcripts that came up under the Prosecution's general search terms applied to all other material reviewed by the Prosecution for Rule 68 purposes. In order to assist the Appellant in his review of material from other cases on the question of the classification of the conflict as internal or international, the Prosecution provided him with a copy of the public closing briefs filed by the Defence in *Naletilić and Martinović* and forwarded a list of defence witnesses who testified on the issue.

2. Parties' submissions

258. The Appellant appears to suggest that the alleged failure of the Prosecution to comply with its duty to disclose exculpatory material was intentional, and submits that: "[t]he Prosecutor's motive in withholding the production of Rule 68 material is clear: the Prosecutor sought the freedom to present alternative and mutually exclusive versions of the 'facts' to the Tribunal in different trials."[520] He asserts that the Prosecution put forward contradictory theories in the present case and the *Kordić and Čerkez* case, and submits that the Prosecution's "unwillingness to expose the fundamental contradiction in these two positions led the [Prosecution] to cancel witness statements and exculpatory evidence relating to the Appellant."[521]

259. The Appellant refers to Exhibits 2, 16, and 25 to the Second Rule 115 Motion, as examples of the Prosecution's strategy of withholding Rule 68 material.[522] Exhibit 2 to the Second Rule 115 Motion, an ABiH 3rd Corps Security Report, was produced to the Appellant on 12 June 2001. Exhibit 16 to the Second Rule 115 Motion, an organization chart created by the Prosecution which details the suspected Bosnian Croat chain of command, and Exhibit 25 to the Second Rule 115 Motion, the testimony of Lt. Colonel J. Floyd Carter in the *Kordić and Čerkez* case, were obtained from the Registry in response to the Appellant's request for access to the public exhibits and transcripts from the *Kordić and Čerkez* case.[523]

260. The Appellant submits that "the prejudice to the Appellant from not having this evidence to present at trial is incalculable,"[524] and that the admissibility on appeal of some of the material disclosed under Rule 68 "does not allow the Appellant full and fair use of that material at trial, such as to confront and cross-examine witnesses.[525] He adds that: (i) the Prosecution has failed to

[520] Appellant's Brief, p. 121.
[521] Appellant's Brief, p. 121.
[522] Appellant's Brief, pp. 121-123. The Appellant submits that these examples are representative of a much larger body of evidence that he has presented to the Appeals Chamber through his Second Rule 115 Motion, which he incorporates by reference.
[523] Hereinafter "Exhibit 2, Exhibit 16 and Exhibit 25."
[524] Appellant's Brief, p. 123.
[525] Appellant's Brief, p. 123.

address its conduct during trial, since during the seven months following closing arguments, and prior to the issuance of the Trial Judgement, no evidence under Rule 68 was disclosed to him;[526] (ii) due to limited resources, lack of immediate access to private sessions, and the delay in public dissemination of transcripts, he could not monitor other proceedings with regularity or completeness;[527] and (iii) the Prosecution must disclose exculpatory information even if theoretically, an accused *could* be aware of exculpatory material, unless it knows that an accused is *actually* aware of the information.[528]

261. In response, the Prosecution submits that the Appellant fails to indicate how and why he claims to have been prejudiced by the Prosecution's conduct in relation to disclosure,[529] and that the three examples addressed by the Appellant "could not seriously be considered to fall under the purview of Rule 68, or, in one instance, involving evidence that was duly disclosed under Rule 68 in a timely fashion."[530] In addition, it points out that the Appeals Chamber found that the Appellant was already aware of the material which he claimed was being withheld from him.[531]

262. The Prosecution asserts that after the Trial Judgement was rendered, it made extensive efforts to ensure that all relevant material conceivably falling under Rule 68 had been disclosed to the Appellant.[532] With respect to the Appellant's argument that the Prosecution breached its Rule 68 obligations in order to present a different version of the facts before the *Kordić* Trial Chamber, the Prosecution submits that: (i) such unfounded argument has been thoroughly addressed by the Prosecution in its Response to Appellant's Second Rule 115 Motion;[533] and (ii) its theory has consistently been that both Kordić and the Appellant are criminally responsible for the crimes committed in the Lašva Valley.[534]

3. Legal principles

263. Rule 68 of the Rules provides, under the heading "Disclosure of Exculpatory Material":

[526] Brief in Reply, para. 107.
[527] Brief in Reply, para. 108.
[528] Brief in Reply, para. 108.
[529] Respondent's Brief, para. 4.82.
[530] Respondent's Brief, para. 4.82.
[531] Respondent's Brief, para. 4.84 (referring to the *Blaškić* 26 September 2000 Decision, paras. 37, 38).
[532] Respondent's Brief, para. 4.88. The Prosecution had disclosed 806 documents under Rule 68 up to the time of the filing of the Respondent's Brief.
[533] Respondent's Brief, para. 4.90.
[534] Respondent's Brief, paras. 4.90-4.91.

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.[535]

264. The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute.[536] Indeed, the rationale behind Rule 68 was discussed by the *Blaškić* Trial Chamber which held that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution,[537] and that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion. The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution.[538]

265. Regarding the manner in which the Prosecution should discharge the obligation provided for in Rule 68, the Appeals Chamber is aware that a broad interpretation of Rule 68 imposes upon the Prosecution a burdensome duty, as held in the *Krstić* Appeal Judgement:

> …[t]he Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope…[539]

266. In line with this broad interpretation of Rule 68, the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.

267. The Appeals Chamber emphasises that indeed, the Prosecution's obligation to disclose exculpatory evidence pursuant to Rule 68 continues after the trial judgement has been rendered in a

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[535] During the trial in this case, Rule 68 read as follows: "The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."

[536] "Rule 68 performs an important function…[i]t forms part of the [P]rosecution's duty as ministers of justice assisting in the administration of justice…The [P]rosecution's obligation under Rule 68 is not a secondary one…it is as important as the obligation to prosecute." *Prosecutor v. Kordić and Čerkez,* Decision on Motions to Extend for Filing Appellants' Briefs, Case No.: IT-95-14/2-A, 11 May 2001, para. 14.

[537] *See Prosecutor v. Blaškić,* Case No.: IT-95-14, Decision on Production of Discovery Materials, 27 Jan. 1997 ("*Blaškić* 27 January 1997 Decision"), para. 50.1.

[538] *See Prosecutor v. Brdanin and Talić,* Case No.: IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment While Matters Affecting Justice and a Fair Trial Can be Resolved, 30 Oct. 2002 ("*Brdanin and Talić* 30 October 2002 Decision"), para. 30.

[539] *Krstić* Appeal Judgement, para. 180.

case and throughout proceedings before the Appeals Chamber.[540] This duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned.[541]

268. In accordance with the International Tribunal's jurisprudence, the test to be applied for discovery under Rule 68 has two steps: first, if the Defence believes that the Prosecution has not complied with Rule 68, it must first establish that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Prosecution; and second, it must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.[542] In this context, in the *Krštić* Appeal Judgement, the Appeals Chamber held that:

> …if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate.[543]

If the Defence satisfies a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber in addressing what is the appropriate remedy, has to examine whether or not the Defence has been prejudiced by a breach of Rule 68 and rule accordingly pursuant to Rule 68*bis*.[544]

269. Having set out the legal principles settled in the jurisprudence of the International Tribunal with respect to Rule 68, the Appeals Chamber will now turn to consider whether the Prosecution did in fact breach Rule 68 as alleged by the Appellant.

4. The Appeals Chamber's findings

(a) Exhibit 2

270. This ABiH 3rd Corps Security Report states that ABiH forces were "on a high state of readiness on 15 April 1993." The Appellant submits that this document would have impacted upon the Trial Chamber's findings in that it shows that he had no reason to know that crimes were being

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[540] *Blaškić* 26 September 2000 Decision, para. 32.

[541] *See Prosecutor v. Blaškić,* Opinion Further to the Decision of the Trial Chamber Seized of the Case the Prosecutor v. Dario Kordić and Mario Čerkez Dated 12 November, Case No.: IT-95-14-T, dated 16 December 1998 and filed on 22 December 1998, p. 3. In the same decision, the Trial Chamber stated:"…the Prosecution remains obligated at all times to disclose to the Defence any material which might, wholly or in part, exculpate the accused or infringe on the credibility of the exculpatory material…the fact that a witness would enjoy protective measures does not relieve the Prosecutor of this obligation…" (p. 5).

In another decision, the same Trial Chamber determined that the Prosecution's disclosure obligations pursuant to Rule 68, and the exculpatory character of confidential documents, take precedence over their confidential nature insofar as the protection of witnesses is maintained or increased. *See Prosecutor v. Blaškić,* Decision on the Prosecution and Defence Motions Dated 25 January 1999 and 25 March 1999 Respectively, Case No.: IT-95-14-T, 28 Apr. 1999, p. 4.

[542] *Blaškić* 27 January 1997 Decision, para. 50.2; *Brdanin and Talić* 30 October 2002 Decision, para. 23.

[543] *Krstić* Appeal Judgement, para. 153 (footnotes omitted).

[544] *Brdanin and Talić* 30 October 2002 Decision, para. 23.

committed in Ahmići on 16 April 1993, and demonstrates the existence of increased tension which led the Appellant to issue D267, D268, and D269. The Appellant submits that the Prosecution possessed the entire ABiH military archive "for at least the duration of the *Kordić* trial, beginning April 1999, if not earlier," and refers to a decision issued by the pre-appeal Judge in the *Kordić and Čerkez* case for support.[545] Since Exhibit 2 was produced only on 12 June 2001, the Appellant claims that the Prosecution failed to disclose it to him for a period of nearly eight months, and that such misconduct requires the reversal of the Appellant's conviction.[546]

271. The Prosecution responds that the allegation that it possessed the ABiH military archive since the beginning of April 1999 is false,[547] and asserts that the ABiH military archive documents only became available to the Prosecution in mid-October 2000.[548] It submits that the material from the ABiH military archive has been reviewed for Rule 68 purposes on appeal and any relevant material possibly falling under Rule 68 has been disclosed.[549] It further adds that "[t]he 'example of non-compliance' advanced by Appellant is actually an *example of compliance* by the Prosecution with its Rule 68 obligations."[550]

272. The Appeals Chamber notes that the *Kordić* 27 July 2001 Decision does not support the Appellant's allegation with respect to Exhibit 2. In fact, paragraph 5 of the said decision does not establish that the Prosecution possessed material from the archives of the Army of the Republic of Bosnia-Herzegovina since the beginning of the *Kordić and Čerkez* trial, but rather states that:

> …the Appeals Chamber still expects an explanation from the [P]rosecution for its non-disclosure of the ABiH archive during the [*Kordić*] trial.[551]

273. According to the Declaration signed by Robert William Reid, then Deputy Chief of Investigations of the Office of the Prosecutor, officers from the Office of the Prosecutor began performing searches in the archives of the Army of the Republic of Bosnia-Herzegovina, in Sarajevo, Bosnia-Herzegovina, in mid-October 2000, and Exhibit 2 became known to the Prosecution on 12 October 2000.[552]

274. The Appeals Chamber recalls the view expressed in the *Krštić* Appeal Judgement:

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[545] The Appellant refers to *Prosecutor v. Kordić and Čerkez*, Case No.: IT-95-14/2-A, Decision on Motion by Prosecution for Variation of Time Limit to File a Response to an Application by the Appellants and Permitting Further Response to be Filed, 27 July 2001 ("*Kordić* 27 July 2001 Decision"), para. 5.
[546] Appellant's Brief, para. 122; Brief in Reply, para. 109.
[547] Respondent's Brief, para. 4.94.
[548] Respondent's Brief, para. 4.95.
[549] Respondent's Brief, para. 4.95.
[550] Respondent's Brief, para. 4.95. The Prosecution pointed out that, since it was still reviewing relevant material from different collections, including the ABiH military archive, in order to ensure compliance with Rule 68 on appeal, further material might still be disclosed to the Appellant before the hearing on appeal.
[551] *Kordić* 27 July 2001 Decision, para. 5.
[552] Declaration of Robert William Reid, dated 1 May 2002, submitted as Annex A to the Respondent's Brief.

> The Appeals Chamber is sympathetic to the argument of the Prosecution that in most instances material requires processing, translation, analysis and identification as exculpatory material. The Prosecution cannot be expected to disclose material which – despite its best efforts - it has not been able to review and assess.[553]

275. In view of the foregoing, the Appeals Chamber concludes that the Prosecution did not take an inordinate amount of time before disclosing Exhibit 2,[554] and therefore did not violate Rule 68.

(b) Exhibit H1

276. During the evidentiary portion of the hearing on appeal, Witness Philip Watkins, who served with the European Community Monitoring Mission (ECMM) in Bosnia, testified amongst other things, that: (i) according to the information gathered from the members of the UNPROFOR, the local staff, interpreters, drivers, and members of the ABiH, "it was conventional wisdom" that the Jokers reported to Kordić;[555] (ii) when the checkpoints were manned by the Military Police, the Appellant's authority and orders were not recognised; and (iii) when leading the Convoy of Joy, the Jokers made clear that they would only accept the authority of Kordić, who had to intervene so that the convoy could pass through.[556] Witness Watkins stated that he was first interviewed by representatives of the Office of the Prosecutor in 1996 and that he gave a written statement but never received a copy. After Witness Watkins's examination in chief at the evidentiary portion of the hearing, Counsel for the Appellant suggested that, since the content of that statement was similar to the substance of his testimony before the Appeals Chamber, the former should have been disclosed by the Prosecution pursuant to Rule 68.[557]

277. During the hearing on appeal, the Prosecution stated that Witness Watkins had been contacted and asked whether he wanted a copy of his statement.[558] However, Witness Watkins clarified that even though he had asked for a copy of his statement, he was not given a copy.[559] Following an oral order issued by the Appeals Chamber pursuant to Rule 98,[560] and prior to the re-examination of the witness, the Prosecution produced the statement of Witness Watkins, dated 31

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[553] *Krštić* Appeal Judgement, para. 197.
[554] A distinction must be drawn between this case and the *Krstić* case, where the Appeals Chamber found that the Prosecution did take an inordinate amount of time before disclosing Rule 68 material. In that case, the said material was not always identified as exculpatory; some of the disclosure took place over two years after the Prosecution came into possession of the evidence, material had been discovered while the trial was still ongoing, and discovery occurred before the commencement of the Defence's case in chief.
[555] AT 295 (9 Dec. 2003).
[556] AT 292, 347-348 (9 Dec. 2003).
[557] Counsel for the Appellant submitted: "The relevance, Your Honours, is this witness told the Prosecutor's office in '96, in substance what he's told Your Honours today. The Prosecutor's office suppressed that information from the Blaškić Defence. They used it in the Kordić trial, continued to suppress it, and to this day they will not produce the statement that they took from this man in 1996. They won't give him a copy and they won't produce it to us, and that needs to be part of the record here." AT 299-300 (9 Dec. 2003).
[558] AT 300 (9 Dec. 2003).
[559] AT 300-301 (9 Dec. 2003).
[560] AT 305 (9 Dec. 2003).

May and 1 June 1996.[561] The statement was admitted as Exhibit H1 during the evidentiary portion of the hearing.[562] After consulting with one of the investigators who took the statement, Counsel for the Prosecution clarified that a copy of his statement was never provided to Witness Watkins,[563] because it was the policy of the Office of the Prosecutor in 1996 not to provide any witnesses with any copies of any statements due to a concern at that time about the witnesses handing around their statements, primarily in the former Yugoslavia.[564]

278. The Prosecution stated that it intended to make submissions the week thereafter on whether an inference could be drawn from its refusal to provide a copy of his statement to Witness Watkins, that the Prosecution was deliberately trying to suppress exculpatory evidence.[565] Counsel for the Prosecution argued that evidence regarding the fact that, when allowing the Convoy of Joy to pass through a checkpoint, the Military Police would only respond to Kordić's orders, was also provided by Witness Duncan who testified at the Appellant's trial and was in the Convoy of Joy with Witness Watkins, and thus the same evidence contained in Exhibit H1 was before the Trial Chamber. [566]

279. In reply, Counsel for the Appellant submitted that the policy of the Office of the Prosecutor not to provide witness statements was an issue concerning which an oral stipulation could be entered.[567] However, he stressed that the real issue was not whether Witness Watkins got a copy of his statement, but rather that the Appellant "was never given information about Kordić controlling the Jokers…despite the obvious relevance that this would have had to [the Appellant's] case," and he added that he would litigate this issue in final argument.[568] Counsel for the Appellant further argued that since Witness Watkins is a military expert, his evidence is neutral and more relevant, and noted that Exhibit H1 contains information concerning command and control problems within the HVO, and the existence of isolated pockets.[569] With respect to the testimony of Witness Duncan, Counsel for the Appellant noted that the former did not identify the Military Police "as the problem with the Convoy of Joy," and did not testify that Kordić controlled the Jokers.[570]

280. The Appeals Chamber notes that contrary to the Prosecution's assertion, the evidence provided by Witness Watkins to the effect that the Military Police would only respond to Kordić's orders was not provided by Witness Duncan, and thus, the same evidence contained in Exhibit H1

[561] AT 329-331 (9 Dec. 2003).
[562] AT 346 (9 Dec. 2003).
[563] AT 363-364 (9 Dec. 2003).
[564] AT 361 (9 Dec. 2003).
[565] AT 361 (9 Dec. 2003).
[566] AT 727, 728 (16 Dec. 2003).
[567] AT 364 (9 Dec. 2003).
[568] AT 364 (9 Dec. 2003).
[569] AT 803 (17 Dec. 2003).
[570] AT 803 (17 Dec. 2003).

was not before the Trial Chamber. Witness Duncan testified about the looting of the Convoy of Joy. He admitted that on 21 June 1993, during the second Joint Commission Meeting held at the Vitez camp, the Appellant told him that due to the tens of thousands of displaced persons and other uncontrolled elements, he was "unable to guarantee the safe passage through his area of responsibility of UNHCR convoys."[571]

281. The Appeals Chamber notes that, for the purposes of this case, Exhibit H1 contains evidence regarding the fact that the Appellant had given clearance to the Convoy of Joy through the Tuzla pocket. Witness Watkins's statement recounts that the checkpoint at the Tuzla pocket was manned by the Jokers who stated that they would only accept the authority of Kordić, and it was not until Kordić arrived at the checkpoint and intervened personally, that the Convoy of Joy was able to pass through the Tuzla pocket.[572]

282. Even though there is no evidence that the Prosecution deliberately withheld this evidence from the Appellant, the Appeals Chamber considers that the Prosecution's failure to disclose Exhibit H1 constitutes a breach of its obligations under Rule 68 of the Rules. However, in light of the fact that the Appellant was able to call Witness Watkins to testify during the hearing on appeal, the Appeals Chamber concludes that the prejudice caused to the Appellant has been remedied.[573]

(c) Witness BA5 and Witness BA3

283. Witness BA5 testified in open session in the *Kordić and Čerkez* case.[574] The transcripts of his testimony were admitted in this case pursuant to Rule 115.[575] Witness BA5 gave a statement in 1995, which was disclosed to counsel for the Appellant in November 1996. During the hearing on appeal, the Prosecution stated that Witness BA5 testified in the *Kordić and Čerkez* case after the Trial Judgement in the present case was rendered, and thus there was no violation of Rule 68 at trial. The Prosecution added: "to the extent that there was a violation in the sense that immediately after trial it wasn't disclosed to the Appellant, there certainly does not appear to be any prejudice at this stage."[576]

284. Witness BA3 testified in open session in the *Kordić and Čerkez* case.[577] The transcripts of his testimony were admitted in this case pursuant to Rule 115.[578] During the hearing on appeal, the

[571] T 9134-9135 (3 June 1998).
[572] Ex. H1, p. 6.
[573] *See Krštić* Appeal Judgement, para. 187. "…where an accused has been prejudiced by a breach of Rule 68, that prejudice may be remedied where appropriate through the admission of additional evidence on appeal under Rule 115."
[574] The date is omitted for the purpose of protecting the witness.
[575] *See Prosecutor v. Blaškić,* Decision on Evidence, Case No.: IT-95-14-A, 31 Oct. 2003.
[576] AT 723 (16 Dec. 2003).
[577] The date is omitted for the purpose of protecting the witness.

Prosecution submitted that the substance of the evidence provided by Witness BA3 was disclosed to the Appellant in November 1996 when the Prosecution produced Witness BA3's statement to the Appellant.[579] The Prosecution further noted that the testimony of Witness BA3 in the *Kordić and Čerkez* case was in the Appellant's possession a few months before the Appeals Chamber issued the *Blaškić* 26 September 2000 Decision, and thus there was no prejudice, as ruled by the Appeals Chamber in the said decision.[580]

285. The Appeals Chamber notes that no specific allegations of a Rule 68 violation in relation to Witnesses BA3 and BA5 were raised in the Appellant's Brief or argued by the Appellant during the hearing on appeal. As a result, the Appeals Chamber considers that the Appellant has not shown, in relation to Witnesses BA3 and BA5, that the Prosecution has failed to comply with Rule 68, or that the Appellant suffered material prejudice.[581]

(d) Exhibit 16 and Exhibit 25

286. Exhibit 16, a chart entitled "Suspected Bosnian Croat Chain of Command", was created by the Prosecution in consultation with General Džemal Merdan,[582] the deputy commander for ABiH 3rd Corps, and admitted into evidence as exhibit Z 2792 during his testimony in the *Kordić and Čerkez* case on 19 January 2000. According to the Appellant, the chart demonstrates that the Bosnian Croat paramilitary special purpose units, including the Jokers, were under the direct command of Kordić. The Appellant submits that if Exhibit 16 had been available at trial, it would have altered the nature of the Prosecution's case, and thus by failing to disclose the existence of Exhibit 16 to the Appellant, the Prosecution violated Rule 68.[583]

287. In response, the Prosecution submits that Exhibit 16 does not fall under Rule 68 and refers to the arguments advanced in response to the Appellant's Second Rule 115 Motion.[584] The Prosecution points out that Exhibit 16 was proffered as an exhibit in the *Kordić and Čerkez* case only for the purposes of illustrating Witness Merdan's evidence, but "was not autonomous evidence."[585] It notes that to a large extent, Witness Merdan rejected the chart, namely, the "vertical connection" between Kordić and Furundžija, and that with respect to the Vitezovi, he did not testify that they were under Kordić's command but that Kordić had influence over Kraljević.[586]

[578] *See Prosecutor v. Blaškić,* Decision on Evidence, Case No.: IT-95-14-A, 31 Oct. 2003.
[579] AT 724 (16 Dec. 2003).
[580] AT 729 (16 Dec. 2003).
[581] *See Krštić* Appeal Judgement, para. 153.
[582] Hereinafter "Witness Merdan."
[583] Appellant's Brief, pp. 122-123.
[584] Respondent's Brief, para. 4.96.
[585] Respondent's Brief, para. 4.97.
[586] Respondent's Brief, para. 4.97.

Finally, the Prosecution points out that the material in question was public and available to the Appellant at the time it was produced.[587]

288. In reply, the Appellant argues that contrary to the Prosecution's claims, Witness Merdan did not reject Exhibit 16 to a "large extent," but testified that "[often] Blaškić was not able to command Darko Kraljević [head of the Vitezovi], but somebody was always asked about this. And I think that somebody was Kordić."[588] With respect to Furundžija, the Appellant notes that Witness Merdan testified that he was not acquainted with the details.[589]

289. According to the Appellant, the Prosecution's failure to disclose Exhibit 25, the testimony of Lt. Colonel J. Floyd Carter[590] in the *Kordić and Čerkez* case, is one example of its failure to disclose the existence of exculpatory material. He submits that the substance of Witness Carter's testimony is relevant to the Trial Judgement almost in its entirety, since Witness Carter verified that both the Military Police and other paramilitary units were not commanded by the Appellant, and thus his testimony directly contradicts the Trial Chamber's finding that the Appellant had control over the Military Police and other special purpose units.[591]

290. The Prosecution responds that during his testimony, Witness Carter was referring to the "police" and the "military" but not to the "Military Police," and submits that the witness's evidence relates to the ability of the political leadership to control both the police and the military, as compared to that of military commanders, who are only able to command the military units.[592] It notes that Carter's testimony was given in public session, and therefore nothing prevented the Appellant from seeking access to that evidence.[593] During the hearing on appeal, the Prosecution pointed out that due to the public nature of the evidence in question, and the due diligence of Counsel for the Appellant, he obtained the evidence on December 1999 through a web page, and subsequently filed the Production Motion requesting that the Prosecution be found in violation of Rule 68 for its failure to disclose this information. The Prosecution submits that it was evident from the Production Motion that the Appellant had had the material before the Trial Judgement was rendered.[594] The Prosecutić further submits that in its *Blaškić* 26 September 2000 Decision, the Appeals Chamber appears to acknowledge that there was a technical violation of Rule 68, yet it

[587] Respondent's Brief, para. 4.99.
[588] Brief in Reply, para. 109 (referring to *Kordić and Čerkez,* T 12,706).
[589] Brief in Reply, para. 109 (referring to *Kordić and Čerkez,* T 12,706).
[590] Hereinafter "Witness Carter."
[591] Appellant's Brief, p. 123.
[592] Respondent's Brief, paras. 4.100-4.101.
[593] Respondent's Brief, para. 4.102.
[594] AT 724 (16 Dec. 2003).

balanced that with the fact that the exculpatory information was in the public domain, thus accessible to the Appellant, and found that the Appellant was not materially prejudiced.[595]

291. The Appeals Chamber recalls that Exhibit 16 was introduced as a public trial exhibit in the *Kordić and Čerkez* case on January 2000. The Appeals Chamber notes that the Appellant obtained Exhibit 16 from the Registry following repeated requests for the production of public transcripts and exhibits from the *Kordić and Čerkez* case. He first requested the production of these documents to the Registrar's office on 19 May 1999,[596] but did not receive any exhibits from the *Kordić and Čerkez* case until July 2000.[597]

292. With respect to material of a public nature, potentially falling under Rule 68, and of which the Appellant became aware before the Trial Judgement was rendered, in particular Exhibit 25, the Appeals Chamber had noted:

> …the Appellant's counsel knew of the existence of the evidence that might exculpate the Appellant soon after the evidence was given in open court at the Tribunal. Yet he remained silent before the Trial Chamber until the Production Motion was filed on appeal. There has been no explanation from the Appellant as to why he remained reticent in spite of this information. A fact concerning the question as to whether the Appellant was capable of ordering certain units of the HVO to attack villages and towns should have alerted any diligent counsel so that he or she would bring it to the attention of the Trial Chamber which might be persuaded to reconsider the evidence. However, this Chamber is not prepared to say that the Appellant has effectively waived his right to complain about non-disclosure. As this Chamber considers that Rule 68 continues to be applicable at the appellate stage of a case before this Tribunal, the Prosecution continues to be under a duty to disclose by virtue of the Statute and the Rules, being thus bound to do so as a matter of law. Further, the Chamber takes note that counsel for the Appellant renewed a request for discovery under, inter alia, Rule 68, in a letter dated 10 February 2000 addressed to the Prosecution, which was sent some time before the delivery of the judgement by the Trial Chamber. The delayed reaction by the Defence in this case cannot alter the duty of the Prosecution to comply with Rule 68.[598]

293. Nevertheless, the Appeals Chamber notes that the Appellant had requested the disclosure of public transcripts and exhibits from the *Kordić and Čerkez* case since 19 and 22 November 1999. On 2 December 1999, the Registry sent the Appellant ten transcripts. He renewed his requests on 24 January 2000, and then again on 18 May 2000; in response, the Registry forwarded certain additional transcripts but no exhibits were produced. Therefore, the Appellant renewed his requests on 27 June 2000. On 15 July 2000, the Registry sent to the Appellant several transcripts, and for

[595] AT 726 (16 Dec. 2003).
[596] The *Kordić and Cerkez* trial lasted from April 1999 until December 2000.
[597] Public Version of Declaration of Andrew M. Paley in Support of Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 Mar. 2002.
[598] *Blaškić* 26 September 2000 Decision, para. 37. The letter referred to in this paragraph requests the disclosure of Rule 68 material not previously disclosed to the Defence, and notes that it had come to the attention of Counsel for the Appellant that in the *Kordić and Čerkez* case, the Prosecution had taken the position that Kordić was the central military and political power in Central Bosnia, and had direct control over certain HVO special units and the Military Police; the letter states that "any information that suggests such theses is *per se* exculpatory with regard to" the Appellant.

the first time, some trial exhibits. The Appellant renewed his requests several times throughout 2000 and 2001.

294. The Appeals Chamber recalls that the Appellant first submitted a short report on the content of Exhibit 25 posted on the "Institute of War and Peace Reporting" web page with his Production Motion, as an example of potentially exculpatory material within the meaning of Rule 68.[599] In his Second Rule 115 Motion, the Appellant stated that only "recently" did he obtain a "near-complete" set of the transcripts of the testimony of witnesses who testified in public session in the *Kordić and Čerkez* case.[600]

295. The Appeals Chamber reiterates that proof of prejudice is a requirement for a remedy sought on appeal for a violation of Rule 68,[601] and recalls the *Blaškić* 26 September 2000 Decision whereby it considered that relief for a violation of the Prosecution's obligations pursuant to Rule 68 would not necessarily be granted if the existence of the relevant exculpatory material is known and the material is accessible to the Appellant, as the Appellant would not be materially prejudiced by this violation.[602]

296. Arguably, the Prosecution's duty to disclose does not encompass material of a public nature potentially falling under Rule 68, for example, Exhibits 16 and 25. However, a distinction should be drawn between material of a public character in the public domain, and material reasonably accessible to the Defence. The Appeals Chamber emphasizes that unless exculpatory material is reasonably accessible to the accused, namely, available to the Defence with the exercise of due diligence, the Prosecution has a duty to disclose the material itself.

297. The Appeals Chamber notes that the *Blaškić* 26 September 2000 Decision denied the Appellant's request for a signed certification by the Prosecution that it had complied with its duties pursuant to Rules 66 and 68, and further stated that:

> …the Appellant has not satisfied the Appeals Chamber that during this appeal, the Prosecution has failed to discharge its obligations under sub-Rule 66(A)(ii) and Rule 68, the scope of the application of which has been clarified only in this decision...[603]

298. Pursuant to the *Blaškić* 26 September 2000 Decision and considering, additionally, that the Appeals Chamber has enabled the Appellant to elicit the same information contained in Exhibits 16

[599] Institute for War and Peace Reporting Tribunal Update 151, 8-13 Nov. 1999, contained in the Production Motion, Exhibit C.
[600] Second Rule 115 Motion (Public redacted version), p. 27. The confidential version was filed on 18 October 2001.
[601] "… a prerequisite for the remedy sought on appeal for breaches of Rule 68 is proof of consequential prejudice to the Defence." *Krštić* Appeal Judgement, para. 199.
[602] *Blaškić* 26 September 2000 Decision, para. 38.
[603] *Blaškić* 26 September 2000 Decision, para. 46.

and 25 from the testimony of witnesses who testified at the evidentiary portion of the hearing on appeal, the Appeals Chamber concludes that the Appellant has not suffered material prejudice.

299. The Appeals Chamber considers that even though the Prosecution did violate Rule 68, in light of the absence of material prejudice to the Appellant in this case, the Appeals Chamber will not issue a formal sanction against the Prosecution pursuant to Rule 68*bis*.[604]

300. The Appeals Chamber acknowledges that due to the fact that the materials in possession of the Prosecution, and/or in the custody of the Registry are so voluminous, delays in disclosure to the Defence may occur. It is often difficult for the various organs within the International Tribunal to access documents. Indeed, the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded.

301. The Appeals Chamber recalls that the *Krštić* Appeal Judgement held that:

> Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment in order to properly prepare themselves.[605]

302. Mindful of the considerable strain which the need to enforce the ruling outlined above places upon the resources provided to the Prosecution,[606] the Appeals Chamber stresses the duty of the Prosecution to disclose exculpatory material arising from other related cases. The Appeals Chamber emphasizes that the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed.

303. In light of the foregoing, the Appeals Chamber finds that the Prosecution violated Rule 68 of the Rules by failing to disclose Exhibits H1, 16, and 25. However, the Appeals Chamber further finds that the Appellant was not prejudiced as a result and dismisses this aspect of the appeal.

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[604] The Appeals Chamber notes that there is no precedent regarding sanctions imposed by Chambers pursuant to Rule 68*bis*. *See Brdanin and Talić* 30 October 2002 Decision, whereby the Trial Chamber did not decide on sanctions to be imposed on the Prosecution for failing to fulfil its disclosure obligations and instructed the Prosecution to verify the exculpatory material disclosed to the Defence in the form of summaries and to disclose the redacted transcripts falling within the purview of Rule 68; *see also Krštić* Appeal Judgement, para. 214, wherein the Appeals Chamber found that there was a Rule 68 breach, yet it did not impose a sanction pursuant to Rule 68*bis*.

[605] *Krštić* Appeal Judgement, para. 206.

[606] *See Prosecutor v. Dario Kordić and Mario Čerkez,* Decision on Motions to Extend Time for Filing Appellant Briefs, Case No. IT-95-14/2-A, 11 May 2001, para. 14.

VII. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN THE AHMIĆI AREA

304. The Trial Chamber found the Appellant responsible for having ordered a military attack on Ahmići and the neighbouring villages of Šantići, Pirići, and Nadioci, which resulted in the following crimes being committed against the Muslim civilian population: (i) persecution (count 1); (ii) unlawful attacks upon civilians and civilian objects (counts 3 to 4); (iii) wilful killing (counts 5 to 10); (iv) destruction and plunder of property of Bosnian Muslim dwellings, buildings, businesses, private property and livestock (counts 11 to 13); and (v) destruction of institutions dedicated to religion or education (count 14).

305. The Appeals Chamber notes that the submissions of the parties relating to this ground of appeal are quite lengthy. In light of their detailed nature, the Appeals Chamber will summarize them at some length.

A. The Appellant's responsibility under Article 7(1) of the Statute

1. Parties' submissions

(a) Whether there was direct evidence that the Appellant ordered the commission of the crimes

306. The Appellant submits that he was not responsible under either Article 7(1) or Article 7(3) of the Statute for the crimes that occurred in Ahmići on 16 April 1993, and that based on both trial and additional evidence, no reasonable trier of fact could find him guilty of the charges relating to those crimes.[607] He argues that there is no evidence that he issued an illegal order, and that the evidence shows that of those with authority in Central Bosnia, he was the least likely to be involved in any criminal activity.[608] He claims that the Operative Zone War Diary showed that he issued lawful military orders.[609] In his submission, the only testimony linking him with the crimes was from Witness A, a hearsay witness - out of the many persons interviewed by the Prosecution - who overheard the words of another person who harboured personal resentment against the Appellant.[610]

307. The Appellant argues that the Trial Chamber improperly concluded that the Appellant's lawful orders to take up defensive positions on the Vitez-Busovača road were illegal orders to

[607] Appellant's Brief, p. 19. This ground of appeal was the Second Ground of Appeal in the Appellant's Brief.
[608] Appellant's Brief, p. 19 (where the Appellant refers to a newly discovered SIS Report prepared on 1 January 1994, describing the Appellant as being "one of the few in Central Bosnia who have not dirtied their hands and involved themselves in shady dealings which to a large extent even exceed the bounds of crime." Ex. 6 to the First Rule 115 Motion).
[609] Appellant's Brief, p. 20. Ex. 14 to the Second Rule 115 Motion (war diary).
[610] Appellant's Brief, pp. 20-21.

attack and kill civilians.[611] He adds that the sole witness who testified about D269,[612] stated that it was unambiguously legal, as were D267[613] and D268.[614] He reiterates that his orders were issued for "legitimate" military reasons in light of the fact that upon receipt of a military intelligence report, he expected the ABiH units to launch an attack in order to sever the Vitez-Busovača road, and adds that additional evidence corroborates the veracity of the intelligence report.[615]

308. The Prosecution argues that evidence is not to be considered piecemeal, but in totality and submits that the orders described as "defensive" by the Appellant do not constitute circumstantial evidence, as the Trial Chamber found them to be illegal orders directly implicating him.[616] With respect to the testimony of Witness A, the Prosecution submits that, on appellate review, the Appeals Chamber does not isolate individual pieces of evidence to assess whether each piece could reasonably sustain a conviction. It asserts that the Appellant issued illegal orders, and that the Appellant confuses the fact that an order may be legal on its face with the fact that it may be illegal in effect.[617] The Prosecution submits that the Appellant has not demonstrated that no reasonable trier of fact could have found him guilty for the crimes committed by the HVO troops in Ahmići and its environs on 16 April 1993.[618]

(b) Whether there was circumstantial evidence that the Appellant ordered the commission of the crimes

309. The Appellant submits that the Trial Chamber committed four errors in convicting him in the absence of direct evidence concerning the crimes in Ahmići.[619] First, the Trial Chamber erroneously concluded that D269 was an order directing attacks against Muslim civilians in Ahmići.[620] Second, the finding of the Trial Chamber, not disputed by the Appellant, that the attack on Ahmići was planned and organised, does not mean that it was planned or organised by him, as found by the Trial Chamber.[621] Further, the Trial Chamber relied on the testimony of one witness without supporting evidence to find that the Appellant ordered the crimes in question on the basis of

[611] Brief in Reply, para. 25.
[612] D269 tendered as a Defence Exhibit at trial, is an order dated 16 April 1993 issued by the Appellant at 0130 hours, and also referred to as the "third order" in the Trial Judgement.
[613] D267 tendered as a Defence Exhibit at trial, is an order dated 15 April 1993 issued by the Appellant at 1000 hours, and also referred to as the "first order" in the Trial Judgement.
[614] Brief in Reply, para. 26. D268 tendered as a Defence Exhibit at trial, is an order dated 15 April 1993 issued by the Appellant at 1545 hours, and also referred to as the "second order" in the Trial Judgement.
[615] Brief in Reply, para. 28 (referring to Ex. 2 to the Second Rule 115 Motion).
[616] Respondent's Brief, paras. 2.113, 2.114.
[617] Respondent's Brief, para. 2.119.
[618] Respondent's Brief, para. 2.145.
[619] Appellant's Brief, p. 21.
[620] Appellant's Brief, pp. 21-22.
[621] Appellant's Brief, p. 24.

the "scale and uniformity" of the attack and the crimes.[622] Third, the Trial Chamber erroneously found the Appellant responsible for the crimes in question by presuming that the orders in the period from 1 May 1992 to 31 January 1994, which were not presented to the Trial Chamber, must have directed the crimes.[623] Fourth, he claims that the Trial Chamber erred in finding that the Viteška Brigade[624] participated in the crimes in question and that the Military Police was under the effective control of the Appellant.[625]

310. The Prosecution submits that: (i) the finding that D269 was not a defensive order was reasonable, as the trial evidence showed that there was no significant ABiH presence in the area proximate to Ahmići and there was no justification for the extent of the attack;[626] and (ii) the Appellant issued D269 whose timing corresponded to the commencement of the attacks, and it was thus open to the Trial Chamber to conclude that he ordered the attacks.[627] The Prosecution notes that the Appellant does not challenge the finding that the attacks were planned,[628] that Bosnian Croat civilians were forewarned,[629] that the attacks were on a large scale,[630] and that the Appellant had control over the artillery that was used on Ahmići.[631] In response to the Appellant's argument that the Trial Chamber erred in convicting him in the absence of evidence, the Prosecution asserts that the argument lacks merit, as the Trial Chamber heard evidence of a practice of issuing oral orders.[632]

311. In reply, the Appellant argues that the pertinent issue is not *whether* the crimes in question were planned and ordered, but rather *who* planned and ordered them, and that no evidence at trial allowed the Trial Chamber to conclude beyond reasonable doubt that he planned and ordered the crimes.[633] He challenges the Prosecution's emphasis on the use of artillery by stating that there was no evidence that the NORA howitzer, which was under his *de jure* control, was used in Ahmići, and that it is unreasonable to premise his guilt on the use of unspecified artillery in the village.[634] He also disputes the Prosecution's reliance upon the testimony of Witness A and Witness Adnan Zec, because, he says, Witness A's testimony was a multiple hearsay statement with the ultimate source-

[622] Appellant's Brief, p. 25.
[623] Appellant's Brief, p. 25.
[624] Also referred to in this Judgement as the Vitez Brigade.
[625] Appellant's Brief, p. 26.
[626] Respondent's Brief para. 2.122.
[627] Respondent's Brief, para. 2.123.
[628] Respondent's Brief, para. 2.124.
[629] Respondent's Brief, para. 2.125.
[630] Respondent's Brief, para. 2.126. *See also* para. 2.144.
[631] Respondent's Brief, para. 2.127.
[632] Respondent's Brief, para. 2.143.
[633] Brief in Reply, para. 30.
[634] Brief in Reply, para. 31.

declarant unidentified, and Witness Zec did not say that the Appellant ordered the crimes in Ahmići and no reasonable trier of fact could have given weight to Zec's testimony.[635]

312. In his Supplemental Brief, the Appellant reiterates that D269 is a lawful order and submits that the fact that he issued combat orders to the units in his area on the evening of 15 April and morning of 16 April 1993, in anticipation of ABiH attacks is a "legitimate" military response in light of the increased tensions in Central Bosnia.[636] He claims that new evidence confirms that ABiH forces were located in and around Ahmići.[637] Finally, he submits that the rebuttal material proffered by the Prosecution does not constitute evidence that the Appellant ordered the commission of the crimes in Ahmići.[638]

313. During the hearing on appeal, Counsel for the Appellant noted that the Prosecution had chosen not to bring any witness with military training to testify on the legality of D269. He submitted that in light of the additional evidence heard by the Appeals Chamber, no reasonable trier of fact "could conclude that either D269 was an order to the Military Police or that it was an order to attack or that it was an order to attack civilians."[639]

314. The Prosecution submitted that Exhibits 12 and 13 to the Fourth Rule 115 Motion, rather than demonstrating that the ABiH "attacked" the HVO, indicate that there had been an attack by the HVO,[640] and that in light of Exhibits PA 6, PA 7, PA 8, PA 10, and the evidence at trial, it was not unreasonable for the Trial Chamber to have found that D269 was a "combat order."[641]

(c) Whether the Viteška Brigade took part in the attack

315. The Appellant claims that the sole support for the Trial Chamber's finding that the Viteška Brigade participated in the crimes committed in Ahmići, is a supposed statement from a witness who testified in closed session that "the Viteška Brigade must have co-operated with the Military Police in the operation against Ahmići."[642] The Appellant argues that the Trial Judgement distorts the testimony of that witness.[643] The Appellant points out that the absence of evidence linking the Viteška Brigade to the crimes committed in Ahmići led the Trial Chamber in the *Kordić* case to

[635] Brief in Reply, para. 32.
[636] Supplemental Brief, para. 27.
[637] Ex. 12 to the Fourth Rule 115 Motion; Ex. 13 to the Fourth Rule 115 Motion.
[638] Supplemental Brief, para. 29 (referring to PA12 which he submits is the flipside of Ex. 12 to the Fourth Rule 115 Motion).
[639] AT 593 (16 Dec. 2003).
[640] AT 734-735 (16 Dec. 2003).
[641] AT 745-749 (17 Dec. 2003).
[642] Appellant's Brief, p. 26 (referring to the Trial Judgement, para. 401).
[643] Appellant's Brief, p. 26. The Appellant also refers to an intelligence report from the Croatian archives which lends support to the assertion that the Viteška Brigade was not involved in the crimes at Ahmići. Ex. 14 to the First Rule 115 Motion.

exonerate Čerkez and the Viteška Brigade for any role in the early morning attack on Ahmići and the Appeals Chamber in *Kupreškić* to conclude that the Viteška Brigade was not deployed to Ahmići to participate in the attack in the early morning of 16 April 1993. [644]

316. The Appellant further submits that: (i) new evidence establishes conclusively that the Viteška Brigade was not involved in the Ahmići massacre;[645] (ii) the sequence of communications between Čerkez and the Appellant proffered as rebuttal material by the Prosecution bolsters his argument;[646] and (iii) the record before the Appeals Chamber mandates a reversal of the Trial Chamber's finding that the Appellant was responsible for that unit's alleged commission of crimes in Ahmići.[647]

317. During oral argument, Counsel for the Appellant submitted that Exhibit PA 6 is simply a report on the situation in the area of responsibility and does not demonstrate that the Viteška Brigade was in Ahmići. He claimed that the reference to "our forces" is a reference to the Croatian forces. He relied on Exhibit 14 to the First Rule 115 Motion which shows that the attack on Ahmići was carried out by the Jokers, and Exhibit 14 to the Second Rule 115 Motion (War Diary) which relates that at 0900 hours, orders were given to the commander of the Viteška Brigade, Mario Čerkez, to block the shooting of the fire station building in Vitez, and is consistent with D269 as regards the place where the Viteška Brigade was supposed to be in the morning of 16 April 1993.[648]

318. The Prosecution argues that the Trial Chamber heard evidence that the Viteška Brigade, together with other units of the HVO, the Military Police, and the HV, participated in the attack on Ahmići.[649] The Prosecution notes that soldiers testified that they saw regular HVO soldiers during the attack, points out that the Trial Chamber noted that members of the first company of the first battalion of the Viteška Brigade were stationed nearby, and stresses that several soldiers from the Viteška Brigade were wounded in the vicinity on 16 April 1993.[650] The Prosecution also points out

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[644] Appellant's Brief, p. 28 (referring to *Kordić* Trial Judgement, para. 691, and *Kupreškić* Appeal Judgement, paras. 213, 214).
[645] Supplemental Brief, paras. 19, 20. Ex. 14 to the First Rule 115 Motion; Ex. 14 to the Second Rule 115 Motion (War Diary), p. 70 (record of call by Mario Čerkez at 0900 responding to the Appellant's orders to defend against shooting coming from the Vitez fire station).
[646] Supplemental Brief, paras. 21, 22 (referring to PA 6, PA 8, and PA 10). The Appellant argues that in this exchange between Mario Čerkez and Appellant, there is no reference whatsoever to undertaking crimes against civilians, but instead only an evaluation of ABiH resistance. He asserts that this evidence shows that he issued a generic order to Čerkez to capture all four of the listed villages (Donja Veceriska, Ahmići, Sivrino Selo and Vrhovine) without in any way singling out Ahmići, "even as the massacre at Ahmići was not replicated anywhere else – further proof that the Appellant did not order that crime" and submits that the Trial Chamber in the *Kordić and Čerkez* case heard the same evidence and concluded that there was no involvement of the Viteška Brigade in the initial attack on Ahmići. *Id.,* para. 23, n. 8.
[647] Supplemental Brief, para. 24.
[648] AT 599-600 (16 Dec. 2003).
[649] Respondent's Brief, paras. 2.130-132.
[650] Respondent's Brief, para. 2.148.

that the *Kordić* Judgement concluded that the Viteška Brigade took part in the operations in Ahmići but not in the initial assault.[651] Likewise, it further notes that the *Kupreškić* Appeal Judgement does not compel the conclusion that no member of the Viteška Brigade took part in the crimes in Ahmići.[652]

319. With respect to Exhibit PA 6, Counsel for the Prosecution contends that it was illogical for the commander of the Viteška Brigade to give a report about Ahmići if his forces were not there, and submits that Exhibits PA 6, PA 7, PA 8, and PA 10[653] contradict the Appellant's testimony at trial that the Viteška Brigade did not receive any tasks from him in the area of Ahmići.[654]

(d) Whether new evidence suggests that the crimes were planned and ordered by others

320. The Appellant submits that new evidence supports the contention that the 4th MP Battalion and the Jokers committed the crimes in Ahmići on 16 April 1993; he also submits that some of the items identify Dario Kordić,[655] Ignac Koštroman, Anto Šliškovic, Paško Ljubičić, and Vlado Ćosić as those responsible for planning and ordering the massacre.[656] According to the MUP Report, two meetings were held amongst various HVO political and military members on 15 April 1993. In the afternoon of 15 April 1993, the Appellant met with various members of the HVO military hierarchy and issued lawful orders regarding an attack. This is consistent with the Appellant's testimony that he attended a meeting with Ljubičić and other military commanders in the afternoon of 15 April 1993 with the expectation that there was to be an attack the following day by the ABiH and that his three defensive orders[657] to HVO regular units and independent units including the Military Police

[651] Respondent's Brief, para. 2.152 (referring to *Kordić* Judgement, para. 691). The Appeals Chamber notes that this finding is currently being appealed by the Prosecution in the *Kordić and Čerkez* case.
[652] Respondent's Brief, para. 2.153 (referring to *Kupreškić* Appeal Judgement, para. 213).
[653] PA 6: Report sent at 1000 hours on 16 April 1993 by Mario Čerkez, Commander of the Viteška Brigade which informs the Appellant about the situation in his area of responsibility, indicating: "Pursuant to your order no. 01-04-243/93… Our forces are advancing on Donja Večeriska whose fall is imminent, and in Ahmići…"

PA 7: Order issued by the Appellant at 1035 hours on 16 April 1993 addressed to the commander of the Vitez Brigade, which reads: "Capture the villages of Donja Večeriska, Ahmići, Sivrino Selo and Vrhovine completely."

PA 8: Report addressed to the Commander of Central Bosnia signed by Mario Čerkez (sometime between 1035 and 1400 hours) on 16 April 1993, where he informs about further combat operations as instructed by the Appellant: "The village of Donja Večeriska is 70% done… The village of Ahmići is also 70% done and we have arrested 14 who are accommodated in weekend houses in Nadioci village."

PA 10: Report signed by the Appellant at 1400 hours on 16 April 1993, in which he responds to PA 8 sent by Mario Čerkez. The report reads: "Continue the activities described under item 1 of your report." (Item 1 of that report concerns the taking of Donja Večeriska and Ahmići.)
[654] AT 745-748 (17 Dec. 2003).
[655] Hereinafter "Kordić."
[656] Ex. 1 to the First Rule 115 Motion; Ex. 4 to the First Rule 115 Motion; Ex. 6 to the First Rule 115 Motion; Ex. 13 to the First Rule 115 Motion; Ex. 1 to the Second Rule 115 Motion (also referred to as the MUP Report). Appellant's Brief, pp. 33-35. *See also* Supplemental Brief, para. 13.
[657] D267, D268, and D269.

were in response to this expected attack.[658] The Appellant notes that the report states that although he issued orders for an attack, he "gave a stark warning forbidding any kind of crime."[659]

(e) Whether the Appellant was reckless or assumed the risk that civilians would be harmed

321. The Appellant's argument is twofold: first, that recklessness is not the proper *mens rea* for responsibility under Article 7(1), and second, that there is no evidence to support the conclusion that the Appellant knew that the Military Police were predisposed to massacre civilians.[660] The Appellant argues that the Trial Chamber erred in finding that "recklessness in ordering the Military Police to take up positions on the road outside Ahmići carries the same legal consequence as if he had ordered the Military Police to slaughter civilians."[661] He submits that the evidence cited in paragraph 474 of the Trial Judgement only shows that he was aware that some members of the troops looted and burnt houses, and he gave orders to stop such behaviour.[662] He claims that the Trial Chamber's inference that he ordered the crimes cannot be reconciled with the fact that he issued orders which show that he was alert to the risk to civilians by ordering that discipline and peace be maintained in the zone of operation, and the fact that he issued orders for the protection of the life and property of civilians.[663]

322. The Prosecution contends that: (i) the Trial Judgement discussed the orders issued by the Appellant for the protection of civilians and notes that these orders were issued *after* Ahmići; (ii) the Trial Chamber noted that these orders established that the Appellant knew that his troops were in fact committing crimes; (iii) the Trial Chamber noted that despite issuing "so-called preventative orders," the Appellant never enforced the orders or ensured that the criminal elements had been removed; and (iv) the Trial Chamber found that "his repeated failure to enforce these so-called preventative orders clearly demonstrated to his subordinates that certain types of illegal conduct were acceptable and would not be punished."[664] The Prosecution maintains that "[g]iven the Appellant's repeated public denials regarding the crimes in Ahmići, the Trial Chamber was not

[658] Referring to T 18,481 and 18,482-18,495 (25 Feb. 1999).
[659] The Appellant refers to his testimony and the War Diary (Ex. 14 to the Second Rule 115 Motion), which he argues makes clear that he attended only one such meeting, and contrary to the inference in the MUP Report, the meeting occurred in the Appellant's headquarters in the Hotel Vitez, and not in the post office in Busovača; *see also* Ex. 1 to the Second Rule 115 Motion (MUP report). Appellant's Brief, pp. 34, 35.
[660] Appellant's Brief, p. 36.
[661] Appellant's Brief, p. 36.
[662] Appellant's Brief, p. 36.
[663] Appellant's Brief, pp. 37, 38. The Appellant refers to the following orders submitted as trial exhibits which targeted "risk factors" that he was aware of: D346, D347, D208, P456/12, and D211. The Appellant refers to orders he issued to protect civilians: D336, D77, D43, D44, D149, D362, D39, D147, D79, D370, P456/37, D374, D371, D373, and D376.
[664] Respondent's Brief, para. 2.169 (referring to Trial Judgement, paras. 474, 487). *See also* Brief in Reply, para. 36.

unreasonable in discounting his so-called humanitarian orders or disbelieving that he made reasonable efforts to prevent crimes." [665]

323. The Prosecution submits that the Appellant mistakenly argues that the Trial Chamber based its finding on the Appellant ordering the Military Police to take up positions on the road outside Ahmići, but that the finding was made on the ground that the Appellant was aware of previous crimes and did not ensure that criminal elements be removed *before* he ordered them to attack Ahmići.[666] It further submits that the "had reason to know" requirement under Article 7(3) of the Statute also applies under Article 7(1) in the sense that the accused is put on notice of subordinates' crimes.[667] The Prosecution asserts that the Appellant has mischaracterized the "multitude of criminal acts as random but makes no arguments to challenge the Trial Chamber's general findings of an organised and widespread attack against the Muslim civilian population."[668]

2. The Appeals Chamber's findings

324. The Trial Chamber convicted the Appellant pursuant to Article 7(1) of the Statute for crimes that targeted the Muslim civilian population and were perpetrated as a result of his *ordering* the Viteška Brigade, the Nikola Šubić Zrinski Brigade, the 4th MP Battalion, the Džokeri (Jokers), the Vitezovi, and the Domobrani to offensively attack Ahmići and the neighbouring villages. The Appeals Chamber considers that the Appellant's conviction under Article 7(1) of the Statute is based upon the following findings reached by the Trial Chamber: (i) that the attack was organised, planned at the highest level of the military hierarchy[669] and targeted the Muslim civilian population in Ahmići and the neighbouring villages;[670] (ii) that the Military Police, the Jokers, the Domobrani, and regular HVO (including the Viteška Brigade) took part in the fighting,[671] and no military objective justified the attacks;[672] and (iii) that the Appellant had "command authority" over the Viteška Brigade,[673] the Domobrani, the 4th MP Battalion, and the Jokers during the period in question.[674]

[665] Respondent's Brief, para. 2.171.
[666] Respondent's Brief, para. 2.162.
[667] Respondent's Brief, para. 2.163.
[668] Respondent's Brief, para. 2.165.
[669] Trial Judgement, para. 386.
[670] Trial Judgement, para. 385.
[671] Trial Judgement, para. 400.
[672] Trial Judgement, para. 410.
[673] Trial Judgement, para. 442.
[674] Trial Judgement, paras. 443, 465. Only paragraph 463 in the section of the Trial Judgement entitled "The accused's control over the Military Police" uses the term *de facto* authority, in contrast with the term "command authority" used in the finding.

(a) The orders issued by the Appellant

325. The Prosecution's case was that the Appellant ordered the Viteška Brigade, the Nikola Šubić Zrinski Brigade, the 4th MP Battalion, the Jokers, the Vitezovi, and the Domobrani to offensively attack the area of Ahmići, destroy and burn the Muslims' houses, kill Muslim civilians, and destroy their religious institutions. As part of his defence at trial, the Appellant put forward three orders[675] issued by him following a military intelligence report dated 14 March 1993, which indicated the possibility of an attack by the ABiH on Ahmići in order to cut off Busovača and Vitez.[676]

326. With respect to D267, addressed to the 4th MP Battalion, the Vitezovi, and the HVO Operative Zone Brigades, the Trial Chamber concluded that "[t]he reasons relied upon in this order were: combat operations to prevent terrorism aimed at the HVO, and ethnic cleansing of the region's Croats by extremist Muslim forces."[677]

327. Witness Marin testified that D268 was an "order for action" given in response to information from the HVO intelligence services pointing to a general mobilisation in Zenica of Muslim forces assumed to be arriving via Mount Kuber.[678] The order blamed the Seventh Muslim Brigade for a new wave of "terrorist activities."

328. With respect to D269, addressed to the Viteška Brigade and to the Tvrtko unit, which refers to the threat of an enemy attack "with the probable goal, after carrying out the planned terrorist activities, of engaging open offensives against the HVO and destroying all that is Croatian," the Trial Chamber concluded as follows:

> …That order indicated that the forces of the Military Police Fourth Battalion, the N. Š. Zrinski unit and the civilian police would also take part in the combat. The order required the forces to be ready to open fire at 05:30 hours and, by way of combat formation, provided for blockade (observation and ambush), search and attack forces. …The order closed by saying that the "instruction given previously [should be] complied with", although the Trial Chamber was not able to establish what that instruction was. [679]

329. The Trial Chamber found that D269 was "very clearly" an order to attack, and that it was addressed to the Viteška Brigade, the 4th MP Battalion, the forces of the Nikola Šubić Zrinski

[675] D267, D268, and D269.
[676] D193: Military Intelligence Service report addressed to the Nikola Šubić Zrinski Brigade and the SIS in Busovača. The report mentions that the BH Army might attempt to launch an attack on Ahmići. The relevant part of the report reads: "The BH Army may attempt through an adroit manoeuvre, to evade HVO monitoring in Čajdras by crossing the territory under their control, along the Zenica-Vražale-Dobriljeno (756) -Vrhovine axis, and launch an attack on Ahmići (in order to cut off Busovača and Vitez)…"
[677] Trial Judgement, para. 433.
[678] Trial Judgement, para. 434.
[679] Trial Judgement, para. 435 (footnotes omitted).

Brigade and the forces of the civilian police which "were recognised on the ground as being those which had carried out the attack."[680] The Trial Chamber also found that the time set out in the order to commence hostilities corresponded to the start of fighting on the ground.[681]

330. The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack."[682] The order defines the type of military activity as a blockade in the territory of Kruščica, Vranjska, and D. Večerska (Ahmići and the neighbouring villages are not specifically mentioned), and it addresses the Viteška Brigade and the Tvrtko special unit, but not the Jokers or the Military Police which are only mentioned in item 3 of the order in the following terms:

> [i]n front of you are the forces of the IV Battalion VP, behind you are your forces, to the right of you are the forces of the unit N.S. Zrinski, and to the left of you are the forces of the civilian police.

331. As noted above, the Trial Chamber had concluded that since the Ahmići area had no strategic importance, no military objective justified the attack, and determined that it was unnecessary to analyze the reasons given by the Appellant for issuing D269.[683] The Trial Chamber concluded that nothing had been adduced to support the claim that an imminent attack justified the issuing of D269.[684] The Appeals Chamber notes that the Trial Chamber gave no weight to the argument that the road linking Busovača and Travnik had a strategic significance, and with respect to the fact that ABiH soldiers were reported travelling towards Vitez, it concluded that "the fact that these soldiers were drinking highlighted the fact that the soldiers were on leave and were not preparing to fight in the municipality of Vitez."[685]

332. The Appeals Chamber considers that the Trial Chamber's assessment of D269, as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review. The Appeals Chamber considers that the Trial Chamber's assessment was "wholly erroneous."[686]

333. The Appeals Chamber considers that the trial evidence does not support the Trial Chamber's conclusion that the ABiH forces were not preparing for combat in the Ahmići area. In addition, the

[680] Trial Judgement, para. 437. *See also* para. 435, where the Trial Chamber states: "The order indicated that the forces of the Military Police Fourth Battalion, the N.Š. Zrinski unit and the civilian police would also take part in the combat."
[681] Trial Judgement, para. 437.
[682] Trial Judgement, para. 437.
[683] Trial Judgement, para. 437. *See also* para. 411.
[684] Trial Judgement, para. 438.
[685] Trial Judgement, para. 405.

Appeals Chamber notes that additional evidence admitted on appeal shows that there was a Muslim military presence in Ahmići and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmići-Santići-Dubravica axis.[687]

[686] For this test, *see Kupreškić* Appeal Judgement, para. 30.

[687] Ex. 12 to the Fourth Rule 115 Motion, which is an order issued by 3rd Corps Commander Enver Hadžihasanović to the 325th Mountain Brigade on 16 April 1993, states that:

> …the 1st Battalion of the 303rd Mountain Brigade/ has been sent to the Kuber- Saračevica sector and has occupied the left Kićin- right Saračevica line to depth of tt/trig point/ 567 with the task to organize the defence on the line reached and be in readiness to assist our forces in the villages of Putiš, Jelinak, Lončari, Nadioci and Ahmići, and in the event of an attack by HVO units, to switch to a resolute counterattack along the Nadioci-Sivrino Selo axis.

The document also recounts that 7th Muslim Mountain Brigade

> …has been sent to the Ahmići village sector with the task to organize and carry out a march and arrive in the Ahmići village sector, where it is to assist our forces in the defence and organize the defence and be in readiness to carry out an infantry attack on the Ahmići – Šantići - Dubravica axis.

Ex. 13 to the Fourth Rule 115 Motion is Order no. 518/93 issued by Commander Asim Koričić addressed to the 7th Muslim Brigade on 16 April 1993, which pursuant to order no. 02/33-872 issued by the 3rd Corps Commander issued on the same date, instructs:

> One company from the 2/2nd Battalion/ of the 7th Muslim Mountain Brigade/ shall be dispatched along Bilmišće -Gornja Zenica- Urije- Saračevica- elevation 860-Ahmići axis, with the task of reaching the village of Ahmići as soon as possible and joining in combat operations. The marching column is to be properly secured and ready to fight any HVO forces that have been either infiltrated or left behind. The march shall be carried out on foot with absolute secrecy of movement, the utmost effort, a high level of combat readiness and strict military discipline. Upon arrival in the waiting area, i.e. the general area of the village of Ahmići, make a detailed evaluation of the situation and get an idea of the combat operations; if necessary, introduce the unit into combat operations to support the forces carrying out defence and organise the defence and be prepared to repel an enemy attack and launch a counter-attack along the Ahmići - Šantići - Dubravica axis.

The Appeals Chamber notes that at trial, the Appellant invoked the presence of units of the 325th ABiH Mountain Brigade in Ahmići and the neighbouring villages and in support he proffered Ex. D192.

D192: Military Intelligence situation report addressed to the Viteška Brigade Command dated 10 April 1993 which refers to the 4th battalion of the 325 Mountain brigade. Relevant parts read as follows:
"-4th battalion: Its command post is in Poćulica, Prnjavor and Vrhovine, one for G.Dubravica, Tolovići and the village of Selo and one for Pirići, Ahmići, Šantići and Nadioci. The total number of soldiers is 500."

With respect to this evidence, the Trial Chamber, at para. 404, concluded that:

> … documents submitted in support of that assertion [the presence of the 325th ABiH Mountain Brigade] mention only the village of Ahmići with no further details as to the number of soldiers, the amount of equipment there or the precise location of their headquarters. Moreover, the "defense" orders issued by the accused on the eve of the attack did not mention the presence of the 325th Brigade at all. Those orders, and in particular the order issued on 15 April at 15:45 hours, only refer to the threat which the seventh Muslim Brigade allegedly posed.

Witness BA5 testified:

> Q. Can you tell me: The village of Ahmići, which area staff of the Territorial Defence did it belong, or which Territorial Defence staff was this unit in the village of Ahmići subordinate to?
>
> A. They belonged to the area Territorial Defence staff of Dubravica and Sivrino Selo, and it had a platoon of 30, 35 people, maximum. And they were armed with army rifles and with hunting rifles. Not all of them. 25 to 30 rifles, that's what they had.

Consequently, the Appeals Chamber considers that there was a military justification for the Appellant to issue D269.

334. The Appeals Chamber further notes that in light of the planned nature, scale, and manner in which crimes were committed in the Vitez municipality on 16 April 1993, the Trial Chamber concluded that D269 corresponded to the start of fighting in the Ahmići area, and that it instructed all the troops mentioned therein to coordinate an offensive attack and commit the crimes in question.[688] The Appeals Chamber has failed to find evidence in the record which shows that the Appellant issued D269 with the "clear intention that the massacre would be committed" during its implementation,[689] or evidence that the crimes against the Muslim civilian population in the Ahmići area were committed in response to D269.

335. In light of the analysis of the Trial Chamber's interpretation of D269 and on the basis of the relevant evidence before the Trial Chamber, the Appeals Chamber concludes that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that D269 was issued "with the clear intention that the massacre would be committed,"[690] or that it gave rise to the crimes committed in the Ahmići area on 16 April 1993.[691] The Appeals Chamber stresses that the additional evidence heard on appeal confirms that there was a military justification for issuing D269.[692] The additional evidence shows that D269 was a lawful order, a command to prevent an

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…On the 20th of October, 1992, a roadblock was set up by the Territorial Defence of Bosnia and Herzegovina on the Vitez-Busovača road.
….The purpose [of the roadblock] was to make it impossible for the HVO units to move from Kresevo, Fojnica, Kiseljak, and Busovača…

Q. Why was the roadblock set up in Ahmići?

A. Because of the lay of the land, the main road leading from Busovača to Vitez and Travnik passes through there.

Q. So military reasons dictated that this roadblock be set up there?

A. Yes, yes. That's where the terrain was the most favourable for a roadblock.

AT 510-511 (11 Dec. 2003).

[688] Trial Judgement, para. 437.
[689] Trial Judgement, para. 474.
[690] Trial Judgement, para. 474.
[691] Trial Judgement, para. 495.
[692] Witness BA1 testified that Exhibits D267, PA12, and D269 are consistent with D193 (military intelligence report dated 14 April 1993 warning that the ABiH may attempt to launch an attack on Ahmići in order to cut off Busovača and Vitez) and the threat assessed in the report. He stated that nothing in Exhibits D267, PA12, and D269 is inconsistent with the notion that the Military Police unit in question was merely attached to the Appellant's command and that they are all legal orders. He also testified that D269 is not an order to attack. AT 210-214 (8 Dec. 2003) (Closed Session).

Witness BA3 testified that after having received D193 if he had been the Appellant, he would have issued the same preparatory combat order (D267). With respect to D269, he testified that it is a legal military order which is only addressed to the commander of the Viteška Brigade and the Special Purpose Unit Trvtko, and does not cover the territory of Ahmići. He pointed out that in most armies it is customary to issue orders which cover the neighbouring

attack, and did not instruct the troops mentioned therein to launch an offensive attack or commit crimes.

(b) The troops involved in the commission of the crimes

336. The Trial Chamber found that in addition to the Military Police, and the Jokers, regular HVO units, in particular the Viteška Brigade, took part in the fighting on 16 April 1993.[693] The Appeals Chamber reads this finding together with paragraph 440 of the Trial Judgement, wherein the Trial Chamber concluded as follows:

> …the evidence established on the contrary that the crimes committed were not the work of the Military Police alone but were also ascribable to the regular HVO units, in particular, the *Viteška* Brigade and the Domobrani.[694]

337. The evidence underlying the finding outlined above includes documentary evidence, such as one exhibit indicating the presence in nearby locations of members of the "First Vitez Battalion" on 14 April 1993,[695] and two HVO certificates[696] documenting that during the attack of 16 April 1993, some Viteška Brigade soldiers were wounded in the exercise of their duties.[697]

338. The Appeals Chamber notes that as stated in the Trial Judgement, most witnesses relied upon testified that they saw "HVO soldiers" who worked in a coordinated manner,[698] and a superior of the Appellant testified in closed session, that "the *Viteška* [B]rigade must have co-operated with the Military Police in the operation against Ahmići."[699] The Appeals Chamber notes, however, that this reference was not accurate, since the said witness's actual testimony was that he had no knowledge of whether the Viteška Brigade was in the Ahmići area, but that if they were, they had to cooperate with the Military Police.[700]

339. The Appeals Chamber considers that the finding that the Viteška Brigade and the Domobrani took part in the commission of crimes during the attack on Ahmići and the

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units on the left and right flank. With respect to PA 12, BA3 testified that it is defensive in nature, and quite logical in light of D193. AT 391-396 (9 Dec. 2003) (Closed Session). Regarding the nature of "offensive" orders generally, the witness testified that defence combat operations cannot be simultaneously offensive but that once the defensive operation has been completed, then, following orders of the superior, an offensive may be launched. AT 465 (10 Dec. 2003) (Closed Session).

[693] Trial Judgement, para. 400.

[694] Trial Judgement, para. 440.

[695] Ex. D245.

[696] Ex. P691 and P692, dated 24 and 27 June 1994, respectively.

[697] Trial Judgement, paras. 397-399.

[698] Witnesses G, H, and Zec, referred to in the Trial Judgement, para. 401.

[699] Trial Judgement, para. 401 (referring to T 2410 *rectius* 24100), quoted and accepted for the purposes of this case only.

[700] AT 598 (16 Dec. 2003) (Private Session). The Appeals Chamber notes that the testimony in question reads as follows: "I do not have any information, or rather; I did not receive any information on the extent to which they cooperated with the [M]ilitary [P]olice, if at all. My assumption can only be that they had to cooperate with the [M]ilitary [P]olice if they were there." T 24100 (23 June 1999) (Closed Session).

neighbouring villages, on the basis of the trial record, was a tenuous finding. The Appeals Chamber stresses that the additional evidence admitted on appeal fatally undermines the said finding and suggests that the crimes committed in the Ahmići area on 16 April 1993 were perpetrated by the Jokers and the 4th MP Battalion.[701] For the foregoing reasons, the Appeals Chamber considers that

[701] Ex. 13 to the First Rule 115 Motion. Hand-written report from the Department of Defence, Croatian Community Herceg-Bosna, dated 8 June 1993, based on interviews with wounded individuals then currently located in a hospital in Split. The document blames the Jokers and Ljubičić for the Ahmići massacre. The report also identifies at least one other individual ("Zoran Krišto") as claiming to have "bombed the mosque in Ahmići."

Ex. 14 to the First Rule 115 Motion. Report from the Croatian Information Service dated 21 March 1994, addressed to Franjo Tudjman and signed by the Director of the HIS, Miroslav Tudjman. The report states that the attack on Ahmići was carried out by the Jokers Special Purpose police unit under the command of Vlado Cosić and Paško Ljubičić, as well as a group of criminals released from Kaonik prison. The report addresses the alleged participation of the Viteška Brigade, and its commander, Mario Čerkez in the Ahmići massacre. The report states that Čerkez was not involved in the massacre in the village of Ahmići, and that he had no influence in these events.

Ex.14 to the Second Rule 115 Motion (War Diary) at p. 70, record of call by Mario Čerkez at 0900 hours responding to the Appellant's orders to defend against shooting coming from the Vitez fire station.

Ex. 1 to the Second Rule 115 Motion:

> The aim of this operation [Ahmići massacre] was to scare the Muslim population into moving out of the area…
>
> …several units participated in the attack on Ahmići:
>
> The Jokeri/ Jokers/ as part of the 4th battalion of the HVO VP/military police/ (about 60 people under the command of A. FURUNDŽIJA, operated from the direction of the village of Nadioci).
>
> The 4th battalion of the HVO from Posušje commanded by Paško LJUBIČIĆ,
>
> Miroslav BRALO aka Cicko also participated in the attack and committed crimes without anyone's orders and did not belong to any unit,
>
> The unit of Žarko ANDRIĆ aka Žuti.
>
> Parts of other units of the HVO Central Bosnia Operative Zone participated in the conflict…
>
> Following increased kidnappings, robberies and skirmishes begun by the Muslim forces and because of the danger that these forces might sever communications between Vitez and Busovača, a decision was taken by the military leadership of the Central Bosnia Operative Zone, which was then headed by General BLAŠKIĆ, that the HVO would attack the Muslims first on the Vitez-Busovača axis in order to create a security belt against the Muslims. This decision was based on previous experiences of Muslim attacks in Travnik where they attacked first and gained a great advantage in later combat activity, or acquired a relatively large swathe of territory for combat operations.
>
> General BLAŠKIĆ issued a written command which ordered that the aforementioned communications must be relieved at all costs but in a manner by which they would occupy the hills above the village. According to the order, the village [Ahmići] should have been entered if armed resistance was offered from a house or another building. In such an instance, the command read, they could open fire on the building from which the shooting was coming, but only to the extent necessary to neutralise the armed resistance. It was specifically ordered that houses and buildings which offered no resistance should be avoided and that during the first phase of the operation, until the positions in the hills overlooking the village had been occupied, they should not be entered. This order was also received by Mario ČERKEZ, commander of the HVO brigade. (pp. 12, 13)
>
> The direct commanders in the field who carried out the order issued were Vlado ČOSIĆ, Paško LJUBIČIĆ and Vlado ŠANTIĆ…

the Trial Chamber's finding that the crimes committed in the Ahmići area "were also ascribable to the regular HVO units, in particular, the *Viteška* Brigade and the Domobrani," cannot be sustained on appeal.

(c) New evidence suggests that individuals other than the Appellant planned and ordered the commission of crimes in the Ahmići area

340. The Appeals Chamber notes that in his final trial brief, the Appellant submitted that Kordić's power extended beyond Busovača and over some of the units whose members were committing "violative" acts in Central Bosnia, including the Military Police.[702] During the appeal hearing, the Prosecution argued that the reason that the Appellant testified at trial that he had no information as to whether Kordić could have ordered the massacre in Ahmići, was that they were working in close coordination.[703]

341. The role of Kordić in the persecutory campaign against the Muslim population in Central Bosnia and the enforcement of the plan to create a sovereign Bosnian Croatian state was considered in the Trial Judgement.[704] However, the Appeals Chamber notes that the question of Kordić's criminal responsibility for the crimes committed in the Ahmići area is not before the Appeals Chamber in the present case.

342. The Appeals Chamber considers that some documents admitted as additional evidence on appeal, support the assertion that the 4th MP Battalion and the Jokers committed the crimes in the

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> …Paško LJUBIČIĆ coordinated the attack on Ahmići using hand-held radio equipment. Tihomir BLAŠKIĆ was also present in the area during the attack itself…(p. 13)

Ex. 1 to the First Rule 115 Motion: The relevant parts read as follows:

> …The attack on the village of Ahmići itself was carried out by the *Jokers* JPN/special purposes unit/ police unit under the command of Vlado ĆOSIĆ [*sic*] and the commander of the regional military police Paško LJUBIČIĆ, and also by an attached squad of criminals who had been released from the Kaonik prison and included in combat operations.

[702] Final Trial Brief, *Under Seal,* 22 July 1999, p. 211 ("Final Trial Brief") (referring to the testimony of General Hadžihasanović for support. T 23237 (9 June 1999)). It is worth noting that the Appellant also submitted that Kordić exercised complete military authority with regard to Busovača. *Ibid.,* pp. 381-385.

[703] AT 773 (17 Dec. 2003) (referring to Exhibits PA 3 and P456/109).

PA 3: Report dated 26 September 1993 drafted by KUM (Godfather) sent by the SIS Center in Travnik/Vitez and addressed to Ivica Lučić from the Security Sector, Administration Mostar. The document reports on the political conflict between Busovača and Vitez as having a negative effect upon the combat readiness and the defence. The report requests the removal of Ante Slišković and reads:

"In the so-called Busovača side the hierarchical order is the following:

1. Dario Kordić…
    a) Tihomir Blaškić
    b) Ignjac Koštroman…
    c) Anto Puljić…"

See also P456/109: The minutes from the meeting of Croatian Defence Councils in the municipalities of Central Bosnia on 22 September 1992, which indicate that Kordić, Valenta, Blaškić and Koštroman were members of the working presidency.

Ahmići area on 16 April 1993, and do not identify the Appellant as responsible for planning and ordering the massacre.[705] One of those documents admitted pursuant to Rule 115 is an SIS investigative report on the events in Ahmići dated 26 November 1993 which the Trial Chamber had referred to as "the item of evidence most likely to exonerate" the Appellant.[706]

343. In light of the foregoing, the Appeals Chamber will now consider whether the Appellant was aware of the substantial likelihood that crimes would be committed in the Ahmići area on 16 April 1993 in the execution of his orders.

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[704] Trial Judgement, paras. 118, 341, 358, 359, 360, 387, 538.

[705] Ex. 13 to the First Rule 115 Motion.

Ex. 1 to the Second Rule 115 Motion (MUP report). Relevant parts read as follows:

> …it is most likely that two meetings were held with the commanders of the military units from this area- the first at 1400 hours in the cellar of the post office in Busovača (present were Vlado ČOSIĆ, assistant commander of the Military Police, Dario KORDIĆ, Ignac KOŠTROMAN, Paško LJUBIČIĆ, Darko KRALJEVIĆ and Vlado ĆOSIĆ [sic] at which BLAŠKIĆ issued orders about the attack and the manner of the attack, and the second without BLAŠKIĆ… in the evening in KORDIĆ's family home. The decision to carry out this massacre was taken at this meeting. However, there is information that one meeting was held during the afternoon in a hotel in Vitez at which BLAŠKIĆ was also present. It is possible that this amounts only to confusion over the location of the meeting, but it should nevertheless be checked just as the confusing information regarding the participants of these meetings should. There are statements saying that BLAŠKIĆ held this third meeting with the commanders of special-purpose units (Paško LJUBIČIĆ, Žarko ANDRIĆ aka Žuti and Marinko ŽILIĆ aka Brzi, a one-time member of the special police in Rijeka, current status being checked). Mario ČERKEZ, although invited, did not come. BLAŠKIĆ gave instructions for the attack at the meeting, and gave a stark warning forbidding any kind of crimes. (p. 11)
>
> …on the night of 15/16 April 1993 a meeting of an informal group, composed of Ignac KOŠTROMAN, Dario KORDIĆ, Ante ŠLIŠKOVIĆ, Tomo VLAJIĆ, ŠLIŠKOVIĆ's deputy Paško LJUBIČIĆ, Vlado ĆOSIĆ and Anto FURUNDŽIJA, who wanted conflict with the Muslims at any price, was held at Dario KORDIĆ's house. At this meeting it was agreed that an order would be issued to kill the entire male population in Ahmići and to torch the village. (p. 11)
>
> The report recounts that Šlišković "masterminded the operation in Ahmići" and Ljubičić "coordinated the attack." (pp. 13-14).

[706] Trial Judgement, para. 493.

Ex. 1 to the First Rule 115 Motion (SIS report):

> Sporadic fighting in this area on 15 April 1993 developed into a fierce battle on 16 April 1993, when MOS/Muslim Armed Forces/ attempted to take control of the Vitez-Busovača road. Our forces responded with counterattack… The attack on the village of Ahmići itself was carried out by the *Jokers* JPN /special purposes unit/ under the command of Vlado ĆOSIĆ and the commander of the regional military police Paško LJUBIČIĆ, and also by an attached squad of criminals who had been released from the Kaonik prison and included in combat operations. According to the statement of Zoran KRIŠTO, who acknowledges that he destroyed the mosque in Ahmići, they paid no attention to age, but killed everyone they encountered. According to our information, Miroslav BRALO aka Cicko from Vitez and Ivica ANTOLOVIĆ aka Sjano from Žepče displayed extremely uncontrolled and criminal conduct.

(d) Whether the Appellant was aware of the substantial likelihood that civilians would be harmed

344. The Trial Chamber concluded that since the Appellant knew that some of the troops engaged in the attack on Ahmići and the neighbouring villages had previously participated in criminal acts against the Muslim population of Bosnia or had criminals within their ranks, when ordering those troops to launch an attack on 16 April 1993 pursuant to D269, the Appellant deliberately took the risk that crimes would be committed against the Muslim civilian population in the Ahmići area and their property. The Trial Chamber held that:

> [e]ven if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes...[A]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) [*le dol éventuel* in the original French text] so as to incur responsibility for having ordered, planned or incited the commitment of the crimes. In this case, the accused knew that the troops which he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population of Bosnia. [707]

345. The Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to the finding outlined above. Therefore, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes which occurred in the Ahmići area on 16 April 1993.

346. The evidence underlying the finding in paragraph 474 of the Trial Judgement consists of orders issued by the Appellant with the aim of deterring criminal conduct, *i.e.,* orders prohibiting looting, the burning of Muslim houses, and instructing the identification of soldiers prone to criminal conduct.[708] The analysis of the evidence relied upon by the Trial Chamber supports the

[707] Trial Judgement, para. 474.

[708] D347: Order dated 5 November 1992, issued by the Appellant based on the agreement signed with General Merdan. The order commands that all measures be taken to prevent setting fire to the houses of eminent Muslim citizens, warning that the most rigorous measures should be taken against the transgressors.

D204: Report "on the activities of Groups and Individuals acting without the knowledge of the HVO" from the Stjepan Tomašević Brigade, dated 25 January 1993. Informs about incidents of looting, and robberies by "Herzegovinians." The report provides some names; however, it is unclear whether they are all members of the Stjepan Tomašević Brigade. The report states that the perpetrators of many of the crimes had not been identified.

D208: Warning issued by the Appellant on 6 February 1993 following an order issued on 10 January 1993, addressed to all HVO brigades and Military Police Fourth Battalion in connection with occurrences of disturbance of public order, murders, injuries, and opening fires in inhabited places.

conclusion that concrete measures had been taken to deter the occurrence of criminal activities, and for the removal of criminal elements once they had been identified. For instance, approximately a month before the attack of 16 April 1993 took place, the Appellant had ordered the commanders of HVO brigades and independent units to identify the causes of disruptive conduct, and to remove, arrest and disarm conscripts prone to criminal conduct.[709]

347. The Appeals Chamber considers that the orders and reports outlined above, may be regarded at most, as sufficient to demonstrate the Appellant's knowledge of the mere possibility that crimes could be committed by some elements. However, they do not constitute sufficient evidence to prove, under the legal standard articulated by the Appeals Chamber, awareness on the part of the Appellant of a substantial likelihood that crimes would be committed in the execution of D269.

348. Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence and the additional evidence admitted on appeal prove beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in the Ahmići area on 16 April 1993.

B. The Appellant's responsibility under Article 7(3) of the Statute

1. Parties' submissions

(a) Whether the Appellant had effective control over the Military Police

349. The Appellant argues that he did not have *de jure* control over the Military Police because the Military Police existed outside the Appellant's chain of command in a parallel line of command that reported directly to the Military Police Administration in Mostar, as well as to politicians such as Kordić and Koštroman. As a result, he submits, he could not discipline members of the Military Police and whenever there was a serious violation of regulations or a crime committed, he had to make a request for the prosecution of that individual and send it to the head of the Military Police Administration in Mostar.[710]

D211: Order entitled "Treatment of Persons Inclined towards Criminal and Destructive Conduct" issued by the Appellant on 17 March 1993 addressed to commanders of HVO brigades, the Vitezovi, the Military Police Fourth Battalion, the Chief of the Travnik Police, and the Chief of the Travnik Defence Department. The order commands: (a) to order platoon, company and battalion commanders to assess the conduct of conscripts and name the persons inclined toward destructive and criminal conduct, and (b) that persons prone to disruptive conduct were to turn over their weapons and uniform, by 29 March 1993 (also submitted as P456/16).

[709] *See* D211. The Appeals Chamber notes that D204, which is the only exhibit that identifies the names of those involved in criminal acts, was sent to the Appellant by the Stjepan Tomašević Brigade, which brigade was not addressed in D269 and did not participate in the military attack on Ahmići.

[710] Appellant's Brief, p. 29.

350. In addition to his lacking *de jure* control over the Military Police, the Appellant argues that: (i) new evidence supports the argument that the Military Police and in particular the Jokers, were not under the Appellant's effective control but under Kordić's chain of command;[711] and (ii) new evidence establishes that the Military Police operated outside any formal command structure, *i.e.*, as an outlaw unit which answered only to the command of Ljubičić, and operated in collusion with political extremists such as Kordić, to commit crimes.[712]

351. The Prosecution submits that the evidence presented at trial supports the conclusion that the attack on Ahmići was not committed by the Military Police only, but also by regular HVO troops, *i.e.*, the Viteška Brigade and Domobrani.[713] However, it submits that "assuming *arguendo* that regular HVO forces were not involved in Ahmići, the Appellant would still be responsible for the atrocities committed in Ahmići by the Military Police and the Jokers."[714] The Prosecution argues that trial evidence enabled the Trial Chamber to conclude that the Military Police was attached to his command during the relevant period, and that the Appellant's argument that the Military Police was not attached to him until 1142 hours on 16 April 1993 has been rejected at trial.[715] It points out that D267 and D268, which the Appellant acknowledges issuing, were addressed to the Jokers and the Military Police, which demonstrates his control over them.[716] The Prosecution stresses that the Appellant's orders assigned combat duties to the Military Police.[717] It also relies on Exhibit PA 12,[718] which the Prosecution claims, contradicts the Appellant's testimony that he never issued any written orders to the Military Police prior to the combat operations, on 15 April 1993.[719]

352. The Appellant replies that he has never disputed that he could and did issue miscellaneous lawful orders to the Military Police, but states that this fact does not establish that he controlled the

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[711] Appellant's Brief, pp. 29, 30. *See* Ex. 16 to the Second Rule 115 Motion, Ex. 25 to the Second Rule 115 Motion.
[712] Appellant's Brief, p. 30. *See* Ex. 10 to the First Rule 115 Motion; Ex. 27 to the Second Rule 115 Motion; Ex. 86 to the First Rule 115 Motion; Ex. 8 to the First Rule 115 Motion; Ex. 12 to the First Rule 115 Motion; Ex. 85 to the First Rule 115 Motion; Ex. 1 to the First Rule 115 Motion.
[713] Respondent's Brief, para. 2.156 (referring to Trial Judgement, para. 440).
[714] Respondent's Brief, para. 2.156.
[715] Respondent's Brief, para. 2.157 (referring to Trial Judgement, paras. 460-466).
[716] Respondent's Brief., para. 2.132 (referring to D267 and D268).
[717] Respondent's Brief, para. 2.138. *See* para. 2.43, n. 113.
[718] PA 12: "Combat order on securing section on Kaonik-Dubrave road and repelling enemy attack" dated 16 April 1993 at 0130 hours signed by the Appellant and addressed to the Commander of the 4th MP Battalion Paško Ljubičić. The order instructs the 4th Military Police unit to block the Ahmići-Nadioci road and prepare for enemy attack; it states that the time of readiness is 05:30 hours. Relevant portions read:

> Attack of enemy of probable size of a reinforced platoon is expected in the section of the road Ahmići Nadioci and their aim is to conduct terrorist-sabotage activities and obvious intention to liquidate all HVO members.Task of your of your [*sic*] unit is to block approaches to the Ahmići-Nadioci road and in case of enemy attack by precision fire with artillery support repel the enemy attack and inflict casualties in man power and technical equipment and materiel [*sic*] and repel their attack during your counter-attack.

[719] AT 742-743 (17 Dec. 2003).

Jokers at the time that they perpetrated the crimes in Ahmići.[720] He argues that there is overwhelming evidence that Kordić, Koštroman, and Slišković used the Military Police as their private death squad.[721] The Appellant emphasizes that the MUP Report demonstrates that Ljubičić and Ćosić would carry out military operations at their own discretion without consulting the Appellant, and were actually commanded by Kordić.[722] The Appellant asserts that his evidence fundamentally contradicts the assumptions made by Witness Baggesen that the Appellant was the only one who had command over the Military Police, and reiterates that Exhibit 36 to the Second Rule 115 Motion directly contradicts a central piece of evidence relied upon in the Trial Judgement.[723] The Appellant contends that the testimony of Witness HH, who claimed on the basis of his observations as a guard at the Hotel Vitez that "Paško Ljubičić received orders from the Appellant and never refused to carry them out," must now be viewed in light of the statement and testimony of Witness BA2.[724] The Appellant notes that the Prosecution itself in the *Kordić and Čerkez* trial confirmed that the Appellant could not and did not have effective control over the Jokers.[725] With respect to Exhibit PA 12, the Appellant submits that it is consistent with the Appellant's testimony that other than D267, he did not issue orders to the Military Police on 15 April 1993, since Exhibit PA 12 is dated 16 April 1993.[726] The Appellant finally submits that since the additional evidence demonstrates that the Trial Chamber erred in concluding that the Appellant had effective control over the Military Police, and specifically over the Jokers, his conviction under Article 7(3) of the Statute for the crimes committed in Ahmići is a miscarriage of justice and should be reversed.[727]

(b) Whether the Appellant was aware of the crimes committed in the Ahmići area

353. The Appellant argues that new evidence supports his contention at trial that he was not aware that crimes had been committed in the Ahmići area until 22 April 1993.[728] He notes that the trial evidence shows that BRITBAT, stationed eight kilometres from Ahmići, did not hear the

[720] Supplemental Brief, para. 34.
[721] Supplemental Brief, para. 34. Ex. 8 to the First Rule 115 Motion; Ex. 10 to the First Rule 115 Motion; Ex. 102 to the First Rule 115 Motion; Ex. 14 to the Fourth Rule 115 Motion.
[722] Supplemental Brief, para. 35. Ex.1 to the Second Rule 115 Motion.
[723] Supplemental Brief, para. 36.
[724] Supplemental Brief, para. 37.
[725] Supplemental Brief, para. 38 (referring to Ex. 16 to the Second Rule 115 Motion, which is a chart entitled "Suspected Bosnian Croat Chain of Command" created by the Prosecution in consultation with General Merdan, Deputy, and proffered as evidence by the Prosecution in the *Kordić* trial on 19 January 2000. The chart illustrates that the paramilitary special purpose units, including the Jokers, were under the direct command of Dario Kordić. The Appellant argues that this chart reflects the Prosecution's "candid assessment of the true HVO chain of command in Central Bosnia.").
[726] AT 814 (17 Dec. 2003).
[727] Supplemental Brief, para. 39.
[728] Appellant's Brief, pp. 40-41. The Appellant testified at trial that beginning at 0530 hours on 16 April 1993, he and the entire CBOZ headquarters staff were forced to take shelter in the basement of the Hotel Vitez due to a continual

"ABiH attack on the Hotel Vitez at 05:30 on 16 April and did not discover the massacre until 22 April 1993" despite the fact that it had regular warrior patrols in the area during the conflict unlike the HVO.[729]

354. The Appellant claims that the War Diary[730] confirms that he was forced to take refuge in the basement of the Hotel Vitez on the morning of 16 April 1993, and was unaware of the attacks against Muslim civilians occurring around the Vitez Municipality, including in Ahmići.[731] The Trial Chamber stated that at 1000 hours on 16 April 1993, BRITBAT Colonel Robert Stewart attempted to visit the Appellant at the Hotel Vitez and was told that he was not there.[732] According to the Appellant, the War Diary demonstrates that he was in the Hotel Vitez at that time but was unable to meet with Stewart because he was on the phone with the commander of the Ban Josip Jelačić Brigade finding out what was the situation in the field.[733]

355. Regarding the Trial Chamber's conclusion that the sounds of gunfire and smoke arising from the area of Ahmići must have alerted the Appellant to the crimes being committed, the Appellant argues that, since the ABiH troops were engaged in fierce fighting in Ahmići on 16 April 1993, he had no reason to know that crimes were being committed in the village.[734] The Appellant further claims that the Trial Chamber's conclusion that the Appellant "must have been aware that crimes against civilians were occurring near the scene of full-scale combat raging several kilometres from his headquarters is not supportable," and thus he cannot be held responsible for failing to prevent crimes he did not know were occurring. [735]

356. The Appellant further reiterates that he had no reason to conclude that crimes were being committed or had been committed in Ahmići, for the following reasons: (i) he received a report

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artillery barrage by the ABiH and that, as a result, he was unaware of the Ahmići massacre until 22 April 1993. T 18912-18917 (11 Mar. 1999), T 22905 (28 May 1999).

[729] Appellant's Brief, p. 41 (referring to Witness Bell, T 17648 (15 Feb. 1999), Witness Morsink testifying that ECMM did not discover Ahmići until 22 April 1993 when BRITBAT Warriors went through the village, T 24,405-24,407 (6 July 1999)).

[730] Ex. 14 to the Second Rule 115 Motion.

[731] Appellant's Brief, p. 42. The Appellant claims that the multiple entries in the War Diary regarding his presence in the Hotel Vitez lend support to his argument. He asserts that additional evidence corroborates trial evidence that he was unaware of the crimes committed against civilians as he was trapped in the basement of the Hotel Vitez. Brief in Reply, para. 38 (referring to Ex. 14 to the Second Rule 115 Motion (War Diary), p. 72; the Appellant notes that Ex. 14 also demonstrates that Ljubičić lied to him regarding the events in Ahmići and failed to report the crimes).

[732] Trial Judgement, para. 479.

[733] Appellant's Brief, p. 42. Ex. 14 to the Second Rule 115 Motion, pp. 72, 73.
The War Diary recounts that at 0950 hours, the Appellant received a phone call from M. Batinić, and that at the same time, Colonel Stewart arrived at the Hotel Vitez and met with M. Prskalo, another staff member.

[734] Appellant's Brief, p. 42. The Appellant had argued that he would have had no reason to believe that the sounds of gunfire or smoke arising from the direction of Ahmići (had he noticed them) were evidence of anything but lawful military combat. In support, he submits Ex. 2 to the Second Rule 115 Motion.

[735] Supplemental Brief, para. 32. In support of his argument, he refers to the following exhibits proffered by the Prosecution as material in rebuttal: PA 6, PA 8, and the following admitted additional evidence: Ex. 12 to the Fourth Rule 115 Motion, Ex. 13 to the Fourth Rule 115 Motion.

later in the day from Paško Ljubičić which concealed that a massacre had been committed; (ii) from the Hotel Vitez one could not discern the difference between combat activities and a crime; and (iii) it can no longer be disputed that there was a military conflict on 16 April 1993, and that there was a Territorial Defence unit of some 30 or 35 men stationed there. He also pointed out that the ABiH was not aware that crimes had been committed.[736]

357. The Prosecution contends that the Trial Chamber found that the Appellant was not trapped in the Hotel Vitez the whole day of 16 April 1993,[737] that the Appellant could move easily in the area, *e.g.,* he often requested BRITBAT to escort him around Central Bosnia,[738] and that there was overwhelming evidence that the HVO controlled the roads and the villages for several days following the attacks.[739] The Prosecution submits that the Trial Chamber clearly found that the HVO began the attack; thus, the Appellant's assertion that BRITBAT did not hear the attack on the Hotel Vitez that morning is unsubstantiated.[740] It further contends that the Appellant's assertion that BRITBAT did not "discover the massacre until the 22 April" is incorrect, and submits that BRITBAT clearly heard the attack and witnessed some of the destruction on 16 April 1993, even though Witness Stewart might not have characterised the attack as a massacre until 22 April 1993.[741] It adds that several witnesses testified that smoke could be seen over Ahmići, even from the Hotel Vitez, BRITBAT reported that they heard from a reliable local source that a number of civilians were killed in Ahmići, and BRITBAT rescued some survivors from Ahmići on 16 April 1993.[742]

358. The Prosecution argues that the fact that the Appellant acknowledged that Džemo Merdan informed him on 20 April that 500 Muslim civilians had been killed (but assumed that he was exaggerating) means that he had notice of the extent of the crimes in Ahmići at least by 20 April 1993.[743] The Prosecution points out that Slavko Marin, the Appellant's Chief of Staff, testified that the Appellant informed him of the crimes committed in Ahmići on 20 April 1993 when he returned from his meeting with Merdan.[744] The Prosecution challenges the Appellant's argument that he could not hear or see the attack because he was underground and submits that there was evidence that the Appellant responded quickly to other events nearby. For instance, it claims that at 0900

[736] AT 584-586 (16 Dec. 2003).
[737] Respondent's Brief, para. 2.174.
[738] Respondent's Brief, para. 2.175.
[739] Respondent's Brief, para. 2.175 (referring to Trial Judgement, para. 435).
[740] Respondent's Brief, para. 2.176.
[741] Respondent's Brief, para. 2.177 (referring to P690 (BRITBAT reporting mortar fire at 0605 hours)).
[742] Respondent's Brief, para. 2.177.
[743] Respondent's Brief, para. 2.180 (referring to Appellant's Brief, p. 45).
[744] Respondent's Brief, para. 2.180.

hours on the same date, a BRITBAT warrior drove through the fence of a nearby church, and the Appellant issued a formal protest to BRITBAT within fifteen minutes.[745]

359. During the evidentiary portion of the hearing, the Prosecution submitted that a superior of the Appellant issued an order on 18 April 1993, instructing the latter to conduct an investigation on Ahmići.[746] However, in reply, Counsel for the Appellant clarified that the Appellant's superior testified at trial that he only learned about the Ahmići massacre after a CNN report was broadcast on 22 April 1993.[747]

(c) Whether the Appellant is responsible for failing to prevent or punish

360. According to the Appellant, the Trial Chamber erred in finding that he had effective control over the Military Police, specifically the Jokers, which included the ability to punish them.[748] He argues that, in light of the absence of any evidence in the Trial Judgement which supports the assumption that the Appellant had a duty to punish the Military Police; the Trial Chamber's conviction under Article 7(3) "is seemingly based on a normative appeal to a [G]ood [S]amaritan standard and is clearly erroneous."[749]

(i) Whether the Appellant had power to punish members of the Military Police

361. The Appellant submits that he only had powers to issue orders to the Military Police for daily policing tasks, but not powers to discipline them.[750]

362. The Prosecution recalls that the Trial Chamber heard substantial evidence about the disciplinary powers vested in the Appellant as commander of the CBOZ to investigate, discipline, and punish his subordinates including the Military Police, the Vitezovi, and the troops in Busovača and Kiseljak.[751] The Prosecution submits that there was evidence at trial to show that the Appellant had powers to appoint and dismiss his subordinates, powers which he exercised frequently,[752] and that the evidence at trial showed that he had *de facto* control over the Military Police, even though the latter had its own rules and regulations.[753] Furthermore, the Prosecution notes that the Trial Chamber found that the Appellant had the obligation to report any crimes committed by his

[745] Respondent's Brief, para. 2.181 (referring to Prosecutor's Final Trial Brief, RP A11614).
[746] AT 424 (10 Dec. 2003) (Closed Session).
[747] AT 811 (17 Dec. 2003) (Private Session) (referring to T 24,099, 24,152 (Closed Session); T 23,756 (Witness Stewart); and T 17,625 (Witness Bell)).
[748] Appellant's Brief, p. 39.
[749] Appellant's Brief, p. 39.
[750] Appellant's Brief, p. 43.
[751] Respondent's Brief, paras. 2.77-81.
[752] Respondent's Brief, para. 2.82.
[753] Respondent's Brief, para. 2.83.

subordinates to the competent authorities.[754] The Prosecution adds that the Appellant's duty to prevent or punish cannot be substituted with that of other persons, and that more than one superior can be held responsible for the acts of the same subordinates.[755]

(ii) Whether the Appellant had information as to particular suspects

363. The Appellant argues that although he learned that the Military Police was in Ahmići on 16 April 1993, he had no knowledge as to individual perpetrators of the massacre.[756]

364. The Prosecution points out that the Appellant did suspect that the Military Police and Ljubičić could be implicated in the crimes in Ahmići;[757] he did not mention the fact that he had ordered an investigation into the crimes committed in Ahmići in his report of 24 April 1993 to Kordić and the HVO Main Staff;[758] and that he has failed to show that no reasonable trier of fact could have found him to have failed to report the crimes to his superiors.[759]

(iii) Whether the Appellant reported suspicions regarding Ljubičić and the Military Police to his superior commander

365. According to the Appellant, the Trial Chamber erred by ignoring evidence that the Appellant reported the Ahmići crimes to his superior, General Petković, two days after learning of the crimes, and asked him to replace Ljubičić, the commander of the Military Police unit which the Appellant suspected had committed the crimes in question. Ljubičić was removed from his position afterwards.[760] In response, the Prosecution submits that the report referred to by the Appellant contains no allegation that members of the Military Police were responsible, nor does it mention the need to order an investigation.[761]

(iv) Whether the Appellant ordered an investigation

366. The Appellant submits that the Trial Chamber erred in finding that he did not take reasonable measures to punish those responsible for the crimes in Ahmići, as he had no *de jure* power to punish the alleged culprits, and he further did endeavour to investigate the crimes and the identities of the perpetrators.[762] He also claims that he issued further orders to protect civilians.[763]

[754] Respondent's Brief, para. 2.86.
[755] Respondent's Brief, para. 2.89.
[756] Appellant's Brief, pp. 43-44.
[757] Respondent's Brief, para. 2.185.
[758] Respondent's Brief, para. 2.186.
[759] Respondent's Brief, para. 2.187.
[760] Appellant's Brief, pp. 44-46.
[761] Respondent's Brief, para. 2.186 (referring to exhibit P456/58).
[762] Appellant's Brief, p. 46.
[763] Appellant's Brief, p. 47.

After the ABiH and UNPROFOR failed to respond to his proposal for a joint commission for the investigation, he turned over the investigation to the SIS which was the competent organisation to deal with such matters.[764] He recalls that the report of the SIS was not satisfactory and he informed General Petković of this. Later, on 23 July 1993, in response to the Appellant's request for a revision of the Military Police's command structure, Petković gave him the command of the Military Police and Ljubičić was replaced.[765] He adds that a further report by the SIS on the Ahmići crimes was never shown to him.[766] According to the Appellant, he continued to investigate the crimes in Ahmići in a different capacity, but never managed to obtain the Ahmići file to which access was restricted.[767] He further suggests that the lack of evidence that he was alerted to the propensity of the Military Police to kill civilians, as well as the lack of discussion by the Trial Chamber regarding what reasonable steps he failed to take to prevent the crimes, amounts to the imposition of strict liability under Article 7(3) of the Statute.[768] The Appellant considers that the Prosecution and the Trial Chamber employed in effect a strict liability standard by keeping silent with respect to the Appellant's efforts, and that they made no attempt to demonstrate why these efforts were legally deficient.[769] Accordingly, the Appellant submits that his conviction for "failing to investigate must be deemed a miscarriage of justice."[770]

367. The Prosecution submits that though presented with opportunities, the Appellant failed to investigate the crimes committed by his subordinates in the Vitez Municipality, and that he has not shown why the finding of the Trial Chamber in this regard was unreasonable, since no one was ever punished for the crimes in Ahmići.[771]

(d) Whether new evidence shows that the Appellant did not fail to investigate or punish

368. The Appellant submits that additional evidence confirms that: (i) he lacked legal authority to discipline Military Police; (ii) he initiated investigations which were frustrated by the SIS and the HVO superiors; (iii) separate investigations were taken over by the SIS and HIS and he was not informed of the results; and (iv) the leadership of the Croatian government possessed specific information regarding the actual perpetrators but made a political decision not to punish them.[772]

[764] Appellant's Brief, pp. 47-48.
[765] Appellant's Brief, p. 50.
[766] Appellant's Brief, pp. 51-52.
[767] Appellant's Brief, p. 52.
[768] Brief in Reply, para. 37.
[769] Brief in Reply, para. 39.
[770] Supplemental Brief, para. 42.
[771] Respondent's Brief, paras. 2.190-2.194.
[772] Appellant's Brief, pp. 53-56. Ex. 1 to the First Rule 115 Motion; Ex. 1 to the Second Rule 115 Motion; Ex. 4 to the First Rule 115 Motion; Ex. 13 to the First Rule 115 Motion.

369. During the hearing on appeal, Counsel for the Appellant submitted that the Appellant never received any reports informing him of the commission of crimes in Ahmići. He referred to the War Diary which recounts that Paško Ljubičić called the Appellant at 1142 hours on 16 April 1993 and did not inform him about the crimes. He submitted that the SIS report, Exhibit 1 to the First Rule 115 Motion, enables the Appeals Chamber to conclude that an investigation was conducted and the perpetrators were identified, but that no information was ever disclosed to the Appellant. He submitted that the Appellant did what was within his power to identify the perpetrators, but since the HVO had no investigative powers, he had to instruct the SIS to conduct the investigation. At that time the Appellant did not know that the SIS assistant in Central Bosnia, Anto Šlišković, was involved in the commission of the crimes. Counsel for the Appellant recounted the Appellant's communications with the SIS regarding the investigation into the crimes committed in Ahmići, from 23 April until September 1993.[773]

370. During the hearing on appeal, the Prosecution submitted that Exhibit 1 to the First Rule 115 Motion is not the evidence referred to by the Trial Judgement in paragraph 493 as the "item of evidence most likely to exonerate" the Appellant, because it contains the same information as Exhibit D410 tendered at trial.[774] In reply, the Appellant compared both documents and pointed out their differences; Exhibit D410 does not identify the Jokers as having participated in the attack, nor does it mention Ljubičić or Šlišković.[775]

371. During the hearing on appeal, the Prosecution advanced the following arguments: (i) since the Appellant was convicted under Article 7(1) on the basis that he ordered the crimes committed in Ahmići, his attempts to challenge the elements of his responsibility under Article 7(3) are legally flawed;[776] (ii) the Appellant's efforts to show that he did not exercise effective control over all HVO troops should have no impact on the verdict in light of the fact that "the Trial Chamber found that above and beyond his responsibility under Article 7(3) of the Statute he also ordered the crimes in question;"[777] and (iii) whether the 4th MP Battalion was in the Appellant's chain of command would only matter if, contrary to the overwhelming evidence on the record, he did not issue orders to that unit to engage in combat operations.[778]

[773] AT 608-614 (16 Dec. 2003).
[774] AT 711 (16 Dec. 2003).
[775] AT 795-796 (16 Dec. 2003) (Private Session). The Appeals Chamber notes that the text of Ex. D410, which cannot be reproduced due to the confidential nature of the document, differs considerably from that of Ex. 1 to the First Rule 115 Motion.
[776] AT 680 (16 Dec. 2003).
[777] AT 680 (16 Dec. 2003).
[778] AT 688 (16 Dec. 2003).

2. The Appeals Chamber's findings

372. The Appeals Chamber notes that besides finding the Appellant guilty under Article 7(1) of the Statute, the Trial Chamber also entered a conviction against the Appellant for his superior criminal responsibility under Article 7(3) of the Statute. The Trial Chamber stated:

> [i]n the final analysis, the Trial Chamber is convinced that General Blaškić ordered the attacks that gave rise to these crimes. *In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them.*[779]

373. The Appeals Chamber notes that the Trial Chamber concluded that the HVO military structure operated under a unified command, order, and discipline, and that the Appellant maintained effective control over every HVO unit in Central Bosnia. It determined that the Appellant exercised authority over the special units, the Military Police, and conventional combatants involved in the attack in the Ahmići area at the time that the crimes were committed, based *inter alia* on the territorial nature of his authority.[780]

374. The Appeals Chamber has reversed the finding that the crimes in the Ahmići area were "ascribable" not only to the Military Police, but also to regular HVO troops, in particular the Viteška Brigade and the Domobrani.[781] The Appeals Chamber has also found that the trial record assessed together with the additional evidence admitted on appeal suggests that the crimes in the Ahmići area were perpetrated by the 4th MP Battalion and the Jokers.

375. It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct.[782] The Appeals Chamber will discuss whether the Appellant wielded effective control over the troops that perpetrated the crimes in the Ahmići area.

376. The Trial Chamber found that the Appellant had "command authority" over the 4th MP Battalion and the Jokers during the period in question.[783]

377. The evidence underlying this finding consists of the Appellant's acknowledgment that troops from the Military Police could be attached to him for *ad hoc* missions pursuant to specific

[779] Trial Judgement, para. 495(emphasis added).
[780] Trial Judgement, paras. 453-466.
[781] Trial Judgement, para. 440.
[782] *Čelebići* Appeal Judgement, para. 256. *See* Chapter III (B) (3) in this Judgement.
[783] Trial Judgement, para. 465.

requests,[784] the testimony of Witnesses HH,[785] and Baggessen,[786] and the Appellant's admission that he had a duty to report any abuse committed by a soldier to the soldier's commander.[787]

378. Witness Baggesen testified that the only one who had command over the Military Police was the Appellant. He referred to an incident in which the Appellant was able to secure the release of General Džemal Merdan (Deputy Commander of the ABiH 3rd Corps based in Zenica) who had been detained by the commander of the Travnik Military Police.[788]

379. During the hearing on appeal, Counsel for the Prosecution stated that the Trial Chamber "noted the testimony of Witness Baggesen but it did not adopt it," and submitted that the Trial Chamber's assessment of the Appellant's effective control over the Military Police "was confirmed by several elements on the record and they are cited in paragraph 463 of the [Trial] [J]udgement."[789]

380. The Appeals Chamber considers that the "several elements" referred to by the Prosecution are in fact references to Witnesses HH and Baggesen whose testimony was relied upon heavily by the Trial Chamber. The Appeals Chamber cannot speculate as to what are the "several elements" cited in the said paragraph, since the Trial Judgement cites only the testimony of those two witnesses. In this regard, the Appeals Chamber recalls that the degree of flexibility that must be accorded to a Trial Chamber in setting out its reasoning is always limited by the obligation to provide a reasoned explanation of its decision, which is a matter of fundamental fairness for all the parties concerned.[790]

381. The Appeals Chamber concludes that on the basis of the relevant evidence before the Trial Chamber, and in particular the Appellant's admission that troops from the Military Police could be attached to him for *ad hoc* missions pursuant to specific requests,[791] a reasonable trier of fact could have concluded, as the Trial Chamber did, that the Appellant had "command authority" over the Military Police.

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[784] Trial Judgement, paras. 459-460.
[785] The Trial Judgement stated that Witness HH testified that Paško Ljubičić never refused to carry out any of the Appellant's orders. T 6917 (25 Feb. 1998) (Closed Session).
The Appeals Chamber notes that Witness HH testified that all the knowledge that he had about the command relationship between the Appellant and Paško Ljubičić came directly from Paško Ljubičić, but that he never saw any decrees or commands of higher level bodies regarding their mutual relationship. He also testified that Paško Ljubičić told the members of the 4th MP Battalion that that they should execute all orders received from the Appellant and his staff. AT 6911 (25 Feb. 1998) (Closed Session).
Witness HH also testified that even though he never saw orders addressed to Ljubičić issued by the Appellant, he knew that Paško Ljubičić never refused to carry those orders out, because the 4th MP never refused to carry out any commands addressed to them. T 6917 (25 Feb. 1998) (Closed Session).
[786] Trial Judgement, para. 463.
[787] Trial Judgement, paras. 464, 465.
[788] T 1905-1907 (22 Aug. 1997).
[789] AT 707-708 (16 Dec. 2003).
[790] *Kupreškić* Appeal Judgement, para. 224.
[791] Trial Judgement, para. 459; *see also* para. 460.

382. The Appeals Chamber turns now to determine whether in light of the trial evidence assessed together with the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to whether the Appellant had effective control over the Military Police.

383. Certain portions of Exhibit 36 to the Second Rule 115 Motion, the testimony of General Merdan in the *Kordić and Čerkez* case, are relevant to the finding of the Trial Chamber, contained in paragraph 463 of the Trial Judgement, regarding the Appellant's effective control over the Military Police. In that paragraph, the Trial Chamber appears to have relied upon the Appellant's intervention when General Merdan was abducted by the commander of the Travnik Military Police, as evidence that the Appellant had effective control over the Military Police:

> …According to witness Baggesen, "the only one who had command over the Military Police was Mr. Blaškić." That witness testified to the attempt by the Commander of the Travnik Military Police to abduct Dzemo Merdan as a protest against the slowness of the inquiry carried out into the abduction of four officers of the Stjepan Tomašević brigade. When requests made by UNPROFOR and the ECMM remained unsatisfied, the commander in question abandoned this forthwith after receiving an order by telephone from the accused.[792]

384. Exhibit 36 to the Second Rule 115 Motion recounts General Merdan's arrest and the conditions surrounding his release. His account is that after speaking to the Appellant on the phone, the Military Police officer refused to comply with the Appellant's orders and would not release General Merdan, who stated that they were waiting for consultations with somebody else.[793]

385. The Appeals Chamber finds that the additional evidence referred to above shows that Witness Baggesen's account was mistaken, and confirms that the Military Police commander who detained General Merdan refused to carry out the Appellant's order for his release.

386. The Appeals Chamber further considers that evidence admitted on appeal indicates that members of the Military Police were involved in criminal activities. For instance, Exhibit 8 to the First Rule 115 Motion, a report prepared on 18 February 1993 by the HVO Defence Department, discusses the formation of Kordić's and Koštroman's "criminal group" headed by Šlišković. It describes the special police force as "a private police force of Kordić and Koštroman" and states that their conduct "greatly compromised the HVO."

387. Exhibit 102 to the First Rule 115 Motion, a report from the Croatian Democratic Union of Busovača to the Information Security Service, dated 18 November 1992, discusses the criminal activity of special units of police controlled by Slišković. The document gives the impression that

[792] Trial Judgement, para. 463 (footnote omitted).
[793] Ex. 36 to the Second Rule 115 Motion, pp. 12,866-12,867. This account was confirmed by the testimony of Witness BA3, AT 375-376 (9 Dec. 2003) (Closed Session).

units controlled by Sliškovic were not under the control of the HVO or other civilian authorities and were acting according to their own criminal agenda, at least in July 1992. The document states that at the beginning of the war, the Military Police in Busovača consisted of a large number of people of dubious backgrounds, and recounts that complaints had been made by citizens and soldiers about the work of some of the members of the Military Police.

388. Exhibit 84 to the First Rule 115 Motion, a report signed by Valentin Ćorić and sent to Mate Boban, the President of HZ H-B on 9 March 1993, provides information on the activities of the Military Police units and points out the main problems regarding its work, namely, the malfunctioning of the municipal authorities and the HZ H-B legal system; numerous attempts by the civilian authorities to interfere in the affairs of the Military Police; conflicts between military and civilian authorities; lack of professionalism and nepotism; and numerous cases of seizing business premises and apartments with the blessing of local authorities in Mostar and Central Bosnia.

389. Exhibit 85 to the First Rule 115 Motion, an order issued by the Appellant on 6 May 1993, addressed to the commander of the 4th MP Battalion, instructs that an investigation be conducted to determine which members of the unit had forcibly moved into apartments owned by Muslims or jointly owned by Muslims and Croats and requests that Ljubičić issue an order to his subordinate units prohibiting such behavior. The order states that the commander of the 4th MP Battalion would be held personally responsible for the implementation of the order.

390. In addition, the following evidence suggests that the Military Police enjoyed the protection of, and often acted on orders of others.

391. Exhibit 10 to the First Rule 115 Motion, a report from the Croatian Defence Council to Miroslav Tuđjman prepared on 4 December 1993, states that, with respect to Busovača, Ignjac Koštroman, *inter alia*, was involved in almost all illegal activities, serving as "the commanders and ideological leaders, and Ante Slišković and Paško Ljubičić were leading executors of their ideas." The report also states that: "70% of the Busovača military policemen are criminals which cannot be commanded or controlled."

392. Exhibit 14 to the Fourth Rule 115 Motion, an ABiH report regarding the relations with HVO units and the conflict in Busovača dated 26 January 1993 at 2354 hours, notes that information had been obtained from captured HVO members that Slišković was the "prime mover" of the "special police." It further states: "Alongside Slišković in the leadership are Vlado Cosić and Zarko Milić (supported by Dario Kordić)." This report refers to the fighting in the Busovača municipality, particularly in Kaonik and Kaćuni.

393. Further, the Appeals Chamber has heard evidence on appeal which reveals that the Military Police units, including the Jokers, were not *de facto* commanded by the Appellant.

394. For instance, Witness BA 1 testified that generally speaking, the military police are attached to the main-line combat unit; therefore, the commander of the operational zone would have administrative responsibilities but not overall operational control; for example, drawing upon an American parallel, the commander of the operational zone would be able to direct the military police to control the traffic, roads, and the like, but would have no responsibility for operational deployment, or offensive actions. He stated that generally speaking, paramilitary units such as the Jokers would fall under the central government authority, *i.e.,* the Ministry of Interior or the Ministry of Defence, but not directly under the authority of the military command of an operational zone. He also stated that special purpose units would have a command relationship with the central government ministry in Grude or Mostar.[794]

395. Witness Philip Watkins, a retired British military officer who worked with the ECMM at the relevant time in Bosnia, provided evidence regarding the Appellant's lack of control over the Jokers. He testified, based upon information obtained from UNPROFOR, the local staff working with the ECMM, drivers, interpreters, and ABiH officers, that the Jokers reported to Kordić.[795] Witness Watkins also confirmed a statement provided to the Prosecution in June 1996 where he recounted an incident that took place when leading the Convoy of Joy, a humanitarian convoy.[796] Witness Watkins had been personally involved, along with Alastair Duncan, the commander of BRITBAT forces, in negotiations to allow the free passage of the convoy. The Appellant had given clearance for the passage of the convoy through the Tuzla pocket; however, the Jokers who were manning the checkpoint, stated that they would only accept the authority of Kordić. It was not until the arrival of Kordić at the checkpoint and his personal intervention that the convoy was allowed to pass on through the Tuzla pocket.[797]

396. Witness BA2 testified that Paško Ljubičić told him that Military Police officers did not have any obligations towards the Appellant, since their headquarters were in Mostar and they had Kordić's support.[798]

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[794] AT 176, 177 (8 Dec. 2003) (Closed Session).
[795] Q. "Was your view an outsider view or was your view on this very important subject commonly held among the ECMM monitors and professional staff? [A.] I would describe it as conventional wisdom that those were reporting to Kordić." AT 295, (9 Dec. 2003).
[796] Ex H1, p. 6.
[797] AT 347-348 (9 Dec. 2003).
[798] AT 225-226 (8 Dec. 2003) (Closed Session).

397. Witness BA3 testified that whenever he had to pass through checkpoints manned by the Military Police, the *laissez-passer* issued by the Appellant would not be recognized as valid as opposed to the *laissez-passer* issued by Kordić which would enable him to pass through the checkpoints.[799] With respect to the special units of the Military Police, and specifically the Jokers, he stated that based on his experience, it was not possible that they were under the Appellant's command, and that this was also the general view of the 3rd Corps of the ABiH Army. He also testified that the commander of the 4th MP Battalion and special units of the Military Police, Paško Ljubičić, received orders directly from Slišković and Kordić.[800]

398. Witness BA4 testified that acting under the control of Kordić and following Slišković's orders, some members of the Jokers and the Military Police terrorized the Muslims in January 1993 in Busovača, and engaged in looting.[801] He concluded that the Jokers primarily reported to Slišković who in turn reported to Kordić.[802]

399. In addition, evidence admitted on appeal bolsters the conclusion that the Appellant's authority was not recognized by the members of the Military Police, and that his orders were not carried out, as shown above.

400. For instance, Exhibit 1 to the Second Rule 115 Motion (MUP Report) states that since the Appellant demanded strict discipline from the local commanders, the latter refused to carry out the Appellant's orders. The report states that Paško Ljubičić, the commander of the 4th MP Battalion and his deputy Vlado Ćosić, enjoyed relative independence *vis-à-vis* the Appellant in leading their units and planning operations.[803] This report states that several special units, among them the Jokers, were actually commanded by Kordić,[804] and that the Military Police was not commanded by the Appellant but by the Military Police Administration in the Ministry of Defence.[805]

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[799] AT 377-378 (9 Dec. 2003) (Closed Session).
[800] AT 380 (9 Dec. 2003) (Closed Session.)
[801] AT 485 (10 Dec. 2003).
[802] AT 495-496 (10 Dec. 2003).
[803] Ex. 1 to the Second Rule 115 Motion, p. 7.
[804] *Ibid.,* p. 8. *See* relevant portions which read as follows:

> …The first commander of the military component of the HVO in Central Bosnia was Paško Ljubičić…In Central Bosnia there were four HVO military formations territorially deployed in Kiseljak, Vitez, Žepče and Vareš. These military formations were manned mostly by volunteers and the local population. As a rule they were poorly armed, completely lacked any military organisation and were not coordinated among themselves. The commander of the military formation based in Kiseljak was Ivica RAJIĆ, in Žepče it was Ivo LOZANČIĆ, in Vitez it was Paško LJUBIČIĆ, while in Usora it was JELAČA. According to some of our intelligence, the headquarters were not in Usora but in Sarajevo, and were headed by a man named Slavko. Of the aforesaid commanders of operative groups, only the commanders of Usora and Žepče really obeyed BLAŠKIĆ's orders.

The following special units, which were formally under the command of the Assistant Minister for Special Units in the Ministry of Defence of the HR HB Ivica PRIMORAC, but were actually commanded by Dario KORDIĆ, were active either permanently or temporarily in Central Bosnia:

The Convicts Battalion, under the command of Mladen NALETILIĆ aka TUTA, whose sub-unit in Mostar was led by Vinko MARTINOVIĆ aka Štela.

The *Maturice,* under the command of Dominik ILIJAŠEVIĆ aka Coma, who were active in Kiseljak.

The *Vitezovi* /Knights/, who operated in the Vitez area under the command of Darko KRALJEVIĆ.

The *Jokeri* /Jokers/, under the command of Anto FURUNDŽIJA.

The *Žuti*/ Yellow / unit under the command of Žarko ANDRIĆ aka Žuti.

The *Apostoli* /Apostles/, a unit from the Travnik area which withdrew to Kiseljak, under the command of Marinko ŠUNJIĆ. (p. 8).

The Jokeri/Jokers

The Jokeri unit was a civilian police unit akin to special police or an antiterrorist unit. They were quartered in the so-called "Bungalow", a small motel near Vitez. The unit mostly consisted of young men from Vitez and Travnik. According to some sources (for example Blaženko RAMLJAK), before the events in Ahmići this unit did not participate in any military operations but engaged in looting abandoned Muslim houses and flats in the towns, seizing vehicles and committing other crimes. Some sources state that KORDIĆ mostly recruited prison convicts into this unit, and in exchange for being released from prison they had to swear that they would carry absolutely all orders. (emphasis added)

There are some contradictions in statements about who commanded the Jokeri unit, because according to KOŠTROMAN they were under Darko KRALJEVIĆ's command, while other intelligence indicates that the commander was Anto FURUNDŽIJA. KOŠTROMAN is probably trying to pin the blame for the crime on KRALJEVIĆ (according to the available information, KRALJEVIĆ and his unit did not participate in the attack, just a small number of volunteers whom KORDIĆ and the others recruited on the eve of the attack.)…(p. 9).

[805] *Ibid.,* p. 9. *See* relevant portions which read as follows:

The Military Police

At the end of 1992 the Military Police was established. The Central Bosnia area was covered by the 4th Military Police Battalion, which consisted of five companies and eight independent brigade platoons. The entire battalion and the companies were not commanded by the commander of the OZ/ Operative Zone/ or a brigade commander, but by the Military Police Administration at the Ministry of Defence. The independent brigade platoons were commanded by the brigade commanders, i.e. the commanders of the units into which the platoons had been integrated.

The Military Police was restructured in January 1993 so that the brigade platoons were disbanded and three Military Police companies were formed. The entire battalion and the companies were not commanded by the commander of the OZ or a brigade commander, but the Military Police Administration. The chief of the Military Police Administration was Valentin ĆORIĆ.

…The first commander of the Military Police was Milijov PETKOVIĆ and the chief of SIS was Ante Slišković. Tihomir BLAŠKIĆ was not happy about the establishment of these formations because they were outside his control and he did not command them; they were under the command of the Command of the Ministry of Defence of the HV/? [*sic*] Croatian Army/, and the HVO Main Staff… (p. 9).

401. The Trial Chamber further held that:

> since [the Appellant] had reason to know that crimes had been, or were, about to be, committed, as the hierarchical superior of the forces in question, the accused was bound to take reasonable measures to forestall or prevent them […] the Trial Chamber considers that the accused knew that crimes had been or were about to be committed and took no action as a consequence. [806]

402. The Trial Chamber did not believe the Appellant's argument that he was unaware - until 22 April 1993 - of the crimes that had been committed against civilians as he was trapped in the basement of the Hotel Vitez.[807] The Trial Chamber relied on witnesses who testified that they tried to see the Appellant on 16 April 1993 and were told that no one was there,[808] the fact that at least two of the Appellant's colleagues were able to leave the Hotel Vitez, and evidence that the HVO repeatedly tried to keep foreigners from visiting the village.[809]

403. The Trial Chamber noted that members of the ECMM witnessed signs of fighting coming from the direction of the village, and expressed disbelief that ABiH forces were located in Ahmići.[810] The Trial Chamber concluded that the sounds of gunfire and smoke arising from the area of Ahmići must have alerted the Appellant to the crimes being committed.[811]

404. The Appellant argued that even if he had noticed the sounds of gunfire and smoke arising from the direction of Ahmići, he would have had no reason to believe they were evidence of anything but lawful military combat. The Appeals Chamber notes that it has already concluded that trial and additional evidence support the conclusion that there was a Muslim military presence in Ahmići, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmići-Šantići-Dubravica axis.

405. The Appeals Chamber has stated earlier in this judgement, that the Trial Chamber erred in its interpretation of the mental element "had reason to know," and has held that the interpretation of the "had reason to know" standard shall remain the one given in the *Čelebići* Appeal Judgement.[812] Therefore, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant had reason to know that crimes had been committed in the Ahmići area on 16 April 1993.

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[806] Trial Judgement, para. 477.
[807] Trial Judgement, para. 478.
[808] Trial Judgement, para. 479.
[809] Trial Judgement, para. 482. Witness Stewart, T 23,746 (17 June 1999) (testifying that HVO soldiers tried to keep him from entering Ahmići on 22 Apr. 1993); Witness Baggesen, T 1929-1932 (22 Aug. 1977) (testifying that the HVO roadblock prevented them from entering the village of Ahmići on 16 April); Witness Akhavan, T 5285 (15 Dec. 1997) (testifying that the U.N. Commission on Human Rights team was shot at when it attempted to investigate Ahmići on 2 May 1993); *see also* Ex. P184, para. 4.
[810] Trial Judgement, paras. 404, 407-409.
[811] Trial Judgement, para. 479.
[812] *See* Chapter III (B) (2) of this Judgement.

406. In this regard, the Appeals Chamber considers that the mental element "had reason to know" as articulated in the Statute, does not automatically imply a duty to obtain information. The Appeals Chamber emphasizes that responsibility can be imposed for *deliberately* refraining from finding out but not for negligently failing to find out.[813]

407. The analysis of the evidence underlying the Trial Chamber's finding that the Appellant knew that crimes had been or were about to be committed, reveals no evidence that the Appellant *had information* which put him on notice that crimes had been committed by his subordinates in the Ahmići area on 16 April 1993.

408. Further, the additional evidence admitted on appeal lends support to the Appellant's argument that he had no reason to believe that crimes had been committed in light of the military conflict taking place at that time between the HVO and the ABiH.

409. Exhibit 2 to the Second Rule 115 Motion, an ABiH 3rd Corps Security Report dated 16 April 1993, issued by the 7th Muslim Brigade and addressed to the 3rd Corps Security Sector, shows that all units of the 7th Muslim Brigade were in a state of readiness. The report recounts that fierce fighting was taking place in Ahmići.[814]

410. Exhibit 12 to the Fourth Rule 115 Motion, an Order issued by the 3rd Corps Commander, Enver Hadžihasanović, addressed to the Lašva Operative Group and the 325th Mountain Brigade on 16 April 1993, shows that there were ABiH troops deployed in Ahmići on that date. The order

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[813] *See* Chapter III (B) (2) of this Judgement.

[814] *See* relevant parts of the report which read as follows:
…Given the deterioration of relations between the BH Army and HVO Croatian Defence Council units in Zenica and other parts of Central Bosnia, and in accordance with the orders issued, all units of the 7th Muslim Brigade are in a state of readiness.
…7th Muslim Brigade units stationed in Zenica are located at the barracks, and under order strictly confidential no 332/93 of 15 April 1993, soldiers and officers are forbidden from leaving the grounds of the barracks without special permission.
…at 0600 hours on 16 April 1993 an artillery attack was launched on Vitez- on parts of the town inhabited by Muslims. The villages of Vranjska, Večerska and Ahmići were shelled. Fierce fighting is going on in Ahmići, and Army members have been forced to retreat to reserve positions.

states that the 1st Battalion of the 303rd Mountain Brigade and the 7th Muslim Mountain Brigade had been tasked with assisting ABiH forces present in Ahmići.[815]

411. Witness BA3 testified that the ABiH 3rd Corps received information about a major crime being committed in Ahmići only 10 to 15 days after 16 April 1993, and stated that during meeting held in Zenica on 21 April 1993,[816] attended by the Appellant and the ABiH 3rd Corps chiefs of staff, the chiefs of staff still did not know about the crimes committed in Ahmići.[817]

412. The Trial Judgement further addresses the attempts made by the Appellant to carry out an investigation of the crimes,[818] noting that even when he was appointed HVO Deputy Chief of Staff

[815] *See* relevant parts which read as follows:

> In accordance with the unfolding events and in connection with the attack by HVO/Croatian Defence Council/ units on units of the BH Army in the zone of responsibility of the 325th bbr and the newly arisen situation, the Corps Command is taking measures with the aim pf assisting our forces and tying down the HVO forces. In the spirit of the Commander's decision, the following orders have been issued:
>
> …the 1st Battalion of the 303rd Mountain Brigade has been sent to Kuber….with the task to organize the defence …and be in readiness to assist our forces in the villages of Putis, Jelinak, Lončari, Nadioci and Ahmići.
>
> The document also recounts that 7th Muslim Mountain Brigade:
> …has been sent to the Ahmići village sector with the task to organize and carry out a march and arrive in the Ahmići village sector, where it is to assist our forces in the defence and organize the defence and be in readiness to carry out an infantry attack on the Ahmići – Šantići – Dubravica axis.

[816] This meeting is referred to in paragraph 481 of the Trial Judgement.

[817] AT 386-387 (9 Dec. 2003) (Closed Session). Witness BA 3 also testified that on 16 April 1993, when he reached the crossroads of the main road running from Busovača towards Vitez near Ahmići in an armed warrior, he could infer that a conflict of some scale was taking place but did not come to the conclusion that a massacre was committed in Ahmići. AT 389-390 (9 Dec. 2003) (Closed Session).

In cross-examination pursuant to Rule 90(H) of the Rules, the Prosecution suggested (without success) that in an attempt to assist the Appellant's case, Witness BA 3 lied about the date when he found out about the Ahmići massacre. Counsel for the Prosecution referred to reports from the 3rd Corps dated 17 and 18 April 1993, regarding the massacre but made no reference to specific documents. Witness BA 3 responded that even though the ABiH had available information that the village was on fire, it was impossible to ascertain on those dates the number of people killed and whether war crimes had been committed. AT 423-424 (9 Dec. 2003) (Closed Session).

Counsel for the Prosecution submitted that as of the night of the 17th or the morning of 18 April 1993, Witness BA3 was in a position to know about the crimes committed in Ahmići. The Prosecution relies on Ex. 22 to the Fourth Rule 115 Motion (ABiH combat report from the commander of the 3rd Corps dated 17 April 1993, sent on 18 April 1993 to the RBH OS/ Armed Forces/ Supreme command staff) which informs that HVO soldiers had attacked the ABiH in the terrain around Vitez and that the population in Ahmići had been massacred. AT 752-754 (17 Dec. 2003).

[818] Trial Judgement, para. 492.

[819] Trial Judgement, para. 493. Where the Trial Chamber notes that the 26 November 1993 SIS report is the "item of evidence most likely to exonerate [the Appellant]." This report has been admitted pursuant to Rule 115 as Ex. 1 to the First Rule 115 Motion (SIS Report).

in 1994, he did not manage to recover the SIS report on Ahmići.[819] Yet, the Trial Chamber found as follows:

> …. In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them.[820]

413. The Trial Chamber had concluded that it is a commander's material ability that determines which are the reasonable measures required, either to prevent a crime or to punish a perpetrator, and held that, a commander may discharge his obligation to (prevent or) punish by reporting the crimes to the competent authorities.[821]

414. The Appellant thus was not obliged to issue orders concerning further investigations or able to take disciplinary measures himself. However, the Trial Chamber also noted that no one was ever punished by the HVO for crimes committed in Ahmići, Šantići, Pirići, and Nadioci.[822] The Appeals Chamber finds some guidance in paragraph 488 of the Trial Judgement regarding those "reasonable measures" not taken by the Appellant. [823]

415. The Trial Chamber rejected the Appellant's claim that he sought the help of international organizations such as the ECMM and UNPROFOR to carry out the investigations regarding Ahmići.[824] It appears that in reaching that conclusion, it relied heavily upon the testimony of Colonel Duncan from the BRITBAT, who testified that during a meeting, the Appellant explained to him that:

> …the crimes committed at Ahmići had been carried out either by Muslims wearing HVO uniforms or by Muslim extremists who were out of control, or even by Serbs who could have infiltrated the HVO controlled zone.[825]

416. During the hearing on appeal, the Prosecution referred to this statement allegedly made by the Appellant.[826] In reply, the Appellant stated that Duncan had misidentified the Appellant. [827] Witness Stewart, who was also present at the meeting, testified that the Appellant would have never made such a statement, and confirmed that it was another individual who made that claim.[828]

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[820] Trial Judgement, para. 495.
[821] Trial Judgement, para. 335. *See also* para. 302.
[822] Trial Judgement, para. 494.
[823] The Trial Chamber emphasizes that the Appellant failed to contact the commander of the Military Police, Paško Ljubičić; he did not take any measures to seal off the area and ensure that evidence was preserved; he did not order an autopsy on any body before it was buried; and he did not attempt to interview any survivors although they were detained at the school in Dubravica.
[824] Trial Judgement, paras. 489, 490, 491.
[825] Trial Judgement, para. 490.
[826] AT 775-776 (17 Dec. 2003).
[827] AT 793-794 (17 Dec. 2003).
[828] T 23810-23812, Witness Stewart (17 June 1999). *See also* Final Trial Brief, p. 333.

417. The Appeals Chamber considers that even though a determination of the necessary and reasonable measures that a commander is required to take in order to prevent or punish the commission of crimes, is dependent on the circumstances surrounding each particular situation, it generally concurs with the *Čelebići* Trial Chamber which held:

> [i]t must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.[829]

418. Evidence admitted on appeal supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmići be carried out, and that the investigation was taken over by the SIS Mostar. For instance, Exhibit 1 to the Second Rule 115 Motion (SIS report), states that the Appellant asked Slišković to carry out an investigation of the events which occurred in Ahmići so that he could send a report to Mostar. This document states that Slišković allegedly conducted the investigation inefficiently, and obstructed it.[830]

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[829] *Čelebići* Judgement, para. 395.

[830] Ex. 1 to the Second Rule 115 Motion. *See* the following parts:

> …Tihomir BLAŠKIĆ told Ante SLIŠKOVIĆ, chief of the SIS for the Central Bosnia Military District, to carry out an investigation into the incident so that he could send a report to Mostar. SLIŠKOVIĆ however, allegedly obstructed the investigation, repeating the theory about the involvement of the Serbs, Muslims and the British "staging" the crime.
>
> After the Military Police unit had committed the crime in Ahmići, of which BLAŠKIĆ informed Darijo KORDIĆ by telephone, BLAŠKIĆ asked for a report into the incident, which was compiled and signed by Vlado ĆOSIĆ on behalf of Paško LJUBIČIĆ who was the commander of the Military Police. According to the information available, the report does not mention the crime, only the fighting.
>
> There is allegedly a report into the incident at Ahmići from Ivo LUČIĆ which was sent to the Assistant Minister for Security in BH, and an analytical report by the HIS. These reports are, apparently, incomplete and are only reconstructions of the incidents or summaries of more extensive reports, which should be in the SIS HZ HB/Croatian Community of Herceg-Bosna/archive. (p. 14)
>
> The Croatian political leadership had mainly accurate information at its disposal about the extent of the crime, its circumstances, victims, perpetrators, etc…
>
> …On the other hand, based on the premise that the RH is in no way guilty for the war in BH that blame lies entirely with the Muslims and Serbs, and that the international community offered no support to RH, the SIS RH began an investigation into the crimes committed by Muslims and Serbs against Croats in BH. In order to corroborate these crimes, documentation from BH was delivered to the RH and people were prepared for possible testifying in trials in The Hague. Identification papers and other such items were procured for individuals who came to the RH (by *Lora,* the SIS in Split). However, it is obvious that the analysis for the crime in Ahmići was conducted in parallel and that the documents which are now stored in the offices of the SIS in Split were also transferred from BH to the RH.

419. The Appeals Chamber has admitted as additional evidence on appeal documents that contain information on those allegedly responsible for the crimes committed in the Ahmići area; this evidence supports the conclusion that the Appellant was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him. For instance, Exhibit 4 to the First Rule 115 Motion, an HIS Report dated 17 February 1994, addressed to Franjo Tuđjman (then President of the Republic of Croatia), signed and stamped on 18 February 1994 by Miroslav Tuđjman, Head of the Croatian Information Service, states that others were responsible for the crimes in Ahmići, the poor organization of production in the Vitez Slobodan Princip Seljo plant, and the destruction of invaluable documents.[831]

420. The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmići be carried out, that

> …The first signs of involvement of individual parts of the Croatian intelligence services in the events and investigation into Ahmići were obvious soon after it became apparent that the BH SIS, that is Ante SLIŠKOVIĆ, was conducting the investigation inefficiently…
>
> …Ante GUGIĆ was also in the areas and later complied an expert report in which there are no details of either the perpetrators or the circumstances of the crime. At the beginning of 1997 operations were started regarding monitoring the trial of General BLAŠKIĆ on the basis of an agreement between the then head of the HIS, M. TUĐMAN, and the chief of the HIS Department of Operations Ivo LUČIĆ. It was planned that this operation would be led by the RH Ministry of Defence, meaning the SIS, and that the MUP/Ministry of the Interior/ and the RH Ministry of Justice would assist the SIS as necessary. However, this was not implemented and the operation remained under the SIS which nominated Ante SLIŠKOVIĆ as special coordinator for gathering information about people who could be used as witnesses in the trial of BLAŠKIĆ. According to unconfirmed information, the HIS also participated in this operation and having processed this information sent its anlyses [*sic*] to the SIS. (p. 15)
>
> …At the end of September 1998 the lawyer Anto NOBILO began his case for the defence in the trial of General BLAŠKIĆ, and soon sought documentation from the SIS which might be of use to the defence, particularly regarding events in Ahmići. However, the SIS did not send the documentation he requested, explaining that the requested investigation report did not exist because no investigation had been carried out.
>
> …While working with witnesses according to unconfirmed information, the SIS coordinator obstructed the work of advocate NOBILO because he had attempted to prove the existence of a parallel chain of command, which did not suit Darijo KORDIĆ or the people devoted to him since he was deputy to Mate BOBAN, who in turn took his instructions from the HDZ leadership in Zagreb, whose connection to events in BH it was wished to conceal. Because of the aforementioned problems with the SIS coordinator, NOBILO said in public that there were secret indictments from the Hague Tribunal against Paško Ljubičić and Ante Slišković, after which Slišković "disappeared." (p. 16)

[831] Ex. 4 to the First Rule 115 Motion, p. 2. *See also* Ex. 13 to the First Rule 115 Motion, and Ex. 1 to the First Rule 115 Motion, which informs that the attack on Ahmići was carried out by the *Jokers* under the command of Vlado ĆOSIĆ and the commander of the regional Military Police Paško LJUBIČIĆ, and also by an attached squad of criminals who had been released from the Kaonik prison and included in combat operations.

the investigation was taken over by the SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.

421. For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmići area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.

422. In light of the foregoing, the Appeals Chamber is not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal, proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in Ahmići, Šantići, Pirići, and Nadioci on 16 April 1993 or to punish the perpetrators.

VIII. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN OTHER PARTS OF THE VITEZ MUNICIPALITY

A. Preliminary issues

423. The main argument of the Appellant is that the Trial Chamber erred by attributing crimes associated with military action in the Vitez Municipality to the Appellant as a superior officer of the HVO in the area, and that this was a case of applying the standard of strict liability.[832] On the other hand, the Appellant never disputes that "he had de jure authority to command regular HVO troops in Central Bosnia, generally, or that he ordered certain military actions in the Vitez Municipality in 1993".[833] The issue before the Trial Chamber, he contends, was whether he issued illegal orders.[834] The Appellant argues that the Trial Chamber confused the ordering of lawful action with the ordering of criminal acts, and that the fact that he ordered legitimate military action is not probative of the question whether he ordered the commission of crimes during the military action.[835]

424. The Prosecution notes that the Appellant was found guilty of ordering the attacks on Vitez and Stari Vitez on 16 and 18 April, and 18 July 1993, and for failing to prevent the crimes or to punish the perpetrators.[836] The Prosecution argues that the Appellant misconstrues the finding of the Trial Chamber concerning the hostilities in the Vitez Municipality that the HVO troops initiated a widespread and simultaneous attack throughout the CBOZ on the morning of 16 April 1993.[837]

425. The Appeals Chamber will consider two preliminary issues. First, the Appeals Chamber has to determine whether the Trial Chamber found the Appellant guilty on the basis of his command position alone. The Appeals Chamber notes that the Trial Chamber found him guilty for ordering certain crimes, and for failing to prevent the crimes or to punish the perpetrators after the commission of the crimes. Neither finding, however, can stand on the sole ground that he was the commander of the perpetrators, because each finding required proof of certain elements such as the *actus reus* and the *mens rea* of the commander. The Appeals Chamber does not, therefore, accept

[832] Appellant's Brief, pp. 56-57. This ground of appeal was part of the second ground of appeal in the Appellant's Brief.
[833] Appellant's Brief, p. 57.
[834] *Ibid.*
[835] Brief in Reply, para. 41.
[836] Respondent's Brief, para. 2.197.
[837] Respondent's Brief, para. 2.212.

the argument of the Appellant that the Trial Chamber found him guilty on the sole basis of his command position in the CBOZ.

426. Second, the Appeals Chamber considers that the Trial Judgement seems to have treated the relevant attacks as unlawful military actions *per se*. That is, the Trial Chamber found that the attack of 16 April 1993 on the town of Vitez including Stari Vitez, the lorry bombing in Stari Vitez of 18 April 1993, and the attacks on Stari Vitez on 18 July 1993 were crimes against humanity.[838] The Appeals Chamber notes that the Trial Chamber would appear to have found that the attack of 16 April 1993 was a war crime, because:

> …it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez. In the event that there had been, the devastation visited upon the town was out of all proportion with military necessity.[839]

This reading of the Trial Judgement seems to be borne out by the conviction of the Appellant on Count 12 of the Indictment, charging devastation not justified by military necessity.

427. The Appeals Chamber notes the finding of the Trial Chamber that an armed conflict began between the HVO and ABiH forces in the Vitez municipality in April 1993,[840] and that "the three attacks described above targeted the Muslim civilian population and were not designed as a response to a military aggression."[841] It is not clear whether, in the view of the Trial Chamber, the three attacks would have been regarded as lawful if they had been launched in response to a military aggression.[842] In any case, the Appeals Chamber considers that, in the context of this armed conflict which had been in the making for some time, involving both sides,[843] the issue as to which side *initiated* the conflict is irrelevant for the purposes of determining the nature of its actions during the conflict.[844] What concerns the International Tribunal is whether crimes were committed during the conflict and by whom. The Appeals Chamber therefore considers it reasonable to draw a distinction between a lawful military action during which certain crimes might have occurred without the commander ordering their commission, and an unlawful military action which, ordered by the commander, itself constitutes a crime.

428. In the following sections, the Appeals Chamber will deal with the issue of the criminal responsibility of the Appellant in relation to each of the attacks which the Appellant has been found

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[838] Trial Judgement, paras. 502 and 507.
[839] Trial Judgement, para. 510.
[840] Trial Judgement, para. 497.
[841] Trial Judgement, para. 507. The three attacks were referred to the events of 16 April, 18 April, and 18 July 1993.
[842] There was evidence on appeal showing that the Croatian side was on the defensive in Central Bosnia at least from May through October 1993: Witness Watkins, AT 357-358 (9 Dec. 2003).
[843] Trial Judgement, paras. 343-356.
[844] This disposes of an argument in this vein by the parties: Appellant, AT 616 (16 Dec. 2003); Prosecution, AT 731-734 (16 Dec. 2003).

guilty of ordering. While being cognizant of the act of ordering with intent, the Appeals Chamber reiterates the standard it has set out above, that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. In addition, the Appeals Chamber will also consider, where appropriate, the issue of the criminal responsibility of the Appellant for crimes committed in those attacks in terms of Article 7(3) of the Statute.

B. The Appellant's responsibility under Article 7(1) of the Statute

1. The attack on the town of Vitez on 16 April 1993

(a) The role of the Appellant

(i) The indicia of planning

429. The Appellant submits that the Trial Chamber erred in inferring that he issued illegal orders because the military action in question was "well prepared".[845] In his view, additional evidence shows that the Vitezovi unit was not commanded directly by him.[846] He argues that it was the Vitezovi unit that committed the crimes.[847] He further argues that the movement of the HVO forces pursuant to his orders was due to an anticipated combat with the ABiH forces in the area, and not due to an order to commit the crimes.[848] The Trial Chamber, in his view, also erred in referring to the use of artillery as evidence that he issued illegal orders, since the crimes were not shown to have been committed by artillery and he was not the only person that could authorize the use of artillery.[849]

430. The Prosecution submits that the Appellant errs in his submissions for the following reasons: i) the Trial Chamber did not conclude that the Appellant issued illegal orders solely because it regarded the attacks as being well planned;[850] ii) the attacks occurred at a time when there were no hostilities between the ABiH and the HVO, and this shows that the attacks were planned for a purpose: to drive Muslims from the area;[851] iii) the Appellant's orders of 15 and 16

[845] Appellant's Brief, p. 58 and p. 59. *See also* Brief in Reply, para. 42.
[846] Appellant's Brief, p. 59.
[847] Appellant's Brief, p. 59.
[848] Appellant's Brief, p. 61.
[849] Appellant's Brief, pp. 59-60, 61-62.
[850] Respondent's Brief, para. 2.218.
[851] Respondent's Brief, para. 2.219.

April 1993 were found to be orders to attack;[852] and iv) the Trial Chamber found that artillery barrage including that of heavy artillery was inflicted upon Stari Vitez.[853]

431. The Appeals Chamber considers that the Appellant does not challenge the indicia of planning as relied on by the Trial Chamber in examining the attack of 16 April 1993 on the town of Vitez, but that he argues that he was convicted by the Trial Chamber on the basis of such indicia alone. The Appellant has misconstrued the findings of the Trial Judgement. The Trial Chamber did not convict him *merely* on the basis of the indicia of planning of the attack, because it also dealt with his control over the HVO troops and special units involved in the attack and his control of the artillery in the area.[854] The indicia of planning were used as *part* of the proof for the finding that the Appellant ordered the attack. It is noted that the Trial Chamber examined closely the way in which the attack was carried out by the HVO units. The Appeals Chamber considers, however, that the way in which the attack was carried out, consisting of two phases of artillery attack and then infantry assault,[855] cannot be relied on as proof as to who planned or ordered the attack, because it is just a standard military tactic.[856] The Appeals Chamber rejects the Appellant's submission that he was convicted by the Trial Chamber on the basis of indicia for planning alone.

(ii) The participation of the HVO troops in the hostilities

432. The Appellant submits that the Trial Chamber erred in basing its finding that he ordered the crimes against civilians simply on the evidence that the regular HVO troops participated in the hostilities, as no evidence shows that the troops committed the crimes in question and additional evidence shows that it was the Vitezovi unit that was responsible for the crimes.[857]

433. The Prosecution submits that the Trial Chamber found the Appellant to have had effective control over regular HVO units as well as the Vitezovi at the relevant time,[858] and that the Trial Chamber considered that the scale of the attacks made it impossible that only the Vitezovi unit was involved in the crimes or that the unit acted independently.[859]

434. The Appeals Chamber notes that the argument of the Appellant summarised above was already raised before the Trial Chamber.[860] The Appeals Chamber also notes that the Appellant has never denied that he held command over regular HVO troops in the CBOZ. In the view of the

[852] Respondent's Brief, para. 2.220.
[853] Respondent's Brief, paras. 2.221-2.222.
[854] Trial Judgement, para. 529.
[855] Trial Judgement, para. 503.
[856] Witness Watkins, AT 297 (9 Dec. 2003).
[857] Appellant's Brief, pp. 62-63. *See also* Supplemental Brief, para. 45.
[858] Respondent's Brief, para. 2.199.
[859] Respondent's Brief, para. 2.205.

Appeals Chamber, the issue here is whether the regular HVO units participated in the crimes relevant to this case. The Trial Chamber answered this issue in the affirmative,[861] but its premise was that the attack of 16 April 1993 was unlawful from the outset, constituting the crime of which the Appellant was found guilty. This premise is to be addressed in the next sub-section, and, before that is done, the Appeals Chamber will not conclude on this issue.[862]

(b) Was the town of Vitez a legitimate military target?

435. The Appellant argues that the Trial Chamber erred in finding that there was no strategic military reason to attack Stari Vitez on 16 April 1993, as considerable ABiH forces were stationed in Stari Vitez whose strategic importance was proved beyond doubt at trial.[863] He submits that trial and additional evidence show that the HVO was first attacked by the ABiH, contrary to the findings of the Trial Chamber.[864] The Appellant further submits that the witness testimony relied on by the Prosecution showed that Stari Vitez was a legitimate military target with the presence of ABiH soldiers, which was corroborated by others' testimony.[865] He also argues that the destruction of civilian property is not germane to the issue of whether a location is a legitimate military target, especially where, as here, soldiers were positioned in civilian houses.[866] Further, he argues that there is no requirement that a force be "considerable" to legitimise military action against it,[867] and that it would be unclear how many troops can justify the use of force.[868] Moreover, he submits that the fact that crimes were committed at other times cannot serve as proof beyond reasonable doubt that he ordered any crime; otherwise, strict liability would result because the Prosecution argues that the Appellant ordered the HVO to engage the ABiH in Stari Vitez as part of a general "persecution" plan.[869]

436. The Prosecution argues that a small ABiH unit was in Stari Vitez which had more than 1,600 civilians,[870] that there was no evidence at trial showing that Stari Vitez had defensive arrangements prior to the attacks by HVO,[871] and that only Muslim civilian property was destroyed in the attack.[872]

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[860] Trial Judgement, paras. 514 and 516.
[861] Trial Judgement, para. 516.
[862] *See* (b) below.
[863] Appellant's Brief, pp. 63-64, p. 65.
[864] Appellant's Brief, pp. 64-65.
[865] Brief in Reply, paras. 43-44.
[866] Brief in Reply, para. 45.
[867] Brief in Reply, para. 46.
[868] Brief in Reply, para. 46.
[869] Brief in Reply, para. 47.
[870] Respondent's Brief, para. 2.228.
[871] Respondent's Brief, para. 2.229.
[872] Respondent's Brief, para. 2.230.

437. In respect of the events on 16 April 1993, the Trial Chamber found that units of the ABiH army were present in the town of Vitez on that day.[873] The Trial Chamber further found that the ABiH units were the ones who were attacked that day, and it stated that this could be inferred from the following: i) there was no military installations, fortifications, or trenches in the town on the day; ii) at that time, the front line was fluctuating and changing daily depending on who the commanders of the opposing troops were; iii) prior to 16 April 1993, there had been no confrontation between the HVO and ABiH troops; iv) on 16 April 1993, "there were no reports of any military victims or of the presence of soldiers" of the ABiH Army; v) the Muslim side did not put up any defence and civilian houses were torched, which could not "in any circumstances" be construed as military targets; and vi) "the artillery was not aiming particularly at the front lines where most of the ABiH soldiers were".[874] The Trial Chamber concluded that "it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez".[875] It further stated that "the attack was designed to implement an expulsion plan, if necessary by killing Muslim civilians and destroying their possessions."[876] The Trial Chamber therefore considered the attack of 16 April 1993 to be unlawful, as it targeted the Muslim civilian population.[877] The Appeals Chamber accepts that a reasonable trier of fact could have reached this finding on the basis of trial evidence.

438. However, during the evidentiary phase of the appeal hearing, Witness BA5 testified that since October 1992, all ABiH units in the Vitez Municipality had been at an increased level of combat readiness, and that on the day of 16 April 1993, the TO had 280 men, of whom 200 to 220 had weapons, stationed in Stari Vitez.[878] Further, the men were quartered in, among other places, civilian houses, rather than trenches later developed along the separation line between the ABiH and the HVO forces in the town of Vitez.[879] The Appeals Chamber also notes that the Trial Chamber considered, in a later passage of the Trial Judgement, that it was not able to characterise

[873] Trial Judgement, para. 509.
[874] Trial Judgement, para. 509.
[875] Trial Judgement, para. 510.
[876] Trial Judgement, para. 510.
[877] Trial Judgement, para. 507.
[878] AT 514 (11 Dec. 2003). It should be noted that the "TO" had a military structure: AT 444 (10 Dec. 2003) (closed session), Witness BA3. *See also* Ex. 22-25, Fourth Rule 115 Motion: Exhibit 22 is an ABiH combat report, dated 17 April 1993. It notes that the ABiH had a detachment in the town of Vitez with 150 soldiers and approximately 50 military policemen; Exhibit 23 is an ABiH combat report of 19 April 1993, reporting that the ABiH set up a circular defence in the old part of the Vitez town, and had successfully repelled enemy's attacks; Exhibit 24 is an HVO Main Staff report for 17 April 1993, sent up to Mostar on 18 April l993. It reports that throughout the night, ABiH forces engaged in provocation and regrouping, and that in early morning, they launched combat operations to cut off and seize control of part of the Kaonik and Vitez road, thus encircling Busovača; and Exhibit 25 is a report from the ABiH 7th Muslim Brigade dated 18 April 1993. It reports that the brigade units overran certain HVO positions, including the HVO Command post, one of its units was fighting in Ahmići in cooperation with other ABiH units and local population, and the enemy suffered heavy losses and a large number of wounded.
[879] AT 545 (11 Dec. 2003). *See also* AT 515 (11 Dec. 2003), wherein Witness BA5 stated that his units used houses for defence purposes.

the attack on the village of Donja Večeriska as targeting the Muslim civilian population, because of the presence of a 40-person strong TO unit.[880] The Appeals Chamber considers that the question whether the town of Vitez was a military target was determined by, *inter alia*, the presence of the ABiH units that held, among other places, Stari Vitez on 16 April 1993. Evidence admitted at trial and on appeal also shows that the town of Vitez is at one end of the Vitez-Busovača road and attempts were made by the ABiH to cut it off.[881] Furthermore, it was not a coincidence that the Appellant set up his command post in the town of Vitez, which was not far from the local TO headquarters that must, in turn, have constituted a military target.[882] In addition, trial evidence shows that there was a military purpose in launching the attack on 16 April 1993, namely, to contain the ABiH forces in the town.[883] Evidence admitted on appeal also shows that Stari Vitez had the largest of the armed units of the TO,[884] and that the attack of 16 April 1993 resulted in a battle.[885] In the light of trial and additional evidence, the Appeals Chamber does not consider it to be proved beyond reasonable doubt that the attack of 16 April 1993 was directed at a civilian target, or that the attack targeted the civilian population of the town of Vitez. The Appeals Chamber does not therefore consider that the attack of 16 April 1993 was unlawful *per se*, but agrees with the Trial Chamber only to the extent that crimes were committed in the course of the attack. The Appeals Chamber notes that the criminal nature of the attack of 16 April 1993 was determined by the Trial Chamber with reference to the looting and torching of Muslim houses in, and the expulsion of the inhabitants from, the town of Vitez, and the detention of Muslim inhabitants.[886]

(c) Extent of civilian casualties

439. The Appellant argues that "a military action is legal if it has a military objective and unreasonably disproportionate harm to civilians is avoided", and that the Trial Chamber's finding on the proportionality issue was not supported by any analysis of disproportionality.[887]

440. The Prosecution submits that the Appellant is unclear as to whether he is referring to proportionality regarding civilian casualties or civilian property,[888] but that the Trial Chamber found

[880] Trial Judgement, para. 543.
[881] Witness BA3, AT 390-392 (9 Dec. 2003) (closed session). *See also* D267.
[882] Trial Judgement, para. 497.
[883] Trial Judgement, para. 510.
[884] Witness BA5, AT 510 (11 Dec. 2003).
[885] Ex. 23-25, Fourth Rule 115 Motion.
[886] Trial Judgement, paras. 499 and 503.
[887] Appellant's Brief, p. 66. *See also* Supplemental Brief, para. 47.
[888] Respondent's Brief, para. 2.233.

both that the damage of assets and the methods of destruction could not be proportionate to the needs of military necessity,[889] and that the majority of casualties were Muslim civilians.[890]

441. The Appeals Chamber notes that the Trial Chamber found that the majority of the victims from the attacks including the conflict on 16 April 1993 were Muslim civilians.[891] The Appeals Chamber considers that a reasonable trier of fact could have reached that finding based on the trial evidence. But, according to Witness BA5's testimony given during the appeal hearing, the casualty figures on the ABiH side in Stari Vitez after the fighting of 16 April 1993 was the death of three soldiers and the wounding of 10 to 20 civilians.[892] Witness BA5 added that during the whole period of the siege of Stari Vitez between 16 April 1993 and 25 February 1994, there were 66 victims, half of whom were soldiers.[893] In the light of the findings in the Trial Judgement and additional evidence, the Appeals Chamber concludes that the finding regarding civilian casualty figures in connection with the 16 April 1993 attack cannot be relied on in determining the nature of that attack.

(d) Was the Appellant aware of a substantial likelihood that crimes would be committed during the attack of 16 April 1993?

442. The Appeals Chamber notes that there was no finding in the Trial Judgement that referred to the knowledge of the Appellant of a risk that crimes might be committed during the attack, as was stated elsewhere in the Trial Judgement. However, the Appeals Chamber considers that paragraph 531 of the Trial Judgement may, in the context of that judgement, be susceptible of being interpreted in support of a possible finding on the basis of the standard set out in paragraph 474 of the Trial Judgement, that the Appellant ordered the attack with the knowledge that there was a risk of crimes being committed, and that he accepted that risk. The Appeals Chamber will therefore also consider the attack in this light.

443. Even if the Trial Chamber applied the standard set out in paragraph 474 of the Trial Judgement in finding the Appellant guilty of ordering the attack, the Appeals Chamber notes that the Trial Chamber applied the standard on the premise that "the accused knew that the troops he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population in Bosnia."[894] Prior to 16 April 1993, the only conflict between the HVO

[889] Respondent's Brief, para. 2.234.
[890] Respondent's Brief, para. 2.235.
[891] Trial Judgement, para. 507.
[892] AT 515 (11 Dec. 2003).
[893] AT 516 (11 Dec. 2003).
[894] Trial Judgement, para. 474.

and the ABiH had been the one in Busovača in January 1993.[895] The Trial Chamber found, *inter alia*, that the Vitezovi took part in the fighting in this conflict.[896] The Appeals Chamber considers, however, that it is not clear from the Trial Judgement whether the Vitezovi unit burnt or looted Muslim houses during the conflict in Busovača in January 1993 or whether the Appellant knew who burnt the houses or committed the looting.[897] The Appellant could not, therefore, be aware of the risk, if any, incurred by ordering the Vitezovi unit or other units into combat during the conflict in April 1993. Given that the attack of 16 April 1993 was launched at the outset of an all-out war between the HVO and the ABiH forces, there was no evidence included in the Trial Judgement that suggested that the Appellant could be aware of any criminal tendency of the HVO units under his *de jure* command, including the Vitezovi. No reasonable trier of fact could have found, on the basis of the trial evidence, that the Appellant knew of the risk that crimes might be committed during that attack. *A fortiori*, the trial evidence cannot satisfy beyond reasonable doubt the correct standard pronounced by the Appeals Chamber in this Judgement.[898] The Appeals Chamber therefore concludes that it is not proved beyond reasonable doubt that the Appellant was aware of a substantial likelihood that crimes would be committed during the attack of 16 April 1993.

(e) Conclusion

444. In respect of the attack on 16 April 1993, the Appeals Chamber concludes that it was not an unlawful military action. But it was reasonable for the Trial Chamber to conclude that crimes were committed in the course of the attack, such as the looting and torching of Muslim houses. There was, however, no finding at trial that the Appellant directly ordered that these crimes be committed by the HVO units.[899] Nor is the Appeals Chamber satisfied beyond reasonable doubt on the basis of the trial evidence assessed together with the additional evidence that the Appellant was aware at the time of the attack of 16 April 1993 that the HVO troops under his *de jure* command would be substantially likely to commit crimes during the attack. The Appeals Chamber therefore concludes that it is not satisfied beyond reasonable doubt that the Appellant was responsible under Article 7(1) of the Statute for ordering the crimes committed during the attack. The remaining question would be whether he should still be held responsible for the crimes committed during the attack under Article 7(3) of the Statute, and this question will be considered later.[900]

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[895] Trial Judgement, paras. 371 and 383.
[896] Trial Judgement, paras. 375 and 475.
[897] Trial Judgement, paras. 371-378.
[898] *See* Chapter II (A) of this Judgement, above.
[899] E.g., D267 and D269. *See also* Supplemental Brief, para. 48; AT 799 (17 Dec. 2003). *See also* Ex. 14, Second Rule 115 Motion, p. 93 (this exhibit contains the Central Bosnia Operative Zone War Diary for the period 11 January 1993 until 15 May 1993); PA 25 (Darko Kraljević's report of 26 April 1993 to the HVO Main Staff which shows that the Vitezovi engaged in fighting on 16-17 April in Stari Vitez, pursuant to the Appellant's orders).
[900] *See* this Chapter, section C, below.

2. The lorry bombing of 18 April 1993

445. The Appellant argues that there was no credible evidence at trial that he ordered the 18 April 1993 lorry bombing in Stari Vitez.[901] He submits that the Trial Chamber erred in inferring that he was guilty of ordering the bombing on the basis that he commanded the regular HVO forces and the Vitezovi, and that he was the person in control of the Vitez explosives factory.[902] He also argues that there was no evidence that he shared the political goal of segregating Central Bosnia or that he acted only to militarily implement unlawful political goals.[903] Further, he submits that the goals, embodied in the Vance-Owen Peace Plan, were not illegal. Moreover, he adds that every witness who testified on the subject stated unambiguously that he did not harbour any animus against Muslims, and that the lorry bombing was as likely a random act of violence as it was part of a persecutory plan.[904]

446. The Prosecution argues that as the bombing was perpetrated by troops under the Appellant's command, as the Appellant alone could procure such a large amount of explosives, and as he tried to implement the policy of driving Muslims away from the area, the Trial Chamber was entitled to its finding that the Appellant ordered the bombing.[905]

447. The Appeals Chamber accepts the finding of the Trial Chamber that the bombing of the lorry was a terrorist operation, as agreed by both parties.[906] Further, the bombing can be characterised as a crime against humanity, as was found by the Trial Chamber.

448. The Appeals Chamber notes that the explosion did not take place in the centre of Stari Vitez, and that the casualties included three solders and four civilians.[907] However, the Appeals Chamber cannot fail to note that no evidence was cited by the Trial Chamber that the Appellant ordered the bombing, and that the Trial Chamber convicted him for ordering the bombing on the basis of circumstantial evidence. Before concluding on this part of the appeal, the Appeals Chamber will briefly examine two additional arguments raised by the Appellant.

(a) Evidence of the use of explosives in the bombing

449. The Appellant claims that additional evidence shows that the Vitezovi had exclusive access to fuel in the area and the bombing might have been caused by the explosion of the lorry full of fuel

[901] Appellant's Brief, pp. 66-67.
[902] Appellant's Brief, p. 67.
[903] Brief in Reply, para. 53. For support, *see* Witness Watkins, AT 276-277 (9 Dec. 2003).
[904] Brief in Reply, para. 53. For support, *see* Witness Watkins, AT 350 (9 Dec. 2003).
[905] Respondent's Brief, para. 2.242.
[906] Trial Judgement, para. 505.
[907] Witness BA5, AT 517 (11 Dec. 2003).

rather than explosives.[908] But he later also declared that whether the explosion was caused by petrol or explosives was not the real issue.[909]

450. The Prosecution submits that there was evidence showing that explosives were used in the bombing,[910] and that the Appellant has not shown why the Trial Chamber erred in accepting evidence showing that the bombing was caused by explosives rather than petrol.[911]

451. The Appeals Chamber has carefully considered trial and additional evidence and rebuttal material relevant to this argument,[912] and is satisfied beyond reasonable doubt that the explosion was caused by explosives. This part of the finding of the Trial Chamber stands.

(b) Were the explosives in the Appellant's exclusive control?

452. The Appellant argues that additional evidence shows that the Military Police, local civilians, and local criminal elements also had access to ample supplies of explosives.[913] He also submits that, even assuming that military grade explosives from the Vitez factory as opposed to gasoline caused the explosion, the fact that the HVO controlled the explosives factory does not prove that the Appellant was the only one who could have ordered the bombing.[914] He specifies that additional evidence shows that General Petković controlled the factory with the direct assistance of the Military Police, and that explosives were widely accessible.[915]

453. The Prosecution points out that the Trial Chamber found that the HVO controlled the Slobodan Princip Seljo weapons factory which produced explosives, and that the Appellant controlled the HVO including the Vitezovi.[916]

454. The Appeals Chamber considers that the Trial Chamber's finding that the Appellant was in control of explosives in the Vitez factory and that he was therefore responsible for the lorry bombing could have been reasonably reached on the basis of trial evidence. However, additional evidence does show that explosives were available in the region to all sides of the conflict, and that

[908] Appellant's Brief, pp. 68-69.
[909] AT 620 (16 Dec. 2003).
[910] Respondent's Brief, para. 2.244.
[911] Respondent's Brief, para. 2.246.
[912] T 18,835-18,836 (10 Mar. 1999); Ex. 96, First Rule 115 Motion (Ex. 96 contains a letter dated 7 May 1993 from the Appellant to the head of the HZHB Defence Department, Bruno Stojić, complaining about the fact that Kraljević took control of the Kalen petrol station in Vitez and was selling fuel to the HVO at market price); PA 26 (Colonel Primorac's order of 9 May 1993 to both the Appellant and Darko Kraljević, which was issued in response to Ex. 96, First Rule 115 Motion regarding the control of the Kalen petrol station, ordering the establishment of a commission to establish the quantity of the fuel at the station, that the station be placed at the disposal of the Vitez HVO Government, and that the Vitezovi be subordinated to the Appellant); Witness BA5, AT 531 (11 Dec. 2003).
[913] Appellant's Brief, pp. 69-70. *See also* Supplemental Brief, para. 54; AT 622 (16 Dec. 2003).
[914] Brief in Reply, para. 52.
[915] Brief in Reply, para. 52.

the HVO did not have sole control over the factory that produced explosives.[917] The Appeals Chamber considers that the trial and additional evidence do not satisfy it beyond reasonable doubt that the explosives used for the lorry bombing of 18 April 1993 could not be secured without the authorization of the Appellant.

(c) Conclusion

455. In respect of the lorry bombing of 18 April 1993, the Appeals Chamber considers that the elements of the offence of ordering the bombing as a crime against humanity are not proved beyond reasonable doubt on the basis of trial and additional evidence. The remaining question is whether the Appellant could still be held responsible for the lorry bombing of 18 April 1993, which resulted in civilian casualties, under Article 7(3) of the Statute on the factual basis established by trial evidence and evidence admitted on appeal. The Appeals Chamber will consider this question later.[918]

3. The 18 July 1993 attack on Stari Vitez

(a) Did the Appellant order the attack against Stari Vitez on 18 July 1993?

456. The Appellant submits that additional evidence shows that the attack was solely ordered by the commander of the Vitezovi, Darko Kraljević.[919] The "assets" used in the attack were not under the sole control of the Appellant, and on the contrary, the assets that fell under his control were not shown to have been used in the attack.[920] No reasonable trier of fact, the Appellant argues, could have found him guilty of ordering the attack.[921] The Appellant further argues that no direct or circumstantial evidence exists linking him to the 18 July 1993 attack on Stari Vitez or any crime that occurred during or after the attack.[922] He submits that, although the Vitezovi unit was attached to his command, additional evidence shows that it often operated independently or at the direction

[916] Respondent's Brief, para. 2.245.
[917] Ex. 10, First Rule 115 Motion (Ex. 10 includes a report from the SIS Chief at Mostar to the Chief of the Croatian Information Services, dated 4 December 1993. Regarding the crimes in Vitez, it reveals that a private company, *Vitez Trejd* held a monopoly over everything in a local factory, SPS, which was regarded as the main cause for local crimes because of its goods, such as explosives, rocket fuel, weapons, and military equipment. The factory was the conduit for the purchase of weaponry and equipment for the HVO in Central Bosnia. The goods were sold to both Croats and Muslims and high military officers and politicians were involved in such dealings. This document shows that the Appellant was not the only person who could provide explosives that blew up the lorry on 18 April 1993). Also see Ex. 31, Fourth Rule 115 Motion (Ex. 31 contains an SIS report dated 1 July 1993, and describes the role of Darko Kraljević in the Vitez area and his rejection of the Appellant's orders. Kraljević and the SIS Chief threatened the Appellant, who dare not act against them, and they dealt with both Croatia and the Muslim side in explosives and military equipment).
[918] *See* this Chapter, sections (C)(1) and (C)(2), below.
[919] Appellant's Brief, p. 77.
[920] Appellant's Brief, p. 77.
[921] Appellant's Brief, p. 78.
[922] Brief in Reply, para. 54.

of Kordić or the HVO Main Staff.[923] He points out that one witness the Prosecution refers to, Mr. Darko Gelić, never testified at trial and his statement, presented at trial as D708, did not mention the Appellant, or indicate whether the HVO included regular HVO troops and the Vitezovi, who commanded those troops, who ordered the attack, or whether the attack was directed at civilians.[924] He recalls a statement by the Presiding Judge at trial that the Appellant had not ordered the attack.[925] He disputes the conclusion of the Trial Chamber and the Prosecution that he ordered the attack simply because the Vitezovi unit was attached to his command, and argues that the relevant question is whether he ordered the Vitezovi to attack on 18 July 1993 and if so, whether he ordered the unit to commit crimes.[926] He further argues that his conviction for this attack should be reversed simply because his responsibility for it was not charged in the Indictment.[927]

457. The Prosecution argues that the Appellant's headquarters were located 300 metres away from Stari Vitez, that the Trial Chamber found him alone in control of heavy artillery, and that the July attack was planned to involve the use of artillery in retaliation of the ABiH's control of the area of Kruščica and Počulica.[928] The Prosecution also suggests that sufficient evidence exists to show that the Appellant organised or authorised the July attack on Stari Vitez by the Vitezovi.[929]

458. The Appeals Chamber notes that the Indictment did not specify this attack under any of the counts. However, Count 1, persecution, covered the period from May 1992 to January 1994 and the municipality of Vitez (besides other municipalities), and charged the Appellant with, *inter alia*, attacks on cities, towns and villages, the destruction and plunder of property, and forcible transfer of civilians. The factual description of this count did not include any specific reference to a particular attack during that period. The Appeals Chamber has discussed the issue of the vagueness of the indictment.[930] At trial, evidence was led by the Prosecution with regard to the attack of 18 July 1993 and the Defence cross-examined the relevant Prosecution witness.[931] The Appellant was also examined in this respect by his counsel.[932] Thus, even assuming that the Indictment was defective, the Appellant did not suffer prejudice such that he could not prepare his defence in relation to this attack. The fair trial issue does not, therefore, arise.

[923] Brief in Reply, para. 54.
[924] Brief in Reply, para. 57.
[925] Brief in Reply, para. 58.
[926] Brief in Reply, para. 59.
[927] Supplemental Brief, para. 56.
[928] Respondent's Brief, para. 2.252.
[929] Respondent's Brief, para. 2.255.
[930] Chapter VI (A), above.
[931] Witness Djidić, T 1368-1369 (31 Mar. 1997).
[932] T 19,496-19,508 (24 Mar. 1999).

459. The Appeals Chamber considers that the Appellant has not shown that no reasonable trier of fact could have reached the conclusion of the Trial Chamber that the Appellant ordered the attack on Stari Vitez on 18 July 1993.[933] The Appeals Chamber will next consider the issue of the nature of the attack.

(b) The nature of the attack on Stari Vitez

460. The Appellant argues that the ABiH refused to evacuate civilians from Stari Vitez despite pleas from the HVO, and that the Trial Chamber found the attack on Stari Vitez to be illegal because of the use of "baby bombs", but found a legitimate military action in the attack on Grbavica in which such bombs were also used.[934]

461. The Prosecution argues that the Appellant has admitted that the attack on Stari Vitez did not make military sense,[935] that the evidence at trial showed that it was impossible for civilians to leave Stari Vitez,[936] and that the Trial Chamber did not state whether the use of baby bombs was acceptable in one place or another.[937]

462. The Appellant replies that as the "baby bombs" were home-made mortars and not heavy artillery such as the NORA howitzer guns which he commanded, the use of the bombs was not indicative that the Appellant ordered an attack on Stari Vitez, and that the use of the bombs that were likely to hit non-military targets was not illegal unless the intent had been to hit non-military targets or the use had caused disproportionate damage to civilian structures.[938]

463. As has been found in relation to the attack of 16 April 1993 on the town of Vitez,[939] the nature of the attack of 18 July 1993 cannot be categorically defined as that of a criminal act, in that there was still the presence of a considerable number of ABiH soldiers in Stari Vitez at that time.[940] The operation itself may have been a wilful one lacking sound military judgement, but that wilful aspect of the attack does not make it a crime in terms of the Statute. The Appellant's view, expressed during his testimony at trial, that this type of operation did not make any sense because it would incur a lot of civilian losses, was given in the context of his statement to the effect that the operation, even if successful, could not secure the facility attacked by the Vitezovi, because, among

[933] The Trial Chamber based that conclusion on the use of artillery and the involvement of other HVO units: Trial Judgement, paras. 506 and 516.
[934] Appellant's Brief, pp. 78-79. *See also* Brief in Reply, para. 55.
[935] Respondent's Brief, para. 2.258.
[936] Respondent's Brief, paras. 2.260-2.261.
[937] Respondent's Brief, para. 2. 262.
[938] Brief in Reply, para. 56. *See also* Appellant, AT 808 (17 Dec. 2003).
[939] *See* this Chapter, section (B)(1), above.
[940] Witness BA5, AT 515-516 (11 Dec. 2003).

other reasons, it was impossible to re-supply the unit holding that position.[941] That the attack lacked military sense should be understood in this context.

464. The Trial Chamber considered that the "baby bombs" were used to "affect" Muslim civilians, that "they killed and injured many Muslim civilians", and that "they also resulted in substantial material civilian damage".[942] It was that finding that enabled the Trial Chamber to see the attack as a crime against humanity. However, the Appeals Chamber notes that the Trial Chamber did not hold the Appellant responsible for the use of "baby bombs" by the HVO units during a legitimate military action against the sizeable village of Grbavica on 7 September 1993.[943] The village was found to be sizeable because the evidence relied on by the Trial Chamber showed that the village had some 200 houses.[944] Further, the Appeals Chamber construes the position of the Trial Chamber to be that, since the home-made "baby bombs" lacked precision in combat operations and consequently killed and injured "many Muslim civilians", they were used "to affect Muslim civilians".[945] The Appeals Chamber considers that the fact of civilian casualties was regarded by the Trial Chamber as part of the proof of the illegal nature of the attack. The position of the Trial Chamber referred to above would be reasonable if the bombs were indeed used intentionally to attack the Muslim civilian population only or only to destroy their property. However, the position is contradicted by the testimony of Witness BA5, which shows that "there were a small number of injured civilians, but not seriously, because by then we had dugouts and trenches, so we had prepared ourselves. The civilians were in the basements. So that there were very few casualties, with very light injuries."[946] Moreover, the evidence given by Witness BA5 also shows that there was a fierce fight on 18 July 1993 with the ABiH units holding out in Stari Vitez.[947] The damage to the civilian houses was due to the narrowness of the area held by the ABiH forces.[948] On the basis of the trial and additional evidence, the Appeals Chamber is not satisfied beyond reasonable doubt either that the attack of 18 July 1993 resulted in heavy casualties among Muslim civilians, or that the attack was directed at the Muslim civilian population or civilian property in Stari Vitez.

[941] Appellant, T 19,498 (24 Mar. 1999).
[942] Trial Judgement, para. 512.
[943] Trial Judgement, paras. 555, 560.
[944] Witness Djidić, T 1263 (29 July 1997).
[945] Trial Judgement, para. 512.
[946] AT 519 (11 Dec. 2003).
[947] AT 518, 532 (11 Dec. 2003).
[948] Witness BA5, AT 515 (11 Dec. 2003); AT 628 (16 Dec. 2003).

(c) Was the Appellant aware of a substantial likelihood that the crime of using "baby bombs" against Muslim civilians or their property would be committed during the attack of 18 July 1993?

465. The Appeals Chamber notes that there was no finding in the Trial Judgement that referred to the knowledge of the Appellant of a risk that crimes might be committed during the attack, as was stated elsewhere in the Trial Judgement. However, the Appeals Chamber considers that paragraph 531 of the Trial Judgement may be, in the context of that judgement, susceptible of being interpreted in support of a possible finding on the basis of the standard of *mens rea* set out in paragraph 474 of the Trial Judgement, that the Appellant ordered the attack with the knowledge of a risk of crimes being committed during the attack, and that he accepted that risk. The Appeals Chamber will therefore consider the attack in this light. Even assuming that the Trial Chamber applied the standard set out in paragraph 474 of the Trial Judgement in finding the Appellant guilty of ordering the attack, the Appeals Chamber considers that as bombardment with "baby bombs" was not known as a means of attack before the attack of 18 July 1993, the Appellant could not be aware of any risk of the HVO units under his *de jure* command using such weapons against Muslim civilians or to destroy their property. No reasonable trier of fact could have found, on the basis of the trial evidence, that the Appellant was aware of the risk that the crime of using "baby bombs" against Muslim civilians or to destroy their property might be committed during the attack. It is, furthermore, clear from the preceding sub-section that the Trial Chamber considered the use of such bombs to be illegal with reference to the circumstantial evidence of the consequences of using them. That conclusion has, however, been put in doubt on the basis of both trial and additional evidence. It need not be decided whether, in general terms, the use of "baby bombs" is illegal. The evidence before the Appeals Chamber, however, does not satisfy beyond reasonable doubt the standard of *mens rea* pronounced by the Appeals Chamber in this Judgement, that the Appellant was aware of a substantial likelihood that "baby bombs" would be used against Muslim civilians or their property during the attack of 18 July 1993.

(d) Conclusion

466. With regard to the attack of 18 July 1993 on Stari Vitez, the Appeals Chamber considers that the trial and additional evidence does not prove beyond reasonable doubt that the attack targeted the Muslim civilian population or their property in Stari Vitez, or that the Appellant ordered the use of the "baby bombs" against Muslim civilians or their property in Stari Vitez, or that he ordered the attack with the awareness of a substantial likelihood that "baby bombs" would be used against the Muslim civilian population or their property during the attack. The finding that the Appellant ordered the attack as a crime against humanity is therefore reversed. The remaining

question is whether the Appellant should bear any responsibility under Article 7(3) of the Statute in relation to this attack, and that will be dealt with later.[949]

4. The crimes committed in April and September 1993 in Donja Večeriska, Gaćice, and Grbavica

467. As a general argument in respect of the attacks on the villages of Donja Večeriska, Gaćice, and Grbavica, the Appellant submits that it is not clear whether his conviction for "negligence" in relation to the crimes committed in those villages was based on Article 7(1) or Article 7(3) of the Statute, but that "negligence is inconsistent with the requisite *mens rea* of Article 7" of the Statute.[950] Further, he argues that there was no evidence linking him to the crimes that occurred after the legitimate military actions in those villages, that it is insufficient to find him liable for the crimes on the basis that the troops responsible for destruction unjustified by military necessity were under his command, and that the finding of the Trial Chamber that the HVO troops were difficult to control was in contradiction with another finding that the Appellant was in effective control.[951]

468. The Appeals Chamber notes that the Trial Chamber found that the villages attacked "could have represented a military interest such as to justify their being the target of an attack", and that the Trial Chamber also found the Appellant guilty of crimes, including "destruction, pillage, and forcible transfer of civilians",[952] arising after the attacks on the villages, on the ground that he ordered the attacks which "he could only reasonably have anticipated would lead to crimes."[953] Notwithstanding the wording of paragraph 562 of the Trial Judgement, the Appeals Chamber, as stated above,[954] considers that the Trial Chamber did apply here the standard of *mens rea* set out in paragraph 474 of the Trial Chamber. The correct standard in this regard has been defined by the Appeals Chamber,[955] which provides that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, and that ordering with such awareness has to be regarded as accepting that crime. The Appeals Chamber will apply this standard to the trial evidence concerning the three villages of Donja Večeriska, Gaćice, and Grbavica.

[949] *See* this Chapter, sections (C)(1) and (C)(2), below.
[950] Brief in Reply, para. 60.
[951] Brief in Reply, para. 61.
[952] Trial Judgement, para. 560.
[953] Trial Judgement, para. 562.
[954] *See* Chapter III (A)(1), above.
[955] *See* Chapter III (A)(1), above.

(a) Donja Večeriska

469. No evidence, the Appellant argues, shows that he ordered the destruction of civilian property after the combat operation.[956] He argues that he cannot be held responsible for crimes that occurred after the attack ended unless he issued a subsequent order to destroy property.[957] He also argues that, as the civilian police were assigned to protect civilian property after the hostilities ceased, it was their responsibility to prevent any burning or looting of civilian property after combat operations ceased, and that there was no evidence to support the finding that the HVO troops set fire to civilian property.[958]

470. The Prosecution submits that the Trial Chamber found that much of the destruction and damage occurred *after* the HVO took control of the village on 18 April 1993, and that the houses, after the fighting ended, could not be regarded as legitimate targets, whose destruction was not required by military necessity.[959] The Prosecution also submits that the trial evidence showed that Muslim houses were burnt by HVO soldiers,[960] and that the Appellant had command over the civilian police.[961]

471. The Appeals Chamber notes that there has been nothing controversial in the finding of the Trial Chamber that the attack ordered by the Appellant on Donja Večeriska was a legitimate military action. The question is whether, in ordering the attack, the Appellant was aware of a substantial likelihood that crimes would be committed during or after the attack on the village. The argument of the Appellant that there was no evidence showing that he ordered the destruction of civilian property does not by itself affect the finding of guilt reached by the Trial Chamber.

472. The Appeals Chamber notes that there was no additional evidence presented on appeal in relation to this attack. On the basis of trial evidence, the Trial Chamber considered that the burning of houses and the looting of the mekteb constituted "large-scale destruction or devastation with no military necessity".[962] The Trial Judgement never indicated which unit with criminal elements had been ordered to assist in the attack on Donja Večeriska,[963] apart from a reference to an order issued by the Appellant on 16 April 1993 in which the names of the Vitez Brigade and the Tvrtko independent unit were mentioned.[964] Assuming these two units were involved in the attack, the

[956] Appellant's Brief, pp. 73-74.
[957] Appellant's Brief, p. 73.
[958] Appellant's Brief, p. 74.
[959] Respondent's Brief, para. 2.290.
[960] Respondent's Brief, paras. 2.292-2.294.
[961] Respondent's Brief, para. 2.294.
[962] Trial Judgement, para. 544.
[963] Trial Judgement, para. 539.
[964] Trial Judgement, para. 537.

evidence at trial was vague as to whether either unit was engaged in the burning of houses and the looting of the mekteb.[965] Further, the Trial Chamber, in determining the mental element of the Appellant in relation to the crimes committed by the HVO units, erred in applying a wrong legal standard.[966] The Appeals Chamber will apply the correct standard of ordering with the awareness of a substantial likelihood as set out in this Judgement. With trial evidence of this quality, and applying the correct legal standard, the Appeals Chamber considers that the trial evidence does not prove beyond reasonable doubt the existence of such an awareness on the part of the Appellant.

(b) Gaćice

473. The Appellant submits that the Vitezovi was alone responsible for the attack of 20 April 1993 on Gaćice.[967] He further submits that the Trial Chamber erred in finding him guilty of the crimes committed during or after the attack on Gaćice "on the basis of his negligence" in using forces that were known to be difficult to control.[968] This finding, in his view, runs counter to the finding of the Trial Chamber that he had effective control over troops under or attached to his command, including the Vitezovi.[969]

474. The Prosecution submits that the Vitezovi unit was under the Appellant's effective control,[970] that the Vitezovi was not the only unit that attacked Gaćice, and that artillery was used in the attack, which was under the command of the Appellant.[971]

475. The Appeals Chamber considers that the Appellant has not shown that no reasonable trier of fact could have reached the conclusion of the Trial Chamber that, besides the Vitezovi, other units, wearing the insignia of the HVO and the HV, among others, also participated in the attack on the village and that artillery was employed.[972] The Appeals Chamber therefore considers that a reasonable trier of fact could have reached a similar finding to that of the Trial Chamber. For the same reasons, the Appeals Chamber also accepts the finding of the Trial Chamber that the Appellant ordered the attack. However, even assuming that he did order the attack, the attack was found to be legal by the Trial Chamber. His guilt in connection with the attack was based on his responsibility in relation to the crimes committed after the attack.

[965] Trial Judgement, para. 544.
[966] Trial Judgement, para. 562. *See* Chapter III of this Judgement, section (A)(1), above.
[967] Appellant's Brief, pp. 74-75.
[968] Appellant's Brief, p. 75.
[969] Appellant's Brief, p. 76.
[970] Respondent's Brief, para. 2.299.
[971] Respondent's Brief, paras. 2.300-2.301.
[972] Trial Judgement, para. 546.

476. The crimes in question were found by the Trial Chamber to be "devastation without military necessity and forcible transfers of civilians".[973] The former was in the form of torching Muslim houses. The Trial Chamber, as it did in the case of the attack on Donja Večeriska, applied the same standard in assessing the requisite *mens rea* of the offence of ordering the crimes, of which the Appellant was found guilty by that Chamber. The Trial Chamber thus erred in applying an incorrect legal standard. The Appeals Chamber will therefore apply the standard of ordering with the awareness of a substantial likelihood that crimes would be committed in the execution of the order as set out by the Chamber in this Judgement.[974] The evidence, as relied on in the Trial Judgement, does not prove beyond reasonable doubt that the Appellant was aware of a substantial likelihood that crimes would be committed in the course of the attack on Gaćice, because there was, at a time when the armed conflict had just broke out between the HVO and the ABiH in Central Bosnia, no possibility for him to realise that the Vitezovi unit (not to mention the other HVO units) was prone to committing crimes.

(c) Grbavica

477. The Appellant submits that the Trial Chamber erred in finding him guilty of the destruction of property after the HVO troops withdrew from the village of Grbavica, which, after the attack, was secured by civilian police.[975] No evidence, according to him, has shown that he had effective control over the civilian police under whose eyes crimes occurred in the village.[976]

478. The Prosecution submits that the Trial Chamber never ruled out the possibility that crimes might have been committed in the course of the military operation, and that it expressly rejected the claim that all the houses burnt during the attack were legitimate military targets.[977] The Prosecution points out that the Appellant has misstated the finding of the Trial Chamber, as the Trial Chamber did not find that "the HVO forces withdrew when the civilian police entered".[978] The Prosecution adds that the Appellant has not established any error of the Trial Chamber in convicting him for the destruction of property following the attack.[979]

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[973] Trial Judgement, para. 550.
[974] See Chapter III (A)(1) of this Judgement, above: "A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime."
[975] Appellant's Brief, p. 79.
[976] Appellant's Brief, p. 79.
[977] Respondent's Brief, para. 2.284.
[978] Respondent's Brief, para. 2.285.
[979] Respondent's Brief, para. 2.286.

479. The Trial Chamber found that there were acts of destruction not justified by military necessity and acts of looting,[980] which took place after the military action ceased.[981] The Appellant conceded that he planned this operation and participated in it.[982]

480. However, as it did in the cases of Donja Večeriska and Gaćice, the Trial Chamber, in determining the mental element of the Appellant, erred in applying an incorrect legal standard.[983] Applying the legal standard set out by the Appeals Chamber,[984] the Appeals Chamber considers that trial evidence does not prove beyond reasonable doubt that the Appellant ordered the attack with the awareness of a substantial likelihood that crimes would be committed during the attack on the village.[985] The Appeals Chamber notes that one unit that was known to be difficult for the Appellant to control, the Vitezovi, was not involved in this attack.[986] The Appeals Chamber is not satisfied beyond reasonable doubt on the trial evidence that the Appellant was responsible for the crimes that were committed after the attack ceased. His conviction in this connection is reversed.

(d) Conclusions

481. Since the Trial Chamber applied an incorrect legal standard in relation to the *mens rea* of the Appellant in finding him to have ordered the attacks on Donja Večeriska, Gaćice and Grbavica, that gave rise to crimes against civilians and civilian property, the Appeals Chamber has examined trial evidence in light of the correct standard of the *mens rea* set out by the Appeals Chamber in this appeal. The Appeals Chamber has stated that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, had the requisite *mens rea* for establishing the responsibility under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. In conclusion, the trial evidence does not prove beyond reasonable doubt that the Appellant had the awareness of a substantial likelihood that crimes would be committed by troops in execution of his orders of attack. Thus, the Appellant's convictions in this regard are all reversed.

[980] Trial Judgement, para. 559.
[981] Trial Judgement, paras. 557-558.
[982] Trial Judgement, para. 554.
[983] Trial Judgement, para. 562.
[984] See Chapter III of this Judgement, section (A)(1), above: "A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime."
[985] No additional evidence was presented on appeal in this regard.
[986] Trial Judgement, para. 554; AT 636 (16 Dec. 2003).

C. The Appellant's Responsibility under Article 7(3) of the Statute

1. The Appellant's Role in the Prevention of Crimes

(a) The Appellant's orders to ensure compliance with humanitarian law

482. The Appellant submits that he issued dozens of humanitarian orders directing troops both within and outside his chain of command to respect civilians' rights and to protect their property, both prior to, and subsequent to, the hostilities in Vitez in April 1993.[987]

483. The Prosecution submits that the Appellant issued "preventive" orders after the 16 and 18 April attacks on Stari Vitez and that he never enforced the orders or punish anyone who violated them.[988]

484. The Appeals Chamber recalls that under Article 7(3) of the Statute, effective control means the possession by the superior or commander of the material ability to prevent and punish the commission of crimes subject to the jurisdiction of the International Tribunal.[989] The Appeals Chamber also recalls that to establish superior responsibility, three elements of that responsibility must be proved beyond reasonable doubt: the existence of a superior-subordinate relationship; the fact that the superior knew or had reason to know that the criminal act was about to be or had been committed; and the fact that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[990]

485. As the Appellant has conceded, he had *de jure* command over regular HVO units in the CBOZ,[991] sometimes with special units such as the Vitezovi attached to his command.[992] His authority entitled him to issue orders, including the humanitarian ones referred to above. However, the Appeals Chamber considers that the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders.

486. While the humanitarian orders referred to by the Appellant may show that he was not a person prone to issuing illegal orders in the conflict in Central Bosnia in 1993, they are not relevant to the issue of his liability, if any, under Article 7(3) of the Statute, unless the reference to them is premised on the fact that he knew or had reason to know that his subordinates were about to commit crimes subject to the jurisdiction of the International Tribunal.

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[987] Appellant's Brief, p. 80.
[988] Respondent's Brief, para. 2.264.
[989] *See* Chapter III of this Judgement**,** section (B)(3), above.
[990] *Aleksovski* Appeal Judgement, para. 72; *Čelebići* Trial Judgement, para. 346.
[991] Appellant's Brief, p. 57.

(b) Did the Appellant have prior knowledge that the Vitezovi would commit acts of violence?

487. The trial and additional evidence, the Appellant submits, shows that he had no prior knowledge, or had no reason to know, that the Vitezovi were planning illegal action.[993] The Appellant argues that his knowledge of the difficulties in organising his troops does not amount to his knowledge that his troops were prone to committing crimes.[994]

488. The Prosecution submits that the evidence at trial showed that the Appellant had repeated notice that HVO troops including the Vitezovi unit had been involved in attacks against civilians.[995] For that submission, the Prosecution refers to the burning of Muslim houses in November 1992 and the Vitezovi's participation in the attacks on Muslim civilians in Busovača in January 1993.

489. In relation to the attack of 16 April 1993, the Appeal Chamber makes the following observations. There was no finding in the Trial Judgement, and there is no evidence to show, that the Appellant knew or had reason to know before the attack that crimes were about to be committed by the HVO units under his command.[996] In relation to the lorry bombing of 18 April 1993, there was no finding in the Trial Judgement, and there is no evidence to show, that the Appellant knew or had reason to know before the explosion that the crime was about to be committed by the Vitezovi unit. In fact, the evidence admitted on appeal suggests the contrary.[997] On the basis of the evidence before this Chamber, the issue of prevention of crimes does not, therefore, arise from these two events.

490. In respect of the attack on Stari Vitez of 18 July 1993, there was no finding in the Trial Judgement that the Appellant knew or had reason to know that crimes were about to be committed in the attack. Some evidence presented on appeal may have shown that the Appellant knew, as early as 2 July 1993, of preparations for an attack on Stari Vitez.[998] There was no finding and there is no evidence to show that he knew or had reason to know beforehand that the "baby bombs" would be used in that attack. The question of preventing the using of those bombs on civilian targets does not, therefore, arise.

[992] Appellant's Brief, p. 70. "Attachment" of such units did not, according to the Appellant, mean that the units were under his *de jure* command: *ibid.,* p.83.
[993] Appellant's Brief, p. 80.
[994] Appellant's Brief, pp. 81-82.
[995] Respondent's Brief, paras. 2.271-2.272.
[996] *See also* AT 626 (16 Dec. 2003).
[997] Ex. 14, Second Rule 115 Motion, p. 135 (Kraljević came to report to the Appellant after the explosion).
[998] PA 34.

(c) The Appellant's reorganisation of the Military Police prior to the attack on Grbavica in September 1993

491. The Appellant argues that the Trial Chamber erred in finding him guilty of ordering the attack on this village in September 1993, on the basis that he used units that were known to be questionable in behaviour following their early crimes, because the Vitezovi did not participate in this attack, and the Military Police had just been purged following the removal of Ljubičić.[999]

492. The Prosecution submits that the reorganisation did not address the fact that the Appellant sent the Džokeri or the NŠZ Brigade, both responsible for previous crimes, to join the attack, that he did not determine whether criminal elements had been removed from the Military Police before he sent them into Grbavica, and that he sent the Military Police into battle even before he received the investigation report on the Ahmići crimes.[1000] The Appellant was found liable because, the Prosecution argues, he repeatedly sent known criminals into combat in Muslim areas.[1001]

493. The Appeals Chamber does not consider this attack on Grbavica to be relevant to the issue of superior responsibility, since the Appellant was found guilty at trial only for *ordering* the attack on Grbavica that led to the crimes of destruction without military necessity and pillage, a conviction based on Article 7(1) of the Statute.

(d) Conclusion

494. For the foregoing reasons, the Appeals Chamber concludes that on the basis of the trial findings and evidence admitted on appeal, the issue of failure to prevent in terms of Article 7(3) of the Statute does not arise in relation to this part of the case.

2. The Appellant's Role in Investigating and Punishing Crimes

(a) The Appellant's ability to discipline the Vitezovi

495. The Appellant submits that additional evidence shows that the Vitezovi unit was outside his command and often acted under the direct orders of Kordić and the Ministry of Defence in Mostar.[1002] The Trial Chamber, the Appellant contends, inferred that he ordered the Vitezovi to commit specific crimes based solely on evidence that he issued lawful orders to them at various times throughout 1993.[1003] He submits that it was not disputed that the Vitezovi was attached to his

[999] Appellant's Brief, p. 82.
[1000] Respondent's Brief, para. 2.287.
[1001] Respondent's Brief, para. 2.287.
[1002] Appellant's Brief, pp. 70-73, and pp. 82-84. *See also* Witness BA3, AT 373-375 (9 Dec. 2003) (closed session).
[1003] Appellant's Brief, p. 70.

command on 16 April 1993 until the hostilities in April ceased, but that "new evidence" shows that the Vitezovi did not heed the Appellant in word or in deed.[1004] He repeats that even though the Vitezovi unit was attached to his command, the unit was commanded directly by the Ministry of Defence in Mostar.[1005] Further, he argues that the attachment of the Vitezovi unit to him is mere evidence of a *de jure* relationship such that he could issue orders to the unit, but that this does not prove beyond reasonable doubt that he had effective control over the unit.[1006] For this contention, the Appellant also relies on evidence admitted on appeal.[1007]

496. The Prosecution responds that the Trial Chamber did not solely base its finding that the Appellant had effective control over the Vitezovi unit on the attachment of the unit to him.[1008] It submits that the Trial Chamber carefully analysed orders issued by the Appellant to the unit.[1009] Further, the Prosecution submits that the Trial Chamber heard considerable evidence regarding the widespread and systematic crimes repeatedly committed throughout Central Bosnia by the Appellant's subordinates, and that it rejected the Appellant's argument that he did not have the ability to punish the Vitezovi.[1010] The Prosecution points out that the Trial Chamber found that the Appellant had effective control over the Vitezovi on the basis of more than just the evidence that the Vitezovi unit was attached to his command in the relevant period.[1011] It also submitted rebuttal material on appeal to show that the unit was subordinate to the Appellant's command.[1012]

497. The Trial Chamber found that the Appellant exercised effective control over the Vitezovi and that there was a permanent relationship of subordination between the Appellant and that unit.[1013] The Appeals Chamber notes that the Appellant does not dispute that the Vitezovi unit was attached to his command in April 1993, and that he issued lawful orders to the unit throughout 1993. The Appeals Chamber also notes that the Trial Judgement seems to have focused on the involvement of the Vitezovi in the events of 18 April and 18 July 1993.[1014]

498. The parties make their submissions in this respect with reference to the issue of effective control over the Vitezovi. On the basis of the trial and additional evidence before it, the Appeals Chamber is satisfied beyond reasonable doubt that the Appellant had *de jure* command over the

[1004] Appellant's Brief, p. 70. S*ee also* Supplemental Brief, paras. 51-53.
[1005] Appellant's Brief, p. 83. This was confirmed by Witness BA1, AT 203 (8 Dec. 2003) (closed session). *See also* Ex. 96, First Rule 115 Motion; PA 26.
[1006] Brief in Reply, paras. 17-18.
[1007] Brief in Reply, para. 19.
[1008] Respondent's Brief, para. 2.51.
[1009] Respondent's Brief, para. 2.52.
[1010] Respondent's Brief, paras. 2.85-2.86.
[1011] Respondent's Brief, paras. 2.51-2.55.
[1012] PA 23–26, 35, 36, 37, 38, 39, 40, and 41.
[1013] Trial Judgement, para. 522.
[1014] Trial Judgement, paras. 516 and 518.

Vitezovi, because, in particular, the unit was attached to him by an express order of the HVO Chief-of-Staff on 19 January 1993,[1015] and because of his own testimony at trial,[1016] as well as evidence admitted or heard on appeal.[1017] The Appellant has also conceded the fact that he had *de jure* command over the unit during the appeal hearing.[1018] The Appeals Chamber notes, however, that the Appellant has also submitted that the unit was attached to him during, at least, the period of 16 April 1993 to 15 January 1994, for combat operations only. The attacks of 16 and 18 April and 18 July 1993 all took place during that period. It follows that, during that period, he had *de jure* power to control the Vitezovi, with or without success, and that it was up to him as the zone commander to punish the offences in a way that was consistent with the level of his command.

499. The Appeals Chamber considers that the weight of existing evidence is in favour of the Appellant's case, in that it shows that there had been constant tension between the Appellant and the Vitezovi unit and that there was evidence to show that the Appellant could not himself discipline the unit.[1019] In these circumstances, the Appeals Chamber cannot find beyond reasonable

[1015] Trial Judgement, paras. 520 and 527.
[1016] T 19509-19510 and 19515-19516 (24 Mar. 1999).
[1017] Ex. 14, Second Rule 115 Motion, p.135. *See also* AT 762 (17 Dec. 2003), submissions by the Prosecution.
[1018] AT 625 (16 Dec. 2003).
[1019] Ex. 4, 14, 87, 88, 89, 90, and 101, First Rule 115 Motion (Exhibit 4 contains an HIS report of 18 February 1994 about a meeting scheduled among Mate Boban and others to appoint Darko Kraljević, leader of the Vitezovi, to the rank of colonel in the HVO. The report mentions that Kraljević intended to use this appointment to topple the Appellant with the aid of Kordić and Koštroman, and that the Appellant had limited influence over the planning of military operations which were carried out exclusively by Kordić and Koštroman; Exhibit 14 includes an HIS report dated 21 March 1994 and addressed to President Tudjman. The report reveals the tense relationship between the Appellant and Kraljević, founder of the Vitezovi, including the fact that the Appellant prevented Kraljević from assuming a command in Vitez, and that the latter openly threatened to kill the Appellant and later assumed the position of assistant to the Chief of the HVO Main Staff, apparently signing documents on the Chief's behalf; Exhibit 87 contains a report dated 15 November 1992 from Zvonko Vuković, the then commander of the 4th Battalion of the Military Police, to the HVO Main Staff and to Valentin Ćorić. The report states that the Vitezovi unit, which used to be an HOS (Croatian Defence Forces) unit under the command of Darko Kraljević, was "presently" subordinated directly to the Main Staff. The report reveals that the Vitezovi without order took away vehicles and weapons from the Zenica-based Ministry of Interior; Exhibit 88 contains a report from the commander of the Vitezovi, Darko Kraljević, to the Head of Defence of HZHB and the Chief of the HVO Main Staff, informing them that the unit had cleared Vitez of Muslims. Dated 17 April 1993, the report stated that the Vitezovi were short of ammunition, shells, and grenades. The Appellant was not copied on the report; Exhibit 89 includes a reply sent by Ivica Primorac, Assistant Chief of the HVO Main Staff, in response to the request contained in Exhibit 88, stating that the request by Kraljević could not be met and that he should try to meet his demands through the Logistics of the CBOZ; Exhibit 90 contains a request from Ivica Primorac of the HVO Main Staff to Kraljević for information on the casualties within the Vitezovi and *Tvertko II* Company since the beginning of the conflict with the Muslim side. It was dated 14 June 1993 and the Appellant did not receive a copy of it; Exhibit 101 includes an SIS Report dated 4 February 1994, detailing the warm-cold relations between the Travnik–Vitez CIS Center and Darko Kraljević. The report details Kraljević's illicit activities through the Vitezovi); Ex.1, 35, 36, and 37, Second Rule 115 Motion (Exhibit 1 contains a report drafted by employees of the Croatian Ministry of Internal Affairs with information gathered since March 2000. The report states that Kordić and Koštroman were more influential than the Appellant, and that some commanders in the field who were connected to them could carry out operations without consulting the Appellant. The report states that certain HVO special units, including the Vitezovi of Darko Kraljević, formally under the command of Ivica Primorac, Assistant Minister for Special Units in the Ministry of Defence, were actually commanded by Kordić; Exhibit 35 is a portion of the transcript of Anto Breljaš's testimony given in the *Kordić and Čerkez* trial on behalf of the Prosecution in January 2000. Breljaš was the information and propaganda officer for the Vitezovi from March 1993 until April 1994. He testified that Kraljević did not report to the Appellant, that the Appellant could not establish operational control of even conventional HVO units that were nominally within his command until late 1993, that Kraljević had a close connection with Kordić, and that the Vitezovi operated in the CBOZ but were under the direct command of the HVO Main Staff; Exhibit 36 consists of a transcript of the testimony

doubt that the Appellant had full effective control over the Vitezovi unit in the period in which it was attached to his command, in the sense that he could discipline them at his level of command. However, as has been discussed elsewhere in this Judgement,[1020] this does not mean that the Appellant had no control over the unit at all, since, according to his testimony at trial, he twice reported the unruly aspect of the unit to his superiors.[1021] If reporting criminal acts of subordinates to appropriate authorities is evident of the material ability to punish them in the circumstances of a certain case, albeit only to a very limited degree, the Appellant had that limited ability in this case. That limited ability determines that the Appellant had limited effective control. His command responsibility is, consequently, an issue in this case.

(b) The Appellant's reporting of the Vitezovi's conduct to his superiors

500. The Appellant submits that the Trial Chamber erred in finding that he had taken "no step" with regard to such conduct.[1022] He refers to his request to his security assistant to conduct an investigation into the lorry bombing of 18 April 1993 and the fact that he reported to his superior the result of the investigation.[1023] He adds that he also informed his superiors of the 18 July 1993 attack launched by the Vitezovi unit.[1024] The Appellant also argues that the Trial Chamber failed to take into account the existing laws of the HZ H-B that prevented military commanders such as the Appellant from controlling the investigatory work of the Military Police, leaving the conduct of investigation and prosecution to the military justice system.[1025] He submits that the Trial Judgement entirely ignored the existence of those laws, in light of which his ability to investigate and punish crimes "was severely limited".[1026]

501. The Prosecution argues that there is no evidence to support the argument of the Appellant that he ordered an investigation upon learning of the lorry bombing of 18 April 1993,[1027] and that no evidence shows that he took any steps to punish perpetrators of the crimes in Stari Vitez.[1028] The

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of General Merdan, a Prosecution witness in *Kordić and Čerkez*, given in January 2000. Merdan was in 1992-1993 the deputy commander of the ABiH 3rd Corps. He testified that he observed on several occasions that the Appellant could not command Kraljević; Exhibit 37 contains a portion of trial transcript in the *Kordić and Čerkez* case dated 7 and 8 March 2000, recording the testimony by a Prosecution witness, Sulejman Kalco. Kalco was the deputy commander of the ABiH forces in Stari Vitez in 1993. He testified that Kraljević, the commander of the Vitezovi, was in charge of the attack on Stari Vitez on 18 July 1993). *See also* PA 26; AT 625 (16 Dec. 2003). *See also* T 13,970-13,971 (27 Oct. 1998), by Slavko Marin.

[1020] *See* Chapter III of this Judgement**,** section (B), above, regarding the ground of appeal on alleged legal errors concerning Article 7(3) of the Statute.

[1021] *See* next sub-section, below.

[1022] Appellant's Brief, p. 84.

[1023] Appellant's Brief, p. 84.

[1024] Appellant's Brief, p. 84.

[1025] Appellant's Brief, pp. 84-86.

[1026] Appellant's Brief, p. 85.

[1027] Respondent's Brief, para. 2.276.

[1028] Respondent's Brief, para. 2.278.

Prosecution submits that the Trial Chamber heard evidence on powers vested in the Appellant as the commander of the CBOZ and "reviewed" relevant decrees and laws.[1029]

502. The Appeals Chamber notes that the Trial Chamber did not set out the necessary factual basis for its finding that the Appellant failed to punish, among others, the Vitezovi for their crimes committed in the town of Vitez in April and July 1993. In particular, there was no factual finding regarding the knowledge of the Appellant with regard to the crimes. The finding of the Trial Chamber was, furthermore, vague as to whether the finding was made due to the failing of the Appellant to report the crimes to his superiors or for some other reasons. This lack of analysis of relevant evidence on a critical element of the criminal responsibility of the Appellant alone justifies that the convictions of the Appellant under Article 7(3) of the Statute in relation to the crimes committed during the April and July 1993 attacks on the town of Vitez be overturned. Further, as has been found by the Appeals Chamber, the Appellant did not order the crimes committed in the April and July 1993 attacks on the town of Vitez. Therefore, the factual basis relied on by the Trial Chamber to find the Appellant guilty of those crimes under Article 7(3) of the Statute falls away. It follows that the Trial Chamber's convictions of the Appellant as a commander in relation to those crimes can no longer remain.

503. On the other hand, the Appeals Chamber notes that in the Trial Judgement the Trial Chamber made no assessment of evidence given at trial by the Appellant that he initiated an investigation into the lorry bombing of 18 April 1993 and reported the result of the investigation to his superiors,[1030] and that he reported to his superiors the attack of 18 July 1993 by the Vitezovi on Stari Vitez.[1031]

504. In respect of the lorry bombing of 18 April 1993, the Appeals Chamber has already decided that there was no evidence in the Trial Judgement directly linking it to the Appellant,[1032] even though evidence before the Appeals Chamber now shows that the Vitezovi was involved in the crime.[1033] However, the investigation initiated by him into the lorry bombing of 18 April 1993 was confirmed by the evidence given at trial by the Appellant's superiors.[1034] No reasonable trier of fact could have reached the conclusion of the Trial Chamber that the Appellant failed to punish in relation to that offence.

[1029] Respondent's Brief, paras. 2.77-2.78.
[1030] T 18,835-18,836, 18,838 (10 Mar. 1999). It is noted that the Trial Chamber relied on his testimony for other findings in the same part of the Trial Judgement.
[1031] T 19,502 (24 Mar. 1999).
[1032] *See* this Chapter, section (B)(2), above.
[1033] AT 517 (11 Dec. 2003).
[1034] T 24,121 (23 June 1999) (Closed Session).

505. As to the report of the attack of 18 July 1993, the evidence at trial was unclear, because the Defence did not have the report of the Appellant at that time.[1035] The Appellant testified at trial, however, that he reported the attack to his superiors.[1036] But there is no additional evidence, admitted on appeal, which either contains that report or confirms that the Appellant sent the report to his superiors.[1037] A reasonable trier of fact could have reached the finding of the Trial Chamber that the Appellant failed to take necessary and reasonable measures to punish the perpetrators of the attack of 18 July 1993, in that he failed to properly report the transgression of the Vitezovi to his superiors. However, the Appeals Chamber has found that the attack was not illegal.[1038] There was no finding in the Trial Judgement that the Vitezovi used the "baby bombs". On the basis of trial and additional evidence, the Appeals Chamber is not satisfied beyond reasonable doubt that the Vitezovi committed an offence by using the "baby bombs". Without knowing whether his subordinates used "baby bombs" against Muslim civilians or their property during the 18 July 1993 attack, the question of the Appellant's superior responsibility does not arise.

506. Attention should now be cast on the attack of 16 April 1993 on the town of Vitez. As the Appeals Chamber has found above, the Appellant did not order the attack on the town as a crime against humanity or the crimes associated with the attack.[1039] The question remains, however, as to whether he may still be held responsible under Article 7(3) in relation to the crimes associated with the attack, *i.e.*, the looting and torching of Muslim houses.

507. The Trial Chamber found no basis to the Defence argument that it was only the Vitezovi unit that was to blame for the crimes committed on 16 April 1993.[1040] However, even assuming that the crimes were committed by the Vitezovi only, there was no factual finding in the Trial Judgement that the Appellant failed to report the crimes to his superiors. No reasonable trier of fact could have, in the absence of a proper factual basis, reached the conclusion of the Trial Chamber that the Appellant should be held responsible under Article 7(3) of the Statute for the failure to punish in relation to the crimes that occurred during the attack of 16 April 1993.

[1035] T 19508-19509 (24 Mar. 1999).
[1036] T 19502 (24 Mar. 1999).
[1037] *See* Appellant's Brief, p. 84 (which repeats verbatim the relevant text in the confidential version of the brief).
[1038] *See* this Chapter, section (B)(3), above.
[1039] *See* this Chapter, section (B)(1), above.
[1040] Trial Judgement, para. 516.

(c) The Appellant's responsibility for crimes committed by other units of the HVO

508. For the sake of completeness, the Appeals Chamber will examine the responsibility of the Appellant, if any, under Article 7(3) of the Statute in connection with the crimes found to be committed by the other HVO units during the attacks of 16 April and 18 July 1993.[1041]

509. In respect of the attack of 16 April 1993, the Appeals Chamber notes that the Appellant does not deny that the HVO troops were present in and around the town of Vitez on 16 April 1993, but that they were involved in the crimes during the attack.[1042] He argues that there was no such evidence at trial that the HVO troops committed crimes against civilians.[1043] Evidence admitted on appeal seems irrelevant to the crimes identified by the Trial Chamber, namely, the looting and torching of Muslim houses, the expulsion of inhabitants and the detention of Muslim civilians.[1044] There is not, therefore, a clear factual finding in the Trial Judgement as to whether the Vitezovi unit alone was responsible for the crimes that occurred during the attack.[1045] On the other hand, there was no evidence relied on in the Trial Judgement showing that the Appellant knew of the crimes having been committed during the attack. In the absence of a proper factual basis, no reasonable trier of fact could have found him to have failed in his duty to punish imposed by Article 7(3) of the Statute.

510. In respect of the event of 18 July 1993, the Appeals Chamber considers that, since the attack itself was not unlawful, the use of the "baby bombs" was not manifestly illegal (in that it is not proved beyond reasonable doubt that they were used intentionally against the Muslim civilian population or to destroy their property), and there was no evidence at trial that any unit under the Appellant's control used the "baby bombs." It is not proved beyond reasonable doubt that the Appellant was responsible under Article 7(3) of the Statute for the criminal behaviour, if any, of HVO units other than the Vitezovi during the attack of 18 July 1993.

(d) Conclusion

511. For the foregoing reasons, the Appeals Chamber finds that the Appellant had effective control to the extent that he had the ability to report subordinates' acts to his superiors. It also finds that no reasonable trier of fact could have reached a guilty verdict against the Appellant for failing in his duty to report in connection with the crimes attributable to the Vitezovi during the attacks of

[1041] Trial Judgement, para. 516.
[1042] Appellant's Brief, p. 62.
[1043] Appellant's Brief, p. 62.
[1044] Ex. 13, First Rule 115 Motion (Exhibit 13 includes an SIS report dated 8 June 1993 and based upon interviews of wounded individuals then staying in a hospital in Split. The document states that the Vitezovi, under the command of Kraljević, were responsible for the killings of Muslim civilians in Vitez).
[1045] Witness Pezer, T 1562-1566 (19 Aug. 1997).

16 April, 18 April, and 18 July 1993. It further finds that no reasonable trier of fact could have found him guilty for failing to report the crimes committed by other HVO units during the 16 April attack, and that it is not proved beyond reasonable doubt, on the basis of trial and additional evidence, that he failed in his duty to report crimes, if any, attributable to other HVO units in connection with the attack of 18 July 1993.

IX. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN THE BUSOVAČA MUNICIPALITY

A. Article 7(1) findings concerning the April 1993 crimes in Lončari and Očehnići

512. The Appellant submits that he did not issue any orders for an attack on Lončari or Očehnići, and that the Trial Chamber erred in attributing crimes committed by the Military Police, including the Jokers, to him.[1046] He maintains that the Trial Chamber itself admits that it did not have any order from the Appellant to seize the villages, and infers from the fact that it lacked some of the orders that the allegedly criminal orders were among those missing.[1047] The Appellant further submits that the evidence cited in the Trial Judgement at best only places the HVO units in Lončari and does not attribute the commission of any crimes to them.[1048] He states that the Nikola Šubić Zrinski Brigade ("NŠZ Brigade") was not in Lončari or Očehnići when the crimes were committed; it was on Mount Kuber and engaged in legitimate military activity near Kratine and Vrhovine.[1049] New evidence, he claims, shows that Kordić and Slišković used the Military Police to commit similar acts in Busovača without his knowledge.[1050]

513. The Appellant further states that his liability also purportedly follows from the scale of the atrocities, the scale of the assets used, and the fact that the crimes were committed at the same time and in allegedly the same way as the attacks in Vitez and Kiseljak.[1051] He submits that the Trial Chamber does not support these assertions in any way, and its overstatements are exemplified by the events in Očehnići from which it was inferred that the Appellant ordered the attacks.[1052] In his Supplemental Brief, the Appellant adds that these attacks were committed by the Military Police, who were not within the Appellant's control, as the additional evidence confirms, and that the additional evidence also shows that Kordić's and Slišković's power in Busovača "was both independent of the Appellant, and in direct opposition to the Appellant's authority."[1053] Finally, the Appellant asserts that despite its access to all the documents in the HVO and ABiH military

[1046] Appellant's Brief, pp. 86-87. This ground of appeal was the Fourth Ground in the Appellant's Brief.
[1047] Appellant's Brief, pp. 86-87
[1048] Appellant's Brief, p. 87.
[1049] Appellant's Brief, p. 87.
[1050] Appellant's Brief, p. 87.
[1051] Appellant's Brief (citing Trial Judgement, para. 590).
[1052] Appellant's Brief, pp. 87-88. He also states that other than the fact that houses were burned, there is nothing linking the events in Lončari or Očehnići with any other crimes alleged in the Trial Judgement.
[1053] Supplemental Brief, para. 62.

archives, the Prosecution "is unable to produce a single document that implicates [the] Appellant in the crimes committed in Busovača."[1054]

514. The Appellant further states that the Trial Chamber failed to provide an assessment of the Appellant's responsibility for crimes committed in Busovača in January 1993, or findings of guilt. Moreover, he states, the additional evidence shows that it was Kordić and others who were responsible for the crimes.[1055] He argues that the Trial Chamber convicted him on the basis of his command position alone, imposing strict liability on him.[1056] He suggests that absent illegal orders, the Trial Chamber based its conclusion on two assumptions: that the crimes in Busovača could not have occurred without orders, and that only the Appellant could have issued such orders. Neither assumption, he states, was supported by evidence, and the additional evidence shows that they are erroneous.[1057] He refers to the additional evidence that Kordić, Koštroman, and Slišković used the Military Police for criminal purposes in Busovača without his knowledge or consent, and that Kordić was the *de facto* military leader in Busovača.[1058] During the hearing on appeal, counsel for the Appellant recalled an entry from the war diary,[1059] which he asserted showed that the Busovača Brigade was sent to Kuber on 16 April 1993 but its position was lost by the following evening.[1060] This, the Defense asserted, is inconsistent with the argument that the brigade was involved in misconduct in Lončari at the time.

515. The Prosecution submits that the Trial Chamber reviewed numerous orders from the Appellant to the Military Police, the Džokeri (Jokers), and the NŠZ Brigade throughout the week of 15-19 April 1993, and found that these units were under the Appellant's command.[1061] It adds that the attacks on the Vitez, Busovača, and Kiseljak municipalities were simultaneous and highly organised, proceeding in a similar manner.[1062] The Prosecution considers that the totality of the evidence showed that the Appellant ordered "all of the attacks" in January and April 1993, and that the Appellant has failed to show why this finding was unreasonable.[1063] The Prosecution argues that the attacks on the two villages in this municipality constituted a part of the widespread and systematic persecutory attack on the Muslims in the region.[1064]

[1054] Supplemental Brief, para. 63.
[1055] Brief in Reply, para. 64.
[1056] Brief in Reply, paras. 65-66.
[1057] Brief in Reply, para. 67.
[1058] Brief in Reply, para. 69.
[1059] Ex. 14, Second Rule 115 Motion.
[1060] AT 638 (16 Dec. 2003).
[1061] Respondent's Brief, para. 2.309.
[1062] Respondent's Brief, para. 2.310.
[1063] Respondent's Brief, para. 2.313.
[1064] Respondent's Brief, para. 2.312.

516. The Appeals Chamber considers that the Trial Chamber found the Appellant responsible for the attacks on the villages of Lončari and Očehnići in April 1993. The Trial Chamber found that regular HVO troops,[1065] the Military Police Fourth Battalion, and more specifically the Jokers, committed the crimes in Lončari and Očehnići; that regular HVO troops in Busovača, including the NŠZ Brigade, took orders directly from the Appellant, and the Military Police Fourth Battalion and the Jokers were under the Appellant's authority; that the Appellant gave numerous orders to the units involved in the crimes, especially to the NŠZ Brigade, and deployed them in the area where the crimes were committed; that he was fully informed of the developments of the NŠZ Brigade's ground mission because he received reports; and that he was therefore responsible for the crimes.[1066] The Trial Chamber also found that by giving orders to the Military Police in April 1993, when he knew there were criminals in its ranks, the Appellant intentionally took the risk that very violent crimes would result.

517. Having examined the findings of the Trial Chamber outlined above, the Appeals Chamber observes that the Trial Chamber seemed to stop short of stating that the Appellant ordered the crimes in Lončari and Očehnići. Rather, it seemed to find that in issuing orders to the troops involved, he intentionally took the risk that crimes would ensue. The Appeals Chamber deems this to be a finding made pursuant to Article 7(1) of the Statute. The Appeals Chamber has articulated the *mens rea* applicable to the form of liability of ordering under Article 7(1), in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of a substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the April 1993 attacks in Busovača. As a result, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for the crimes in Lončari and Očehnići.

518. At the outset, the Appeals Chamber observes that there is no direct evidence of an order or orders issued by the Appellant to attack Lončari and Očehnići in April 1993. Indeed, the Trial Chamber had reached its conclusions on the basis of inference. It had, in part, based its finding not on any order, but rather on the absence of orders. The Trial Chamber had expressly referred to the "irregular numbering of the exhibits submitted during the hearing"[1067] and had stated that it "received only 10 or so of General Blaškić's orders covering the period from 17 April at 04:00

[1065] The Appeals Chamber notes that the Trial Judgement is unclear as to whether the NŠZ Brigade was part of the April 1993 attack on Lončari *only* or Očehnići also; the findings differ in different parts of the Trial Judgement (*see*, for example, paras. 571 and 583 of the Trial Judgement).
[1066] Trial Judgement, paras. 583-589.

hours to 19 April at 18:45 hours, whereas 40 numbers separate the first document from the last."[1068] It had further noted that the accused often addressed his troops orally, but cited no evidence in support of this point.

519. The Appeals Chamber considers that the Trial Chamber drew an adverse inference from the number and sequence of orders in evidence, and indeed, from the absence of orders, in relation to its findings on Lončari and Očehnići. However, when it did so, the Trial Chamber failed to explain or to provide a basis for its inference.[1069] Moreover, it is difficult to conceive of a situation in which the absence of evidence that an individual gave an order could reasonably give rise to an inference that he did do so, and this case does not present such a situation. The Appeals Chamber finds that this inference is not reasonable.

520. The Trial Chamber had also stated that it was convinced beyond reasonable doubt "that it followed from the scale of the atrocities carried out, from the scale of the assets used…and especially from the fact that the attacks were carried out at the same time and in the same way on the municipalities of Busovača, Vitez…, and Kiseljak…, that [Blaškić] had ordered the offensives against Lončari and Očehnići."[1070] It had stated that the Busovača crimes were similar to those carried out in other municipalities — murders, beatings, unlawful confinements, and forced expulsions of Muslim civilians and torching of private homes — and noted that these crimes were set against the same background of persecution of Muslim populations in Central Bosnia.

521. The Appeals Chamber considers that the Trial Chamber drew a second inference: it inferred from the scale of atrocities, the scale of assets, and the manner in which the attacks and crimes were carried out, that the Appellant ordered the offensives in Lončari and Očehnići. It seems that the Trial Chamber had viewed these aspects as evincing a consistent pattern of conduct signifying the Appellant's responsibility. However, the Appeals Chamber considers that general assertions such as the "scale of atrocities" and the "scale of assets" are too broad and sweeping to give rise to an inference that the Appellant ordered the attacks in Lončari and Očehnići.

522. Furthermore, a brief examination of certain facts underlying these general assertions reveals certain inconsistencies. For example, in relation to the manner in which attacks were carried out on the villages of Gomionica and Svinjarevo in Kiseljak, the Appellant ordered that "'all available artillery' be used."[1071] This was not the case in relation to Očehnići, where HVO soldiers or the

[1067] Trial Judgement, para. 589.
[1068] Trial Judgement, para. 589.
[1069] *See* Trial Judgement, para. 589.
[1070] Trial Judgement, para. 590.
[1071] *See* D300.

Military Police entered the village without prior artillery fire.[1072] Witness Q stated that Lončari was not shelled on 16, 17, or 18 April when she left that village.[1073] As to the purportedly massive nature of the attacks, according to Witness Nuhagić, Očehnići was a small village of about eight houses, and five civilians, all of whom were members of his family, were killed.

523. In light of considerations such as these, and given the absence of direct evidence that the Appellant ordered the attacks in Lončari and Očehnići in April 1993, the Appeals Chamber finds that no reasonable trier of fact could conclude beyond reasonable doubt that the Appellant ordered these attacks. As a result, it is not necessary to examine whether the Appellant was aware of a substantial likelihood that crimes would be committed.

524. The Appeals Chamber accordingly finds that no reasonable trier of fact could conclude that the Appellant was responsible for the crimes committed in Lončari and Očehnići in April 1993 under Article 7(1) of the Statute.

525. The Appeals Chamber notes that the additional evidence admitted on appeal only bolsters this conclusion.[1074]

B. The January 1993 crimes in Busovača

526. In light of the parties' submissions on the issue, and in order to clarify the point, the Appeals Chamber also deems it necessary to discuss the apparent finding of the Trial Chamber that the Appellant was responsible for implementing — not ordering — attacks in January 1993 in

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[1072] *See* T 5217 (12 Dec. 1997).
[1073] T 5179, T 5167-8 (11 Dec. 1997).
[1074] Witness BA4, for example, testified: "I have to reiterate that all the events, everything that happened in Busovača, right from the start until all the way down to the killings and the expulsions of the population, that nothing was done without the explicit orders from Dario Kordić and Anto Slišković. They are the really evil men." AT 491 (10 Dec. 2003). *See also* Ex. 6 to the Fourth Rule 115 Motion, a British Battalion military information summary (milinfosum) dated 30 April 1993, which states:

> BHC report that on 28 Apr. a 40 vehicle convoy escorted by Britbat was detained by HVO forces, who demanded that they search it. HVO claim that their orders came from Mr. Kordić. They said that they would ignore any orders from Col Blaškić or Brig Petković. Eventually Brig Petković contacted Mr. Kordić and the convoy was allowed to pass. Local HVO said they were only acting on Mr. Kordić's orders. This occurred in Busovača. [….] Dario Kordić is the HDZ representative for Central Bosnia and also reputedly holds the rank of Col in the HVO. [….] This is not the first incident of this kind in Busovača however it is the first indication of HVO soldiers in the town openly placing loyalty to Kordić before either Blaškić or Petković.

See also Ex. 40 to the Fourth Rule 115 Motion, an ECMM report dated 16 June 1993 (para. 16):

> In theory command and control of the HVO is through the normal military chain, although recent events demonstrate without doubt that the factions are far from being able to implement the ceasefire agreements signed by the two Commanders in chief. Controlled or uncontrolled HVO soldiers continue to prevent freedom of movement for any humanitarian aid or civilian traffic into Muslim held areas of Central Bosnia-Hercegovina. In particular the military police answer only to HVO Minister of Defense Stojić and Mate Boban, and are a major force in the control of traffic moving through South Central Bosnia-Hercegovina. In the Novi Travnik/Vitez/Busovača area HVO preventing the movement of relief convoys answer only to Dario Kordić, Minister for Herceg-Bosna in the HVO Government, political leader, effective military commander in Busovača and cousin of Mate Boban.

Busovača.[1075] The Trial Chamber only stated that these attacks were ordered by the HZHB Ministry of Defense, but that the Appellant was "directly responsible for their implementation because he was the commander in charge of the units deployed on the ground at the time of the criminal acts."[1076] The Appeals Chamber considers that the Trial Chamber did not discuss evidence in relation to or assess the Appellant's responsibility for crimes committed in Busovača in January 1993. As a result, the Appeals Chamber considers that no finding was made pursuant to Article 7(1) of the Statute in relation to the January 1993 attacks in Busovača. Therefore, the Appeals Chamber considers that it is not necessary to examine this issue any further.

C. Article 7(3) findings concerning the April 1993 crimes in Lončari and Očehnići

527. The Appellant argues that the Trial Chamber convicted him for the crimes in Lončari and Očehnići under Article 7(3) of the Statute solely on the basis of his command position.[1077] He submits that Rule 115 evidence shows that the Military Police's operations in Busovača and elsewhere in Central Bosnia were controlled by Kordić and other political extremists,[1078] that Kordić held a senior military position in addition to his political position,[1079] and that none of the intelligence reports implicate the Appellant in any crime in Busovača.[1080] The Appellant claims that he had no prior knowledge of the crimes which were going to be committed, and he took steps, through issuing orders, to prevent the commission of crimes against civilians or civilian properties.[1081] The Appellant further argues that the Prosecution cited D269 to link the Appellant with the crimes in Lončari or Očehnići between 15 and 19 April 1993, but that the unit to which the order was addressed was in the Kuber region on 17 April 1993.[1082] He states that he was convicted for issuing unidentified and entirely legal orders to the Military Police in April 1993 when he allegedly "knew" that there were individual members of the Military Police who had previously committed crimes, and that there was no evidence putting him on notice that the Military Police would carry out legitimate orders in an unlawful way.[1083] He insists that there was no evidence that he had actual knowledge that crimes would be committed.[1084] The Appellant further states that trial

[1075] *See* Trial Judgement, paras. 377-378.
[1076] Trial Judgement, para. 378.
[1077] Appellant's Brief, p. 94.
[1078] Appellant's Brief, pp. 89-90.
[1079] Appellant's Brief, pp. 90-91.
[1080] Appellant's Brief, pp. 92-93.
[1081] Appellant's Brief, p. 94.
[1082] Brief in Reply, para. 71.
[1083] Brief in Reply, para. 73.
[1084] Brief in Reply, para. 74.

evidence and the additional evidence show that he did not have the ability to discipline the Military Police even when they were attached to his command.[1085]

528. The Prosecution submits that contrary to the Appellant's arguments, the Trial Chamber found him not only to have had effective control over the troops involved in the Busovača municipality crimes, but to have had prior knowledge that crimes were about to be committed and to have failed to prevent them.[1086] The Prosecution also submits that the Trial Chamber found that the Appellant never punished a single person for any of the crimes in this region.[1087]

529. In relation to the Appellant's command responsibility for the crimes committed in Busovača, the Trial Chamber stated as follows:

> Granted, in November 1992 and March 1993, General Blaškić ordered that the torching of houses stop and had asked commanders, in particular those of the regular HVO troops and of the Military Police, to identify the criminals responsible for those acts. But he *almost never punished* these criminals and never took steps to put them in a position where they could do no harm by imposing measures that would have prevented the very serious crimes in Lončari and Očehnići from being repeated.[1088]

The Trial Chamber therefore suggested that there were occasions where the Appellant did take the requisite measures but stated that the Appellant "almost never punished" the criminals in the ranks. The Appeals Chamber considers that such a statement is not a proper assessment of criminal responsibility. Moreover, the Trial Chamber seemed to be making a vague reference to future crimes, rather than to the crimes committed in Lončari and Očehnići in April 1993.

530. In relation to this statement of the Trial Chamber, therefore, the Appeals Chamber considers that the Trial Chamber failed to examine and to discuss in an adequate manner the evidence before it, in relation to the legal requirements of Article 7(3) of the Statute.[1089] As a result, the Appeals Chamber concludes that no finding was made pursuant to Article 7(3) of the Statute concerning the crimes committed in Lončari and Očehnići in April 1993, and it declines to consider the issue any further.[1090]

[1085] Brief in Reply, para. 75.
[1086] Respondent's Brief, para. 2.323.
[1087] Respondent's Brief, para. 2.326.
[1088] Trial Judgement, para. 592 (emphasis added).
[1089] See Chapter III (B) of this Judgement, above.
[1090] *See* para. 93 of this Judgement, above.

D. Count 14: The destruction of religious or educational property in Busovača

531. The Appellant submits briefly in a separate sub-section under this ground of appeal that the Trial Judgement was vague and failed to identify the evidence of such destruction.[1091]

532. Count 14 of the Indictment concerns the destruction of institutions dedicated to religion or education from August 1992 until September 1993 in numerous towns and villages; Busovača is listed as one of them. The Appellant was charged in this count for a violation of the laws or customs of war as recognized by Articles 3(d), 7(1), and 7(3) of the Statute. In the Disposition, the Trial Chamber found the Appellant guilty on the basis of Count 14 pursuant to Article 7(1) and 7(3), but in the section of the Trial Judgement concerning Busovača, there is no discussion or analysis pertaining to the charges contained in Count 14, and no specific finding. On appeal, the Prosecution submitted that the Appellant was not charged with, nor convicted on Count 14 for the destruction of religious property in Busovača.[1092]

533. In light of the foregoing, the Appeals Chamber considers that the conviction under Count 14 of the Indictment in relation to Busovača must be vacated.

[1091] Appellant's Brief, p. 95.
[1092] Respondent's Brief, para. 2.329.

X. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN THE KISELJAK MUNICIPALITY

534. The Appellant argues that the Trial Judgement is very vague as to the legal basis for the Appellant's responsibility for attacks on civilians in the Kiseljak municipality, and assumes that the basis lies both in Article 7(1) of the Statute, for his alleged ordering or instigating the illegal attacks, and in Article 7(3) of the Statute.[1093] According to the Appellant, although the Trial Judgement fails to analyze the Appellant's command responsibility for crimes committed in the Kiseljak municipality, and makes no mention of the Appellant's "failure to prevent" or "failure to punish" any crimes committed there, the disposition includes a "catch-all" sentence that apparently finds the Appellant globally culpable on a command responsibility theory.[1094] The Appellant further submits that the Trial Chamber not only applied the wrong *mens rea* of recklessness, but erred in finding him guilty in the absence of factual evidence that he ordered, planned, instigated, or aided and abetted the commission of crimes.[1095]

535. The Prosecution submits that the Trial Judgement is clear as to the basis of the Appellant's responsibility, and that the Trial Chamber's analysis of the Appellant's responsibility for ordering the crimes in the municipality was detailed.[1096] The Prosecution adds that the Appellant was primarily convicted under Article 7(1) of the Statute.[1097]

A. The Appellant's responsibility for the April 1993 attacks in Kiseljak

536. The Appellant claims that no illegal orders were issued by him, and that the Trial Chamber erred in inferring the existence of illegal orders on the basis of the "irregular numbering" of orders introduced at trial.[1098] Further, he argues that the statement in the Trial Judgement that ABiH assets were inferior to those of the HVO is meaningless, because an army is not required to limit its range of weaponry to that of its opponent.[1099] In addition, he states that there was no evidence at trial that the orders he issued to the Ban Jelačić Brigade were illegal, and that neither D299 nor D300

[1093] Appellant's Brief, pp. 95-96. This ground of appeal was the Fifth Ground in the Appellant's Brief.
[1094] Appellant's Brief, p. 96.
[1095] Brief in Reply, paras. 76-77.
[1096] Respondent's Brief, para. 2.334.
[1097] Respondent's Brief, para. 2.335.
[1098] Appellant's Brief, p. 97.
[1099] Appellant's Brief, p. 97.

contains an authorization of an attack on civilians.[1100] The Trial Chamber, he argues, erred in construing the rhetoric of the Appellant's orders as showing his intention to attack civilians, and this rhetoric, which was not addressed to civilians, spoke to ABiH *military* forces and attendant casualties.[1101] He argues that the term "mop-up" was an ordinary military term which does not connote the eradication of civilians, and that even assuming that the words used by the Appellant were hateful, the Prosecution in effect concedes that the International Tribunal's case law has rejected the imposition of criminal liability based on hate speech.[1102] He further submits that this language does not constitute proof beyond reasonable doubt of an intent to incite the commission of crimes against civilians.[1103] The use of rhetoric in the Appellant's order, he states, was reflective of the situation and of the region, in that as confirmed by the war diary, the Appellant received numerous reports of atrocities committed by Muslim forces in Zenica.[1104] The Appellant further submits that his use of rhetoric is typical in Central Bosnia generally, and cites as an example the rhetoric used in an order from the Ban Jelačić Brigade commander issued on 25 May 1993, which prohibited crimes against Muslims.[1105] He states that there exists evidence to show that at the time of the attacks, the Appellant also issued orders to protect Muslim civilians.[1106] He submits that the additional evidence will show that all his orders regarding Kiseljak were directed at legitimate military targets, and that these newly discovered orders "are in sharp contrast to the Trial Chamber's conclusion that missing orders would have inculpated [the] Appellant."[1107]

537. The Appellant further submits that new evidence also shows that the commander of the Ban Jelačić Brigade did not report criminal conduct to the Appellant[1108] and that the brigade carried out military operations in April 1993 without orders from the Appellant.[1109] He adds that once he learned of lawlessness, he took remedial action.[1110] The Appellant asserts that he can only be convicted for "instigating" crimes if his conduct was a contributing factor to the crimes. He states that even if one were to assume *arguendo* that his conduct could be so construed, there is no evidence upon which a reasonable tribunal could have concluded that his conduct was a contributing factor.[1111]

[1100] Appellant's Brief, pp. 97-98.
[1101] Appellant's Brief, pp. 97-99.
[1102] Brief in Reply, para. 79.
[1103] Brief in Reply, para. 79.
[1104] Supplemental Brief, para. 66 (citing Ex. 14, Second Rule 115 Motion, pp 115-6).
[1105] Supplemental Brief, para. 66 (citing Ex. 45, Fourth Rule 115 Motion).
[1106] Appellant's Brief, pp. 99-100 (citing D32, P456/26, P456/27, D284, P456/36). *See also* p. 102.
[1107] Appellant's Brief, pp. 101-102 (citing First Rule 115 Motion Ex. 138, 139, 140, 141).
[1108] Appellant's Brief, p. 101 (citing First Rule 115 Motion Ex. 142, 143, 145).
[1109] Appellant's Brief, p. 101.
[1110] Appellant's Brief, p. 102.
[1111] Appellant's Brief, p. 102.

538. The Appellant submits that there was no evidence that he ordered the Ban Jelačić Brigade to commit crimes when ordering them into action in April 1993.[1112] As to the point that Mijo Božić, the Ban Jelačić Brigade commander, had previously issued an illegal order, the Appellant argues that he did not know of this incident before his trial, that order was not implemented, and its existence is not probative of whether he intended or deliberately risked the commission of crimes.[1113]

539. The Appellant points out that his conviction rests on inferences drawn by the Trial Chamber in the absence of inculpatory evidence, and that the new evidence and evidence at trial "show beyond doubt that Appellant did not order and was not aware of criminal conduct in the April and June attacks, and did not possess effective control over the HVO units in Kiseljak at the time these units engaged in criminal conduct."[1114] Furthermore, his orders had a legitimate military purpose as confirmed by Exhibit 47 to the Fourth Rule 115 Motion, which contains an order from the ABiH commander to his forces in Kiseljak on 17 April 1993 to disarm and capture all areas held by the HVO.[1115]

540. The Appellant adds that Exhibits 146, 147, and 149 to the First Rule 115 Motion confirm that he did not intend criminal conduct to occur and that he prohibited its occurrence. Other evidence admitted on appeal, including Prosecution rebuttal material, he asserts, makes it clear that his orders were legitimately directed at ABiH forces in Kiseljak, rather than civilian targets.[1116] Finally, he maintains that Exhibit 142 to the First Rule 115 Motion illustrates that the Ban Jelačić Brigade commander did not report civilian casualties in Višnjica or Rotilj or crimes which had occurred in the HVO operations.[1117]

541. The Prosecution argues that the Trial Chamber's conclusion that the Appellant is responsible for the crimes committed in Kiseljak is not unreasonable, and that the Appellant's claims that the Trial Judgement is vague are erroneous. It further submits that the Kiseljak attacks were part of an overall policy of persecution of the Muslim population to which the Appellant subscribed.[1118] Based on the widespread and systematic nature of the crimes committed in Vitez, Busovača, and Kiseljak municipalities, the Trial Chamber's conclusion that the Appellant ordered the crimes in Kiseljak was, according to the Prosecution, reasonable.[1119] The Prosecution also

[1112] Brief in Reply, para. 78.
[1113] Brief in Reply, para. 80.
[1114] Supplemental Brief, para. 64.
[1115] Supplemental Brief, para. 66 (citing Ex. 47, Fourth Rule 115 Motion).
[1116] Supplemental Brief, para. 69 (citing PA 49, Ex. 141 (First Rule 115 Motion) and PA 47, PA 48).
[1117] Supplemental Brief, para. 70.
[1118] Respondent's Brief, paras. 2.336, 2.338-2.339.
[1119] Respondent's Brief, para. 2.344; *see also* paras. 2.340-2.343.

points out that the Trial Chamber analyzed orders of the Appellant addressed to the commander of the Ban Jelačić Brigade in the context of all the evidence and identified elements therein that contributed to the finding that the Appellant ordered the crimes in Kiseljak.[1120]

542. The Appeals Chamber considers that, in relation to the April 1993 attacks in Kiseljak, the Trial Chamber found as follows: (i) the Appellant ordered the Ban Jelačić Brigade to seize several villages in Kiseljak in April 1993; (ii) he clearly had to have known that by ordering the brigade to launch such wide-ranging attacks against essentially civilian targets, extremely violent crimes would result,[1121] and even though he did not explicitly order the expulsions and killings, he deliberately ran the risk of making the Muslims and their property the primary targets of the 'sealing off' and offensives launched on 18 April 1993;[1122] and (iii) he sought to implement the policy of persecution set by the highest HVO authorities through the military assets he used, and through these offensives, he intended to make populations in Kiseljak take flight.[1123]

543. The Appeals Chamber considers that the Trial Chamber did not find that the Appellant ordered the crimes in Kiseljak in April 1993. Instead, the Trial Chamber found that the Appellant "deliberately ran the risk" of making Muslims and their property the main targets of these offensives, and concluded that he "had to have known" that by ordering such attacks, very violent crimes would result. The Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering.[1124] Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the April 1993 attacks in Kiseljak. As a result, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for the crimes which occurred in April 1993 in Kiseljak.

544. The Appeals Chamber further notes that the Trial Chamber found that through these offensives and the military assets employed, the Appellant intended to make these populations flee. In the view of the Appeals Chamber, the Trial Chamber seemed to find that the Appellant intended to effect forcible transfers of civilians through these offensives. The Appeals Chamber will examine whether there is evidence of such intent in the discussion below.

[1120] Respondent's Brief, paras. 2.350-2.355.
[1121] Trial Judgement, para. 661.
[1122] Trial Judgement, para. 653.
[1123] Trial Judgement, para. 661.
[1124] *See* Judgement, *supra* para. 42.

545. In support of its assertion that the Appellant deliberately ran the risk of making Muslim civilians and their property the primary targets of the sealing off and offensives launched on 18 April 1993, the Trial Chamber had found that the combat preparation order (D299) and combat order (D300) were "categorical and hate-engendering;"[1125] that the orders were addressed to a commander who "had himself previously threatened to burn a village down;"[1126] and that "they advocated the use of heavy weapons against villages inhabited for the most part by civilians."[1127] The Appeals Chamber will examine the evidence underlying these findings in light of the legal standard articulated above to arrive at a conclusion concerning the Appellant's responsibility for the April 1993 attacks in Kiseljak.

546. D299 is a preparatory combat order dated 17 April 1993 (0910 hours) and addressed to the commander of the Ban Jelačić Brigade. Its subject line indicates that it is an order "for the tying up of a part of the Muslim forces that are attacking [the] HVO." Paragraph 1 of the order contains a description of the activities, probable goal, and positions of the Muslim forces. Paragraph 2 states:

> The mission of your troops: tie up the forces of the aggressor in this way:
>
> a) Engage in the blockade of Višnjice and other villages that could be used by the enemy to launch an attack.
>
> b) Take control of Gomionica and Svinjarevo after a strong artillery support by VBR and MB. The attack of the main forces to be made from Šikulje and Hadrovci. Establish the line of defense and keep the troops together.
>
> c) In the sector no. 5, reinforce the troops at the object of Badnje (one company) and at the object of Pobrde (one company).[1128]

Paragraph 3 states *inter alia* that all of the aggressor's attacks "have been repelled," and that the city of Vitez is under HVO control. Paragraph 4 reads: "Keep in mind that the lives of the Croats in the region of Lašva depend upon your mission. This region could become a tomb for all of us if you show a lack resolution."

547. During the hearing on appeal, Counsel for the Appellant maintained that a military rationale underlay this order, stating that the Appellant limited the sealing off to those villages from which a military attack was probable, that is, "only those villages from which his forces could be placed in jeopardy."[1129] He further explained that the BH army headquarters and main force were located in Gomionica, and that according to the Trial Judgement, there were seventy soldiers in

[1125] Trial Judgement, para. 653.
[1126] Trial Judgement, para. 653.
[1127] Trial Judgement, para. 653.
[1128] D299.
[1129] AT 651 (16 Dec. 2003).

Svinjarevo.[1130] In addition, he stated that the Appellant did not seek an attack on the village of Gomionica directly, but ordered the troops to take the axis of Šikulje and Hadrovci, two hills above the village of Gomionica "from which one is able to militarily exert control on villages lower down, on the slopes lower down beneath the hills."[1131] Counsel for the Appellant concluded that, in light of the all-out attack that was taking place on Busovača, the Appellant sought assistance from Kiseljak and tried to open a second front.[1132] In response, Counsel for the Prosecution merely stated that "[c]onsidering the context of what took place and the number of international witnesses who described what actually took place…it was not unreasonable for the Trial Chamber to determine that that left the door open for them to carry out cleansing operations."[1133]

548. D300 is dated 17 April 1993 (2345 hours) and is an order issued by the Appellant for combat operations. It is addressed to the Ban Jelačić Brigade command. It also contains a description of enemy activities and contains the following orders:

> Using all available artillery, carry out fire preparations for the attack from the VU /abbreviation unknown/. Capture Gomionica and Svinjarevo through systematic targeting (60, 82 and 120 mm MB /mortar launchers/). Afterwards, regroup forces and carry out artillery preparations for launching an attack on and the capture of Bilalovac.
>
> Fojnica must secure your left flank and launch an attack on Dusina or a breakthrough toward Sebešić.
>
> Persist tomorrow with the attack or we will be wiped out because the MOS /Muslim armed forces/ and the Mujahedin are advancing against the Croats in Zenica supported by tanks.
>
> …
>
> All army forces, (military and civilian) police forces are to be placed under the command of the Kiseljak Ban Jelačić Brigade.
>
> All assault operations must be successful and to that end, use units of the military and civilian police for the *mop up*.
>
> Maintain a sense of historic responsibility.[1134]

549. The Appeals Chamber notes that according to the Trial Chamber, the Appellant employed terms in these orders which were not strictly military and "had emotional connotations which were such as to incite hatred and vengeance against the Muslim populations."[1135] The Trial Chamber had further considered that the Appellant used radical words connoting eradication, and cited the term "mop up" contained in D300 as an example. In addition, the Trial Chamber had considered that in the combat order D300, the Appellant ordered that all available artillery be used, that Gomionica

[1130] AT 652 (16 Dec. 2003).
[1131] AT 652 (16 Dec. 2003).
[1132] AT 652-653 (16 Dec. 2003).
[1133] AT 768 (17 Dec. 2003).
[1134] D300 (emphasis added).

and Svinjarevo be captured "through systematic targeting (60, 82 and 120 mm MB [mortar launchers])" and that "fire preparations for the attack must be strong and guarantee a successful attack."[1136]

550. Other trial evidence referred to by the Trial Chamber consists of the following. D305, dated 18 April 1993, 1000 hours, is a regular fighting day report from the Ban Jelačić Brigade officer on duty, Mato Lučić, and is addressed to the CBOZ Headquarters, Forward Command Post Vitez. It states in part: "Our forces which are fulfilling their tasks in the village of Gomionica are being attacked. They are mostly using snipers. A great number of forces have left Gomionica and pulled out towards village of Stojkovići." D305 also states that tasks are being done by orders and that they have reached Mlava but "strong fightings are going on."

551. D306 is a report on the situation also dated 18 April 1993, at 1645 hours, from the Ban Jelačić Brigade Commander, Mijo Božić; it is addressed to the CBOZ Commander, Tihomir Blaškić. It states that the conflict "has spread to the villages of Rotilj, Višnjica, Doci, Hercezi and Brestovsko." It adds: "We have lost Zavrtaljka, we did not manage to handle Gomionica, but we did take around 1 km on both sides around Gomionica. Heavy fighting is in progress. We have had three killed and four wounded, the number of missing is unknown."

552. D323 is a regular combat report for 19 April 1993 at 0200 hours from the Ban Jelačić Brigade operations officer, Mato Lučić. It is addressed to the CBOZ Command, Forward Command Post Vitez. It states that the Muslim Armed Forces (MOS) "continue to fire from infantry weapons on our positions from the region of Gomionica. They attempted a counter-attack from the Gomionica village, which we have repelled. In the Podbrđa region, the MOS fired at our forces." As to HVO forces, the report continues: "Our forces continue with intense activities in the Gomionica village, since the MOS attempted a counter-attack. They are trying to reinforce their positions along the lines they have reached; in other parts of the municipality there is a lull in the fighting."

553. Trial exhibit D324, from the NŠZ Brigade commander, Duško Grubešić, states that on 19 April 1993, a general attack carried out by the ABiH began on Busovača.

554. P456/53, dated 19 April 1993, 1845 hours, is signed by the Appellant and is addressed to the Ban Jelačić Brigade. It states in part: "Attack in groups and only diagonally from Kočatala and Šikulje." P456/50, dated 19 April 1993, 2140 hours, is also from the Appellant to the Ban Jelačić Brigade Command Kiseljak. It states: "You must take Gomionica tonight or in the early morning,

[1135] Trial Judgement, para. 644.

because the main forces of the MOS are at Busovača which is being attacked today by the main forces of the 3rd Corps of the ABiH, although certainly unsuccessfully. They are also attacking Vitez and destroying it using all means." It further states: "…the Croatian people of Zenica are going through a most critical period. They are literally being slaughtered. The main forces have successfully broken through to our Frankopan Brigade in Travnik. Now, our forces have been engaged as well. …. We are in constant contact with the leadership [of the HZHB]."

555. Other trial evidence suggests an ABiH army or TO presence in certain villages in Kiseljak at the relevant time.[1137]

556. The Appeals Chamber also considers evidence that the Appellant's orders were addressed to a commander, Mijo Božić, who had previously threatened to burn down a village in an order dated 27 January 1993.[1138] However, Božić never carried out this order, and it was not addressed or copied to the Appellant, who submits that he was not aware of it prior to his trial.

557. The Appeals Chamber considers that the above evidence illustrates that there was heavy fighting between the HVO and ABiH forces in Kiseljak on 18 and 19 April 1993; that the ABiH attacked Busovača on 19 April 1993; and that the Muslim Armed Forces attempted a counter-attack from the village of Gomionica prior to the time of 0200 hours on 19 April 1993. As a result, the Appeals Chamber considers that there were military motivations underlying the issuance of the Appellant's orders. The Appeals Chamber finds that on the basis of the evidence relied upon by the

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[1136] Trial Judgement, para. 650.

[1137] Indeed, the Trial Chamber had found that military surveillance had been organized by the Muslims, particularly at Gomionica, Hercezi, Svinjarevo, and Višnjica, and that the BH army was present at the time of the offensives carried out in the village of Svinjarevo. Trial Judgement, para. 630. The Trial Chamber relied on the evidence of a witness who testified in closed session and who stated that the main headquarters of the Jasikovica Detachment was in the village of Višnjica T 7979 (28 Apr. 1998) (closed session). *See* Trial Judgement, p. 209, n. 1445. That witness also testified that an order of the commander of the Territorial Defense of Kiseljak established the Jasikovica Detachment, which comprised the villages of Rotilj, Višnjica, Hercezi, and Doci; it was established with the sole purpose of providing assistance to the army of the Republic of BH in the area where the Bosnian Army was conducting war against the Serbs. T 7922 (28 Apr. 1998) (Closed Session). The witness further stated Gomionica, Svinjarevo, Gromljak, and Jehovac came under the authority of the Mlava Detachment. T 7975.

The Trial Chamber cited the opening remarks of Prosecution counsel (T 9244-5 (4 June 1998)), relating to the testimony of another witness who testified in closed session; it is unclear whether this page reference contained in the Trial Judgement is an error. However, that witness did testify, that in a house in Gomionica there was a Territorial Defense, with a staff of 5-6 people, as far as he knew, but he added: "there might have been more people actually working there…." T 9256 (4 June 1998) He added that they functioned as a Territorial Defense; it was a Territorial Defense staff that was operational until 1 January 1993; and that after that, it became the BiH army. The witness also testified, in relation to Gomionica: "Number 1 represents a house where the Territorial Defence staff was. They were expelled from Kiseljak, I think, in early '93 and they were in that house up until the 17th in the evening, the 17th of April that is." T 9252 (4 June 1998) (Closed Session).

In relation to Hercezi, the Trial Chamber cited Witness JJ who testified: "We organized ourselves in the village. There were about 15 able-bodied men there. We split between two ends of the village; we knew what we needed to protect." T 7398 (19 Mar. 1998) (Open Session).

In relation to Višnjica, the Trial Chamber cited Witness AA, who testified that "there were several soldiers, like a detachment of Jasikovci. How many soldiers there were I do not know." T 6621 (19 Feb. 1998) (Open Session).

[1138] *See* Trial exhibit P510.

Trial Chamber, no reasonable trier of fact could have come to the conclusion beyond reasonable doubt that the Appellant intended to effect forcible transfers of civilians. The Appeals Chamber further finds that this evidence does not prove beyond reasonable doubt that the Appellant was aware of a substantial likelihood that crimes would be committed in the execution of his orders. For the foregoing reasons, the Appeals Chamber finds that no reasonable trier of fact could conclude that the Appellant was responsible under Article 7(1) of the Statute for the crimes committed in April 1993 in Kiseljak.

558. Additional evidence heard on appeal supports this conclusion. When asked to interpret the term "mop up," contained in D300, Witness BA3 stated: "These identical terms were used by both parties to the conflict. These terms are customary terms in those times in the territory of Bosnia and Herzegovina, and this is a term used and found in military terminology when one side liberates a part of a territory that had previously been held by the opposing side in order to mop up possible remaining soldiers of the enemy forces."[1139]

559. Witness Watkins similarly testified that the term "mop up" was a standard military term, explaining:

> there [are] levels of intensity of activity, and so after maybe an attack, there would be pockets that one could in a military have left because they were particularly difficult, so one bypasses. And then having won the main objective, you would go back and sort out, either surrender or destroy the enemy, and that action after the main event, when the intensity is reduced to a low intensity activity, that mopping up is the complete control that you wish to have over your territory and the clearing of enemy forces.[1140]

560. Witness BA1 testified along similar lines and stated:

> The term "mop-up" is a legitimate military term meaning eliminating the remaining resistance that may exist in a particular area. That term does not refer to eradication. It means elimination of resistance. Generally speaking, in a military operation, you don't clean out successively each and every person or unit that may be resisting the offensive. Sometimes there are pockets that remain that need to be brought under control after the major military operation, and that's what's referred to as a mop-up operation. There's no way of telling if there might have been other directions, but as written here…this is a totally legitimate order to be given.[1141]

561. The testimony of the above witnesses confirms that the language contained in D300 does not necessarily connote eradication or forcible transfer.

562. Other additional evidence admitted on appeal also indicates that merely military considerations underlay the issuance of these orders. For example, Exhibit 47 to the Fourth Rule

[1139] AT 396 (9 Dec. 2003).
[1140] AT 298 (9 Dec. 2003).
[1141] AT 182 (8 Dec. 2003).

115 Motion, a request from Enver Hadžihasanović dated 17 April 1993 to the operations group (east) commander, states:

> Check out and assess the situation in Kiseljak immediately, and on that basis, with your forces from Kiseljak, disarm and capture all the areas held by the HVO, and in this connection, if possible, organize forces and equipment to blockade the approaches from Fojnica…. Arrange through the organs of authority for every village to be prepared to defend itself in its own way, albeit with pickaxes and hoes.

563. Exhibits 141 and 142 to the First Rule 115 Motion, dated 19 and 23 April 1993, respectively, indicate that there was difficulty in the HVO's taking control of Gomionica. The Appellant had ordered the capture of Gomionica as early as 17 April 1993 and reiterated this order two days later, on 19 April.[1142] Prosecution rebuttal material PA 49, dated 19 April 1993 (0655 hours), bearing the Appellant's name and his purported signature, states that a "strong artillery and infantry attack on Busovača and Vitez started during the early hours of the morning. Our forces are putting up strong resistance and we are trying to repel the attacks." This is corroborated by trial exhibit D324, discussed above.

564. In addition, the Appeals Chamber observes that in the Trial Judgement, there is no discussion pertaining to Article 7(3) responsibility on the part of the Appellant for these crimes. As a result, the Appeals Chamber concludes that no finding was made pursuant to Article 7(3) in relation to the April 1993 attacks in Kiseljak. Therefore, it is not necessary to consider the Appellant's arguments concerning the Appellant's lack of effective control over the HVO units in Kiseljak.[1143]

B. The Appellant's responsibility for the June 1993 campaign in Kiseljak

565. The Appellant submits that the Trial Chamber erred in linking him with the hostilities that broke out in June 1993, and that Ivica Rajić functioned *de facto* and *de jure* as the HVO commander

[1142] *See* PA 47, dated 19 April 1993 (0835 hours), which states: "1. Conduct the capture of Gomionica (slopes above the village) and intensify combat activities because they have launched heavy attacks on Busovača and Vitez so they do not have any large forces there. 2. Today we HAVE TO pass through Gomionica!!!…." *See also* PA 48, dated 19 April 1993 (0950 hours), which states again: "Head toward Gomionica with all available weapons…"

[1143] *See* para. 93 of this Judgement, above. The Appellant's arguments are briefly summarized as follows. The Appellant states that new evidence shows that Rajić was the *de jure* and *de facto* HVO commander in Kiseljak and reported directly to General Petković, and that it shows that Rajić was under the sole, *de facto* command of the HVO Main Staff rather than the Appellant. The Appellant submits in his Brief in Reply that the additional evidence shows that Rajić was appointed in May 1993 by General Petković, and that the Appellant merely recommended Rajić to be so appointed. He adds that there is no support for the proposition that a superior officer (in this case Petković, not the Appellant) is criminally responsible because he appointed an officer who later ordered the commission of crimes, and that Rajić's appointment in May 1993 does not mean that he was incapable of ordering the commission of crimes prior to his appointment.

in Kiseljak from 11 May 1993.[1144] The Appellant further points out that there is no evidence linking him to the June 1993 attacks.[1145]

566. The Prosecution mentions that the Appellant was frequently transported to the Kiseljak municipality from his headquarters in Vitez, and that the evidence at trial showed that the Appellant met with his subordinate commanders in Kiseljak, including Ivica Rajić, two weeks before the HVO attacks on the villages of Grahovci, Han Ploča, and Tulica.[1146]

567. The Appeals Chamber observes that in concluding that the Appellant ordered the June 1993 attacks in Kiseljak, the Trial Chamber did not refer to any evidence which would show that he did so.[1147] Indeed, there is no evidence on the record showing that the Appellant ordered these attacks. The Appeals Chamber considers that the Trial Chamber inferred from the following points that the Appellant ordered the June 1993 attacks in Kiseljak:

> 1) the offensives conducted in April in the municipality of Vitez and to the north of Kiseljak and in June to the south of Kiseljak all evolved along similar lines;
>
> 2) the attacks on Kiseljak were on each occasion led mostly by HVO troops, and more precisely by the Ban Jelačić Brigade whose commander received orders directly from the accused;
>
> 3) and finally, the offensives all produced the same result: the systematic expulsion of Muslim civilian inhabitants from their villages and, in most cases, the destruction of their dwellings and the plunder of their property.[1148]

These will be considered in turn.

568. As to the statement that the April and June attacks "all evolved along similar lines," the Appeals Chamber considers that it is vague and does not support an inference that the Appellant ordered the June offensives.

569. The Trial Chamber's second point, that the attacks were "led mostly by HVO troops, and more precisely by the Ban Jelačić Brigade whose commander received orders directly from the accused," is unsupported by any evidence pertaining to the June 1993 attacks.

570. The third point referred to by the Trial Chamber, concerning the results of the offensives, similarly does not support an inference that the Appellant ordered the June attacks.

571. In light of the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have come to the conclusion beyond reasonable doubt that the Appellant ordered the June 1993

[1144] Appellant's Brief, pp. 103-104.
[1145] Appellant's Brief, p. 103.
[1146] Respondent's Brief, para. 2.348.
[1147] Trial Judgement, paras. 659, 661.

attacks in Kiseljak. As a result, it is not necessary to examine whether the Appellant was aware of a substantial likelihood that crimes would be committed. The Appeals Chamber therefore finds that no reasonable trier of fact could conclude that the Appellant was responsible under Article 7(1) of the Statute for the crimes committed in Kiseljak in June 1993.

572. The Appeals Chamber notes that additional evidence admitted on appeal shows that Ivica Rajić may have wielded power in Kiseljak as of May 1993.[1149]

573. The Appeals Chamber further observes that in the Trial Judgement, there is no discussion pertaining to Article 7(3) responsibility on the part of the Appellant for crimes committed in June 1993. As a result, the Appeals Chamber concludes that no finding was made pursuant to Article 7(3) in relation to the June 1993 attacks in Kiseljak, and it declines to consider the issue any further.[1150]

[1148] Trial Judgement, para. 659.
[1149] *See* the following items of additional evidence: Ex. 132 to the First Rule 115 Motion, dated 11 May 1993, from the Appellant to Bruno Stojić, Milivoj Petković, and Valentić Ćorić, wherein he requests the temporary appointment of Ivica Rajić to the post of Commander of the Kiseljak Operative Group and states "with your guidance, he could keep the situation under control at this moment…"; Ex. 183 to the First Rule 115 Motion, dated 28 April 1993, from Petković to the Ban Jelačić Brigade commander, wherein Petković requests an immediate report in connection with whether Ivica Rajić is in the Kiseljak municipality and further states: "Immediately forbid and firmly punish persons who set Muslim property on fire, and immediately send me information on the perpetrators. Bring everything under control…. If burning property continues, the HZHB HVO will disassociate itself from Kiseljak. Prepare a report on events in the villages of Kazagići, Gomionica, and Svinjarevo and send it immediately…."; and Ex. 16 to the Second Rule 115 Motion, a Prosecution suspected Bosnian-Croat chain of command, wherein Ivica Rajić is placed on the same level as the Appellant.
[1150] *See* para. 93 of this Judgement, above.

XI. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR DETENTION-RELATED CRIMES

574. The Trial Judgement addressed Counts 15 to 20 of the Second Amended Indictment in a section entitled "detention related crimes", as they all entail a deprivation of freedom.[1151] During the course of the conflict in Central Bosnia, HVO forces detained Bosnian Muslims – both civilians and prisoners of war - in various facilities. The Trial Chamber found that non-combatant Bosnian Muslims, both civilians and prisoners of war, were detained during the conflict in the Lašva Valley region of Central Bosnia, and in Vitez in particular.[1152] The Trial Chamber concluded that the Appellant knew of the circumstances and conditions under which the Bosnian Muslims were being detained and the treatment they received, and was "persuaded beyond all reasonable doubt that [the Appellant] had reason to know that violations of international humanitarian law were being perpetrated."[1153] The Trial Chamber found the Appellant guilty on all counts relating to detention-related crimes pursuant to Articles 2 and 3 of the Statute, either pursuant to Article 7(1) or to Article 7(3) of the Statute, or pursuant to both.[1154]

575. The Appellant submits that he is not guilty of the detention-related crimes because he did not order the commission of the crimes, he did not have effective control over those responsible, he did not know or have reason to know of the 'violative conduct' taking place, and in any event he took reasonable remedial measures upon learning of the crimes.[1155] As such, the Appellant seeks to have the convictions for the detention-related crimes overturned.[1156]

[1151] Trial Judgement, paras. 679 *et seq.* The Second Amended Indictment itself referred instead to "inhumane treatment; the taking of hostages; and the use of human shields".
[1152] Trial Judgement, paras. 372, 700, and 739, the last quoting the Appellant's admission of this fact. *See also* Appellant's Brief, p. 108, where these facts are conceded. The Appellant alleges that the detainees were "mostly men of fighting age" but, even if this is accepted, it does not alter their status as non-combatants.
[1153] Trial Judgement, para. 733.
[1154] Namely: Count 15: Inhuman treatment under Article 2(b) of the Statute; Count 16: Cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute, and of common Article 3(1)(a) of the Geneva Conventions; Count 17: Taking civilians as hostages under Article 2(h) of the Statute; Count 18: Taking as hostages non-combatant persons, as a violation of the laws or customs of war under Article 3 of the Statute and of common Article 3(1)(b) of the Geneva Conventions (NB: the indictment refers to Article 3 generally, not expressly to 3(1)(b)); Count 19: Inhuman treatment, for the use of civilians as human shields, under Article 2(b) of the Statute ; Count 20: Cruel treatment, for the use of civilians as human shields, as a violation of the laws or customs of war under Article 3 of the Statute, and of common Article 3(1)(a) of the Geneva Conventions. *See* Trial Judgement, paras. 721, and 733–734, together with the Disposition, p. 268. The parties agree that the convictions on Counts 16, 18, and 20 should be reversed by reason of being impermissibly cumulative with Counts 15, 17 and 20 respectively. *See* Respondent's Brief, para. 8.28 (re. Count 16); para. 8.30 (re. Count 18), and para. 8.29 (re. Count 20).
[1155] Appellant's Brief, pp. 109-114. This ground of appeal was the Fifth Ground in the Appellant's Brief.
[1156] Appellant's Brief, p. 189.

A. Counts 15 and 16: Inhuman and cruel treatment

576. The Second Amended Indictment alleged that detainees in HVO-controlled detention facilities were used as human shields, beaten, forced to dig trenches, subjected to physical or psychological abuse and intimidation, and inhumane treatment including being confined in cramped or overcrowded facilities and being deprived of adequate food and water. The Trial Chamber considered these alleged crimes by municipality, namely Busovača, Kiseljak (including the village of Rotilj),[1157] and Vitez (including the village of Gaćice),[1158] and found that detainees had at various times and locations been imprisoned in poor conditions, and that they were generally mistreated and subjected to abuse, denied sufficient nourishment, and compelled to dig trenches often in dangerous or life-threatening conditions.[1159] Detainees in the municipalities of Kiseljak, Busovača, and Vitez detained in HVO detention facilities were forced to dig trenches, and a number of detainees were killed, injured and wounded while digging trenches.[1160] Acts of murder and rape were also perpetrated in the village of Rotilj (within Kiseljak municipality),[1161] and women were raped in the Vitez municipality (at the Dubravica primary school).[1162]

577. The Trial Chamber found that the Appellant was guilty pursuant to Article 7(3) of the Statute for the crimes committed in the detention facilities,[1163] and pursuant to Article 7(1) of the Statute for crimes associated with trench-digging, as constituting inhuman and cruel treatment of detainees as grave breaches of the Geneva Conventions and violations of the laws or customs of war under Counts 15 and 16.[1164] The Trial Chamber reasoned as follows.[1165] First, the Trial Chamber concluded that, on the evidence before it, the illegal confinement and detention of male Muslim civilians was performed in a manifestly organised way.[1166] Second, the Trial Chamber "deemed" that such a degree of organisation demonstrated that the highest levels of authority within the HVO were involved in that organisation.[1167] Finally, the Trial Chamber concluded that since the Appellant was in nominal command of all the detention centres from 27 June 1992,[1168] there

[1157] Trial Judgement, paras. 688 *et seq.*
[1158] Trial Judgement, para. 694 *et seq*.
[1159] Trial Judgement, paras. 789, 693, 699. In respect of Kaonik, *see* Trial Judgement, para. 372.
[1160] *See below.*
[1161] Trial Judgement, para. 692.
[1162] Trial Judgement, para. 695.
[1163] Trial Judgement, para. 721: "General Blaškić is responsible for the violence committed in the detention facilities pursuant to the principle of command responsibility enshrined in Article 7(3) of the Statute."
[1164] Trial Judgement, para. 738: "[T]he trial Chamber concludes that General Blaškić ordered the use of detainees to dig trenches".
[1165] *See* Trial Judgement, para. 720.
[1166] Trial Judgement, para. 720.
[1167] Trial Judgement, para. 720.
[1168] Trial Judgement, para. 722 (citing the Appellant's testimony at trial).

was sufficient evidence to establish beyond all reasonable doubt that the Appellant ordered the detentions,[1169] thereby incurring command responsibility pursuant to Article 7(3) of the Statute.[1170]

578. The Appellant does not dispute the fact that these acts occurred.[1171] Rather, the Appellant submits that he did not order the crimes, that he had no knowledge – and no reason to know - of their commission, that he took remedial measures when he learned of the unlawful conduct, and is accordingly not guilty of the charges.[1172]

1. Whether the Appellant ordered the detentions

579. The Trial Chamber concluded, on the evidence before it, that the illegal confinement and detention of male Muslim civilians was performed in a manifestly organised way. It drew this conclusion from the testimony of two witnesses, who testified that detainees had been told by HVO personnel that the HVO was under orders to detain them.[1173]

580. The Trial Chamber also found that other detainees were transported in HVO buses to the prison in Kiseljak as additional support for the finding that the detention of male Muslim civilians was performed in a manifestly organised way.[1174] This finding was based on the testimony of Witness TT who declared that after the HVO troops entered his village on 18 June 1993, an HVO commander ordered that 20 able-bodied men be ready by 0800 hours the following day to do labour.[1175] These men were tasked with digging, after which they would return home.[1176] This pattern continued for several days until, on 11 July 1993, after a day of labour, an HVO truck arrived to return the detainees to the Kiseljak barracks. Witness TT described how he worked at several different locations. The testimony of Witness TT does support the finding that there was a high level of organisation in the treatment and employment of the detainees. However, Witness TT's evidence does not support the finding that the Appellant ordered his detention.

581. The Appeals Chamber notes that the Appellant does not contest the finding of the Trial Chamber that HVO soldiers on occasion informed their prisoners that they were acting under

[1169] Trial Judgement, para. 720.
[1170] Trial Judgement, para. 721. As to this application of Article 7(3) of the Statute, *see* section (3) *below*.
[1171] The Appellant submits that he took remedial measures when he learned of unlawful detention, Appellant's Brief, p. 113. *See below.* In addition, the totality of the evidence before the Appeals Chamber, including the additional evidence admitted on appeal, shows that the Appellant occasionally knew that work platoons existed, and that they were at his disposal. The Appellant has in fact denied such knowledge, other than in relation one instance, where the two perpetrators were disciplined.
[1172] Appellant's Brief, pp. 108–113.
[1173] Trial Judgement, para. 207, and n. 1630. The two witnesses were Witness TT and Witness Zeco.
[1174] Trial Judgement, para. 720.
[1175] Witness TT, T 9330 (4 June 1998) (Closed Session).
[1176] Witness TT, T 9330 (4 June 1998) (Closed Session).

orders.[1177] It considers, however, that this evidence does not however indicate either that those orders were in fact issued, or who issued them, and no direct evidence of any such orders was cited in the Trial Judgement.

582. The Appeals Chamber considers that the text of the Trial Judgement is insufficiently clear as to how the Trial Chamber justified its conclusion that the Appellant ordered the detentions, and no evidence is referred to in this regard. Rather, it is a conclusion arrived at by extrapolation. The Trial Judgement does not reveal how the Trial Chamber made the link between, on the one hand, the high degree of organisation and of extensive HVO involvement in the detentions, and, on the other hand, the conclusion that the Appellant ordered the detentions. As a result, the Appeals Chamber finds that no reasonable trier of fact could have concluded, on the basis of the trial evidence, that the Appellant ordered the detentions. For this reason, this finding of the Trial Chamber is overturned.

583. The Trial Chamber's finding that the Appellant was responsible pursuant to Article 7(3) of the Statute for crimes occurring in the detention facilities will be addressed below.

2. The conviction for trench-digging

584. The Trial Chamber found the Appellant guilty pursuant to Article 7(1) of the Statute of ordering the detainees to dig trenches, and for the treatment they suffered as a result.[1178] The Trial Chamber concluded that the Appellant "ordered the use of detainees to dig trenches, including under dangerous conditions at the front."[1179] The Trial Chamber accepted evidence suggesting that the Appellant issued verbal orders for labour to be deployed "to work on the consolidation and digging-in on the first defence lines on the Jardol-Divjak-Grbavica axis towards Sadovača."[1180] Further evidence supports the conclusion that the Appellant ordered the mobilisation of work platoons to work on the Bobaševa-Kuća line, and in the Kruščica area.[1181] The Trial Chamber also relied on the testimony of Zlatko Aleksovski (the Kaonik prison warden), as well as some HVO commanders, to establish that their use of detainees to dig trenches was necessary and that in doing so they were carrying out orders,[1182] although the source of these orders is never established. It

[1177] Trial Judgement, para. 720, n. 1630.
[1178] Trial Judgement, para. 738. The Trial Judgement makes no specific reference to Article 7(1); rather, the Trial Chamber's reliance upon Article 7(1) is inferred from the language in para. 738 where it was held that the Appellant "ordered the use of the detainees". Although it is not expressed anywhere in the Trial Judgement, the Prosecution submits that this finding was based on Article 7(1) of the Statute (Respondent's Brief, para. 3.46); and AT 679 *et seq.* (16 Dec. 2003) (Open Session)), presumably because there is no other possible explanation.
[1179] Trial Judgement, para. 738.
[1180] P715, p. 3.
[1181] P716 and P717.
[1182] Trial Judgement, para. 736.

further relied on the evidence of witnesses McLeod,[1183] Zeco, and Morsink (an ECMM observer)[1184] to conclude that the personnel who controlled the detainees for trench-digging were acting under orders.

585. The Appellant appeals against the finding of the Trial Chamber in relation to trench-digging. First, the Appellant submits that the Trial Chamber imposed on him strict liability for trench-digging because it characterised it as a crime *per se*, independent of the perpetrator's *mens rea*.[1185] Second, the Appellant contests the Trial Chamber's finding that the Appellant knew that soldiers had a propensity to commit violent acts against the detainees but nevertheless took the risk of deploying them, averring that there was insufficient evidence to support this finding.[1186]

586. While the Appellant has acknowledged that he was aware that the Geneva Conventions forbade forced trench-digging on the front lines,[1187] he stated at trial that he neither ordered nor supported such conduct,[1188] that he acted to stop the practice when he learned of it,[1189] and that he was convinced that the teams of detainees digging trenches of which he was aware were in fact lawfully constituted.[1190] It is therefore the Appellant's submission that the Trial Chamber erred first in finding him guilty of ordering detainees to dig trenches at the "frontline",[1191] and second, in finding him guilty of ordering detainees to dig trenches away from the frontline in the knowledge that they might be mistreated by his soldiers, as there was no evidence that the Appellant knew beforehand that his soldiers were likely to mistreat the detainees.[1192]

587. The Prosecution directs the Appeals Chamber to the Trial Chamber's conclusion that "the use of detainees to dig trenches at the front under dangerous circumstances must be characterised as inhuman or cruel treatment."[1193] The Prosecution submits that the key criterion transforming an act of trench-digging into a proscribed act is whether it caused detainees to be placed in dangerous

[1183] Trial Judgement, para. 736, n. 1651.
[1184] Trial Judgement, para. 736, n. 1652.
[1185] Appellant's Brief, p. 110.
[1186] Trial Judgement, para. 738.
[1187] Trial Judgement, para. 737, citing T 22,773 (27 May 1999) (Open Session): Question: "Now, General, if a work platoon had been sent to a front line position, a dangerous front line position, to dig trenches, based on your training in the JNA and training in the Geneva Conventions, would such a practice be unlawful? Blaškić: "Of course, if they were taken to dangerous positions." *See also* the Appellant at T 22,693 (26 May 1999) (Open Session): "[It was] against the law to force civilian detainees, and generally detainees, to force them to dig trenches and undertake engineering work."
[1188] Trial Judgement, para. 736, and T 22,774 *et seq.* (27 May 1999) (Open Session) and Appellant's Brief, p. 110.
[1189] *See* T 22,711 and T 22,714 (26 May 1999) (Private Session).
[1190] Trial Judgement, paras. 686 and 736. *See also* T 22,693 *et seq.* (26 May 1999) (Open Session).
[1191] Since, in relation to those orders, the fighting had ceased at that time. Appellant's Brief, p. 110.
[1192] Appellant's Brief, p. 110.
[1193] Trial Judgement, para. 713.

circumstances, and suggests that the Trial Chamber underscored what was entailed in the trench-digging exercises: forced labour in dangerous conditions.[1194]

588. The Appeals Chamber notes that the Appellant does not contest the finding of the Trial Chamber that detained Bosnian Muslims were used by HVO troops to dig trenches at various times and locations.[1195] HVO documents submitted by the Prosecution, and admitted as evidence, prove that so-called "work platoons" consisting of Bosnian Muslims were created and used to dig trenches.[1196] The Appeals Chamber will consider whether the Trial Chamber erred in fact or in law in determining that the Appellant is criminally responsible for the crimes associated with trench-digging by virtue of having ordered that conduct.

589. The question as to the proper care and maintenance of prisoners of war within the context of forced labour was considered in *The German High Command Trial,*[1197] where the United States Military Tribunal of Nuremberg articulated the following standard:

> Also, [applicable are] the provisions prohibiting their use in dangerous localities and employment, and in this connection it should be pointed out that we consider their use by combat troops in combat areas for the construction of field fortifications and otherwise to constitute dangerous employment under the conditions of modern war.[1198]

590. In the Digest of Laws and Cases of the United Nations War Crimes Commission,[1199] the position was quite clearly stated: "There is nothing illegal in the mere employment of prisoners of war."[1200] Causing prisoners of war to perform unhealthy or dangerous work was, however, clearly recognised as a war crime.[1201]

[1194] Repsondent's Brief, para. 3.40 (citing Trial Judgement, para. 700).
[1195] *See* Appellant's Brief, pp. 109-110 (specifying, however, that civilians of all ethnicities were mobilized to dig trenches). The Trial Chamber found that men detained in Kiseljak barracks and Rotilj village were compelled by the HVO to dig trenches, and that some detainees deployed near the front-line were killed or wounded during exchanges of fire; that forced labour sometimes lasted a long time and the detainees were exposed to bad weather; that detainees digging trenches were mistreated by the Military Police who occasionally inflicted sadistic bodily harm on them and prevented the detainees from taking cover whilst fire was being exchanged; Trial Judgement, para. 693. Detainees imprisoned in Kaonik prison (Trial Judgement, para. 688), the Vitez Cultural Centre, the veterinary station, Dubravica school, and the SDK building were also forced to dig trenches (Trial Judgement, para. 699). Some detainees at the front-line were killed or wounded, and were prevented from taking cover when under fire. In at least one incident, detainees were killed and threatened with death (Trial Judgement, paras. 693, 699). *See generally* Trial Judgement, para. 735. Various evidence admitted at trial supports these conclusions, including *inter alia* Ex. P514, Ex. P677, and Ex. P714.
[1196] *See* P715 HVO "Report on the organization of work platoons", 10 September 1993, and further reports of 20 and 21 September 1993 (P717 and P716 respectively).
[1197] Case No. 72, Law Reports of the Trials of War Criminals, p. 1. The case considered, *inter alia*, the Hague Rules of Land Warfare.
[1198] Law Reports of the Trials of War Criminals, pp. 91-92. As to the compulsory use of civilian labour, this case's application *in casu* is limited, as it finds only that the recruitment of labour in the occupied countries *for use within the Reich* was illegal. *See* p. 93.
[1199] Law Reports Digest of Laws and Cases, Vol. XV.
[1200] Law Reports Digest of Laws and Cases, p. 103, n. 5.
[1201] Law Reports Digest of Laws and Cases, p. 103.

591. As to the position of civilians in occupied territories, it has been established that putting civilians to forced labour may in certain circumstances be a war crime.[1202] Those circumstances include their employment in armament production, and in carrying out military operations against the civilians' own country.[1203]

592. The Appeals Chamber must therefore consider the following two issues: first, whether the compelling of detainees to dig trenches of a military character is *per se* illegal because it necessarily constitutes cruel treatment in breach of common Article 3 of the Geneva Conventions; and second, whether by deliberately running a risk that personnel under his command would perpetrate crimes against the detainees digging trenches, the Appellant incurred criminal responsibility.

(a) Whether the compelling of detainees to dig trenches of a military character is *per se* illegal

593. The first issue for the Appeals Chamber to determine is whether international law criminalises the use of detainees to dig trenches of a military character *per se* because it necessarily constitutes cruel treatment. As regards the employment of civilians for such purposes, Article 51 of Geneva Convention IV, governing the treatment of civilians,[1204] precludes the 'Occupying Power' from compelling 'protected persons' to serve in its armed or auxiliary forces.[1205] The Occupying Power may in fact compel protected persons to work if they are over eighteen years of age, and subject to certain other conditions.[1206] 'Protected persons' may not, however, be compelled to undertake any work which would involve them in the obligation to take part in military operations, and in no case shall the requisition of labour lead to a mobilization of workers "in an organisation of a military or semi-military character."[1207]

[1202] Law Reports Digest of Laws and Cases, p. 119.
[1203] Law Reports of the Trials of War Criminals, p. 120.
[1204] Found by the Trial Chamber to be applicable in this case; *see* Trial Judgement, paras. 133, 143, and 147.
[1205] Article 51 of Geneva Convention IV reads as follows: "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character."
[1206] *Ibid.*
[1207] *Ibid.*

594. Violations of Article 51 of Geneva Convention IV would ordinarily fall within the ambit of Article 3 of the Statute, and more specifically within the category - as defined by the Appeals Chamber - constituted by infringements of the Geneva Conventions other than those classified as grave breaches.[1208] However, the Appeals Chamber has not been seized of determining such violations in this case, since the Appellant was not indicted for violations of these provisions, but only for inhuman treatment (recognised by Article 2 of the Statute) and cruel treatment of detainees as a violation of the laws or customs of war (recognised by Article 3 of the Statute and common Article 3(1)(a) (cruel treatment) of the Geneva Conventions). The Appeals Chamber must therefore determine whether compelling persons taking no active part in hostilities to dig trenches for military purposes is *ipso facto* unlawful, because it constitutes cruel treatment for the purposes of common Article 3(1)(a) of the Geneva Conventions.

595. The Appeals Chamber has defined "cruel treatment" as follows:

> Cruel treatment as a violation of the laws or customs of war is
>
> a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,
>
> b. committed against a person taking no active part in the hostilities.[1209]

596. The Appeals Chamber has considered evidence that the Appellant ordered the use of work platoons to dig trenches,[1210] and the Appellant himself admits having ordered work platoons to dig trenches, but submits that these orders were not unlawful.[1211] If the Appeals Chamber concludes that the Appellant's orders to use detainees to dig trenches either caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity, then it will have established that these orders of the Appellant were such as to satisfy the definition of cruel treatment.

597. The Appeals Chamber has noted that the use of forced labour is not always unlawful.[1212] Nevertheless, the treatment of non-combatant detainees may be considered cruel where, together with the other requisite elements, that treatment causes serious mental or physical suffering or

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[1208] *Tadić* Jurisdiction Decision, para. 89. *See also Naletilić* Trial Judgement, paras. 245 *et seq.* In order for the relevant provisions to apply, the detainees must all have been 'protected persons' within the meaning of Geneva Convention III or IV, depending on their status either as prisoners of war or as civilians respectively.

[1209] *Čelebići* Appeal Judgement, paras. 424, 426 (footnotes omitted) (where the Appeals Chamber distinguished "cruel treatment" from "wilfully causing great suffering or serious injury to body or health" and "inhuman treatment" under Article 2, in that the second two offences each contain an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. The offence of cruel treatment does not require proof that the victims are protected persons). *See also* para. 426.

[1210] *See* P715, HVO "Report on the organization of work platoons", 10 September 1993; and further reports of 20 and 21 September 1993 (P717 and P716 respectively).

[1211] Trial Judgement, paras. 686 and 736. *See also* T 22,693 *et seq.* (26 May 1999) (Open Session).

injury or constitutes a serious attack on human dignity. The Appeals Chamber notes that Geneva Conventions III and IV require that when non-combatants are used for forced labour, their labour may not be connected with war operations[1213] or have a military character or purpose.[1214] The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury. Any order to compel protected persons to dig trenches or to prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes cruel treatment. The Appeals Chamber accordingly finds that a reasonable trier of fact could have come to the conclusion that the Appellant has violated the laws or customs of war under Article 3 of the Statute, and common Article 3(1)(a) of the Geneva Conventions, and is guilty under Count 16 for ordering the use of detainees to dig trenches.

(b) Whether the Appellant was aware of a substantial likelihood that personnel under his command would perpetrate crimes against the detainees digging trenches

598. In addition to the Trial Chamber's conclusion that the Appellant ordered the use of detainees to dig trenches, including under dangerous conditions at the front, the Trial Chamber further found that the Appellant, by ordering the forced labour, knowingly took the risk that his soldiers might commit violent acts against vulnerable detainees, especially in a context of extreme tensions.[1215] This conclusion relied on the premise that the Appellant knew that crimes were occurring elsewhere, or that he knew of the propensity of the soldiers concerned to commit unlawful acts.

599. The Appellant submits that the Trial Judgement cites no evidence enabling it to conclude that the Appellant knew of any such propensity for violence against detainees, and that the finding of the Trial Chamber is based on the application of a strict liability *mens rea* standard.[1216] The Prosecution explains the reasoning of the Trial Chamber as inferring that the Appellant knew (actual knowledge) or "must have known" (constructive knowledge) of conditions in the detention

[1212] Indeed, Article 49 of Geneva Convention III begins: "The Detaining Power may utilize the labour of prisoners of war". Geneva Convention IV (Article 51) specifies what labour is prohibited – there is no blanket prohibition against the use of protected persons for labour.
[1213] Commentary to Geneva Convention III, p. 266, and Article 51 of Geneva Convention IV.
[1214] Commentary to Geneva Convention III, p. 267. Commentary to Geneva Convention IV, p. 294: "it is generally agreed that the inhabitants of the occupied territory cannot be requisitioned for such work as the construction of fortifications, trenches or aerial bases".
[1215] Trial Judgement, para. 738.
[1216] Respondent's Brief, p. 110.

centres because the circumstances in these proximate facilities were such that no reasonable commander could have remained ignorant of the events taking place in them.[1217]

600. As to the finding of the Trial Chamber that the Appellant, by ordering the forced labour, knowingly took the risk that his soldiers might commit violent acts against vulnerable detainees, especially in a context of extreme tensions,[1218] the Appeals Chamber considers that the Trial Chamber, in referring to the Appellant deliberately running a risk, did not apply the correct standard in relation to its findings concerning trench-digging. The Appeals Chamber recalls that it has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent, and has stated that a person who orders an act or omission, with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability for ordering the crime under Article 7(1) of the Statute. Ordering with such awareness has to be regarded as accepting that crime. As a result, the Appeals Chamber will now apply the correct legal standard to determine whether the Appellant, in ordering the trench-digging, was aware of the substantial likelihood that crimes would be committed in the execution of those orders.

601. While the Appeals Chamber has noted that it must give deference to the Trial Chamber that received evidence at trial, upon application of the correct legal standard there is insufficient evidence from which to draw the conclusion beyond reasonable doubt that the Appellant ordered that detainees be used to dig trenches with the awareness of the substantial likelihood that crimes would be committed in the execution of those orders. On the contrary, there is evidence to suggest that, upon hearing of purported abuses against detainees involved in trench-digging, the Appellant ordered that this practice cease. For example, in reference to Exhibit D373,[1219] the following exchange took place at trial between Counsel for the Appellant and Witness Marin:

> Counsel: "This is a direct order from Colonel Blaškić to the brigade commanders and to the wardens of the military prisons, 21 June, 1993, …, forbidding using prisoners of war to dig trenches."
>
> Brigadier Marin: "Yes. This order was given to the commanders of the brigade to implement. It was sent to the warden of the military prisons, because certain soldiers, independently, came to the warden of the prison and wanted to take people away. Therefore, the wardens were -- said that -- he can say, 'General Blaškić sent an order that this was forbidden and I cannot allow to you do this.' That is how I understand this order, and I know the order was issued for that purpose."[1220]

[1217] Respondent's Brief, para. 3.21.
[1218] Trial Judgement, para. 738.
[1219] D373 is an order (number 01-6-486/93) signed by the Appellant.
[1220] Testimony of Brigadier Slavko Marin T 13,598 (15 Oct. 1998) (Open Session) (discussing Ex. D373, an order from the Appellant forbidding the use of detainees to dig trenches). *See also* Marin's statement, at T 13,598, that "the commander of the Operative Zone did issue a command that such things should not be done" from April 1993 onwards, referring to trench-digging. The Appellant himself has testified that he forbade the use of detainees to dig trenches; *see*

602. In concluding that the Appellant knew of the crimes that were being committed, the Trial Chamber further relied upon orders issued by the Appellant directing personnel under his command to treat the detainees according to the requirements of humanitarian law.[1221] This is a finding with which the Appeals Chamber cannot agree. In relying on those orders, the Trial Chamber effectively sanctioned the Appellant for fulfilling his duty as a military officer to prevent and punish violations of humanitarian law. Evidence of the execution of that duty cannot be cited as evidence of the Appellant's prior knowledge of – and assent to – those violations.

603. While the Appeals Chamber has found that the Appellant did order detainees to dig trenches in specific instances,[1222] the evidence does not prove beyond reasonable doubt that the Appellant ordered that trenches be dug with the awareness of the substantial likelihood that crimes would be committed. In other words, while the Appellant has been found responsible under Count 16 for having ordered the trench-digging in specific circumstances, he is not guilty under Counts 15 and 16, pursuant to Article 7(1) of the Statute, for the crimes associated with trench-digging.

604. As the Trial Chamber makes no express finding of the Appellant's responsibility for the alleged crimes associated with trench-digging under Article 7(3) of the Statute, the Appeals Chamber declines to consider it.[1223] As to the unlawful conduct in the detention facilities, the Appeals Chamber will now consider the Appellant's responsibility for those crimes pursuant to Article 7(3) of the Statute.

3. The Appellant's command responsibility for unlawful conduct in the detention facilities

605. The Appeals Chamber now turns to the question of the Appellant's command responsibility under Counts 15 and 16 for the unlawful conduct in the detention facilities. The Trial Chamber found that the Appellant:

> did know of the circumstances and conditions under which the Muslims were detained in the facilities mentioned above. In any case, [the Appellant] did not perform his duties with the necessary reasonable diligence. As a commander holding the rank of Colonel, he was in a position to exercise effective control over his troops in a relatively confined territory. [Footnote omitted] Furthermore, insofar as the accused ordered that Muslim civilians be detained, he could not have not sought information on the detention conditions. Hence, the Trial Chamber is persuaded beyond all reasonable doubt that [the Appellant] had reason to know that violations of international humanitarian law were being perpetrated when the Muslims from the municipalities of Vitez, Busovača and Kiseljak were detained.[1224]

T 22,696 (26 May 1999) (Open Session), and the discussion below of the so-called 'humanitarian orders' issued by the Appellant.

[1221] Trial Judgement, para. 728. As to these 'humanitarian orders', *see below.*

[1222] See the discussion of P715, P716, and P717 above.

[1223] *See* Judgement, para. 93, above.

[1224] Trial Judgement, para. 733.

(a) Effective control over personnel responsible for the unlawful conduct in the detention centres

606. The Appellant argues that he had no control over most units under his command.[1225] As such, the Appellant submits that the Trial Chamber erred in finding that the evidence was sufficient to show that he exercised effective control over those units,[1226] and that his consequent inability to punish the perpetrators requires that his convictions be overturned.

607. The Prosecution submits that there was ample evidence before the Trial Chamber of the Appellant's written and oral orders to release prisoners held by the HVO, this fact making it "inconceivable" that he had no knowledge of or involvement in the detention.[1227] The Prosecution also submits that there was ample evidence that the HVO under the Appellant's command controlled the detention centres.[1228]

608. The Appeals Chamber considers that the Prosecution's submission is inapposite. The question is not whether personnel under the Appellant's command were in control of the detention centres. Rather, the question is whether the Appellant exercised effective control over those personnel.[1229] Given the significant new evidence presented to the Appeals Chamber, it remains to be determined first, on the basis of the trial record alone, whether a reasonable trier of fact could have reached the conclusion of the Trial Chamber. Second, and if so, whether in light of the trial evidence and additional evidence admitted on appeal, the Appeals Chamber is itself convinced beyond reasonable doubt as to the finding of the Trial Chamber, namely, that the Appellant exercised effective control over the relevant units, and the members of those units.

609. As to whether on the basis of the trial record alone no reasonable trier of fact could have reached the conclusion of the Trial Chamber, regard must be had to the reasoning of the Trial Chamber. The Trial Chamber reasoned that since the Appellant had nominal command over HVO regular troops, [1230] as well as Military Police personnel,[1231] he exercised effective control over those forces. Furthermore, the Trial Chamber cited one witness's testimony[1232] that the Appellant could impose disciplinary measures and proceeded to conclude that the Appellant "held at least the

[1225] Brief in Reply, para. 93.
[1226] Brief in Reply, para. 93.
[1227] Respondent's Brief, para. 3.20. In short, the Prosecution submits that the Appellant "has failed to show any error in the Trial Chamber's findings that he had the requisite *mens rea* to be convicted for crimes being committed in the detention centres in Vitez, Bušovača and Kiseljak municipalities" (para. 3.28).
[1228] Respondent's Brief, paras. 3.7 and 3.8.
[1229] The Prosecution further submits that the Appellant has failed to show any error in the Trial Chamber's findings that he exercised "effective control" over the perpetrators of the detention-related crimes (Respondent's Brief, paras. 3.14-3.15). The Prosecution focused primarily on the fact that regular HVO soldiers participated in the violence (Respondent's Brief, para. 3.16 *et seq.*). Even if this is true, it does not *ipso facto* support a criminal charge against the Appellant.
[1230] Trial Judgement, paras. 723.
[1231] Trial Judgement, paras. 724.

material power to prevent" the commission of crimes, or "to punish the perpetrators thereof".[1233] The Appeals Chamber agrees that on the basis of this testimony, this is a finding that a reasonable trier of fact could have reached.

610. Turning to the evidence admitted on appeal, read together with the trial record, there is substantial evidence undermining the conclusion that the Appellant exercised effective control over all personnel and detention centres.[1234] Such evidence supports the following propositions: (i) that the Military Police were in charge of all detention centres;[1235] that others were in control of and *de facto* commanders of the Military Police for combat operations;[1236] and that the Appellant had no command or control over the Military Police[1237] even when they were nominally attached to his command;[1238] (ii) that the Appellant had no command or control over the Vitez Brigade;[1239] and that another individual was its *de facto* commander;[1240] (iii) that the commanders of the Military Police and the Vitez Brigade refused to accept his authority in any event;[1241] (iv) that as far as Busovača was concerned, the Appellant did not exercise any command or control over the persons detained in Kaonik prison, their captors, or the conditions of their detention;[1242] (v) that another individual was

[1232] *Ibid.*.
[1233] Trial Judgement, para. 725.
[1234] For example, the Trial Chamber heard evidence from Witness Slavko Marin that the Appellant could not in fact punish the men responsible as he had no way of doing so (T 13,598) (15 Oct. 1998) (Open Session) - they were beyond his effective command and control.
[1235] Appellant's Brief, pp. 111-112.
[1236] Witness BA3, AT 440 (10 Dec. 2003) (Closed Session) (referring to D523, and regarding the Appellant's authority to use MP's limited to regular duties, and not combat duties); Witness BA4, AT 490 – 492 (10 Dec. 2003) (Closed Session):"[The Appellant's name] carried zero weight. His name didn't mean a thing. As far as we were concerned, we didn't know that man at all." Regarding MP's ignoring Blaškić and heeding Kordić, see Witness BA3's testimony at AT 378 (9 Dec. 2003)(Closed Session), and again at AT 472 (10 Dec. 2003)(Closed Session). Regarding the Appellant's attempts to replace the command of the Military Police, *see* the Appellant's statement at AT 841 (17 Dec. 2003) (Open Session). Regarding HVO Command structure limiting the Appellant's authority over the Military Police to non-combat assignments, *see* testimony of a witness who testified at T 24,018-9 (23 June 1999) (Closed Session, Videolink). *See generally* the evidence considered in Chapter VII (B) above.
[1237] *See* Ex. 84, First Rule 115 Motion, a report from Ćorić (Chief of Military Police Administration) to Mate Boban (HZ-HB President) of 9 March 1993, relating the problems associated with the Military Police. PA12 (an order to the MP 4th Battalion from the Appellant dated 16 Aptil 1993) does not serve credibly to undermine the conclusion reached, and does not evidence effective control.
[1238] Regarding the Military Police ignoring Blaškić and heeding Kordić, *see* Witness BA3's testimony at AT 378 (9 Dec. 2003) (Closed Session), and again at AT 472 (10 Dec. 2003) (Closed Session). Regarding the Appellant's authority to use the Military Police for regular duties, and not combat duties, *see* AT 440 (10 Dec. 2003) (Closed Session), Witness BA3, referring to D523 (rules on the formation and the activity of the administration of the Military Police, *see* Trial Judgement, para. 455). Regarding the Appellant's attempts to replace the command of the Military Police, *see* the Appellant's statement at AT 841 (17 Dec. 2003) (Open Session). *See also* Chapter VII (B) above.
[1239] *See* Ex. 96, First Rule 115 Motion, discussed below. PA 24, an interim report from Vitezovi commander Kraljević, cannot be viewed as credible evidence against Ex. 96, as his statement of subordination to the Appellant is purely formulaic, directed to his ultimate superiors in Mostar. *See* Ex. D677, an UNPROFOR Report dated 6 February 1993: "Čerkez normally controls Vitez Brigade… command and control of external troops is as yet unclear."
[1240] Witness Watkins, AT 284 (9 Dec. 2003) (Open Session). *See* Witness Marin, T 13,970 (27 Oct. 1998) (Open Session) (testimony that the Appellant had no power to discipline members of the Military Police).
[1241] Appellant's Brief, p. 112. Regarding Kraljević, *see* Witness BA5, AT 543 (11 Dec. 2003) (Open Session).
[1242] Witness BA4, AT 490 (9 Dec. 2003) (Open Session), together with the evidence cited for this proposition above. *See also* Witness BA4, AT 492 (10 Dec. 2003) (Closed Session), and Witness Morsink, T 10,037 (3 July 1998) (Open Session); and Witness Tadić T, 17,209 (19 Jan. 1999) (Open Session), that the Appellant was not authorised to control or command what was happening in a military detention centre or military prison.

the commander of the HVO units in Kiseljak;[1243] (vi) that another individual was in control of and was the *de facto* commander of the Jokers;[1244] a Military Police unit which was widely believed to report only to that individual;[1245] and that in general none of the special units (including the Jokers) were under the command of the Appellant;[1246] and (vii) that the general military situation in the CBOZ, and the Appellant's physical isolation from some locations, resulted both in the frustration of his ability to project his command, and in the emanation of 'local' leaders in each locality.[1247]

611. In addition to these more general propositions, evidence was presented, both at trial and on appeal, of particular instances which suggest that the Appellant did not, in fact, exercise effective control over various personnel. For example: (i) With regard to his control over the Vitezovi, the Appellant lacked sufficient control to prevent them from engaging in illicit gasoline-trading[1248] or to secure the release of a detained member of the Croat-Bosnian Joint Commission,[1249] or to secure the release of property seized from civilians;[1250] (ii) with regard to the commander of the military formation based in Kiseljak, the Appellant was unable to exercise effective control over the HVO who destroyed a section of the Visoko-Kiseljak road;[1251] (iii) with regard to the so-called Vitez pocket, an order of the Appellant to permit the passage of a humanitarian convoy transporting wounded civilians from the hospital in Travnik was ignored by local HVO manning the Dolac checkpoint with the statement: "We do not report or take orders from Colonel Blaškić";[1252] (iv) with regard to the so-called Kiseljak pocket, the Appellant had a diminished degree of control;[1253] and (v) the Appeals Chamber heard of at least one instance in which the Appellant was unable to issue a

[1243] Witness Watkins, AT 282-283 (9 Dec. 2003) (Open Session). Another individual may have wielded effective control in the Kiseljak municipality; *see* Ex. 132 and Ex. 183 to the First Rule 115 Motion; Ex. 27 to the Second Rule 115 Motion.
[1244] Witness Watkins, AT 348 (9 Dec. 2003) (Open Session); Witness BA4, AT 492 and AT 503 (10 Dec. 2003) (Open Session).
[1245] AT 294-295 (9 Dec. 2003) (Closed Session). *See also* Section VII (B) above.
[1246] Witness BA3, who testified that, based on his information, the special units were under the command of Kordić. This view was shared by ABiH 3rd Corps. AT 380 (9 Dec. 2003) (Closed Session).
[1247] Witness Watkins, T 281, 292 (9 Dec. 2003) (Open Session).
[1248] *See* Ex. 96, First Rule 115 Motion, a letter from the Appellant to the head of the Defence Department in Mostar (Bruno Stojić "personally") dated 7 May 1993, in which he complains to the HVO Department of Defence that the Darko Kraljević and the Vitezovi, a unit supposedly subordinate to him, was beyond his control: "Since *Vitezovi* PPN Commander Darko KRALJEVIĆ is directly subordinated to you, please help us resolve this issue, which is becoming increasingly complicated."
[1249] *See* testimony of Witness BA3, AT 374 (9 Dec. 2003) (Closed Session), that when the Appellant ordered the immediate release of the witness from detention, Darko Kraljević (commander of the Vitezovi) refused to do so, together with Witness BA3's supposition (at AT 375) (9 Dec. 2003) (Closed Session) that he was only released upon Kordić's intervention.
[1250] Witness BA3, AT 472 (10 Dec. 2003) (Closed Session). *See also* Chapter VIII (C) above.
[1251] Witness Watkins, AT 283 (9 Dec. 2003) (Open Session).
[1252] Witness Watkins, AT 292 (9 Dec. 2003) (Open Session). That checkpoint was reportedly 15 to 20 minutes away from the Appellant's headquarters in the Hotel Vitez. Witness BA3, who frequently travelled throughout the Lašva Valley during the war, further testified (at AT 378) (9 Dec. 2003) (Closed Session) that "in some cases I would show the pass issued by General Tihomir Blaškić to the military police, and they would tell me: 'As far as we're concerned, this pass is invalid'."
[1253] Ex. 132, First Rule 115 Motion.

purely military command without the prior authorisation of another individual nominally his subordinate.[1254]

612. The evidence before the Appeals Chamber clearly establishes that, contrary to the findings of the Trial Chamber, the Appellant did not enjoy or exercise effective command and control over all the units nominally subordinated to him.[1255] It follows that the Appellant cannot be held accountable for failing to punish members of units over which he did not exercise effective control, and conversely, that he can only be held accountable for failing to punish members of units over which he did exercise effective control.

613. However, the Appeals Chamber holds that it was reasonable to find that the Appellant knew of the conditions of detention in the Vitez Cultural Centre and the Vitez veterinary hospital. As regards the other facilities: the detainees in Dubravica, and in the SDK building in Vitez, were subject to Vitezovi control and were beyond the Appellant's control;[1256] Kaonik Prison in Busovača was controlled by Military Police who were loyal to others and beyond the Appellant's control;[1257] Kiseljak was largely isolated, and thus the detention centres there (the former JNA barracks and Rotilj village) were beyond the Appellant's control;[1258] and the detentions in various houses in the village of Gačice has already been shown to have been beyond the Appellant's knowledge.[1259] The Appeals Chamber therefore now turns to the question of whether the Appellant had effective control over personnel responsible for the detentions in the Vitez Cultural Centre and the Vitez veterinary hospital.

614. The evidence at trial relating to the Vitez veterinary hospital shows that the personnel responsible for the detention of non-combatant Bosnian Muslims were regular HVO soldiers under the Appellant's effective command – "[t]hey were HVO soldiers with HVO insignia on their

[1254] A witness testified that, while he was organizing the defence of a town in the Lašva Valley region after the capture of Jajce by the Bosnian Serbs, he requested HVO artillery in support of units under his command. This request could not be authorized without the consent of Kordić, even though it had been addressed to the Appellant. AT 451 (10 Dec. 2003) (Closed Session).
[1255] Regard must also be had to the Appellant's statement to a member of the press, and admitted into evidence, that he exercised command over all operative groups (Ex. P456/32). This evidence must be qualified by the context in which that statement was made. *See* AT 352 (9 Dec. 2003) (Open Session), and the reply of Witness Watkins in response to a question from the Appeals Chamber. *See also* Appellant Counsel's closing arguments, AT 604 (16 Dec. 2003) (Open Session), where Martin Bell interview (video) was screened, AT 632 (16 Dec. 2003) (Open Session). In brief, there is considerable doubt about the extent to which the statement was the Appellant's own, since it was contained in a written response to a series of written questions, and the response had been prepared by an aide to the Appellant. It is also unreasonable to expect a contrary response to the press from a commander in the field and in the midst of combat operations, who would not ordinarily disclose problems in his command structure under such circumstances.
[1256] Detainees in the SDK building were guarded by Military Police (Trial Judgement, para. 698).
[1257] Witness BA4, AT 490 (9 Dec. 2003) (Open Session), together with the evidence cited for this finding above.
[1258] Ex. 132, First Rule 115 Motion; and *see* the discussion above.
[1259] The Trial Judgement's conclusions as to what the Appellant knew or had reason to know (Trial Judgement, para. 733) exclude Gačice Village.

sleeves."[1260] The Vitez veterinary hospital itself was a municipal building approximately 900 metres from the Hotel Vitez.[1261] The Trial Chamber found that these perpetrators were under the Appellant's effective control.[1262]

615. The evidence relating to the Vitez Cultural Centre shows that it was in a municipal building approximately 100 metres from the Hotel Vitez. The building served as a detention centre from 16 April 1993 until the end of April 1993 for between 300 to 500 Bosnian Muslims[1263] under guard of the Military Police and HVO regulars.[1264] As a detention centre, it became overcrowded until the detainees were either released or transferred towards the end of April 1993.[1265] The Cultural Centre also housed the headquarters of the Vitez Brigade commander. That regular HVO personnel under the Appellant's effective command knew and made use of the detainees is beyond doubt.[1266] One witness testified that, while he was detained in the Vitez Cultural Centre, "senior military delegations came to visit the building, headed by the Chief of Staff of the BiH army at the time, Mr. Sefer Halilović, and the commander of the HVO headquarters, Milivoj Petković. They were escorted by local commanders on both sides."[1267]

(b) Actual or constructive knowledge

616. The Appellant submits that there is no evidence that he knew, or had reason to know, of the violative conduct in the detention facilities, that the Trial Chamber did not define the "circumstances" which should supposedly have put a reasonable person on notice of the violative conduct, and that the arbitrary finding that the "circumstances" referred to in the Trial Judgement would have put a reasonable person on notice, without more, is inadequate to support a finding of guilt beyond a reasonable doubt.[1268] The Appellant claims that the Trial Chamber erred in inferring that the Appellant must have known about every occasion on which an HVO soldier committed an offence,[1269] or that he had reason to know of the conditions in the detention facilities because of the proximity of his headquarters to such facilities.[1270]

[1260] Witness Zeco, T 2808, (26 Sept. 1997) (Open Session). Witness D, T 2700-1 (24 Sept. 1997) (Open Session) testified that he was arrested "by HVO soldiers". Witness Beso, T 2216 (26 Aug. 1997) (Open Session) testified that the men who detained him "were wearing camouflage uniforms with HVO patches their sleeves."
[1261] Trial Judgement, para. 694.
[1262] Trial Judgement, paras. 723, 725.
[1263] Not all of whom were necessarily detained there at the same time.
[1264] Trial Judgement, para. 696, and n. 1595.
[1265] Witness Beso T 2232 (26 Aug. 1997) (Open Session).
[1266] *See* Witness Pezer, T 1573 (19 Aug. 1997) (Open Session).
[1267] Witness Y, T 6509 (29 Jan. 1998) (Closed Session).
[1268] Trial Judgement, para. 92.
[1269] Appellant's Brief, p. 112.
[1270] Appellant's Brief, p. 112, and Brief in Reply, para. 91.

617. The Prosecution submits that there is evidence indicating that the Appellant, as the commanding officer of the CBOZ, knew or ought to have known that unlawful conduct was occurring, and that it was therefore reasonable for the Trial Chamber to conclude that the Appellant did know of the unlawful circumstances and conditions under which the detainees were detained in the facilities.[1271] The Prosecution argues that there is evidence indicating that the Appellant knew or ought to have known that unlawful conduct was occurring, and that it was therefore reasonable for the Trial Chamber to conclude that the Appellant did know of the unlawful circumstances and conditions under which the detainees were detained in the facilities.[1272]

618. The Appeals Chamber has found[1273] that the Trial Chamber erred in its interpretation of the "had reason to know" standard, and has corrected it accordingly. As a result, the Appeals Chamber will apply the correct standard to determine whether the Appellant knew or had reason to know of the unlawful conduct of personnel under his command as far as that conduct related to the conditions in the detention facilities. The Appeals Chamber considers that:

(i) the Appellant's personal proximity to some of the detention centres precludes the finding that he was unaware of the presence of the detainees there;[1274]

(ii) the Appellant testified that he frequently visited the front lines;[1275]

(iii) the Appellant's units were under-manned,[1276] yet the trenches continued to be dug pursuant to his orders;[1277]

(iv) the Appellant ordered any mistreatment of detainees to cease on several occasions;[1278]

[1271] Respondent's Brief, para. 3.27.
[1272] Respondent's Brief, para. 3.27.
[1273] *See* Chapter III (B) (2), above.
[1274] On 23 April 1993, the Appellant set up one of his command centres in the former JNA Barracks in Kiseljak, which were also used as a detention centre between April and November of that year; *see* Trial Judgement, para. 690. The Vitez veterinary station, another detention centre for the period 16 to 20 April 1993, was approximately 900 metres from the Hotel Vitez; *see* Trial Judgement, para. 694. The Vitez Cultural Centre, used as a detention centre from 16 April 1993, was at most 100 metres from the Hotel Vitez (*see* Trial Judgement, para. 696, and testimony of Witness BA5, AT 527 (11 Dec. 2003) (Open Session). The SDK building was some 150 metres from the Hotel Vitez; *see* T 22,719 (26 May 1999) (Open Session). On one occasion on 20 April 1993, 247 detainees from Gačice were in front of the Hotel Vitez; Trial Judgement para. 742; and *see* below. Throughout this period, the Appellant used the Hotel Vitez as his headquarters. Note is also taken of the testimony of Witness HH, a Military Policeman at the Hotel Vitez who testified that the trench-digging activities in Busovača were observed by everyone there, as they were so obvious (T 6831) (24 Feb. 1998) (Closed Session).
[1275] T 22733 (26 May 1999) (Open Session): "I visited practically all the front lines at different periods of time, and I spent a long time at the front lines in different periods."
[1276] Witness Zeco testified that the ABiH outnumbered the HVO by a proportion of 10 to 1; *see* T 11,717 (21 Sept. 1998) (Open Session).
[1277] Ex. D298 and D301. The Appeals Chamber notes the distinction between ordering one's subordinates to prepare defensive positions, and ordering that detainees be used for that purpose.
[1278] *See* the discussion of humanitarian orders below.

(v) the practice was widely known to and reported by *inter alia* the ICRC,[1279] the ECMM,[1280] and UNPROFOR[1281] representatives; and

(vi) other HVO personnel present in the area at the time testified that the detention of Muslims, and the use of detainees to dig trenches, was plainly evident.[1282]

619. The trial evidence considered above demonstrates that the Appellant on occasion knew of the mistreatment of non-combatant Bosnian Muslims in detention facilities.[1283] Furthermore, the Appeals Chamber has considered evidence from the trial record illustrating that detainees were held in locations in close proximity to the Appellant's headquarters in Vitez,[1284] namely: the Vitez Cultural Centre (containing the Cinema Hall) and the Vitez veterinary hospital.[1285] In relation to the former of these two locations, the Trial Chamber stated:

> [The] Vitez Cultural Centre was in a municipal building barely a hundred metres from Blaškić's headquarters at the Hotel Vitez. The building was originally used as a head office by the political parties in Vitez. Čerkez, commander of the HVO Vitez Brigade, had established his headquarters there. Beginning on 16 April 1993, between 300 to 500 Muslim civilians were detained under guard of the Military Police and HVO soldiers. In the cellar, a large number of detainees, including some ill pensioners, had to sit or stand on the coal stored there. Since the number of detainees grew rapidly, they were transferred to other rooms in the building, such as the cinema hall, which also became overcrowded. Towards the end of the month some of the pensioners and ill were released but other detainees, particularly ABiH or SDA members and intellectuals, were transferred to other detention centres, such as Kaonik prison.[1286]

[1279] T 22694 and T 22732 (26 May 1999) (Open Session). At T 18,271, the Appellant acknowledged that he discussed reports of detainees digging trenches with an ICRC observer as early as 5 February 1993, and that he followed up on that report to ensure that it was either not happening, or that it would cease (23 Feb. 1999) (Open Session).

[1280] Ex. P514. Witness Morsink, an ECMM monitor, testified that the HVO was repeatedly informed of these observations by the ECMM; *see* T 9895 (2 July 1998) (Open Session).

[1281] Ex. P677 and P714.

[1282] Witness HH, T 6833, 6844 (24 Feb. 1998) (Closed Session). *See* T 22,712 (26 May 1999) (Private Session). The Appellant denies any knowledge of the alleged incidents in that evidence because he was isolated in Kiseljak at that time, T 22,714-5 (26 May 1999) (Private Session).

[1283] This finding, and the finding that the Appellant knew that detainees were forced to dig trenches, is one which the Trial Chamber made *obiter* (Trial Judgement, para. 733). The Appeals Chamber notes that the Prosecution submitted evidence on appeal as rebuttal evidence suggesting that the Appellant allegedly expressed concern that the international community would hear of the deaths of detainees while digging trenches (Ex. PA 56). This exhibit is an order to the Commander of the Ban Jelačić Brigade dated 22 May 1993, in which the Appellant expressed concern about the international community finding out that a Muslim prisoner was killed by a sniper while digging trenches at HVO lines. However, the B/C/S (original) version of this document has a hand-written annotation on it adjacent to the deleted paragraph 3: "*ovo ne*" meaning "this not". The Appeals Chamber considers that the probative value of this evidence must be assessed in light of the manuscript amendment, and the Appeals Chamber cannot conclude that the Appellant intended to distort news of future such occurrences.

[1284] The Appeals Chamber notes that this factor of proximity is one factor among many, and neither sole nor the determining factor. A superior cannot be convicted on the basis of command responsibility merely because of his proximity to the scene of the crime.

[1285] The detainees in Dubravica, and in the SDK building in Vitez, were subject to Vitezovi control and were beyond the Appellant's control (detainees in the SDK building were guarded by Military Police, Trial Judgement para. 698); Kaonik Prison in Busovača was controlled by Military Police loyal to Kordić and beyond the Appellant's control; Kiseljak was largely isolated, and thus the detention centres there (the former JNA barracks and Rotilj village) were beyond the Appellant's control; and the detentions in various houses in the village of Gaćice has already been shown to have been beyond the Appellant's knowledge.

[1286] Trial Judgement, para. 696 (footnotes omitted).

A large number of the detainees at the Vitez Cultural Centre were taken out by force to dig trenches and other military fortifications, and of them were killed during that work process. While this is not an element of liability for the Appellant, it does contribute to a full understanding of the suffering of the detainees who had to endure the pitiful conditions in such a fearful environment.[1287]

620. The veterinary station was used to detain up to 76 Bosnian Muslim men before they were transferred elsewhere.[1288] The veterinary station was not in the town of Vitez itself, but on the outskirts in an area called Rijeka, and fulfilled this function from 16 – 20 April 1993. The conditions were very poor - the basement was underground and unheated, water could penetrate, and it was very cramped. Detainees (all men from the age of 16 to 70) had to sit on the available wood in the basement to protect themselves from the dampness. At least some (if not all) detainees were transferred to the detention facility at Dubravica. Instances of forced removal of private property occurred.[1289]

621. The Appeals Chamber notes the Appellant's contention that when he learned of unlawful detention, he took remedial action.[1290] The Appellant did succeed in having some of these detainees released by 30 April 1993,[1291] and others still on 9 May 1993,[1292] which does suggest both that he (i) was previously unaware of the unlawful conduct, but that (ii) nevertheless exercised a degree of effective control over the offending units and personnel as found above. The Appeals Chamber considers that this submission establishes that the Appellant knew of conditions of unlawful detention by the time he took the remedial action.

622. Having considered the trial evidence in this case, the Appeals Chamber concludes that it was open to a reasonable trier of fact to conclude beyond reasonable doubt that the Appellant knew that detainees had been unlawfully detained in the Vitez Cultural Centre and the Vitez veterinary hospital, and that he was aware that the conditions of their detention had been unlawful. This conclusion has not been contradicted by evidence admitted on appeal. The Appeals Chamber will now consider whether the Appellant failed to punish those subordinates of his who were responsible for the detention-related crimes committed in these locations, and over whom he was able to exercise effective control.

[1287] Witness Mujezinović, T 1710 (19 Aug. 1997) (Open Session); Witness Y, T 6508 *et seq.* (Closed Session) (29 Jan. 1998).
[1288] Witness Zeco testified that he was transferred to the school in Dubravica (T 2809-2810) (26 Sept. 1997) (Open Session), where he and his fellow detainees remained until 30 April 1993.
[1289] Witness Zeco, T 2810-11 (26 Sept. 1997) (Open Session).
[1290] Appellant's Brief, p. 114.
[1291] Ex. D366, an order of 29 April 1993 directing *inter alia* the "[r]elease of all civilians (men, women and children). arrested during the conflicts between the BH Army and the HVO" and that "[a]ll released civilians must be guaranteed

(c) Failure to Punish

623. The Trial Chamber considered the Appellant's responsibility pursuant to Article 7(3) of the Statute for the violative conduct in the detention facilities,[1293] and concluded that:

> The Defence highlighted that General Blaškić had no authority to control or sanction the detention centre administrators. [Footnote omitted] Nevertheless, as established above, the Trial Chamber identified HVO soldiers or the Military Police as being the perpetrators of the crimes. The evidence demonstrated that the accused did not duly carry out his duty to investigate the crimes and impose disciplinary measures or to send a report on the perpetrators of these crimes to the competent authorities [Footnote omitted].[1294]

624. In relation to the Appellant's duty under Article 7(3) to punish the perpetrators, the Appellant maintains that he referred personnel to the competent authorities where he was able to do so, that he had limited ability to control the criminal conduct of many troops in the CBOZ, and that, as a result, he did what any reasonable commander would have done in the circumstances, issuing orders directing troops to abide by international humanitarian law and to treat civilians appropriately.[1295] He adds that the issue of such orders cannot serve as the basis for his conviction for the failure to prevent detention-related crimes.[1296] The Appellant claims that the Trial Judgement ignores the fact that he issued so-called preventative humanitarian orders at the relevant time to these charges,[1297] including orders to release all detainees.[1298]

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full safety in the locations in your zones of responsibility and you shall be held responsible for the situation your zones…".

[1292] Witness Stewart, T 23,813 (17 June 1999) (Open Session).

[1293] Trial Judgement, paras. 721 *et seq.*

[1294] Trial Judgement, para. 734.

[1295] Brief in Reply, para. 94.

[1296] Brief in Reply, para. 94.

[1297] *See*, for example Ex. 14, Second Rule 115 Motion. *See also* D318: "Take care of all the wounded, no matter what army they belong to". *See also* the following exhibits: D32, an order of 18 April 1993 to "Exchange the detained soldiers and civilians at once" and "take care of all the wounded, no matter what army they belong to" and "gather the relevant data … about murdering civilians and soldiers"; D333: an order of 20 April 1993 to "make sure the ICRC has free access to civilians in all areas … respect and protect the civilian population … treat captured civilians and soldiers in a humane fashion … allow free access to humanitarian aid"; D334: an order of 21 April 1993 "with regard to the … violation of the rights of the ICRC … [to] allow the ICRC free access to civilians in all areas … respect and protect the civilian population … treat the captured civilians and soldiers humanely and provide them with suitable protection … D336: an order of 21 April 1993 to "guarantee full safety to Muslim civilians and civilians of other nationalities"; D362: an order of 24 April 1993 providing that "unhindered access and rendering assistance to all wounded persons, be they civilians, soldiers or enemy soldiers, is to be ensured … civilians and prisoners are to be treated in accordance with international conventions and regulations"; D366: an order of 29 April 1993 "release all civilians (men, women and children … all released civilians must be guaranteed full safety"; D373 is an order dated 21 June 1993 which *inter alia* forbids the use of prisoners of war to do engineering work; D389: an order dated 1 December 1993 requiring "the treatment of the military prisoners of war must be within the framework of the Geneva Convention and the international law concerning the treatment of prisoners of war." *See* Appellant's Brief, pp. 38, 40. These orders are all marked confidential, military secret, and directed subordinates to act upon them (ex. D333: "familiarize units under your command with this order"); *see also* Exhibits D334, D362, D373 and D389. Seen in this light, it cannot credibly be maintained that these orders were a 'sham' as was alluded to by the Prosecution (*see* AT 713) (16 Dec. 2003) (Open Session). The Prosecution submitted that the ample evidence before the Trial Chamber of the Appellant's written and oral orders to release prisoners held by the HVO, made it inconceivable that he had no knowledge or involvement in the detention (Respondent's Brief, para. 3.20); this assertion has been addressed above.

[1298] Appellant's Brief, p. 114.

625. The Prosecution argues that there is scant evidence to suggest that anyone in the HVO was punished for the detention or treatment of Bosnian Muslim detainees, and that the Appellant did not offer documentary evidence to support his citation of two instances where HVO soldiers were indicted.[1299] The Prosecution also submits that it is simply untrue that the Trial Chamber disregarded the humanitarian orders issued by the Appellant; that, on the contrary, the Trial Chamber found that the Appellant never did anything to enforce the orders or punish any violations;[1300] and that there is little evidence that the Appellant issued what the Prosecution called "genuine preventative orders."[1301] The Appellant, the Prosecution concludes, failed to take remedial measures.[1302]

626. The Prosecution submits further that, in failing to punish the perpetrators of crimes which he knew had been committed, and in continuing to deploy the perpetrators thereof in military operations, the Appellant incurred command responsibility.[1303] The Prosecution maintains that in cases where the Appellant had effective control over the perpetrators of crimes which he knew (actually or constructively) had been committed, and where he failed to ensure that perpetrators were punished according to his obligations as a commanding officer, the Appellant incurred command responsibility.[1304]

627. The Appeals Chamber notes that on at least two occasions, the Appellant responded to allegations of mistreatment of detainees by HVO personnel.[1305] There were also instances of his exercising military discipline over HVO personnel for misconduct or the commission of crimes,[1306] albeit according to the HVO procedure of referring it to the proper authorities.[1307] Aside from these examples, however, there is insufficient evidence to suggest that the Appellant initiated a systematic, effective process for punishing perpetrators of detention-related crimes in the area of his

[1299] Respondent's Brief, para. 3.31.
[1300] Respondent's Brief, para. 3.32.
[1301] Prosecution's closing submission, AT 713 (16 Dec. 2003) (Open Session). The Prosecution further argued that the Appellant failed to ensure that the orders issued were followed up.
[1302] Respondent's Brief, para. 3.33.
[1303] Respondent's Brief, para. 3.29 *et seq*; AT 698 (16 Dec. 2003) (Open Session).
[1304] T 22,703 (26 May 1999) (Open Session).
[1305] He ordered an investigation into the alleged rape of a detainee at Dubravica (T 19,211–19,214) (17 Mar. 1999) (Open Session) and was later informed that an investigation had been initiated. He further ordered an investigation of two HVO personnel involved in the deaths of two detainees who had been engaged in trench-digging at the time; *see* T 22,968-9 (26 May 1999) (Open Session). The Appellant was however unable to submit documentary evidence of these instances.
[1306] *See* above and *see* Witness Watkins, AT 320 (9 Dec. 2003) (Open Session).
[1307] *See also* Trial Judgement, para. 474, where the Appellant was found to have given an order "on 18 January 1993 for the attention of the regular units of the HVO, the independent units and the MP 4th Battalion instructing them to make sure that all soldiers prone to criminal conduct were not in a position to do any harm" (citing Appellant's testimony, T 18,125-18,126 (23 Feb. 1999) (Open Session); and Witness Marin, T 12,089-12,090 (24 Sept. 1998) (Open Session)). The Appellant later distributed a reminder, but neither order had any effect.

command and over whom he exercised effective control, crimes which he knew or had reason to know were being or had been committed.[1308]

628. In particular, there is no evidence that, on becoming aware of the detention and treatment of the detainees in the Vitez Cultural Centre and the Vitez veterinary hospital, the Appellant punished those responsible. The Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant knew or had reason to know that these practices were extant in those locations, and that he failed to punish the personnel responsible who were under his effective command and control, was a conclusion that a reasonable trier of fact could have made.

629. The Appeals Chamber considers that the Appellant's explanation for his apparent failure to punish the perpetrators is based on two submissions. First, he submits that once suspected offenders were reported to the district military court, the matter was transferred to the authority responsible, and was no longer in the Appellant's competence.[1309] Second, the Trial Chamber heard evidence that the Appellant could not in fact punish the men responsible as he had no practical way of doing so - they were beyond his effective command and control.[1310] This second submission has been examined above.

630. As to the first submission that the Appellant, by referring the matters to the competent authorities, somehow relieved himself of any further obligation to punish the perpetrators, regard must be had to the regulations concerning the application of the international law of war to the armed forces of the SFRY, cited by the Trial Chamber.[1311] These were regulations with which the Appellant, a former JNA officer, was familiar, and they provide that:

> [a] commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorized to charge them, and he did not report them to the authorized military commander, he would also be personally responsible. A military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts.[1312]

[1308] Respondent's Brief, para. 3.31. There are in fact two examples to the contrary. First, the Appellant failed to discipline Duško Grubešić, the deputy commander of the NŠZ Brigade in Busovača, for failing to prevent forced trench-digging by detainees, during which two detainees were killed on the front lines (T 22,699 *et seq.* (26 May 1999) (Open Session)). Appellant: "I personally did not issue disciplinary measures towards those perpetrators of the crime", T 22,703 (26 May 1999) (Open Session). The Appellant maintained that he did all he could to initiate an investigation.) A further example is the Appellant's failure to discipline Ivica Rajić for his involvement in crimes committed in Stupni Do (AT 320–321) (9 Dec. 2003) (Open Session).

[1309] T 22,701 *et seq*. (26 May 1999) (Open Session).

[1310] *See* above.

[1311] Trial Judgement, para. 338. The Trial Chamber was in turn referring to a reference in the *Čelebići* Trial Judgement, para. 341.

[1312] SFRY Military Regulations - Federal Secretariat for National Defence: Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY 1988, Art. 21, translation reprinted in M. Cherif Bassiouni's, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), p. 661.

631. In addition to these regulations, the HVO rules of military discipline were admitted as evidence.[1313] The Appeals Chamber noted the Prosecution's argument that Article 52 of those rules had a clear meaning, and suggested that Appellant was thereby obliged to preserve and collect evidence where crimes were committed, and to arrest persons whom he suspected had committed war crimes.[1314] The Appeals Chamber finds rather that, on a proper reading, Article 52 is in fact a statement of the jurisdiction of the "operative zone military district courts" and did not impose any such obligation on the Appellant.

632. The Appeals Chamber notes further that it has been established that superior responsibility may entail *inter alia* the submission of reports to the competent authorities in order to constitute a reasonable and necessary measure aimed at preventing or repressing the infraction. Commanders are under a duty to report infractions to the competent authorities as is specifically provided for both by the SFRY regulations concerning the application of the international law of war,[1315] and by Article 87(1) of Additional Protocol I, and by Article 86(2) of Additional Protocol I.[1316] Notably, this duty is present even in circumstances where the commander may not exercise effective control over the perpetrators of the infractions concerned such that he can punish them.

633. The Appeals Chamber is convinced beyond reasonable doubt that the Appellant, notwithstanding his knowledge that detention-related crimes had been committed in the Vitez Cultural Centre and the Vitez veterinary hospital, failed to punish those subordinates of his who were responsible, and over whom he was able to exercise effective control, and he failed to report the infractions of which he was aware to the competent authorities. The Appellant is, accordingly, guilty under Count 15 of grave breaches of the Geneva Conventions (inhuman treatment) pursuant to Articles 2(b) and 7(3) of the Statute.

634. The Appeals Chamber recalls that the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment) is that the former contains an element not

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[1313] Ex. P38, tab 2: "Narodni List – Official Gazette of the Croatian Community of Herzeg-Bosna", p. 37 "Rules of Military Discipline". Article 52 provides as follows: First instance courts shall try the following individuals:

(1) The General Staff's military disciplinary courts shall try all non-commissioned officers and officers serving in the General Staff, all officers holding the rank of brigadier or higher, all officers holding the the position of independent battalion commanders and brigade commanders and higher positions in the HZ H-B army.

(2) Operative zone military disciplinary courts shall try non-commissioned officers and officers up to the rank of brigadier in the units or institution, who are subordinate to the operative zone commander or are in units or institutions within the area under the operative zone commander's authority, as well as non-commissioned officers and officers up to the rank of brigadier serving in the administrative bodies of enterprises and other legal entities."

Article 29 of those rules provides for an authorised officer to hand a case to an authorised prosecutor through official channels.

[1314] AT 699–700 (16 Dec. 2003) (Open Session).

[1315] Cited above.

[1316] *See* discussion above.

present in the latter, namely the protected person status of the victim.[1317] The definition of "protected person" provided by Geneva Convention IV[1318] has been interpreted by the International Tribunal as not being limited to a strict requirement of nationality, but as extending to the sometimes more appropriate bonds of ethnicity.[1319] The Appeals Chamber considers that the Bosnian Muslim detainees were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 16 must be dismissed.[1320]

B. Counts 17 and 18: Hostage-taking

635. The Trial Chamber convicted the Appellant of taking hostages, first for use in prisoner exchanges, and second in order to deter ABiH military operations against the HVO.[1321] It is unclear whether the Trial Chamber made this conviction pursuant to Article 7(1) or Article 7(3) of the Statute.

636. The Appellant does not deny that hostages were taken[1322] and does not appeal against this finding as a separate ground of appeal *per se*.[1323] Rather, the Appellant argues in respect of the hostage-taking convictions that the Trial Judgement is "extremely vague," that there was no finding that he ordered the taking of hostages, and that he presumes that he was convicted of the charges on the basis of Article 7(3) of the Statute.[1324] The position of the Prosecution is that the Appellant was in fact convicted of hostage-taking under Article 7(1) of the Statute, even though the Trial Chamber found that the Appellant did not expressly order that hostages be taken.[1325]

637. The Appeals Chamber however emphasises that the Trial Chamber itself found that the Appellant did not order that hostages be taken or used.[1326] Instead, the Trial Judgement stated that the Appellant ordered the defence of Vitez and thereby "deliberately ran the risk that many detainees might be taken hostage for this purpose."[1327] The Appeals Chamber considers that the

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[1317] *Čelebići* Appeal Judgement, para. 426. *See also* paras. 412-413.
[1318] Geneva Convention IV, Article 4: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."
[1319] *Tadić* Appeal Judgement, para. 166: "ethnicity may become determinative of national allegiance"; *see also Čelebići* Trial Judgement, paras. 263-265; *Naletilić* Trial Judgement, para. 207. This implies that effective allegiance to a Party to the conflict may be regarded as the crucial test, rather than relying on formal bonds (*Tadić* Appeal Judgement, para. 166).
[1320] *Čelebići* Appeal Judgement, para. 426.
[1321] Trial Judgement, paras. 701, 708.
[1322] Appellant's Brief, pp. 109, 113.
[1323] Brief in Reply, para. 87.
[1324] Supplemental brief, para. 87.
[1325] Respondent's Brief, para. 3.63. The Prosecution substantiates its position in Section VIII of its Respondent's Brief. *See*, in particular, para. 5.19.
[1326] Trial Judgement, para. 741.
[1327] Trial Judgement, para. 741.

Appellant was convicted for hostage-taking pursuant to Article 7(1) of the Statute, and that no finding was made under Article 7(3) of the Statute in relation to these counts. As a result, the Appeals Chamber declines to consider Article 7(3) responsibility any further.[1328]

638. Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case,[1329] and in the *Kordić and Čerkez* Trial Judgement.[1330] In the latter case, the following was stated:

> It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement …
>
> The additional element … is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a "threat either to prolong the hostage's detention or to put him to death". In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.[1331]

639. The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person.[1332] The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV,[1333] and Article 75(2)(c) of Additional Protocol I.

1. Hostage-taking for prisoner exchanges

640. The Trial Chamber heard evidence of detainees being used in exchanges to secure the release of persons detained by the ABiH.[1334] However, no finding was made in the Trial Judgement in connection with these exchanges. As a result, the Appeals Chamber does not consider this point, and turns instead to the specific incident of hostages being used in the defence of Vitez, to which the parties and the Trial Chamber referred.

[1328] *See* Chapter III (B) above.
[1329] Trial Judgement, para. 158: "The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage."
[1330] *Kordić and Čerkez* Trial Judgement, paras. 311 *et seq.*
[1331] *Kordić and Čerkez* Trial Judgement, paras. 312-3.
[1332] *See also* Article 1 of the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
[1333] Article 34 states simply: "The taking of hostages is prohibited." The Commentary to Geneva Convention IV states that "In accordance with the spirit of the Convention, the word 'hostages' must be understood in the widest possible sense", p. 230.
[1334] Trial Judgement, paras. 630, 720, n. 1632. *See also* Witness Pizer, T 1575-6 (19 Aug. 1997) (Open Session) and D318, an order of the Appellant dated 18 April 1993 (and copied to the ECMM) to begin prisoner exchanges, both soldiers and civilians. *See also* Witness Marin, T 13,568 (15 Oct. 1998) (Open Session).

2. Hostage-taking in the defence of Vitez

641. In convicting the Appellant of hostage-taking, the Trial Chamber relied on the testimony of Witness Mujezinović.[1335] Witness Mujezinović testified at trial that, on 19 April 1993, he was taken to a meeting with Čerkez, the Commander of the Vitez Brigade.[1336] At that meeting, Witness Mujezinović was instructed by Čerkez to contact ABiH commanders and Bosnian leaders, and to tell them that the ABiH was to halt its offensive combat operations on the town of Vitez, failing which the 2,223 Muslims detainees in Vitez (expressly including women and children) would all be killed.[1337] Witness Mujezinović was further instructed to appear in a television broadcast to repeat that threat,[1338] and to tell the Muslims of Stari Vitez to surrender their weapons.[1339] The threats were repeated the following morning.[1340]

642. The Trial Chamber concluded that the detainees were "threatened with death" in order to prevent the ABiH advance on Vitez.[1341] The Appeallant has not contended that these events did not occur. However, the Trial Chamber further concluded the following, since Čerkez was the commander of the Vitez Brigade, and since he was under the direct command of the Appellant:

> The Trial Chamber concludes that although General Blaškić did not order that hostages be taken, it is inconceivable that as commander he did not order the defence of the town where his headquarters were located. In so doing, Blaškić deliberately ran the risk that many detainees might be taken hostage for this purpose.[1342]

643. The Appellant contests this finding both because it is based on the testimony of a single witness, and because the Trial Chamber was wrong to infer from the alleged order to defend Vitez that the Appellant in turn ordered another individual to make this threat.[1343] In addition, the Appellant submits that there is no evidence that the Appellant knew, or had any reason to know, of the threat issued by that other individual.[1344] As a result of his ignorance of the threat, the Appellant submits that he was not in a position to punish that individual for what is manifestly unlawful conduct on his part, and so cannot be held accountable.[1345]

[1335] Trial Judgement, paras. 706 *et seq.*
[1336] Witness Mujezinović, T 1705 *et seq.* (20 Aug. 1997) (Open Session).
[1337] Mujezinović, T 1707 (20 Aug. 1997) (Open Session). The Trial Chamber proceeded to conclude (at para. 708) that *all* of the detainees were therefore threatened with death, "incontestably so at least for those detained at the Vitez Cultural Centre." The Trial Chamber cites no evidence to support this conclusion.
[1338] Witness Mujezinović, T 1712 (20 Aug. 1997) (Open Session).
[1339] Trial Judgement, para. 706; Witness Mujezinović, T 1713 (20 Aug. 1997) (Open Session).
[1340] On that occasion the threats were made by two local HDZ officials: Ivan Šantić and Pero Skopljak; Trial Judgement, para. 707.
[1341] Trial Judgement, para. 708.
[1342] Trial Judgement, para. 741.
[1343] Brief in Reply, para. 87; Appellant's Brief, p. 113.
[1344] Appellant's Brief, p. 113.
[1345] Appellant's Brief, p. 113.

644. The Trial Chamber itself found that the Appellant did not order that hostages be used to repel the attack on Vitez,[1346] only that he ordered the defence of Vitez.[1347] However, the Trial Chamber's further finding that the Appellant can accordingly be held accountable for the crime of hostage-taking is problematic for two reasons. First, the Appeals Chamber disagrees that the Appellant's order to defend Vitez necessarily resulted in his subordinate's illegal threat.[1348] It does not follow, by virtue of his legitimate order to defend an installation of military value, that the Appellant incurred criminal responsibility for his subordinate's unlawful choice of how to execute the order. There is no necessary causal nexus between an order to defend a position and the taking of hostages.

645. Second, the Trial Chamber based its conclusion that the Appellant was responsible for the hostage-taking on its finding that he "deliberately ran the risk that many detainees might be taken hostage for this purpose."[1349] As stated above, the Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent: a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order has the requisite *mens rea* for establishing liability for ordering the crime under Article 7(1) of the Statute. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the taking of hostages.

646. The Appeals Chamber finds that there was insufficient evidence for the Trial Chamber to conclude that the Appellant ordered the defence of Vitez with the awareness of the substantial likelihood that hostages would be taken. The Trial Chamber's finding that the Appellant was on notice that HVO troops were likely to take hostages in order to defend Vitez, or that the Appellant was aware of the threats made by others in that regard, is not supported by the trial evidence. The Appeals Chamber finds that this evidence does not prove beyond reasonable doubt that he was aware of a substantial likelihood that crimes would be committed in the execution of his orders. The findings of the Trial Chamber with respect to hostage-taking are overturned. In light of these conclusions, the Appeals Chamber declines to consider the argument as to the credibility of the

[1346] Trial Judgement, para. 741.
[1347] No evidence was cited in support of this finding; it was merely reasoned at para. 741 of the Trial Judgement that "it is inconceivable that as commander he did not order the defence of the town where his headquarters were located."
[1348] Regarding the Appellant ordering the defence of Vitez, see D267 (a preparatory combat command dated 15 April 1993) and D269 (a combat command dated 16 April 1993). *See also* Ex. 14, Second Rule 115 Motion, p. 71. The Appellant does not dispute that he ordered the defence of Vitez, Appellant's Brief, p. 113.
[1349] In particular, civilians detained during and after the HVO attack on the village of Gaćice were detained in front of the hotel for about three hours before being returned to Gaćice; Trial Judgement, paras. 549 and 714. *See also* Ex. D331, an Operations Report of 20 April 1993 (at 1800 hours) detailing that 47 men from Gaćice were taken prisoner, but that the "women and children were sent home." Trial Judgement, para. 741.

single witness, and grants this ground of appeal. The Appellant's convictions for Counts 17 and 18 are reversed.

C. Counts 19 and 20: Human Shields

647. The Trial Chamber found that the Appellant ordered the use of detainees as human shields[1350] to protect the headquarters of the Appellant at the Hotel Vitez on 20 April 1993.[1351] The Appeals Chamber notes that no finding was made under Article 7(3) of the Statute in relation to this count, and it will not consider this mode of responsibility in that respect.[1352]

648. The Trial Chamber also found that detainees were used as human shields in January or February 1993 to prevent the ABiH from firing on HVO positions.[1353] As regards the use of detainees as human shields in January or February 1993, however, the Trial Chamber did not make a finding establishing the Appellant's criminal responsibility, and the Appeals Chamber therefore does not consider it any further. As regards the use of human shields on 19 and 20 April 1993, on the other hand, the Trial Chamber found that the Prosecution did not prove beyond reasonable doubt that the detainees at Dubravica school and the Vitez Cultural Centre (excluding the Hotel Vitez) were used as protection against attack.[1354] The Trial Judgement entered no conviction for crimes committed against detainees in those particular locations, and the Appeals Chamber is barred from considering these allegations any further in the absence of an appeal from the Prosecution.

649. The Trial Chamber did, however, find that on 20 April 1993, the villagers of Gaćice were used as human shields to protect the HVO headquarters in the Hotel Vitez, which "inflicted considerable mental suffering upon the persons involved."[1355] In convicting the Appellant on Counts 19 and 20, the Trial Chamber's reasoning was the following: first, the detainees (numbering 247) were detained in front of the Appellant's headquarters for two and a half to three hours.[1356] Second, the Appellant was present in the building for a large part of the afternoon. Third, the ABiH on 20 April 1993 began an offensive of which the Appellant was aware.[1357] The Trial Chamber was

[1350] Trial Judgement, para. 743.
[1351] Trial Judgement, paras. 711, 715, 742-3.
[1352] *See* Chapter III (B) above.
[1353] Trial Judgement, paras. 709, 711 (specifically mentioning the village of Merdani).
[1354] Trial Judgement, para. 715.
[1355] Trial Judgement, para. 716. The Trial Chamber concluded that the detainees were either Muslim civilians or Muslims no longer taking part in combat operations.
[1356] Witness Hrustić, T 4814 (8 Dec. 1997) (Open Session); Trial Judgement, para. 714. Ex. D 331, an operations report from the Viteška Brigade Command, filed on 20 April 1993, describes how by 1800 47 men had been detained but the "women and children were sent home", with no mention of the latter's detention in front of the Hotel Vitez. Combined with Witness Hrustić's testimony (below) that the detainees were in front of the Hotel Vitez for at most three hours, it can be deduced that they were first stationed there at approximately 1500 or later. *See also* Trial Judgement, para. 549.
[1357] Trial Judgement, para. 742.

"therefore convinced beyond all reasonable doubt that on 20 April 1993 General Blaškić ordered civilians from Gaćice village to be used as human shields in order to protect his headquarters."[1358]

650. The Appellant appeals this finding on the basis that he did not order the use of detainees as human shields, he was not in the hotel at the relevant time, the hotel was not being shelled at that time, and that in any event causing the detainees to sit in front of the hotel did not constitute cruel or inhuman treatment because there is no evidence to suggest that it caused serious mental or physical suffering.[1359]

651. The Prosecution's response is that the Appellant has not shown that it was unreasonable for the Trial Chamber to convict the Appellant of ordering that civilians be used as human shields around Hotel Vitez on 20 April 1993.[1360] The Prosecution submits that Witness Hrustić provided strong circumstantial proof that detainees were used as human shields.[1361] The Prosecution also refers to a defence exhibit tendered at trial which shows that the Hotel Vitez was in fact shelled on 16 April 1993,[1362] and again on 20 April 1993, which was confirmed by other items of evidence presented during the trial.[1363]

652. The Appeals Chamber notes that Article 23 of Geneva Convention III provides as follows:

> No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

It also considers that Article 28 of Geneva Convention IV provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." Article 83 of the same Convention provides that the 'Detaining Power' "shall not set up places of internment in areas particularly exposed to the dangers of war." Furthermore, Article 51 of Additional Protocol I, relating to the protection of the civilian population in international armed conflicts, provides as follows:

> [T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to

[1358] Trial Judgement, para. 743.
[1359] Appellant's Brief, pp. 110-111.
[1360] Respondent's Brief, paras. 3.60-3.61.
[1361] Respondent's Brief, paras. 3.56-3.57.
[1362] Ex. D273, a combat report dated 16 April 1993.
[1363] Respondent's Brief, para. 3.58. The Trial Judgement cites Ex. P187, a report by ECMM monitors (Friis-Pedersen and Morsink) dated 20 April 1993, indicating "shelling HVO HQ and the PTT building in Vitez." The Appeals Chamber notes, however, that this assertion was made under the heading "Ceasefire-Violations (*Unconfirmed*)" (emphasis added), and that their report on the general situation in the Vitez area described "many refugees with luggage on the streets", suggesting that there was no intense shelling.

> the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[1364]

653. The use of prisoners of war or civilian detainees as human shields is therefore prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively[1365] where the other elements of these crimes are met.[1366]

654. The Trial Chamber convicted the Appellant for ordering the use of detainees as human shields. This finding is partly premised upon the alleged shelling of the Hotel Vitez and the need to protect the HVO headquarters from that shelling. There is also evidence of ABiH shelling of that location in the days before as well as on 20 April 1993.[1367] While there is evidence to suggest that the shelling on 20 April was not as heavy as it had been over the preceding days,[1368] a factual finding that the Hotel Vitez was actually being shelled at all on 20 April is not required in order to establish that detainees were unlawfully being used as human shields in anticipation of such shelling, contrary to the submission of the Appellant.[1369] Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself.[1370] To the

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[1364] Additional Protocol I, Article 51, para. 7. According to paragraph 8 of Article 51, "any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57."

[1365] *Naletilić* Trial Judgement, para. 303.

[1366] *Kvočka* Trial Judgement, para. 161 (citing Trial Judgement, para. 716). Those requirements were laid out by the Appeals Chamber in the *Tadić* Jurisdiction Decision, paras. 94-5. While these institutions are not reflective of the state of customary international law in 1993 and are hence of limited value in this case, the Appeals Chamber notes that this position is also reflected in the Rome Statute of the International Criminal Court, as well as in the Statute of the U.N. Special Court for East Timor (Article 6-6.1(b)(xxiii)) (although these instruments go further and criminalise such conduct). Under Article 8(2)(b)(xxiii) of the Rome Statute, a war crime is defined, *inter alia*, as "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations." In Article 9 of the Rome Statute (Elements of Crimes, developed to assist the ICC in the interpretation and application of Articles 6, 7, and 8), war crimes of using protected persons as shields are referred to under Article 8(2)(b)(xxiii).

[1367] *See* Trial Judgement, para. 714. The Trial Chamber cited *inter alia* the evidence of a witness who testified in closed session (T 24,083-24,085) in establishing that "Vitez and in particular the HVO headquarters in the Hotel Vitez were shelled" on 20 April 1993. *See also* Ex. 187, a daily operational report of the Busovača Joint Commission by Friis-Pedersen and Morsink, dated 20 April 1993 (discussed above).

[1368] Witness Marin, T 13,560 (15 Oct. 1998) (Open Session): "there was no intensive shelling of Vitez on that day", referring to 20 April 1993. *See also* Ex. D331, the Operations Report discussed above, which describes heavy ABiH infantry attacks, but makes no reference to the shelling of Vitez on that day. Witness Hrustić, T 4812 (8 Dec. 1997) (Open Session), who testified that on their way from Gačice into Vitez "we could hear shelling. The children were terrified, they would hide behind us, we heard rifle fire and shelling." This testimony does not however establish that the Hotel Vitez was in fact being shelled, rather it is evidence of the existence of combat operations in and around Vitez in general. The evidence relied upon by the Trial Chamber (para. 714, n. 1622) demonstrates rather that Vitez was shelled on the days preceding 20 April 1993. Ex. 14, Second Rule 115 Motion (the book of observations of the officer on duty in the CBOZ, otherwise known as the Appellant's so-called "War Diary"), pp. 144–152, does not contain a reference to any shelling of Vitez on that day, but does refer to shelling on the preceding days (pp. 71, 134, 136, 139, 140, 142-3).

[1369] Appellant's Brief, p. 111, n. 282.

[1370] *See* Commentary to Geneva Convention IV, p. 208: "the presence of civilians must never be used to render immune from military operations objectives which are liable to be attacked." An alternative interpretation of the prohibition would be illogical in that, where the use of human shields is successful in deterring an attack, with no consequent harm

extent that the Trial Chamber considered the intensity of the shelling of Vitez on 20 April 1993, that consideration was superfluous to an analysis of a breach of the provisions of the Geneva Conventions, but may be relevant to whether the use of the protected detainees as human shields amounts to inhuman treatment for the purposes of Article 2 of the Statute.

655. The facts alleged by the Prosecution rely to a great extent upon the testimony of Witness Hrustić, one of the 247 Bosnian Muslim residents of Gaćice who were brought to the area around the Hotel Vitez on 20 April 1993 following the HVO attack on their village. The Prosecution argues that this witness "provides strong circumstantial proof that detainees were being used as human shields."[1371] This is particularly so when having regard to the witness's statements that:

> One of the soldiers said, while we were standing there, "you are going to sit here now and let your people shell you, because they have been shelling us up to now, and you better sit down and wait".[1372]
>
> [And:] we were told that if anybody moved, they would be shot on the spot because they could see us and they were watching us.[1373]

656. This testimony does indeed provide strong circumstantial proof that detainees were being used as human shields, and that they endured mental suffering as a result.[1374] Witness Hrustić testified that an HVO soldier said he was going to inform the 'commander'.[1375] She tesitfied further, in response to the question as to whether her conclusion that she was used as a human shield was based on the statement made by the soldier, that she believed that she and the other detainees were gathered around the Hotel Vitez to be used as human shields:

> Let me tell you, the moment that we were brought there with the children and with the men, knowing that there were people dead in the village, knowing a little of what had happened to the other villages, and seeing the fires, the shelling and everything, and what the soldier said, 'you sit there for a time and let your people shell you now, because they have been shelling us so far', and knowing that the hotel was a military base for a long time before that day, we could have expected shelling. At this point in time, I believe that we were brought there as a human shield because

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to the human shields themselves, the objective of the perpetrator is met, and yet no criminal responsibility would attach to him.

[1371] Respondent's Brief, para. 3.57.

[1372] Witness Hrustić, T 4815 (8 Dec. 1997) (Open Session).

[1373] Witness Hrustić, T 4816 (8 Dec. 1997) (Open Session).

[1374] The Appeals Chamber notes that the witness's recollection of this statement by an HVO soldier is by its nature hearsay evidence. Although the Statute does not expressly address the admissibility of hearsay evidence, it is settled jurisprudence that hearsay evidence is in principle admissible. *See Prosecutor v. Tadić*, Case No.: IT-94-1, Decision on the Defence Motion on Hearsay, 5 Aug. 1996; and *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb. 1999, paras. 15 *et seq.*, in which the Appeals Chamber affirmed the position that hearsay evidence is admissible as long as it is of probative value under Rule 89(C), and that "the weight or probative value to be afforded that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined", *ibid.*

[1375] Witness Hrustić, T 4814 (9 Dec. 1997) (Open Session), and T 4860 (10 Dec. 1997) (Open Session). The Appeals Chamber notes that Witness Marin testified at T 13,556 (15 Oct. 1998) (Open Session) in relation to another statement, that "HVO commander is too general a term" to identify a particular individual.

> there were not many Croatian soldiers in the hotel, and then we were taken back. At that moment, at that time, I did not care whether I would die there or somewhere else.[1376]

657. The Trial Judgement further relies on the Appellant's presence in the Hotel Vitez in order to infer his criminal responsibility for ordering.[1377] In convicting the Appellant for having ordered the use of detainees as human shields, it is not clear why his presence in a building proximate to the area of detention forms part of the analysis of his criminal responsibility. The Appeals Chamber considers it to be of limited relevance to that determination. This finding can at best constitute circumstantial evidence from which other conclusions may be inferred.

658. In determining whether the Appellant ordered the use of human shields, the Appeals Chamber has accepted the detainees were detained in front of the Hotel Vitez (which had been shelled in the preceding days) for up to three hours. However, the presence of the Appellant in the Hotel Vitez for a large part of the afternoon is of limited value as circumstantial evidence. It remains for the Appeals Chamber to consider whether or not the findings of the Trial Chamber were such that they could have been made by a reasonable trier of fact.[1378]

659. The Appeals Chamber holds that the reasoning of the Trial Chamber in finding the Appellant responsible for ordering the use of civilian detainees as human shields is flawed, although it does not undermine the conviction. The Trial Chamber had no evidence before it suggesting that the Appellant ordered that detainees be used as human shields.[1379] Instead, the Trial Chamber inferred that the Appellant had actually ordered that civilians from Gaćice village be used as human shields because the installations allegedly being protected by the detainees' presence contained his headquarters, and because of his proximity to that location.[1380] A factual conclusion that detainees were used as human shields on a particular occasion (which is one that a reasonable trier of fact could have made) does not lead to the inference that the Appellant positively ordered that to be done.

660. A conviction under Article 7(1) is not, however, limited to the positive act of ordering. The Appeals Chamber notes that the Appellant was indicted by the Second Amended Indictment for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful and inhumane treatment of Bosnian Muslims.[1381] The Second Amended Indictment therefore fairly charges the Appellant with other forms of participation under Article

[1376] Witness Hrustić, T 4847-8 (9 Dec. 1997) (Open Session).
[1377] Trial Judgement, para. 742.
[1378] *See* Chapter II above.
[1379] Indeed, Witness Hrustić's testimony sometimes suggests the contrary. For example, she testified that: "One of the soldiers said, 'we could put them in the cinema'" (T 4814 (8 Dec. 1997) (Open Session)), such uncertainty indicating that the HVO personnel guarding the detainees had not in fact been ordered to station them outside the Hotel Vitez.
[1380] Trial Judgement, para. 716.

7(1) of the Statute in addition to the positive act of ordering. In particular, criminal responsibility for an omission pursuant to Article 7(1) of the Statute is expressly envisaged by the Second Amended Indictment, which reads as follows:

> All acts or omissions herein set forth as grave breaches of the Geneva Conventions of 1949 (hereafter "grave breaches"), recognised by Article 2 of the Statute of the Tribunal, occurred during [the] conflict ….
>
> All of the victims referred to in the charges under Article 2 of the Statute contained in this indictment were, at all relevant times, persons protected by the Geneva Conventions of 1949.
>
> The accused in this indictment was required to abide by the mandate of the laws and customs of war including the Geneva Conventions of 1949.
>
> The general allegations contained in paragraphs 5.0. through to 5.4 of this indictment are re-alleged and incorporated into each of the related charges set out below.[1382]

661. With specific reference to the charge for human shields (Counts 17 and 18), the Second Amended Indictment reads as follows:

> By these acts and omissions Tihomir Blaškić committed:
>
> Count 19: a grave breach as recognised by Articles 2(b), 7(1) and 7(3) (inhuman treatment) of the Statute of the Tribunal;
>
> Count 20: a violation of the laws or customs of war as recognised by Articles 3, 7(1) and 7(3) (cruel treatment) of the Statute of the Tribunal and Article 3(1)(a) of the Geneva Conventions.[1383]

662. In the absence of evidence that the Appellant positively ordered the use of detainees as human shields to protect the Hotel Vitez, and in light of the foregoing analysis of the Second Amended Indictment, the Appeals Chamber will now consider whether the Appellant's criminal responsibility for endorsing the use of human shields is better expressed as an omission.

663. Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates.[1384] Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.[1385]

[1381] Second Amended Indictment, para. 12.
[1382] Second Amended Indictment, para. 5 (emphasis added).
[1383] Second Amended Indictment, para. 16 (emphasis added).
[1384] *See*, for example, Article 14(1) of Geneva Convention III, and Article 27 of Geneva Convention IV, the latter reading in part as follows: "Protected persons … shall at all times be humanely treated, and shall be protected especially

664. The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.[1386]

665. For the use of detainees as human shields, the Appellant was indicted under Counts 19 (a grave breach as recognised by Article 2(b) of the Statute for inhuman treatment), and 20 (a violation of the laws or customs of war as recognised by Article 3 of the Statute and Article 3(1)(a) of the Geneva Conventions, for cruel treatment). Cruel treatment as a violation of the laws or customs of war has already been considered above to be an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. Inhuman treatment under Article 2 is distinct from "cruel treatment" under Article 3, and has been described as:

> (a) an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.
>
> (b) committed against a protected person.[1387]

666. In order to be responsible for the omission under Article 2, the Appellant must have been aware of the use of the detainees as human shields. The Trial Chamber concluded that the Appellant knew that the detainees were outside his headquarters, and were being used as human shields.[1388]

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against all acts of violence or threats thereof and against insults and public curiosity". As stated by the Nuremberg Tribunal, "international law imposes duties and liabilities upon individuals" (*Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 22, p. 65*), who therefore may be held personally responsible for failing to perform those duties (emphasis added). In the *Bagilishema* Trial Judgement, para. 29, n. 19, it was stated that: "An individual incurs criminal responsibility for an *omission* by failing to perform an act in violation of his or her duty to perform such an act." (Emphasis added.)

[1385] Indeed, while various provisions in the Geneva Conventions impose a positive duty to act, Article 86(1) of Additional Protocol I states the position most clearly: "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so." *See also*, *inter alia*: Article 16 of Geneva Convention I, the preparation of records of the wounded, sick or dead; Article 14(2) of Geneva Convention III, protection of prisoners of war against acts of violence or intimidation and against insults and public curiosity; Articles 55 and 56 of Geneva Convention IV, the duty of ensuring the food and medical supplies of the occupied population, and ensuring and maintaining the medical and hospital establishments and services, public health and hygiene in the occupied territory. *See also* the analysis of Additional Protocol I, Article 51, para. 7, above. The Appeals Chamber notes that while these obligations are technically incumbent on the States Party to the Conventions, they have resulted in the recognition of a general principle of criminal liability for omission (*see* Cassesse, A. International Criminal Law, p. 201).

[1386] A superior who perpetrates a crime by omission pursuant to Article 7(1) of the Statute will, at the same time, fail to prevent this crime. The Appeals Chamber has already considered that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute (*see supra*, Chapter III (C)). Thus, in such cases, Article 7(1) of the Statute will in general prevail over Article 7(3) of the Statute.

[1387] *Čelebići* Appeal Judgement, para. 426.

[1388] Trial Judgement, paras. 742-3.

In arriving at this conclusion, the Trial Chamber relied on evidence that Vitez and the Hotel Vitez were shelled around 20 April 1993;[1389] that on 20 April 1993, 247 Muslim men, women and children from the village of Gaćice were directed to a place in front of the Hotel Vitez following an HVO attack on their village, that the men were led off elsewhere, that one of the soldiers said to some of them that they were to sit and be shelled by ABiH forces, that the detainees were surveilled by soldiers inside the Hotel Vitez and that whoever moved would be shot, and that the detainees (excluding the men) were returned to the village after about two and a half to three hours.[1390] The Trial Chamber also accepted evidence that that there were many HVO soldiers in and around the Hotel Vitez, which had a glass façade, and that one of the HVO soldiers told one of the detainees in front of the Hotel Vitez that he would go and tell the 'commander';[1391] and that the officer responsible for operations under the Appellant implicitly admitted that the detainees were put in danger.[1392] Despite his presence in his headquarters in the Hotel Vitez for a large part of the afternoon, the Appellant claimed that he knew nothing of it.[1393] The Appeals Chamber concludes that the Trial Chamber's finding that the Appellant knew of the use of the detainees as human shields is one that a reasonable trier of fact could have made.

667. The Appellant submitted evidence on appeal which included the 'War Diary', which provides a detailed account of the communications to and through the Appellant's headquarters *inter alia* on 20 April 1993.[1394] For instance, it details the Appellant's absence from the Hotel Vitez late on 20 April 1993, as he had left for Zenica by 1650 hours,[1395] a trip he undertook in order to attend a meeting of the combined HVO/ABiH Chiefs of Staff meeting (under ECMM auspices).[1396] Although the War Diary contains details of the detention of civilian prisoners during the fighting in Gaćice at 1445 hours, it contains no reference to any need to protect the Hotel Vitez from shelling, and no reference is made to the detainees being stationed outside that location. The 'War Diary' and is not probative of any finding that the Appellant ordered the use of human shields. Nevertheless, it reduces the time window between the detention of the detainees in Gačice and their station at the Hotel Vitez (approximately 1445 to 1500 hours) and the departure of the Appellant from Vitez

[1389] Trial Judgement, para. 714; P187; D273; Witness Marin, T 12,307-12,309; T 24,084-24,085.
[1390] Trial Judgement, para. 714; Witness Hrustić, T 4815-4816. The Trial Chamber inferred that "this inflicted considerable mental suffering upon the persons involved;" Trial Judgement, para. 716.
[1391] Trial Judgement, para. 742; Witness Hrustić, pp. 4814-4816.
[1392] Trial Judgement, para. 742; Witness Marin, pp. 13,567-13,568. The Appeals Chamber notes that this is inferred and not actually expressly stated in the testimony.
[1393] Trial Judgement, para. 742; Witness Blaskic, T 22,463-22,464.
[1394] *See* Ex. 14, Second Rule 115 Motion (the book of observations of the officer on duty in the CBOZ, otherwise known as the Appellant's "War Diary"), pp. 144–152.
[1395] Ex. 14, Second Rule 115 Motion, p. 150.
[1396] This evidence is corroborated by the testimony of Witness Marin, T 13,562-3 (15 Oct. 1998) (Open Session), although he was unsure of the Appellant's time of departure from Vitez. Ex. D330 is a report showing that the fighting at Gaćice had ended by 1800, and D331 shows that the detainees (excluding the men) had been sent home by this time. The Appellant later returned from that meeting at 2230 hours (Ex. 14, Second Rule 115 Motion, p. 152.)

(approximately 1650 hours) to almost two hours. During this time, the Appellant was present in the Hotel Vitez both conducting combat operations and preparing his departure for Zenica. The additional evidence does not challenge the Trial Chamber's finding that the Appellant knew that human shields were being used.

668. In addition to his knowledge that human shields were being used, the Appeals Chamber finds that the Appellant failed to prevent their continued use. The Appellant was under a duty, imposed upon him by the laws or customs of war, to care for the protected persons put in danger, and to intervene and alleviate that danger. He did not. The consequential breach of his duty, leaving the protected persons exposed to danger of which he was aware, constituted an intentional omission on the part of the Appellant.

669. Furthermore, the testimony of Witness Hrustić demonstrates that the detainees:

(i) had been threatened with being shot[1397] or otherwise put in danger; [1398]

(ii) had been told that they were possibly going to be shelled;[1399]

(iii) had been treated in such a way as to inspire fear and humiliation;[1400] and

(iv) had been forced to remain in front of the Hotel Vitez for two and a half to three hours before being returned to Gaćice (the 47 men having been retained in detention) at around 1800 hours.

The Appeals Chamber considers that the use of the detainees as human shields caused them serious mental harm and constituted a serious attack on human dignity.

670. The Appeals Chamber concludes that the Appellant's conviction for the use of human shields under Counts 19 and 20 was correct in substance. However, in the absence of proof that he positively ordered the use of human shields, the Appellant's criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: there was an omission to care for protected persons which was deliberate

[1397] Witness Hrustić, T 4816 (8 Dec. 1997) (Open Session).
[1398] The Appeals Chamber notes that Trial Judgement, para. 742, n. 1663, cited the evidence of Witness Marin (15 Oct. 1998) (Open Session) and said he "admitted that civilians from Gaćice were put in danger." While this admission is inferred from the testimony, the Appeals Chamber notes that it is not actually expressly stated.
[1399] Witness Hrustić, T 4815 (8 Dec. 1997) (Open Session)
[1400] Witness Hrustić testified that "the women were very tired, the children were frightened. My eight year old little girl was crying and saying, "please tell the man not to kill us[.]"" T 4856 (9 Dec. 1997) (Open Session).

and not accidental, caused serious mental harm, and constituted a serious attack on human dignity. The Appellant is accordingly guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields.

671. The Appeals Chamber has above considered the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment):[1401] that the former contains the protected person status of the victim as an element not present in the latter.[1402] Also considered above is the definition of "protected person" provided by Article 4 of Geneva Convention IV and how it has been extended to the apply to bonds of ethnicity.[1403] The Appeals Chamber considers that the Bosnian Muslim detainees used as human shields were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 20 must be dismissed.[1404]

[1401] *See Čelebići* Appeal Judgement, para. 426. *See also* paras. 412-3, and *see* above footnote 1209.
[1402] *Čelebići* Appeal Judgement, para. 426.
[1403] *Tadić* Appeal Judgement, paras. 164-166, discussed above.
[1404] *Čelebići* Appeal Judgement, para. 426; and *see* above footnote 1209.

XII. APPEAL AGAINST SENTENCE

672. The Trial Chamber sentenced the Appellant to forty-five years' imprisonment, and the Appellant has appealed this sentence.[1405] The Appellant contends that the sentence imposed on him should be vacated.[1406] He claims that the Trial Chamber failed to provide a "reasoned opinion" in support of its sentencing determination as required by Article 23 of the Statute.[1407] Specifically, the Appellant argues that the Trial Judgement failed to provide any explanation as to how each charge for which the Appellant was convicted impacted upon the single, or global, sentence imposed. He submits that the Trial Chamber did not adhere to the required standard of proof in assessing mitigating and aggravating factors.[1408]

673. The Appellant argues further that the Trial Chamber disregarded "critical factual issues" in its assessment of the Appellant's criminal responsibility.[1409] In particular, he contends that the Trial Chamber made no allowance for the fact that the acts were committed in the context of a particular armed conflict. He submits that the special position of the Appellant, namely as a military commander in an internecine conflict, should likewise have been taken into account as a mitigating factor, and contends that the errors committed by the Trial Chamber in respect of sentencing are such that the sentence should be vacated.[1410]

674. Finally, the Appellant claims that, after the conclusion of his trial, he obtained substantial exculpatory evidence, which, if it been available to him at trial, would have precluded not only his convictions but also the sentence imposed by the Trial Chamber.[1411] In light of this "dramatic new evidence," the Appellant submits that the sentence must be vacated.[1412]

675. In response, the Prosecution argues that the Trial Chamber's sentence was not vague[1413] and that the Trial Chamber provided a reasoned opinion for its imposition of the single sentence.[1414] With respect to the new evidence on appeal, the Prosecution reiterated its position with respect to the Appellant's Rule 115 Motions and reserved its right to address the impact of this evidence upon

[1405] Appellant's Brief, section XI. The appeal against sentencing was the tenth ground of appeal.
[1406] Appellant's Brief, section XI, pp. 182.
[1407] Appellant's Brief, section XI, pp. 182.
[1408] Appellant's Brief, pp. 182, 186-187.
[1409] Appellant's Brief, pp. 183.
[1410] Appellant's Brief, pp. 183.
[1411] Appellant's Brief, pp. 187-188.
[1412] Appellant's Brief, pp. 188. The Appeals Chamber notes that the Appellant also appealed against "cumulative sentencing for duplicative charges" in relation to the cumulative convictions under Articles 2 and 3 of the Statute.
[1413] Respondent's Brief, para. 8.4. The Prosecution avers that the authoritative French text of the Trial Judgement is not vague.

a decision by the Appeals Chamber on its admissibility.[1415] The Prosecution twice failed to observe the time- and page limits within which to file its written submission and its supplemental brief was rejected.[1416]

A. The Convictions Against the Appellant

676. The Trial Chamber convicted the Appellant pursuant to Article 7(1) and Article 7(3) of the Statute of all the counts contained in the Second Amended Indictment, except for Count 2, which was withdrawn by the Prosecutor.[1417] In sentencing the Appellant to forty-five years' imprisonment, the Trial Chamber considered material and personal mitigating circumstances, aggravating circumstances, and the sentencing practice of the International Tribunal. It held:

> that, in this case, the aggravating circumstances unarguably outweigh the mitigating circumstances and that the sentence pronounced accurately reflects the degree of seriousness of the crimes perpetrated and the faults of the accused given his character, the violence done to the victims, the circumstances at the time and the need to provide a punishment commensurate with the serious violations of international humanitarian law which the Tribunal was set up to punish according to the accused's level of responsibility.[1418]

677. The Appeals Chamber has significantly revised the findings of the Trial Chamber and has granted several of the appeals and overturned most of the convictions. However, the Appeals Chamber has found the Appellant guilty of Counts 15, 16, and 19.

B. Purposes and Objectives of Sentencing and Arguments on Appeal

1. Relevant Factors

678. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Section 5 of the Rules (Rules 100 to 106). These provisions constitute factors to be considered by the Trial Chamber when deciding a sentence on conviction.[1419] The Appeals Chamber recalls that Article

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[1414] Respondent's Brief, para. 8.5.
[1415] Respondent's Brief, para. 8.72.
[1416] By its Scheduling Order of 31 October 2003, the Appeals Chamber ordered the parties to file, if they so wished, a supplementary brief in the light of the admitted additional evidence and rebuttal material, by 1 December 2003. On 1 December 2003, the Prosecution filed the Prosecution's Request for an Extension of Page Limit for its Supplemental Filing Pursuant to the Appeals Chamber's Scheduling Order of 31 October 2003, which was rejected in the Appeals Chamber's "Decision on Prosecution's Request for an Extension of Page Limit for Its Supplemental Filing," issued on 4 December 2003. On 8 December 2003 the Prosecution filed confidentially the Prosecution's Re-filed Supplemental Filing. However, on 16 December 2003, the Appeals Chamber issued a decision rejecting the Prosecution's Re-filed Supplemental Filing in its entirety, since it did not adhere to the requirements of the Practice Direction. (Decision on Appellant's Objection to Prosecution's Re-filed Supplemental Filing of 8 December 2003, 16 Dec. 2003.)
[1417] Note further that the Appellant was not convicted under Counts 3 and 4 insofar as those counts related to the shelling of Zenica.
[1418] Trial Judgement, para. 808.
[1419] *Čelebići* Appeal Judgement, para. 806.

24(1) of the Statute limits the penalty imposed by the Trial Chamber to imprisonment. In imposing a sentence, the International Tribunal has recognized the following purposes to be considered: (i) individual and general deterrence concerning the accused and, in particular, commanders in similar situations in the future;[1420] (ii) individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced; (iii) retribution;[1421] (iv) public reprobation and stigmatisation by the international community;[1422] and (v) rehabilitation.[1423]

679. The combined effect of Article 24 of the Statute and Rule 101 of the Rules is that, in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offences or totality of the conduct; [1424] (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal;[1425] and (v) the extent to which any penalty

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[1420] *See generally* on the concept of deterrence: *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806. These cases were cited in the *Babić* Trial Judgement where it was held (at para. 45): "The deterrent effect of punishment consists in discouraging the commission of similar crimes. (footnote omitted) The main effect sought is to turn the perpetrator away from future wrongdoing (special deterrence), but it is assumed that punishment will also have the effect of discouraging others from committing the same kind of crime under the Statute (general deterrence) (footnote omitted)) .... With regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions.

[1421] *Aleksovski* Appeal Judgement, para. 185. Retribution and public reprobation and stigmatisation by the international community are similar purposes in the context of punishing crimes. As the Trial Chamber stated in the *Jokić* Sentencing Judgement, "[a]s a form of retribution, punishment expresses society's condemnation of the criminal act and of the person who committed it and should be proportional to the seriousness of the crimes" (*Jokić* Sentencing Judgement, para. 31). Considering retribution as a purpose of sentencing, the Trial Chamber in *Jokić* "focus[ed] on the seriousness of the crimes to which Miodrag Jokić has pleaded guilty, in light of the specific circumstances of their commission" (*Jokić* Sentencing Judgement, para. 32).

[1422] *Erdomović* Sentencing Judgement, para. 65.

[1423] *Čelebići* Appeal Judgement, para. 806.

[1424] *Čelebići* Appeal Judgement, para. 429.

[1425] Rule 101 (C); *Tadić* Appeal Judgement, paras. 38, 75.

[1426] Article 10(3). This factor is not relevant to the present case.

[1427] *Krstić* Appeal Judgement, para. 242, and *see* the authorities cited there.

[1428] *Krstić* Appeal Judgement, para. 241; *Jelisić* Appeal Judgement, para. 101

[1429] *Krstić* Appeal Judgement, para. 242, *Vasiljević* Appeal Judgement, para. 9. *See also Jelisić* Appeal Judgement, para. 99; *Čelebići* Appeal Judgement para. 725; *Furundžija* Appeal Judgement, para. 239; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22; *Serushago* Appeal Judgement, para. 32.

[1430] *Krstić* Appeal Judgement, para. 242, and *see* the authorities cited there. *See also Kupreškić et al.* Appeal Judgement, para. 457.

[1431] *Ibid.,* citing the *Furundžija* Appeal Judgement; the *Serushago* Sentencing Appeal Judgement, para. 32; the *Aleksovski* Appeal Judgement, para. 187 and the *Tadić* Judgement in Sentencing Appeals, paras. 20-22.

[1432] *Čelebići* Appeal Judgement, paras. 813, 816; *Kunarac et al.* Appeal Judgement, para. 377; *Jelisić* Appeal Judgement, paras. 116-117.

[1433] *Momir Nikolić* Sentencing Judgement, paras. 97-100 (under appeal), Furthermore, the International Tribunal is not bound to apply the more lenient penalty under the jurisdictions on the territory of the former Yugoslavia (the *lex mitior*-principle); *see Dragan Nikolić* Sentencing Judgement, paras. 157-165.

imposed by a court of any State on the convicted person for the same act has already been served.[1426]

680. The Appeals Chamber has emphasised in previous judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines.[1427] The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator.[1428] The Appeals Chamber has stated that a revision of a sentence on appeal can be justified where a Trial Chamber has committed a "discernible error" in the exercise of its sentencing discretion,[1429] and thus has ventured outside its discretionary framework in imposing sentence.[1430] In general, the Appeals Chamber will not impose a revised sentence unless it believes that the Trial Chamber has committed such an error.[1431] If, however, the Appeals Chamber overturns one or more convictions on which the Trial Chamber had based a single sentence, the Appeals Chamber is competent to impose a single sentence – or concurrent sentences – for the remaining convictions. In doing so, the Appeals Chamber revises the sentence meted out by the Trial Chamber, although the latter did not necessarily commit a discernible error in the exercise of its sentencing discretion.

(a) The general practice regarding prison sentences in the courts of the former Yugoslavia

681. The Trial Chambers must consider the sentencing practices in the former Yugoslavia as an aid in determining the appropriate sentence; however, they are not bound by them.[1432] Thus, the International Tribunal can impose a sentence in excess of that which would be applicable under relevant law in the former Yugoslavia,[1433] and the Appeals Chamber has held that this sentencing practice does not violate the principle of *nulla poena sine lege* because an accused must have been aware that the crimes for which he is indicted are the most serious violations of international humanitarian law, punishable by the most severe of penalties.[1434] As a result, the Trial Chambers are obliged only to take account of the general practice regarding prison sentences in the courts of the former Yugoslavia.[1435]

682. The Trial Judgement considered the sentencing practices in the former Yugoslavia.[1436] The approach of the International Tribunal regarding recourse to the sentencing practice of the former Yugoslavia, pursuant to Article 24(1) of the Statute and to Rule 101(B)(iii) of the Rules, is best

[1434] *Čelebići* Appeal Judgement, paras. 816-817.
[1435] *Tadić* Appeal Judgement, para. 21.
[1436] Trial Judgement, paras. 759-760.

expressed in the decision of the Trial Chamber in *Kunarac* and recently affirmed in the *Krstić* Appeal Judgement:[1437]

> Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.[1438]

[1437] *Krstić* Appeal Judgement, para. 260.
[1438] *Kunarac* Trial Judgement, para. 29. In addition to the *Krstić* Appeal Judgement, the following judgements in the Appeals Chamber have consistently affirmed this formulation: *Kunarac* Appeal Judgement, paras. 347–349; *Tadić* Judgement in Sentencing Appeals, para. 21; *Čelebići* Appeal Judgement, paras. 813 and 820; *Kupreškić* Appeal Judgement, para. 418.

(b) The gravity of the offence

683. Article 24(2) of the Statute provides that the Trial Chambers shall consider the gravity of the offence when imposing sentences. The gravity of the offence is the primary consideration in imposing a sentence[1439] and is the "litmus test" in the determination of an appropriate sentence.[1440] The Appeals Chamber has ruled that sentences to be imposed must reflect the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1441] Factors to be considered include the discriminatory nature of the crimes where this is not considered as an element of a conviction,[1442] and the vulnerability of the victims.[1443] The consequences of the crime upon the victim directly injured is always relevant to sentencing, that is, "the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences."[1444] Furthermore, the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence.[1445]

684. In this case, the Appellant has been found guilty of particular instances of ordering what amounted to cruel and inhuman treatment of persons who were not participating in the hostilities, and of failing to punish such conduct on the part of others. The crimes of which the Appellant has been convicted are serious violations of international humanitarian law, directed almost exclusively

[1439] *Čelebići* Appeal Judgement, para. 731; *Kupreškič* Appeal Judgement, para. 442.
[1440] *Čelebići* Trial Judgement, para. 1225, cited with approval by *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Krstić* Appeal Judgement, n. 431.
[1441] *Furundžija* Appeal Judgement, para. 249.
[1442] *Kvočka et al*. Trial Judgement, para. 702 (under appeal).
[1443] *Kunarac* Appeal Judgement, para. 352.
[1444] *Krnojelac* Trial Judgement, para. 512 (not addressed on appeal).
[1445] *Krnojelac* Appeal Judgement, para. 260 ("The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.")

against Bosnian Muslims. Their arbitrary detention in pitiful conditions, and in a climate of fear, combined with their employment for forced labour or as human shields, establishes the gravity of the offences in this case. In particular the abuse of the sizeable number of 247 human beings as human shields and – in doing so – endangering their lives at least *in abstracto* has to be seen as a serious aggravating factor.

(c) The individual circumstances of the accused[1446]

685. The factors that remain critical to sentencing are the individual circumstances of each case and the individual guilt of the perpetrator.[1447] The factors to be taken into account in aggravation or

[1446] Article 24(2) of the Statute.
[1447] Article 24(2) of the Statute; *Čelebići* Appeal Judgement, para. 717 (noting "the overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime."). *See also Furundžiia* Appeal Judgement, para. 237, *cited in Čelebići* Appeal Judgement, para. 721.
[1448] *Čelebići* Appeal Judgement, para. 780.
[1449] Rule 101(B)(i).
[1450] *Čelebići* Appeal Judgement, para. 763.
[1451] *Jokić* Sentencing Judgement, paras. 61-62. *See also Tadić* Appeal Judgement, paras. 55-56.
[1452] *Vasiljević* Appeal Judgement, paras. 172-173: "The first issue is whether discriminatory intent can be used as an aggravating factor. To that question the answer is in the affirmative". *See also* the *Vasiljević* Trial Judgement, para. 277: "[T]he discriminatory purpose of the crimes and the selection of victims based on their ethnicity … can only … [constitute an aggravating factor] where the crime for which an accused is convicted does not include a discriminatory state of mind as an element. The crime of persecution in Article 5(h) of the Statute already includes such an element. Such a discriminatory state of mind goes to the seriousness of the offence, *but it may not additionally aggravate that offence*." (Emphasis added.). *See also Kunarac* Appeal Judgement, para. 357.
[1453] *Kunarac* Appeal Judgement, para. 357, *citing Tadić* Appeal Judgement, para. 508 (stating that a discriminatory intent "is an indispensable ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution."). *See also Todorović* Trial Judgement, para. 57 ("Since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic's criminal conduct is already encompassed in a consideration of the offence. [I]t should not be treated separately as an aggravating factor.").
[1454] *Kunarac* Appeal Judgement, para. 356; *Todorović* Sentencing Judgement, para. 65.
[1455] *Krstić* Trial Judgement, para. 708.
[1456] *Furundžija* Trial Judgement, para. 281. This issue was not raised on appeal (*see Furundžija* Appeal Judgement).
[1457] *Čelebići* Appeal Judgement, paras. 736-737.
[1458] *Jelisić* Appeal Judgement, para. 86; *Kayishema* Appeal Judgement, para. 351.
[1459] *Krstić* Trial Judgement, paras. 711-712. *See also Krstić* Appeal Judgement, para. 258 ("There was an element of premeditation in the decision forcibly to transfer the civilian population, but it was within the discretion of the Trial Chamber to discount this factor from having any bearing on the sentence imposed.")
[1460] *Kunarac* Trial Judgement, para. 867, and *Kunarac* Appeal Judgement, para. 353.
[1461] *Kunarac et al*. Trial Judgement, para. 864, 866; *Kunarac et al.* Appeal Judgement, para. 355.
[1462] *Furundžija* Trial Judgement, para. 283: "[T]he Trial Chamber considers the fact that Witness A was a civilian detainee and at the complete mercy of her captors to be a further aggravating circumstance."
[1463] *Čelebići* Appeal Judgement, para. 788 (referring to the behaviour of the accused during trial proceedings, which "is relevant to a Trial Chamber's determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.")

mitigation of a sentence have not been defined exhaustively by the Statute or the Rules, and a Trial Chamber has considerable discretion in deciding how these factors are applied in a particular case.[1448]

(i) Aggravating circumstances[1449]

686. Aggravating circumstances must be proved by the Prosecution beyond reasonable doubt[1450] and include the following: (i) the position of the accused, that is, his position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia;[1451] (ii) the discriminatory intent[1452] or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime;[1453] (iii) the length of time during which the crime continued;[1454] (iv) active and direct criminal participation, if linked to a high-rank position of command,[1455] the accused's role as fellow perpetrator,[1456] and the active participation of a superior in the criminal acts of subordinates;[1457] (v) the informed, willing or enthusiastic participation in crime;[1458] (vi) premeditation and motive;[1459] (vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims;[1460] (viii) the status of the victims, their youthful age and number, and the effect of the crimes on them;[1461] (ix) civilian detainees;[1462] (x) the character of the accused;[1463] and (xi) the circumstances of the offences generally.[1464]

687. Not included as an aggravating circumstance is the decision of an accused to make use of his right to remain silent.[1465] In this way, the consideration of aggravating circumstances differs from that of mitigating circumstances and reflects the different burden of proof for each.[1466] Furthermore, the absence of a mitigating factor can never serve as an aggravating factor.[1467]

[1464] *Tadić* Sentencing Judgement, para. 19 (referring to the "horrific conditions at the camps established by Bosnian Serb authorities in opština Prijedor").
[1465] *Čelebići* Appeal Judgement, para. 783; *Plavšić* Sentencing Judgement, para. 64.
[1466] *Čelebići* Appeal Judgement, para. 763: "The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence"; *Kunarac* Trial Judgement, para. 847: "The Trial Chamber underlines its view that fairness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt, [footnote omitted] and that the Defence needs to prove mitigating circumstances only on the balance of probabilities."
[1467] The absence of a mitigating factor does not itself constitute an aggravating factor (*Plavsić* Sentencing Judgement, para. 64).

a. The Trial Chamber failed to mention the required standard of proof applicable to aggravating factors

688. With regard to aggravating factors, the Appellant states that the Trial Chamber failed to mention the required standard of proof applying to such factors, thereby committing an error.[1468] As the Appeals Chamber has recognised above, the burden of proof in relation to aggravating factors is on the Prosecution to discharge beyond reasonable doubt, and the Appellant submits that the Trial Judgement cannot be upheld because it fails to specify the burden of proof which it applied with regard to aggravating factors relevant to this case.[1469]

689. The Prosecution submits that the Appellant has not indicated why a failure on the part of the Trial Chamber to specify the burden of proof for establishing aggravating and mitigating factors would constitute an error of law.[1470] The Prosecution argues that it does not follow that a failure to indicate this burden of proof demonstrates a failure to consider or to apply the correct standard.[1471] Contrary to the Appellant's claim, the Prosecution submits that the aggravating factors taken into account by the Trial Chamber had been proven beyond reasonable doubt and that nothing in the Trial Judgement suggests that it committed an error in that respect.

690. The Appeals Chamber has jurisdiction to hear appeals on the grounds of an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice.[1472] The question is whether the Trial Chamber committed an error of law in failing to specify the burden of proof applicable to aggravating factors in sentencing. The Appellant cites no authority for this proposition,[1473] which extends the basic requirement of the correct application of the appropriate legal standard. It may be that meeting this basic requirement itself necessitates a proper expression of the appropriate legal standard before applying it, but this is neither necessarily the case, nor is it an express legal requirement, and it has not been demonstrated in this case. The Appeals Chamber considers that the Trial Chamber's failure to state the legal standard does not amount to an error of law *per se*.

[1468] Appellant's Brief, pp. 186-7.
[1469] Appellant's Brief, p. 186.
[1470] Respondent's Brief, para. 8.45.
[1471] Respondent's Brief, para. 8.46.
[1472] Article 25 of the Statute.
[1473] Appellant's Brief, p. 187.

b. The Trial Chamber incorrectly found that the accused's motive could be considered as an aggravating factor

691. The Appellant also argues that the Trial Chamber erred in classifying the Appellant's motive as an aggravating factor,[1474] and in finding that persecutory acts necessarily aggravate the sentence.[1475] The Appellant directs the Appeals Chamber to a passage in the *Kunarac* Trial Judgement, stating that "[w]here … consequences are part and parcel of the definition of the offence, … care should be taken to avoid considering them separately in imposing sentence."[1476] The Appellant submits that, since the persecutory *mens rea* is an element of the crime of persecution, it cannot additionally amount to an aggravating factor, and that in considering it, the Trial Chamber erred.

692. The Prosecution rejects the Appellant's suggestion that he was punished more severely on the sole ground that he was convicted *inter alia* of persecutions. It submits that the Trial Chamber's pronouncement on that point[1477] was only "a pronouncement *in concreto*" and that "the Trial Chamber looked at the range of crimes it convicted the Appellant of, considered the motive for these crimes, and concluded that the motive for the crime of persecution was the most important element to be taken into account as persecution was the main charge in this case".[1478] In addition, the Prosecution says that there is no indication that the Trial Chamber regarded crimes against humanity as more serious than war crimes, or that it offended the "double jeopardy rule".[1479]

693. The authority cited by the Appellant has been misconstrued. The Appeals Chamber had the opportunity to pronounce on the state of mind of the accused as an aggravating factor in the *Vasiljević* Appeal Judgement:

> The Appeals Chamber finds that the Trial Chamber did not err in holding that "a discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element." A discriminatory state of mind is not an element of the crime of murder under Article 3 of the Statute and was not therefore taken into account in convicting the Appellant for the crime of murder. It could however be taken into account in estimating the gravity of the murder. This is the way the Trial Chamber used it. The discriminatory state of mind was used once in order to assess the gravity of the crime of murder and, of course on another occasion, in order to establish that the Appellant had the requisite discriminatory intent of

[1474] Trial Judgement, para. 785: "The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant … the Trial Chamber takes note of the ethnic and religious discrimination which the victims suffered. In consequence, the violations are to be analysed as persecution *which, in itself, justifies a more severe penalty*." (Emphasis added.)
[1475] Appellant's Brief, p. 187.
[1476] *Kunarac* Trial Judgement, para. 852. The issue was not addressed in the *Kunarac* Appeal Judgement.
[1477] *See* Trial Judgement, paras. 783-784.
[1478] Respondent's Brief, para. 8.70.
[1479] Respondent's Brief, paras. 8.70-8.71.

> the crime of persecution. The Trial Chamber committed no error in holding that a discriminatory state of mind can be regarded as an aggravating factor in relation to the crime of murder.[1480]

The law relating to aggravating factors as applied by the International Tribunal is clear. Where an aggravating factor is present and yet is not an element of the crime, that factor may be considered in aggravation of sentence. However, where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.[1481]

694. The Appeals Chamber is conscious, however, that reference to 'factors' ought not obscure the distinction between *mens rea* and motive. *Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law,[1482] but it "becomes relevant at the sentencing stage in mitigation or aggravation of the sentence".[1483] Motive is also to be considered in two further circumstances: first, where it is a required element in crimes such as specific intent crimes, which by their nature require a particular motive; and second, where it may constitute a form of defence, such as self-defence. As the Appeals Chamber held in the *Jelisić* and *Kunarac* Appeal Judgements and in the ICTR *Kayishema and Ruzindana* Appeal Judgement:

> The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.[1484]

> The Appeals Chamber wishes to assert the important distinction between "intent" and "motivation". The Appeals Chamber holds that, even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.[1485]

> The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed "with intent to destroy, in whole or in part a national, ethnical, racial or religious group".[1486]

[1480] *Vasiljević* Appeal Judgement, paras. 172-173 (footnote omitted).
[1481] *Vasiljević* Appeal Judgement, para. 172-173 (*see above*, together with *Todorović* Sentencing Judgement, para. 57).
[1482] *Tadić* Appeal Judgement, para. 268.
[1483] *Ibid.*, para. 269.
[1484] *Jelisić* Appeal Judgement, para. 49. *See also Kunarac* Appeal Judgement, paras. 103 and 153; and *Krnojelac* Appeal Judgement, para. 102: "It is the Appeals Chamber's belief that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute."
[1485] *Kunarac* Appeal Judgement, para. 153.
[1486] *Kayishema and Ruzindana* Appeal Judgement, para. 161, cited in *Niyitegeka* Appeal Judgement, para. 52.

695. The Appeals Chamber considers that the Trial Chamber in the instant case was entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence of any conviction which included that discrimination as an element of the crime of which he was convicted.[1487] The Trial Judgement's wording does not make this clear, however, and the Appeals Chamber is left with no option but to conclude that the Trial Chamber may have erred in its application of the law in allowing the Appellant's discriminatory intent to be used as an aggravating factor in calculating his sentence for persecutions. The Trial Chamber should have stated its reasoning more clearly in order to ensure that the legal requirements of sentencing the Appellant were respected.[1488]

(ii) Mitigating circumstances

696. Rule 101(B) of the Rules provides that the Trial Chamber, in determining a sentence, shall consider, *inter alia*, "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction."[1489] Despite this requirement, a Trial Chamber maintains discretion when deciding the weight to be attached to any mitigating circumstances.[1490] The factors taken into account as evidence in mitigation include the following: (1) co-operation with the Prosecution;[1491] (2) the admission of guilt or a guilty plea;[1492] (3) an expression of remorse;[1493] (4) voluntary surrender;[1494] (5) good character with no prior criminal convictions;[1495] (6) comportment in detention;[1496] (7) personal and family circumstances;[1497] (8) the character of the accused subsequent to the conflict;[1498] (9) duress[1499] and indirect participation; [1500] (10) diminished mental responsibility;[1501] (11) age;[1502] and (12) assistance to detainees or victims.[1503] Poor health is to be considered only in exceptional or rare cases.[1504]

[1487] Namely, persecution, of which the Trial Chamber found the Appellant guilty.
[1488] *See* the discussion of the purposes of sentencing above.
[1489] Rule 101(B)(ii). *See also* Article 24 of the Statute.
[1490] *Čelebići* Appeal Judgement, para. 777.
[1491] *Jokić* Sentencing Judgement, paras. 95-96; *Todorović* Sentencing Judgement, para. 88; Rule 101(B)(ii).
[1492] *Jelisić* Appeal Judgement, para. 122, *Jokić* Sentencing Judgement, para. 76.
[1493] *Jokić* Sentencing Judgement, para. 89; *Erdemović* Second Sentencing Judgement, para. 16(iii).
[1494] *Jokić* Sentencing Judgement, para. 73.
[1495] *Erdemović* Second Sentencing Judgement, para. 16(i); *Kupreškić* Appeal Judgement, para. 459.
[1496] *Jokić* Sentencing Judgement, para. 100; *Nikolić* Sentencing Judgement, para. 268.
[1497] *Kunarac et al.* Appeal Judgement, paras. 362, 408.
[1498] *Jokić* Sentencing Judgement, paras. 90-91, 103.
[1499] *Erdemović* Second Trial Judgement, para. 17 (stating that duress "may be taken into account only by way of mitigation.").
[1500] *Krstić* Appeal Judgement, para. 273.
[1501] *Čelebići* Appeal Judgement, para. 590.
[1502] *Jokić* Trial Judgement, para. 100.
[1503] *Sikirica* Sentencing Judgement, paras. 195, 229.
[1504] *Krstić* Appeal Judgement, para. 271; *Simić* Trial Judgement, para. 98.

a. The Trial Chamber did not adhere to the required standard of proof in assessing mitigating factors

697. The Appellant submits that the sentence cannot be upheld because it fails to specify the burden of proof which it applied with regard to both mitigating and aggravating factors relevant to this case.[1505] Whereas the burden of proof in relation to aggravating factors is beyond reasonable doubt, that relating to mitigating factors is the balance of probabilities.[1506] This argument has been addressed above, and the Appeals Chamber does not consider that the failure to specify the burden of proof which the Trial Chamber applied to mitigating circumstances has any effect on the sentence.

b. The Trial Chamber should have considered the Appellant's cooperation with the Prosecutor and his voluntary surrender as mitigating factors

698. The Appellant claims that the Trial Chamber should have considered his voluntary surrender as a mitigating factor, and the fact that he may only have done so after preparing his defence should not exclude that fact as a relevant mitigating circumstance. The Appellant submits that the Trial Chamber did not engage in "substantive discussion"[1507] as to how his voluntary surrender affected his sentence.

699. In addition, the Appellant claims that the Trial Chamber erred in its consideration of the particular circumstances of his surrender, in that it ignored as a mitigating factor his voluntary surrender (approximately one year before his co-indictees)[1508] because he did so only after taking the time to prepare his defence. The Appellant further argues that the Trial Chamber erred by failing expressly to state the weight given to the cooperation of the Appellant with the Prosecutor.[1509]

700. The Prosecution argues that the Appellant failed to identify any error in this respect, and has not offered any legal basis to substantiate his claim that his voluntary surrender amounts to substantial co-operation with the Prosecution.[1510]

701. Rule 101(B)(ii) of the Rules permits the Trial Chamber to take into account "substantial co-operation with the Prosecutor" as a mitigating factor. However, the Trial Chamber noted, as it was

[1505] Appellant's Brief, pp. 185-6.
[1506] *Čelebići* Appeal Judgement, para. 763. *See also* Appellant's Brief, p. 185.
[1507] Appellant's Brief, p. 186.
[1508] The Appellant was originally indicted, along with Dario Kordić, Mario Čerkez, Ivica Santić, Pero Skopljak, and Zlatko Aleksovski in a single indictment dated 10 November 1995.
[1509] Appellant's Brief, p. 186.
[1510] Respondent's Brief, paras. 8.53-8.54.

entitled to do, that the Appellant had not co-operated with the Prosecution.[1511] Regarding the Appellant's voluntary surrender, the International Tribunal has previously held that this may constitute a mitigating circumstance.[1512] In any case and furthermore, the Trial Chamber considered his voluntary surrender as a "significant mitigating circumstance in determining the sentence", among other relevant factors (including his *delayed* surrender).[1513]

702. The Appeals Chamber does not consider as a discernible error the Trial Chamber's omission to state expressly the weight it gave to the cooperation of the Appellant with the Prosecutor in relation to his sentence; the Trial Chamber's analysis of this factor as a mitigating one was sound, and the Appeals Chamber agrees with the Trial Chamber that the Appellant's voluntary surrender constitutes a mitigating factor.

c. The Trial Chamber should have considered the Appellant's remorse as a mitigating factor

703. The Appellant submits that the Trial Chamber erred by failing to consider the Appellant's remorse as a mitigating factor.[1514] The Prosecution argues that the Appellant has not identified any error of law or discernible error in the Trial Chamber's finding that the Appellant's expression of remorse was questionable because he had created the situation largely by ordering the crimes.[1515]

704. The relevant passage from the Trial Judgement is the following:

> The Trial Chamber points out that, from the very first day of his testimony, Tihomir Blaškić expressed profound regret and avowed that he had done his best to improve the situation although this proved insufficient. [Footnote omitted] The Trial Chamber observes that there is a flagrant contradiction between this attitude and the facts it has established - having given orders resulting in the commission of crimes the accused cannot claim that he attempted to limit their consequences. His remorse thus seems dubious.[1516]

705. The Trial Chamber correctly identified the requirement that, in order to be a factor in mitigation, the remorse expressed by an accused must be real and sincere.[1517] The Appeals Chamber finds, however, that the reasoning of the Trial Judgement with respect to the Appellant's remorse is erroneous. It may be that a Trial Chamber's findings of fact may undermine a finding of the

[1511] Trial Judgement, para. 774.
[1512] *Kunarac* Trial Judgement, para. 868: "The fact that [the accused] voluntarily surrendered to the International Tribunal is a factor in mitigation of his sentence. That an accused may be said to be under an obligation to surrender to the International Tribunal does not mean that doing so should not be considered in mitigation. Treating such voluntary surrender as a mitigating factor may inspire other indictees to similarly surrender themselves, thus enhancing the effectiveness of the work of the Tribunal."
[1513] Trial Judgement, para. 776.
[1514] Appellant's Brief, p. 186, n. 532.
[1515] Respondent's Brief, para. 8.60 (citing Trial Judgement, para. 775).
[1516] Trial Judgement, para. 775.
[1517] Trial Judgement, para. 775. That standard was recognized in the *Simić* Trial Judgement, para. 1066.

existence of remorse. The Appeals Chamber, however, in light of its own considerations of the trial record, assessed together with the new evidence admitted on appeal, considers that the limited orders that the Appellant issued do not serve to undermine a finding that his remorse is real and sincere. The Appeals Chamber has also considered substantial evidence of the Appellant's so-called humanitarian orders.[1518] As such, the integrity of the Trial Chamber's conclusion that the Appellant has demonstrated remorse is in fact unchallenged by the contradiction putatively identified by the Trial Chamber. The Appellant's expressions of remorse therefore constitute a factor in mitigation of sentence.

d. Evidence of the Appellant's good character as a mitigating factor

706. The Appellant did not challenge the Trial Chamber's analysis of his character,[1519] and its resulting impact on sentencing. Nevertheless, the Appeals Chamber notes that no evidence has been presented to suggest that the accused is of bad character, and that, to the contrary, several witnesses were at pains to point out the Appellant's good character, his equitable treatment of Bosnian Muslims both before and during the war and the absence of any bias against or animosity towards Bosnian Muslims,[1520] and his professionalism as a soldier.[1521] There was also evidence of respect he engendered in his ABiH opponents.[1522]

(iii) The personal circumstances of the Accused

[1518] *See above*, Chapter XI on Alleged Errors Concerning the Appellant's Responsibility for Detention-Related Crimes and Section VII on Alleged Errors Concerning the Appellant's Responsibility for Crimes Committed in Ahmići.
[1519] Trial Judgement, paras. 771, 780-781.
[1520] Witness Philip Watkins, AT 350 (Open Session) (9 Dec. 2003); Witness BA3, AT 397 (Closed Session) (9 Dec. 2003); Witness BA1, AT 175 (Closed Session) (8 Dec. 2003); Ivica Pervan, T 14,440-1 (Open Session) (3 Nov. 1998); Witness Henrik Morsink, T 9939 (Open Session) (2 July 1998); Witness Alistair Duncan, T 9172 (Open Session) (3 June 1998); Witness Fuad Zeco, T 2884 (Open Session) (26 Sept. 1997).
[1521] Witness Philip Watkins, AT 275-6 (Open Session) (9 Dec. 2003); Witness BA1, AT 175 (Closed Session) (8 Dec. 2003).
[1522] Witness Philip Watkins, AT 277 (Open Session) (9 Dec. 2003), as opposed to his opinions of other, political leaders. Witness BA3, a senior member of the ABiH and opponent of the Appellant, testified as follows: "I really did have a large number of opportunities to be in direct contact with General Tihomir Blaškić. I personally respect him, and there are my colleagues in the army of the Republic of Bosnia and Herzegovina who believe that General Tihomir Blaškić is a professionally capable military man, a soldier, a general, that he is of a firm character, a man of integrity, and I'm quite sure, and I'm confident, on the basis of my knowledge of General Tihomir Blaškić, that he would not issue an order for ethnic cleansing, nor for any kind of crime." AT 397 (Closed Session) (9 Dec. 2003). And further: "I'm sure that had it not been for the war, that Blaškić would never have commanded units that shot at Muslims, killed Muslims, and I am also sure that Mr. Blaškić would have acted in a totally different manner had the situation been different. And I'm sure that he was never in favour of the conflicts between the BH army and the Croatian Defence Council, and he also was trying to avoid and prevent such conflict" AT 448 (Closed Session) (10 Dec. 2003).

707. Neither the Appellant nor the Prosecution addressed the personal circumstances of the accused for the purposes of sentencing. Nevertheless, the International Tribunal has frequently taken into account evidence of personal circumstances when deciding on sentence.[1523]

708. In its finding concerning the personal circumstances of the Appellant, the Trial Chamber noted that several witnesses attested to the professionalism of the accused, that he is a man of duty and a professional soldier of conviction.[1524] Furthermore, the Appellant is a father to young children.

(d) Credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal

709. Rule 101(C) of the Rules states: "Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal." The Appeals Chamber in the *Tadić* case held that "fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal's formal request for deferral."[1525] The Appeals Chamber considers that any time spent in custody for the purpose of this case must necessarily be taken into account.

(e) The special position of the Appellant as a military commander in a particular conflict

710. The Appellant claims that the Trial Chamber erred in its analysis of the mitigating factors by declining to take into account the "chaotic" context in which the acts were allegedly committed.[1526] The Prosecution's response to this assertion is that the Appellant has failed to establish a discernible error in the Trial Chamber's sentence, and that the argument pertains more to the Appellant's conviction than to his sentence.[1527]

711. The Appeals Chamber considers that the Appellant's argument is inappropriate. For one thing, it does not demonstrate that the Trial Chamber committed a discernible error in failing to account for the chaotic context of Central Bosnia in 1993. Furthermore, a finding that a "chaotic" context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone. Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian

[1523] *Čelebići* Appeal Judgement, para. 788.
[1524] Trial Judgement, para. 780.
[1525] *Tadić* Sentencing Appeal Judgement, paras. 38, 75.
[1526] Appellant's Brief, pp. 183, 186.
[1527] Respondent's Brief, para. 8.52.

law. While the circumstances in Central Bosnia in 1993 were chaotic, the Appeals Chamber sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants.

712. Nevertheless, the Appeals Chamber does consider that the particular circumstances of the Appellant at the outset of and during the war deserve consideration. The Appellant has testified that he returned to Bosnia and was appointed to the rank of Colonel (and commander of the CBOZ) at the age of 32, his previous positions not having exceeded the rank of company commander, and that he was tasked essentially with establishing the military structure in that area of operations at a time of strategic adversity[1528] to defend against Serb aggression.[1529] The Appellant regretted the subsequent conflict with the ABiH, and testified: "However, as I was also a military commander in the midst of this conflict, it was my duty, and I also had the authority and competence, to order legal, lawful combat operations against the forces of the Bosnia-Herzegovina army, which is what I did. Although I very much regret that the conflict ever took place, it was my duty, however, to protect the Croatian community in the enclaves, and all the population living in those isolated pockets throughout Central Bosnia."[1530]

(f) The Trial Chamber improperly relied on the Appellant's failure to enter a guilty plea

713. The Appellant submits that the Trial Chamber improperly relied on the Appellant's failure to enter a guilty plea, even if it did so theoretically, and that the Trial Chamber erred to the extent that an accused cannot be penalised for failing to enter a guilty plea.[1531] The Prosecution responds that nowhere in the Trial Judgement is there any indication that the Trial Chamber drew an adverse conclusion from the absence of a guilty plea.[1532]

714. The Appeals Chamber notes that a failure to enter a guilty plea cannot constitute an aggravating factor, although a guilty plea may conversely be considered as a mitigating factor.[1533] Further, a Trial Chamber cannot take into consideration what it should not:

> A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.[1534]

[1528] AT 837 and AT 843 (Open Session) (17 Dec. 2003).
[1529] AT 838 (Open Session) (17 Dec. 2003).
[1530] AT 838 (Open Session) (17 Dec. 2003).
[1531] Appellant's Brief, pp. 186-7.
[1532] Respondent's Brief, para. 8.63.
[1533] *Jokić* Sentencing Judgement, para. 76; *Plavsić* Sentencing Judgement, paras. 80–81; *Milan Simić* Sentencing Judgement, para. 84.
[1534] *Čelebići* Appeal Judgement, para. 780.

On a plain reading of the relevant paragraphs of the Trial Judgement,[1535] the Appeals Chamber cannot conclude that the Trial Chamber in any way relied on or drew an adverse inference from the Appellant's failure to plead guilty in deciding the Appellant's sentence. Thus, while the Trial Chamber's consideration of this element *in abstracto* is of no relevance to the sentence imposed, it cannot be found to be improper.

2. Whether the Trial Chamber failed to provide a "reasoned opinion" in support of its determination of a single sentence

715. While not opposing the imposition of a single sentence *per se,*[1536] the Appellant submits that the reasons provided by the Trial Chamber for imposing a single sentence are impermissibly vague and deprive the Appellant of his right to be informed of the specific grounds of his sentence.[1537] A single sentence, the Appellant claims, must be based on a specific assessment of each offence for which the sentence has been imposed.

716. The Prosecution responds that the Trial Chamber did in fact provide a reasoned opinion as to why it imposed a single sentence and that it took into account a number of valid and relevant factors in doing so.[1538] The Prosecution directs the Appeals Chamber to the (authoritative) French text of the Trial Judgement in as much as the French text more accurately reflects the *ratio* of the Trial Judgement as to the last two sentences of paragraph 807.[1539] The Prosecution further submits that nothing in the Statute and the Rules prevents the Trial Chamber from imposing a single sentence, and that it was therefore within the Trial Chamber's discretion to do so.[1540] The Prosecution claims that, contrary to the Appellant's suggestion, the underlying factual basis of all the Trial Chamber's findings against the Appellant was not identical or indistinguishable (apart from those instances where the Prosecution specifically makes a concession on that point)[1541] and that the Appellant offered no justification for suggesting that a single sentence was improper and led to a miscarriage of justice.[1542]

[1535] Trial Judgement, paras. 773, 775, and 777.
[1536] Brief in Reply, para. 160.
[1537] Appellant's Brief, pp. 182-184.
[1538] Respondent's Brief, para. 8.5-8.7.
[1539] Respondent's Brief, paras. 8.4. Paragraph 807 of the Trial Judgement is reproduced below.
[1540] Respondent's Brief, paras. 8.9-8.11.
[1541] Respondent's Brief, paras. 8.8-8.9; and *see below.*
[1542] Respondent's Brief, para. 8.15.

717. As to whether the International Tribunal is competent to impose a single sentence, the Appeals Chamber has regard to Rule 101 of the Rules as it was at the time the Trial Judgement was rendered,[1543] which the Trial Chamber decided did not preclude the passing of a single sentence for several crimes.[1544] In the *Čelebići* Appeal Judgement, the Appeals Chamber held that "a single global sentence … appears to have been contemplated by the Rules at that time," that is, before Rule 87(C) came into force. The Appeals Chamber considers that the International Tribunal was competent, by virtue of the then Rule 101, to impose a single sentence, and it retains such competence by virtue of Rule 87(C).[1545]

718. However, this competence does not entitle the International Tribunal to impose a single sentence arbitrarily; due consideration must be given to each particular offence in order for its gravity to be determined, and for a reasoned decision on sentence to be provided. As the Appeals Chamber has held:

> The process of determining the individual sentences . . . requires a consideration of the particular offence in respect of which that count was charged and the evidence of the circumstances in which that offence was committed to enable a determination of the gravity of the offence. The imposition of exactly the same penalty for each count, . . . , and the order that they be served concurrently, demonstrates that the Trial Chamber made no attempt to *distinguish between the gravity of each of the offences*. It effectively simply imposed a global sentence of seven years to cover every offence, which was a manifestly erroneous assessment of the totality of [the accused's] conduct.[1546]

719. The Trial Chamber's reasoning for the imposition of a single sentence, which the Appellant contests, is contained in the following paragraph of the Trial Judgement:

> Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. The Trial Chamber further observes that crimes other than the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted. *In other words, it is impossible to identify which acts would relate to which of the various counts - other than those supporting the prosecution for and conviction of persecution under count 1 which, moreover, covers a longer period of time than any of the other counts. In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.*[1547]

[1543] Rule 101 was amended at the Twenty Third Plenary Session: 29 November - 1 & 13 December 2000 (1st and 13 December 2000) (IT/32/Rev. 19), effective 19 January 2001. Rule 87(C) of the Rules, which currently allows the International Tribunal to decide whether "to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused", was not in force at the date of the Trial Judgement.

[1544] Trial Judgement, para. 805 (citing *Kambanda* Judgement and Sentence, para. 102: "nothing in the Statute or Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted", and *Serushago* Sentencing Judgement).

[1545] *Kunarac* Appeal Judgement, para. 342.

[1546] *Čelebići* Appeal Judgement, para. 741. The Appellant's Brief, p. 154 and note 514, discussed the practice of national legal systems regarding how a sentence must "expressly reflect and relate to the individual circumstances of a case."

[1547] Trial Judgement, para. 807. The authoritative French version of this operative paragraph reads as follows: "En l'espèce, les crimes reprochés à l'accusé ont été qualifiés de plusieurs manières distinctes mais font partie d'un ensemble

720. Notwithstanding the Prosecution's reliance on the original French text of the Trial Judgement, the Prosecution concedes that the final two sentences of this paragraph are ambiguous in either language.[1548] The Prosecution avers that Count 1 of the Second Amended Indictment (persecution) "was the most important charge against the Appellant as it covered the entire time-span . . . and included acts charged elsewhere in the indictment additionally as separate war crimes".[1549] The Prosecution submits further that the majority of the war crimes charged in Counts 3 to 20 were based on clearly distinguishable conduct.[1550]

721. The observations of the parties regarding this question are apposite. Any contrary argument would confound the fundamental legal distinctions between the crimes alleged in the Second Amended Indictment. It is wrong to hold, as the Trial Chamber did, that "it is impossible to identify which acts would relate to which of the various counts - other than those supporting the prosecution for and conviction of persecution under count 1." Where it is impossible to identify which acts would relate to which of the various counts, it is likewise impossible to arrive at distinct convictions. Either an accused person is guilty of different crimes constituted by different elements which may sometimes overlap (but never entirely), or the accused is convicted of that crime with the most specific elements, and the remaining counts in which those elements are duplicated are dismissed as impermissibly cumulative. The Appeals Chamber finds that the reasoning of the Trial Chamber is wrong in law.

722. It is erroneous in this case to hold that all of the convictions "rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted".[1551] Such conclusions cannot but violate the International Tribunal's obligation to deliver a reasoned decision on sentencing which accurately reflects the totality of an accused's criminal conduct, and it seriously undermines the objectives of sentencing by failing to state what conduct is being punished and why.[1552]

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unique de faits criminels, commis sur un territoire géographiquement déterminé, au cours d'une période de temps relativement étendue mais dont la longueur même a contribué à asseoir la qualification de crime contre l'humanité et sans qu'il soit possible de procéder entre eux à une distinction de l'intention ou du mobile criminels. *En outre, la Chambre observe que les crimes autres que le crime de persécution retenus à l'encontre de l'accusé reposent en totalité sur les mêmes faits que ceux visés pour les autres crimes poursuivis à l'encontre de l'accusé. En d'autres termes, il n'est pas possible d'identifier quels faits seraient concernés par les différents chefs d'accusation que ceux supportant la poursuite et la condamnation au titre du chef 1 – Persécution, lequel vise au demeurant une période de temps plus longue qu'aucun des autres chefs. Vu cette cohérence d'ensemble, la Chambre considère qu'il y a lieu d'infliger une peine unique pour la totalité des crimes dont l'accusé a été reconnu coupable.*"

[1548] Respondent's Brief, para. 8.8.

[1549] Respondent's brief, para. 8.8.

[1550] *Ibid.,* para. 8.9. The Prosecution excludes those convictions which it concedes were impermissibly cumulative (*see above*).

[1551] Trial Judgement, para. 807.

[1552] *See Simić* Trial Judgement, para. 33, regarding the various objectives of sentencing, *inter alia* deterrence and retribution. *See also* Trial Judgement, para. 761, regarding the purposes and objectives of sentencing.

723. The Appeals Chamber finds that the reasoning of the Trial Chamber with respect to the imposition of a single sentence fails to respect the requirements that the Trial Chamber was obliged by Rule 87 of the Rules to meet, namely either to impose a sentence in respect of each finding of guilt, or to impose a single sentence reflecting the totality of the criminal conduct of the accused. It is clearly established that the International Tribunal is competent to impose a single sentence, but that single sentence must reflect the totality of the criminal conduct in question.[1553]

3. Whether the Trial Chamber allegedly disregarded "critical factual issues" in its assessment of the Appellant's criminal responsibility

724. The Appellant submits that the Trial Chamber allegedly disregarded 'critical factual issues' in its assessment of the Appellant's criminal responsibility, and that the Appellant lacked the material ability to control the perpetrators of the crimes alleged. In particular, he alleges that the Trial Chamber made no allowance for the fact that those acts were committed in the context of an armed conflict which was "nothing short of chaotic", and that the Appellant lacked the material ability to control the perpetrators of the crimes alleged.[1554]

725. The Appeals Chamber disagrees with the submission of the Appellant on the relevance to sentencing of whether or not the Appellant exercised effective control over the perpetrators. Such a determination is not a sentencing factor, but is instead an element used in establishing criminal responsibility for each count under Article 7(3) of the Statute which cannot as such have an impact on the sentence.

[1553] This so-called 'totality principle' was considered in some detail by the Appeals Chamber in the *Čelebići* Appeal Judgement at para. 429, note 663.
[1554] Appellant's Brief, p. 186.

C. Considerations of the Appeals Chamber

726. The Trial Chamber imposed a prison sentence of forty-five years on the Appellant. The Appeals Chamber has granted some of the appeals of the Appellant against his sentence. In this particular case, however, the application of the established test for the revising of a sentence[1555] would be inappropriate. The Appeals Chamber in this appeal is being called upon not simply to affirm or revise the sentence imposed by the Trial Chamber, but rather to impose a sentence *de novo*.[1556] Instead of revising the sentence of the Trial Chamber, the Appeals Chamber will substitute its own reasoned sentence for that of a Trial Chamber on the basis of its own findings, a function which the Appeals Chamber considers that it may perform in this case without remitting the case to the Trial Chamber.

727. In its discussion of the factors relevant to sentencing above, the Appeals Chamber has identified the following factors as relevant to this case. The aggravating circumstances proved beyond reasonable doubt are: (i) the position of the accused as holding the rank of Colonel in the HVO, and the position of commander of the regional forces in the CBOZ; and (ii) the fact that many of the victims of the crimes of which the Appellant has been found guilty were civilians.

728. As mitigating circumstances proved on the balance of probabilities: (i) the Appellant's voluntary surrender to the International Tribunal;[1557] (ii) his real and sincere expression of remorse;[1558] (iii) his good character with no prior criminal convictions; (iv) his record of good comportment at trial and in detention; (v) his personal and family circumstances, including his health; (vi) his having been detained for over 8 years pending a final outcome in his case;[1559] and (vii) his particular circumstances at the outbreak of and during the war.

[1555] *Čelebići* Appeal Judgement, para. 725. *See also Serushago* Appeal Judgement, para. 32.

[1556] The Appeals Chamber notes the findings of the Chamber in the *Vasiljević* Appeal, para. 9: "an appeal from sentencing is a procedure of a corrective nature rather than a *de novo* sentencing proceeding." The *Vasiljević* case is distinguished from the instant case in that the former was able to apply the "discernible error" test in the circumstances of that case.

[1557] The Appeals Chamber clarifies that the Appellant's surrender only subsequent to preparing his defence has no effect on this factor. The Trial Judgement (para. 773) found this to be a mitigating factor.

[1558] AT 844 (Open Session) (17 Dec. 2003).

[1559] In the *Dragan Nikolić* Trial Judgement, para. 271, Trial Chamber II considered whether the length of proceedings could constitute a mitigating circumstance. In that case, the decision was that the time spent awaiting a decision was not disproportional, but the Appeals Chamber notes that Nikolić did not surrender voluntarily. Rather, he: "was already well informed about the indictment against him at the end of 1994 or beginning of 1995, of course not having any obligation to surrender voluntarily to this Tribunal. The Accused was apprehended by SFOR only in the year 2000. Taking into account, *inter alia*, the lengthy period of time necessary for preparing and deciding his motions on jurisdiction, the time spent in the United Nations Detention Unit cannot be regarded as disproportional." The Appeals Chamber considers that in this case, the time spent in custody before and during the proceedings is a factor in mitigation of sentence. This is because in this case the International Tribunal has been hampered by the complexity of these

729. As discussed above, Rule 87(C) of the Rules provides that a Chamber may decide to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused, and the Appeals Chamber decides to impose a single sentence in this case, as the criminal conduct for which he has been convicted forms part of similar overall behavior, and occurred within a close temporal context.

proceedings, and the Appeals Chamber has had to deal with the sheer volume of additional material submitted on appeal (a burden which could easily have been avoided had the material been made available to the parties at trial, but which was beyond the parties' control).

XIII. DISPOSITION

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

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

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 16 and 17 December 2003;

SITTING in open session;

DISMISSES the Appellant's ground of appeal concerning denial of due process of law;

ALLOWS by majority, Judge Weinberg de Roca dissenting, the Appellant's ground of appeal concerning his responsibility for the crimes committed in Ahmići, Šantići, Pirići, and Nadioci, on 16 April 1993, **REVERSES** the Appellant's convictions pursuant to Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **REVERSES** the Appellant's convictions pursuant to Article 7(3) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for the crimes committed in parts of the Vitez Municipality other than Ahmići, Šantići, Pirići, and Nadioci, in April, July, and September 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **REVERSES** his convictions pursuant to Article 7(3) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for crimes committed in Lončari and Oćehnići in the Busovača Municipality in April 1993, **REVERSES** his convictions under Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **FINDS** that no finding was made by the Trial Chamber pursuant to Article 7(1) of the Statute in relation to the January 1993 attacks in Busovača, and that no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute concerning the crimes committed in Lončari and Oćehnići in April 1993;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for the crimes committed in April 1993 in Kiseljak, **REVERSES** his conviction under Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **FINDS** that

no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute in relation to the crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for detention-related crimes, to the extent that his appeal against the convictions under Counts 17, 18, and 20 pursuant to Article 7(1) of the Statute is granted, and **REVERSES** his convictions under those counts;

AFFIRMS, unanimously, the Appellant's convictions under: 1) Count 15 pursuant to Article 7(3) of the Statute for the detention-related crimes committed in the relevant detention facilities, 2) Count 16 pursuant to Article 7(1) of the Statute for ordering the use of protected persons for the construction of defensive military installations, and 3) Count 19 under Article 7(1) of the Statute for the inhuman treatment of detainees occasioned by their use as human shields, and **FINDS** that no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute under Counts 15 or 16 in relation to the use of protected persons for the construction of defensive military installations, under Counts 17 or 18 in relation to the taking of hostages, or under Counts 19 and 20 for the inhuman treatment of detainees occasioned by their use as human shields;

DISMISSES the Appellant's appeal against convictions in all other respects;

ALLOWS unanimously, in part, the Appellant's ground of appeal against the sentence, and **IMPOSES** by majority, Judge Weinberg de Roca dissenting, a new sentence;

SENTENCES the Appellant to 9 (nine) years imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention, that is from 1 April 1996 to the present day;

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

Done in English and French, the English text being authoritative.

Judge Fausto Pocar
Presiding

Judge Florence Ndepele Mwachande Mumba

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inés Mónica Weinberg de Roca

Judge Wolfgang Schomburg appends a separate opinion limited to the sentence.

Judge Inés Mónica Weinberg de Roca appends a partial dissenting opinion.

Dated this twenty-ninth day of July 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

XIV. SEPARATE OPINION OF JUDGE SCHOMBURG

With regard to the legal and factual findings I am in full agreement with the majority. I also fully accept, within the margin determined by the Appellant's individual guilt, the special emphasis on general deterrence as an aggravating factor in finding the appropriate sentence, in particular when it is to prevent commanders in similar circumstances from committing similar crimes in the future.

However, in all circumstances of the convictions, including the aggravating and mitigating sentencing factors set out in this Judgement, I hold that the remaining crimes committed by the Appellant, limited to wilful interference with the safety of others, do not justify a term of imprisonment as long as that imposed by the Appeals Chamber.

Done in English and French, the English text being authoritative.

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Wolfgang Schomburg

Dated this twenty- ninth day of July 2004
At The Hague
The Netherlands

[Seal of the International Tribunal]

XV. PARTIAL DISSENTING OPINION OF JUDGE WEINBERG DE ROCA

A. Introduction

1. After more than two years of trial, having heard 158 witnesses and having considered more than 1300 pieces of evidence, three experienced trial judges concluded that the Appellant was guilty beyond a reasonable doubt and sentenced him to forty-five years of imprisonment. The Appeals Chamber disagrees and reverses the judgement, sentencing the Appellant to nine years.

2. In my opinion, the Appeals Chamber is only able to reach this conclusion by disregarding the deference normally accorded to the trier of fact. In doing so, the Appeals Chamber announces a new standard of review. This new standard empowers the Appeals Chamber to independently assess whether "it is itself convinced beyond reasonable doubt as to the finding of guilt."[1560] In making this assessment, the Appeals Chamber limits its examination of the trial record to those portions of the record cited in the Trial Judgement or mentioned in the parties' submissions. As a consequence, in evaluating the additional evidence admitted on appeal the Appeals Chamber neglects to consider the totality of the evidence. Moreover, in applying this new standard, the Appeals Chamber fails to properly assess the probative value of the admitted additional evidence and ignores the Prosecution's rebuttal evidence.

B. Standard of Review for Errors Fact

3. The standard of appellate review with respect to alleged errors of fact firmly established by the jurisprudence of the International Tribunal is a "reasonableness" standard.[1561] Under this standard, the Appeals Chamber assesses whether a finding of fact made by the Trial Chamber was one that no reasonable trier of fact could have reached. In all prior cases, this standard was applied when assessing all errors of fact, regardless of whether additional evidence was adduced on appeal. This standard is consistent with the Statute of the International Tribunal, which limits appellate jurisdiction to factual errors occasioning a miscarriage of justice and not to all errors of fact in the Trial Judgement.[1562]

4. In the present case, the Appeals Chamber has introduced an innovative standard of review which requires that when additional evidence is introduced on appeal, "the Appeals Chamber will

[1560] Judgement of the Appeals Chamber, para. 24(c)(ii).
[1561] *Krstić* Appeal Judgement, para. 40; *Vasiljević* Appeal Judgement, paras. 7-8; *Krnojelac* Appeal Judgement, paras. 11-12; *Kunarac* Appeal Judgement, paras. 37-48, footnote 243; *Čelebići* Appeal Judgement, para. 434; *Kupreškić* Appeal Judgement, para. 30; *Furundžija* Appeal Judgement, paras. 37, 40; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
[1562] Statute of the International Tribunal, Article 25(1)(b).

determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt."[1563]

5. It is well established that the Appeals Chamber should not lightly overturn a Trial Chamber's findings of fact.[1564] The reasons for this deference are obvious and are fundamental to the conceptual distinction between the trial of first instance and the appeal. It is the judges of the Trial Chamber who are uniquely positioned to evaluate and assess the evidence, having been immersed in the case over a long period of time. The judges at trial have the distinct advantage of observing the witnesses in person. They are best placed to assess a witness's demeanour and are able to question witnesses directly. Even where additional evidence is admitted on appeal, the Appeals Chamber hears only a very a small percentage of the total witnesses. In this case, the Appeals Chamber heard six witnesses over four days and admitted 108 pieces of evidence, compared to the Trial Chamber's 158 witnesses and 1300 pieces of evidence.

6. I accept that in cases involving additional evidence, the Appeals Chamber is less deferential because it becomes the primary trier of fact in relation to the new evidence. It should nevertheless still defer, to the extent possible, to the Trial Chamber's evaluation of the evidence in relation to matters unaffected by the additional evidence, such as the credibility or reliability of witnesses who testified at trial. The primary question remains whether no reasonable trier of fact could have reached the finding of fact in the trial judgement. In cases involving additional evidence this analysis is undertaken in light of the new evidence, the probative value of which the Appeals Chamber is free to assess without deference to the Trial Chamber. But this evaluation of additional evidence must be undertaken together with a consideration of the evidence in the trial record, with deference observed where possible.[1565]

7. The Appeals Chamber has failed to provide "cogent reasons in the interests of justice" for departing from this well established precedent.[1566] The Appeals Chamber's explanation is that its new standard is necessary because "if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case… be reached by either Chamber, beyond reasonable doubt."[1567]

[1563] Judgement of the Appeals Chamber, para. 24(c)(ii).
[1564] *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, para. 11; *Kupreškić* Appeal Judgement, para. 32; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63.
[1565] *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 30 May 2001 (redacted version), para. 8 ("New material will be considered alongside the material already in the trial record to see if the Trial Chamber's judgement is sustainable by the newly enlarged record on appeal and the usual deference will be given to a Trial Chamber's findings of fact insofar as they were based on the material before the court at the time.")
[1566] *Aleksovski* Appeal Judgement, para. 107.
[1567] Judgement of the Appeals Chamber, para. 23.

This argument seems to suggest that a single chamber should evaluate the totality of the evidence available before reaching a conclusion of guilt beyond a reasonable doubt. However, it is apparent that the Appeals Chamber does not consider the totality of the available evidence, but rather only those elements of the record which are referred to in the Trial Judgement or by the parties.[1568] Thus, the only reason advanced to support the new standard of review is undermined by the Appeals Chamber's own application of the standard to the facts of this case.

8. The Appeals Chamber asserts that this new standard is necessary in the interests of justice. I disagree. This argument ignores the fact that the Appellant has already been convicted by a Trial Chamber at the "beyond a reasonable doubt" standard, and minimizes the importance of the principle of finality. On appeal, the burden is on the Appellant to demonstrate that an error of fact occasioning a miscarriage of justice has occurred. The Appeals Chamber's new standard places this burden on the Prosecution, which must prove for a second time that the Appellant is guilty beyond a reasonable doubt even in light of the new evidence.

9. Of course, I accept that every finding of guilt in a criminal trial must be established beyond a reasonable doubt. Where additional evidence adduced on appeal raises sufficient doubt, then the Appeals Chamber will reverse the conviction. I emphasize, however, that this is not because the Appeals Chamber has conducted a second trial and has reached its own conclusion of guilt beyond a reasonable doubt on the basis of the combined trial and appellate evidence, but rather because the Trial Chamber's finding of fact is no longer one that a reasonable trier of fact could have reached in light of the newly adduced doubt-raising evidence.

C. Evaluation of the Evidence

1. Failure to evaluate the totality of the record

10. Whichever standard is applied, the Appeals Chamber must evaluate the probative weight to be accorded to additional evidence in light of the totality of the evidence on the record of the trial and the appeal. This is even more important if the standard of review proposed by the Appeals Chamber were to be accepted. However, as the Appeals Chamber acknowledges, it limits its evaluation of the evidence to those portions of the record cited in the Trial Judgement or by the parties on appeal. The Appeals Chamber states, with no justification for its approach, that:

> The Appeals Chamber reiterates that an appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence

[1568] Judgement of the Appeals Chamber, para. 13.

> contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.[1569]

11. This approach is contrary to the Rules of Procedure and Evidence ("Rules"). Rule 115(B) of the Rules requires the Appeals Chamber to consider "the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117." Rule 117(A) of the Rules explicitly states that "[t]he appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it." The record on appeal is defined in Rule 109 of the Rules as consisting of "the trial record, as certified by the Registrar." The record is not limited to the materials referred to in the trial judgement or by the parties; it is the *entire* trial record.[1570]

12. As the Appeals Chamber has previously explained in a number of cases, "the fact that the Trial Chamber did not mention a particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration."[1571]

13. The approach adopted by the Appeals Chamber leads to an overestimation of the probative weight that should properly be accorded to the additional evidence. For example, the Trial Chamber recounts the testimony of Witness Bagessen relating to the arrest and subsequent release of General Merdan as part of its analysis of whether the Appellant had control over the Military Police who made the arrest.[1572] The Appeals Chamber revisits this analysis in light of new evidence on appeal which suggests that the release may have been secured by Kordić rather than the Appellant. In light of the new evidence, the Appeals Chamber makes the summary conclusion that the additional evidence "shows that Witness Baggesen's account was mistaken, and confirms that the Military Police commander who detained General Merdan refused to carry out the Appellant's order for his

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[1569] Judgement of the Appeals Chamber, para. 13.

[1570] Pursuant to the version of Rule 109(C) (As revised on 20 October and 12 November 1997) (IT/32/Rev. 12) in force at the relevant time, the parties designated the parts of the trial record which each considered necessary for the decision on the appeal. Both the Appellant and the Prosecutor agreed that the record should consist of the trial record certified by the Registrar consisting of all the transcripts, documents, and exhibits, with minor differences. The Prosecutor removed the "list of witnesses", and the Appellant added those documents tendered for admission into evidence but excluded. *See* Certificate on the Trial Record, 13 April 2000; Internal Memorandum from Prosecution Senior Appeals Counsel to Deputy Registrar entitled "Record on Appeal," 13 June 2000; Appellant's Designation of Record on Appeal, 14 June 2000.

[1571] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 7; *Čelebići* Appeal Judgement, para. 481 ("The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the Judgement in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings."); *Kupreškić* Appeal Judgement, para. 458 ("failure to list in the Trial Judgement, each and every circumstance placed before Šthe Trial ChamberĆ and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question").

[1572] Trial Judgement, para. 463.

release."[1573] However, this analysis fails to examine the other evidence in the trial record relating to this event. Notably, the Appeals Chamber ignores the Appellant's own trial testimony concerning this event in which he maintains that, although he could not order the Military Police Commander to release the detainees, he "eventually convinced him to release the arrested individuals".[1574] The Appellant, who directly participated in securing the release of the detainees, did not testify about any intervention by Kordić.

14. The Appeals Chamber's failure to consider the entire record also results in an exaggerated understanding of the novelty of the additional evidence and leads the Appeals Chamber to erroneously assume that the additional evidence is something that was not considered by the Trial Chamber. Take, for example, the Appeals Chamber's discussion of the events relating to the "Convoy of Joy". The Appeals Chamber relies on the appeals testimony of Witness Watkins, who recounted that the humanitarian convoy was stopped at a checkpoint manned by the Jokers and that, despite the Appellant's clearance, the Jokers would only permit them to pass after Kordić's personal intervention.[1575] The Appeals Chamber states that this new evidence supports the conclusion that "the Military Police units, including the Jokers, were not *de facto* commanded by the Appellant".[1576] Had the Appeals Chamber considered the entirety of the Trial Record, however, it would have seen that other witnesses testified at trial about this incident. For example, Colonel Alistair Duncan testified that the soldiers, Military Police, and civilians who stopped the Convoy of Joy refused to carry out the order of the Appellant and that the Witness was told by a soldier "that they wanted the order to come from Kordić".[1577] Colonel Duncan's testimony that the Appellant had no control over the situation was entirely consistent with that of Witness Watkins, and was already considered by the Trial Chamber.

2. Failure to evaluate the probative weight to be accorded to the evidence

15. The Appeals Chamber has also failed to evaluate the probative value of the additional evidence admitted on appeal. Providing only bare descriptions of the additional evidence, the Appeals Chamber has not made *any* findings of credibility or reliability in relation to this new evidence, instead seeming to accept each document or testimony as the truth. Where there is a contradiction between the additional evidence and the trial evidence, the Appeals Chamber has not articulated any reasons why it has preferred the additional evidence over that adduced at trial. This approach assumes that, once admitted pursuant to Rule 115, the credibility and reliability of that

[1573] Judgement of the Appeals Chamber, para. 385.
[1574] Trial Transcript p. 18457. *See also* Trial Transcript pp. 18454-18456.
[1575] Judgement of the Appeals Chamber, para. 395.
[1576] Judgement of the Appeals Chamber, para. 393.
[1577] Trial Transcript p. 9142. *See also* Trial Transcript pp. 9141, 9151.

additional evidence has been established. This is incorrect. At the time of its admission, the evaluation of the additional evidence is necessarily preliminary; the Appeals Chamber does not yet have the benefit of the parties' final arguments on its weight.[1578]

16. For example, the Judgement of the Appeals Chamber is silent on the probative value of Exhibit 1 to the Second Rule 115 Motion, a Ministry of the Interior Police (MUP) report on the events in Ahmići. Although this report is undated, it was certainly created after the 3 March 2000 delivery of the Trial Judgement since it refers to the preparation of the report on the basis of data "gathered since March 2000".[1579] The report is admittedly preliminary and it is specifically stated that the information is "neither complete nor verified in detail since it is of an operative nature".[1580] The credibility and reliability of this document, which was prepared in reaction to the Trial Judgement, is questionable. Nevertheless, the Appeals Chambers appears to rely, without explanation, on the report's unsourced speculation that "it is most likely" that two meetings were held on 15 April 1994 and that the Ahmići massacre was planned at the second meeting at the Kordić family home in the absence of the Appellant.[1581]

3. Failure to consider rebuttal evidence

17. In its analysis of the evidence admitted on appeal, the Appeals Chamber fails to address the merits of the rebuttal evidence admitted on behalf of the Prosecution. It does not consider this rebuttal evidence when evaluating the probative value of the Appellant's additional evidence or when evaluating whether it is satisfied beyond a reasonable doubt as to the guilt of the Appellant. The one and only reference to an item of rebuttal evidence in the main text of the Appeals Chamber's analysis (rather than in the Appeals Chamber's summary of the submissions of the parties) can be found in paragraph 563 of the Judgement of the Appeals Chamber. Even the footnotes to the Appeals Chamber's analysis contain only a handful of references to a very limited range of rebuttal evidence. Having already determined that this material "directly affects the substance of the additional evidence admitted by the Appeals Chamber",[1582] it is incumbent on the Appeals Chamber to explain why it did not merit examination.

[1578] *Prosecution v. Kupreškić*, Case No. IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 30 May 2001 (redacted version), para. 8 ("[When admitting material pursuant to Rule 115(B)] the Appeals Chamber must give its best judgement as to the importance of the new material in light of its familiarity with the trial record at that time. This means that even after a finding that the material has satisfied the requirements of Rule 115(B) the Chamber on further consideration and in light of the briefs and arguments may decide that indeed it is not so important that it would have changed the result and requires the overturning of the verdict or the alteration of a sentence.")
[1579] Exhibit 1 to the Second Rule 115 Motion, p. 4.
[1580] Exhibit 1 to the Second Rule 115 Motion, p. 4.
[1581] Exhibit 1 to the Second Rule 115 Motion, p. 11.
[1582] Decision on Evidence, 31 October 2003, p. 5.

18. For example, the Appeals Chamber found that "the Appellant lacked effective control over the military units [Military Police and Jokers] responsible for the commission of crimes in the Ahmići area on 16 April 1993".[1583] In doing so, the Appeals Chamber did not even mention PA14, a document signed by the Appellant on 18 April 1993 at 2:00 a.m. commending the Military Police 4th Battalion and their commander "for courage displayed in defending Croatian people and Croatian areas and conducting their military duties".[1584] In this document, the Appellant instructs that "[i]nformation on the commendation of the unit and its commander are to be entered in their HVO personal files." In my opinion, Exhibit PA14 is relevant to a number of the Appeals Chamber's conclusions, and yet it is never mentioned in the Judgement of the Appeals Chamber.

D. Application to the Appeals Chamber's Analysis of the Crimes Committed in Ahmići Area

19. In my view, if the Appeals Chamber had applied the correct standard of review and if it had properly evaluated the totality of the evidence on the record, the conclusions reached by the Appeals Chamber would have been significantly different. To demonstrate this, and to illustrate why I have dissented from the approach adopted by the Appeals Chamber, I have chosen to concentrate my analysis on the most serious crimes for which the Appellant was convicted at trial and then acquitted on appeal, the attacks on civilians in Ahmići, Šantići, Pirići, and Nadioci on 16 April 1993. While I have limited my analysis to these events, I am satisfied that the application of the correct approach to the other factual findings overturned by the Appeals Chamber would have rendered different results. My analysis tracks that of the Appeals Chamber in order to demonstrate how and why our views diverge.

1. The orders issued by the Appellant

20. The Trial Chamber convicted the Appellant pursuant to Article 7(1) for crimes targeting the Muslim civilian population that were perpetrated as a result of his ordering the 16 April 1993 attack on the village of Ahmići and neighbouring villages.[1585] The Trial Chamber reasoned that: (i) the attack was planned at a high level of the military hierarchy; (ii) the attack involved the Military Police including the Jokers, as well as regular HVO units including the Viteška Brigade and the Domobrani; (iii) the attack targeted the Muslim civilian population; (iv) the Appellant had command authority over those who committed the crimes. The Trial Chamber found that the Appellant was responsible for ordering the attack with either the clear intention that the massacre

[1583] Judgement of the Appeals Chamber, para. 421.
[1584] Decision on Evidence, 31 October 2003, p. 6.
[1585] Trial Judgement, paras. 437, 749-750.

would be committed or, at least, with knowledge of a risk of crimes being committed and acceptance of such a risk.[1586]

21. The Appeals Chamber's reversal of these findings pays no deference to the Trial Chamber's careful analysis of the evidence at trial. Rather the Appeals Chamber concludes that the Trial Chamber's assessment of the trial evidence was "wholly erroneous"[1587] because the Trial Chamber interpreted Defence Trial Exhibit D269 "in a manner contrary to the meaning of the order"[1588] and because the Trial Chamber failed to give weight to evidence suggesting that the Busovača-Travnik road was a legitimate military target.[1589] The Appeals Chamber also concludes that the trial evidence did not support the conclusion that the Muslim Army of Bosnia-Herzegovina ("ABiH") forces were not preparing for combat in the Ahmići area, without citing the relevant evidence.[1590] Instead, the Appeals Chamber relies on additional evidence admitted on appeal to conclude that there was a military justification for the Appellant to issue Exhibit D269.[1591]

22. However, the Trial Chamber itself found that D269 was presented as a defensive combat command to prevent an attack by the enemy.[1592] Nevertheless, the Trial Chamber concluded that, in light of the totality of the evidence, it was "very clearly an order to attack."[1593] In reaching this conclusion, the Trial Chamber observed that the order was addressed to the Viteška Brigade, but mentions other units such as the Military Police 4th Battalion, which "were recognised on the ground as being those which had carried out the attack."[1594] The Trial Chamber noted that the time set out in the order to commence hostilities corresponded precisely to the start of fighting in the Ahmići area.[1595] Elsewhere in the Judgement, the Trial Chamber observed that Exhibits D268 and D269 recommended modes of combat, such as taking control over fuel consumption, and "blocking (observation and ambush), search, and offensive forces", which were actually used on 16 April 1994.[1596] Moreover, the Trial Chamber found that the attack started with artillery fire, weapons which had been placed under the Appellant's direct command.[1597] The Trial Chamber also noted

[1586] Trial Judgement, para. 474.
[1587] Judgement of the Appeals Chamber, para. 332.
[1588] Judgement of the Appeals Chamber, para. 330.
[1589] Judgement of the Appeals Chamber, para. 331.
[1590] Judgement of the Appeals Chamber, para. 333.
[1591] Judgement of the Appeals Chamber, para. 333.
[1592] Trial Judgement, para. 437.
[1593] Trial Judgement, para. 437.
[1594] Trial Judgement, para. 437.
[1595] Trial Judgement, para. 437.
[1596] Trial Judgement, para. 470.
[1597] Trial Judgement, para. 471.

that the massive and systematic nature of the crimes and the testimonies of the victims of the attack served to support the conclusion that it was ordered.[1598]

23. The Trial Chamber also carefully reviewed the evidence relating to whether the attack was a defensive measure or a measure directed against a legitimate military target, before concluding that no military justification existed. Contrary to the assertion of the Appeals Chamber, the Trial Chamber did consider the Defence evidence that HVO intelligence suggested that Muslim troops might seek to regain control of the Busovača-Travnik road. However, the Trial Chamber dismissed this argument because the villages that were attacked, with the exception of Santići, were not on the main road.[1599] The Trial Chamber considered and dismissed the other arguments put forward by the Appellant to explain the fighting, noting that "much of the evidence contradicted the Defence submission that the ABiH forces were preparing for combat".[1600] The Trial Chamber also considered the evidence of international observers, who "unanimously confirmed that those villages had not prepared for an attack."[1601]

24. Despite the evidence closely considered by the Trial Chamber, the Appeals Chamber finds that the additional evidence now "shows that there was a Muslim military presence in Ahmići and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmići-Santići-Dubravica axis"[1602] and consequently that there was a military justification for the Appellant to issue Exhibit D269.[1603] To support its conclusion, the Appeals Chamber relies on Exhibit 12 to the Fourth Rule 115 Motion, Exhibit 13 to the Fourth Rule 115 Motion, and the testimonies of Witnesses BA5, BA1, and BA3.[1604] In my opinion, this additional evidence merely supplements that which was already available at trial.

25. Exhibit 12 to the Fourth Rule 115 Motion, an order on the engagement of units issued by 3rd Corps Commander Enver Hadžihasanović to the 325th Mountain Brigade on 16 April 1993, describes a series of orders that were taken "with the aim of assisting our forces and tying down the HVO forces." The document indicates that the 1st Battalion of the 303rd Mountain Brigade was sent to "assist our forces in the villages of … and Ahmići, and in the event of an attack by HVO units, to switch to a resolute counterattack." Prosecution Trial Exhibit P475, also issued on 16 April 1993, appears to be the relevant order that commands the 303rd Brigade to move. In his trial testimony

[1598] Trial Judgement, para. 472.
[1599] Trial Judgement, para. 402.
[1600] Trial Judgement, para. 407, referring in particular to Witnesses Ahmić, Kavazović, Hadžihasanović and to Exhibit P647.
[1601] Trial Judgement, para. 408. *See also* Trial Judgement para. 409.
[1602] Judgement of the Appeals Chamber, para. 333.
[1603] Judgement of the Appeals Chamber, paras. 333, 335.
[1604] Judgement of the Appeals Chamber, paras. 333-334.

Witness Hadžihasanović explained that in giving that order on 16 April 1993, when he ordered troops "to assist *our* forces" in Ahmići he was referring to the territorial defence unit from Zenica that first responded to the attack.[1605] Considered in context, the additional evidence does not add anything to the evidence already available at trial and therefore would not have affected the Trial Chamber's findings.

26. Exhibit 12 to the Fourth Rule 115 Motion also states that the 7th Muslim Mountain Brigade was sent to Ahmići village sector "to assist our forces in the defence … and be in readiness to carry out a[n] … infantry attack". This is supported by Exhibit 13 to the Fourth Rule 115 Motion, an order issued by Commander Asim Koričić to the 7th Muslim Brigade on 16 April 1993. Although these documents suggest that a company from the 7th Muslim Brigade could be mobilised to support the combat operations in Ahmići, they do not demonstrate that these troops were preparing to attack in the region. On the contrary, this Brigade appears to have been moved in a manner similar to the 325th Brigade, in reaction to the HVO attack on the Ahmići area in the early morning of 16 April 1993.

27. Witnesses BA1 and BA3, witnesses with military backgrounds, testified that Exhibit D269 appeared to be a legal order consistent with the military intelligence evidence shown to them.[1606] I find these witnesses' abstract discussion of the legality of Exhibit D269 to be credible. However, their commentary on the theoretical legitimacy of the orders does not demonstrate that the Trial Chamber's findings were unreasonable. The Trial Chamber itself admitted that the language of Exhibit D269 was defensive and considered evidence produced by the Appellant to demonstrate the legitimacy of his actions.[1607]

28. On appeal, Witness BA5 testified that the Territorial Defence staff of Dubravica and Sivrino Selo, which included Ahmići, had a platoon of between 30 and 35 people at maximum, who shared up to 30 rifles. I would accept that this witness was credible and was in a good position to observe the operation of the Territorial Defence in the area. However, this account does not present a challenge to the Trial Chamber's findings, which appear to have been based on the evidence of Witness Abdullah Ahmić, who testified that the "territorial defence was starting to organise in the area and consisted of about 120 men".[1608] Again, although the additional evidence adds further details not available to the Trial Chamber, it is not of such a nature as to impact upon the reasonableness of the Trial Chamber's conclusions.

[1605] Trial Transcript pp. 23222-23225.
[1606] AT 210 -214 (8 Dec. 2003) (closed session); AT 391-396 (09 Dec. 2003) (closed session). The evidence given by these two witnesses is summarised in the Judgement of the Appeals Chamber, footnote 691.
[1607] Trial Judgement, paras. 402-410, 437.
[1608] Trial Judgement, para. 407.

29. The Prosecution argues that its rebuttal evidence demonstrates that the Appellant gave illegal orders and that he instructed his troops to justify his orders as a response to provocation from the other side.[1609] The additional evidence, considered in light of the rebuttal evidence as well as the evidence on the trial record, fails to establish that the Trial Chamber erred in finding that there was no military justification for ordering an attack on the villages of Ahmići, Šantići, Pirići, and Nadioci on 16 April 1993. Although the evidence both at trial and on appeal shows that there was a small Muslim military presence, consisting mainly of armed civilians participating in a territorial defence unit from their homes in Ahmići and environs, this evidence does not substantiate the Appellant's assertion that he had reason to believe that the ABiH intended to launch an attack along the Ahmići-Santići-Dubravica axis. The conclusion reached by the Trial Chamber was one that a reasonable trier of fact could have reached.

2. The troops involved in the commission of the crimes

30. The Trial Chamber found that in addition to the Military Police and the Jokers, regular HVO units, in particular the Viteška Brigade and the Domobrani, took part in the fighting in the Ahmići area on 16 April 1993.[1610] The evidence underlying this finding includes: (i) eyewitness testimony placing members of the Viteška Brigade, identifiable by their uniforms, insignia, or because they were local members of the HVO who were known to the witnesses;[1611] (ii) documentary evidence, including an exhibit indicating that members of the Viteška Brigade were stationed nearby on 14 April 1993,[1612] and two HVO certificates documenting that during the attack on Ahmići some Viteška Brigade soldiers were wounded in the exercise of their duties;[1613] and (iii) circumstantial evidence attesting to HVO participation.[1614]

31. The Appeals Chamber concluded that this finding was "tenuous", without providing reasons to support its characterisation.[1615] Having reached this conclusion, the Appeals Chamber then substitutes its own finding, based on the additional evidence, that the crimes in the Ahmići area were committed only by the Jokers and the Military Police 4th Battalion.[1616] In doing so, the Appeals Chamber relies on Exhibits 1, 13, and 14 to the First Rule 115 Motion and Exhibits 1 and 14 to the Second Rule 115 Motion.

[1609] Exhibits PA51 and PA52.
[1610] Trial Judgement, paras. 400, 440.
[1611] Trial Judgement, paras. 396-398.
[1612] Trial Exhibit D245.
[1613] Trial Judgement, paras. 397-399; Trial Exhibits P691 and P692.
[1614] Trial Judgement, para. 399.
[1615] Judgement of the Appeals Chamber, para. 339.
[1616] Judgement of the Appeals Chamber, para. 339.

32. In my view, the conclusion of the Appeals Chamber is erroneous. Exhibit 1 to the First Rule 115 Motion is an SIS investigative report on the events in Ahmići, which states that the attack on the village was carried out by the Jokers, the Military Police, and "an attached squad of criminals". The cover sheet of this document is dated 15 March 1994, but the contents of the document, dated 26 November 1993, are very similar to trial Exhibit D410 also dated 26 November 2003. Interestingly, Exhibit D410 indicates that combat activities began in the morning of 16 April 1993 as a result of uncontrolled individuals and groups. Exhibit D410 specifically warns that international observers and journalists have visited the village and that "the European public will insist on conducting an investigation and determining the responsibility for the deeds committed." The similar report, dated the same day, submitted as additional evidence, indicates that sporadic fighting began on 15 April 1993, but only developed into a fierce battle on 16 April 1993 after the Muslim Armed Forces attempted to take control of the Vitez-Busovača road. The HVO forces are described as bringing a "counterattack" in which three persons were killed. These killings enraged their comrades and caused the cleansing of the village.

33. Exhibit 13 to the First Rule 115 Motion is a report on the fighting in Vitez dated 8 June 1993. This report, signed with an illegible signature, has not been shown to be credible or reliable and I would not place any weight upon it.

34. Exhibit 14 to the First Rule 115 Motion, an HIS Report reviewing two foreign newspaper accounts concerning responsibility for the attack on Ahmići dated 21 March 1994, is substantially similar to Exhibit 13's account of the attack on Ahmići. Notably, both reports rely on the same account of Zoran Kristo, who claims that he bombed the mosque in Ahmići. This report also supports the theory that the attack was committed by the Military Police, the Jokers, and criminals. The Report explains that the "mop up" operation was a counterattack resulting from an earlier conflict with the Muslim armed forces in which three HVO soldiers were killed. The Report categorically states that Mario Čerkez was not involved in the massacre. I note that the scope of this report is limited to reacting to the two newspaper articles and that it does not purport to provide a detailed account of the events.

35. The additional evidence suggesting that the attack on Ahmići and surrounding villages was a spontaneous revenge attack is unconvincing in light of the substantial trial evidence relied on by the Trial Chamber that demonstrated that the attack was planned and organised at high levels in the military hierarchy. Indeed, the theory of rogue individuals avenging the deaths of their colleagues is inconsistent with the Appellant's own testimony at trial that the attack was organized and "it could

not have been done by a group of three or four drunken … soldiers."[1617] In my opinion, this additional evidence, when considered in context, does not demonstrate that the Trial Chamber erred.

36. As I have explained above, I consider that Exhibit 1 to the Second Rule 115 Motion is neither credible nor reliable, since it was prepared in response to the Trial Judgement and it is neither complete nor verified.

37. Exhibit 14 to the Second Rule 115 Motion, the "War Diary", recounts that at 9:00 a.m. on 16 April 1993, orders were given to the commander of the Viteška Brigade, Mario Čerkez, to "block the shooting … on the fire station building in Vitez."[1618] I am of the view that this contemporaneous record of events is generally reliable for the notations contained therein. However, I would not necessarily expect that illegal orders or information involving potentially inculpatory events, such as meetings or telephone calls with particular persons, would be indicated in such a document.

38. In rebuttal, the Prosecution has adduced a series of communications between the Appellant and Čerkez, which are submitted to demonstrate that the Viteška Brigade was involved in the capture of Ahmići on 16 April 1993. In PA6, a Report dated 10:00 a.m. 16 April 1993, Brigade Commander Čerkez reported to the Appellant that "Our forces are advancing … in Ahmići". This corresponds with PA7, a response from the Appellant at 10:35 a.m., in which he told Čerkez to "capture the villages of … Ahmići … completely". In PA8, Čerkez reported that "the village of Ahmići is also 70% done and we have arrested 14…". The Appellant then instructed Čerkez to continue these activities.[1619] During oral argument, Counsel for the Appellant submitted that Exhibit PA6 is simply a report on the situation in the area of responsibility and does not demonstrate that the Viteška Brigade was in Ahmići, and claimed that reference to "our forces" is a reference to the Croatian forces.[1620] In response, the Prosecution contended that it would be illogical for the commander of the Viteška Brigade to give a report about Ahmići if his forces were not there, and submitted that Exhibits PA6, PA7, PA8, and PA10 contradict the Appellant's testimony at trial that the Viteška Brigade did not receive any tasks from him in the area of Ahmići.[1621]

39. The additional evidence, considered in light of the evidence at trial, does not demonstrate that a reasonable trier of fact could not have concluded that the Viteška Brigade participated in the attacks in the Ahmići area. The only reliable piece of additional evidence, the War Diary, shows

[1617] Trial Transcript, p. 19031.
[1618] Exhibit 14 to the Second Rule 115 Motion, p. 70.
[1619] Exhibit PA10.
[1620] AT 599-600 (16 Dec. 2003).

that at 9:00 a.m., some hours after the attack began, Čerkez was ordered to take action at the fire station in Vitez. Prosecution rebuttal Exhibits PA6, PA7, PA8, and PA10 serve to support the Trial Chamber's conclusion that the Viteška Brigade was involved in the attacks. There is no credible and reliable additional evidence which contradicts the Trial Chamber's finding that the Domobrani, who were also under the orders of the Appellant,[1622] participated in the attacks of 16 April 1993.

3. New evidence suggests that individuals other than the Appellant planned and ordered the commission of crimes in the Ahmići area

40. The Appeals Chamber notes that some of the additional evidence points to the participation of other leaders in planning and ordering the attack on the Ahmići area on 16 April 1993.[1623] This observation relies on Exhibit 13 to the First Rule 115 Motion and Exhibit 1 to the Second Rule 115 Motion, both of which I find to be neither credible nor reliable. While making these observations, the Appeals Chamber does not draw any conclusion in relation to how the involvement of others impacts upon the role played by the Appellant.

41. In any event, this inquiry is misconceived. There is no legal requirement that a person giving orders be a sole decision-maker or be the highest or only person in a chain of command. It is entirely possible that a commander, who is himself acting on the orders of a hierarchical superior, or who is acting in concert with, or at the behest of other political or military leaders, may nevertheless be criminally responsible for ordering crimes.

42. With respect to this issue, I note that there is evidence on the record concerning communication and coordination between the Appellant and Kordić on 16 April 1994.[1624] Similarly, there is evidence on the record concerning the relationship between the Appellant and Ljubičić, including a substantial number of orders addressed to the Military Police dating from September 1992 to March 1994[1625] and a series of reports from Ljubičić addressed or copied to the Appellant.[1626] Thus, even after considering the additional evidence which suggests that other actors may have been involved, I would still conclude on the totality of the evidence on the record that the Trial Chamber was reasonable in finding that the Accused was criminally responsible for ordering the attack on the Ahmići area on 16 April 1993.

[1621] AT 745-748 (17 Dec. 2003).
[1622] Trial Judgement, para. 443.
[1623] Judgement of the Appeals Chamber, para. 342.
[1624] *See e.g.* Exhibit 14 to the Second Rule 115 Motion (War Diary) which notes thirteen contacts between the Appellant and Kordić on 16 April 1994.
[1625] *See e.g.* the 59 trial exhibits listed in Prosecution Final Trial Brief, Book II, pp. 46-50.
[1626] *See e.g.* the 15 trial exhibits listed in Prosecution Final Trial Brief, Book II, pp. 50-51.

4. Whether the Appellant was aware of the substantial likelihood that civilians would be harmed

43. The primary conclusion of the Trial Chamber was that the Accused ordered the attack with the clear intention that a massacre would be committed. The Trial Chamber found beyond a reasonable doubt that Ahmići and the other villages "had been the object of a planned attack on the Muslim population on 16 April 1993."[1627] The Trial Chamber relied on several factors in concluding beyond a reasonable doubt that the attack on civilians, which in other places in the Trial Judgement is referred to as a massacre, was planned and organised at a high level of the military hierarchy.[1628]

44. First, the Trial Chamber noted that the attack was consistent with political declarations, ultimatums, and warnings made by the Croatian political and military authorities.[1629] In addition, the Trial Chamber considered the special symbolic significance of Ahmići and its Mosque to the Muslim community in Croatia.[1630] The Trial Chamber found that Croatian inhabitants were warned of the attack and that preparations for the attack included the imposition of a curfew, the closing of schools, the evacuation of Croatian women and children, and the holding of rallies and meetings.[1631] During this time, certain members of the Croatian population warned their Muslim friends to hide or to leave the villages.[1632] The Trial Chamber also considered the evidence that "the attack occurred from three sides and was designed to force the fleeing population towards the south where elite marksmen, with particularly sophisticated weapons, shot those escaping",[1633] while other small groups of attackers moved from house to house, insulting the Muslim inhabitants before killing them and burning their houses.[1634]

45. In addition, the Trial Chamber found that the Appellant knew that his troops were previously involved in committing crimes against Muslim civilians and that he "did not ensure himself, before calling on their services on 16 April, that measures had indeed been taken so as to be sure that those criminal elements were not in a position to do any harm."[1635] The Trial Chamber found that "his subordinates clearly understood that certain types of illegal conduct were acceptable and would not lead to punishment".[1636] The Trial Chamber also took the content of the

[1627] Trial Judgement, para. 428.
[1628] Trial Judgement, paras. 391-393.
[1629] Trial Judgement, para. 387.
[1630] Trial Judgement, para. 411.
[1631] Trial Judgement, paras. 388-389.
[1632] Trial Judgement, para. 389.
[1633] Trial Judgement, para. 390. *See also* Trial Judgement, para. 415.
[1634] Trial Judgement, paras. 390, 412-418, 750.
[1635] Trial Judgement, para. 474.
[1636] Trial Judgement, paras. 487, 753.

orders issued by the Appellant into account, noting that the reasons adduced in D269 to justify the attack were "based on propaganda designed to incite racial hatred."[1637]

46. In my view, it was reasonable for the Trial Chamber to conclude, on the basis of the totality of the evidence on the trial record, that the Appellant ordered troops under his command to participate in the attack directed at the Muslim civilian population in Ahmići and the neighbouring villages on 16 April 1993. There is nothing in the additional evidence that demonstrates this conclusion to be unreasonable. I would therefore have affirmed his conviction for ordering the crimes that occurred during the attack on the Ahmići area on 16 April 1993.

E. Conclusion

47. The correct standard of review, even in cases involving additional evidence, is whether a reasonable tribunal of fact could have reached the Trial Chamber's factual conclusion. Applying this standard, and analysing the additional evidence together with the trial record, I conclude that it has not been shown that no reasonable tribunal of fact could have assessed the evidence as the Trial Chamber did.

48. Applying the standard of review well established by the jurisprudence of the International Tribunal, I would affirm the Trial Chamber's finding that the Appellant was guilty beyond a reasonable doubt of ordering the crimes committed in the Ahmići area on 16 April 1993 pursuant to Article 7(1) of the Statute.

49. For similar reasons, I would affirm other factual findings in the Trial Judgement.

50. As a consequence, I do not agree with the new sentence imposed by the Appeals Chamber.

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Judge Weinberg de Roca

Done this 29th day of July 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[1637] Trial Judgement, para. 469.

XVI. ANNEX A: PROCEDURAL BACKGROUND

A. The Appeal

1. Notice of Appeal

1. The Trial Judgement was rendered on 3 March 2000. In accordance with Rule 108 of the Rules, the Appellant filed his Notice of Appeal on 17 March 2000.[1638]

2. Motions Related to the Appellant's Brief

2. The Appellant filed a motion on 4 April 2000, pursuant to Rule 127(B) of the Rules, for the suspension of the briefing schedule as set out by Rule 111, or alternatively, for an extension of time to file his appellant's brief.[1639] This motion was partially granted by an order issued by the Appeals Chamber on 19 May 2000.[1640] On 16 October 2001, the Appeals Chamber issued an order, pursuant to Rule 111 of the Rules, whereby it considered that the briefing schedule should be resumed and instructed the Appellant to file his appellant's brief by 30 November 2001.[1641]

3. On 27 June 2000, the Appellant filed a confidential motion to suspend the briefing schedule.[1642] The Prosecution filed a confidential response on 7 July 2000.[1643] On 20 July 2000, the Appellant filed under seal an additional filing regarding his Supplemental Filing.[1644] The Prosecution filed a confidential response to the Appellant's Additional Supplemental Filing on 31 July 2000.[1645]

4. On 26 September 2000, the Appeals Chamber issued a decision whereby it suspended the briefing schedule, until the translation of the documents, which the Appellant submitted to the Registry through the Supplemental Filing and the Additional Supplemental Filing, was completed.[1646] This decision also ordered the Appellant to indicate by motion his intention to seek

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[1638] Defendant's Notice of Appeal, 17 Mar. 2000.
[1639] Appellant's Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief, 4 Apr. 2000.
[1640] Order, 19 May 2000.
[1641] Order, 16 Oct. 2001.
[1642] Appellant's Supplemental Filing Re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief, 27 June 2000, confidential ("Supplemental Filing").
[1643] Prosecution Response to Appellant's Supplemental Filing of 27 June 2000 to Suspend Briefing Schedule, 7 July 2000, confidential.
[1644] Appellant's Additional Supplemental Filing Re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief and Reply to Prosecutor's Response of 7 July 2000, 20 July 2000, confidential ("Additional Supplemental Filing"); Corrigendum to Appellant's Additional Supplemental Filing Re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief and Reply to Prosecutor's Response of 7 July 2000, 1 Aug. 2000, confidential.
[1645] Prosecution Response to Appellant's Additional Supplemental Filing of 20 July 2000 to Suspend Briefing Schedule, or Alternatively, Extension of Time to File Appellate Brief, 31 July 2000, confidential.
[1646] *Blaškić* 26 September 2000 Decision, paras. 68-69.

the admission of documents as additional evidence on appeal pursuant to Rule 115 of the Rules, and to specify which documents he would submit under Rule 115. The decision set out a schedule for the parties to make submissions on the applicability of Rule 115.[1647]

5. The Appellant filed a motion on 26 October 2001 to extend the deadline for filing his appellant's brief and to exceed the applicable page limit for the brief,[1648] and, on 5 November 2001, the Prosecution filed a response to this motion.[1649] On 7 November 2001, the Appeals Chamber issued a decision authorizing a page limit of a maximum of two hundred pages and granting the Appellant an extension of time until 14 January 2002 to file his appellant's brief.[1650]

3. Filing of Briefs on Appeal

6. Pursuant to Rule 111 of the Rules, the Appellant filed his Brief on Appeal confidentially on 14 January 2002[1651] and a public redacted version on 7 March 2002.[1652] Pursuant to an order issued by Judge Pocar, Pre-Appeal Judge, on 21 February 2002, the Appellant re-filed a public version of his Brief on Appeal with redactions on 4 July 2002.[1653] On 4 February 2002, he filed an appendix of non-Tribunal authorities cited in his Appellant's Brief[1654] and an appendix of additional non-Tribunal authority on 3 June 2002.[1655]

7. The Prosecution filed its Respondent's Brief on 30 April 2002, pursuant to a decision dated 29 January 2002 granting an extension of time.[1656] The Prosecution filed its Book of Authorities on 1 May 2002[1657] and a public redacted version of its Respondent's Brief on 14 June 2002.[1658] The Prosecution filed a confidential motion regarding clarifications to its respondent's brief and objections to the scope of the Appellant's Reply Brief on 26 June 2002,[1659] and the Appellant filed a

[1647] *Ibid*., para. 69.
[1648] Appellant's Motion to Extend Deadline for Filing Appellant's Brief and Request for Authorization to Exceed the Page Limit for Appellant's Brief, 26 Oct. 2001.
[1649] Prosecution Response to the Appellant's Motion to Extend the Deadline for Filing Appellant's Brief and Request for Authorization to Exceed the Page Limit for Appellant's Brief, 5 Nov. 2001.
[1650] Decision on Appellant's Motion to Extend Deadline for Filing Appellant's Brief and Request for Authorization to Exceed the Page Limit for Appellant's Brief," 7 Nov. 2001.
[1651] Appellant's Brief on Appeal, 14 Jan. 2002, confidential ("Appellant's Brief").
[1652] Redacted Version of Appellant's Brief on Appeal, 7 March 2002.
[1653] Revised Redacted Version of Appellant's Brief on Appeal, 4 July 2002.
[1654] Appellant's Appendix of Non-Tribunal Authorities Cited in Brief on Appeal, 4 Feb. 2002.
[1655] Appellant's Appendix of Additional Non-Tribunal Authority Cited in Support of Brief in Reply, 3 June 2002.
[1656] Decision on Prosecution's Request for an Extension of Time and for Authorisation to Exceed the Page Limit for Its Response to the Appellant's Brief, 29 Jan. 2002.
[1657] Book of Authorities to the Prosecution Response to the Defence Appeal Brief Filed on 1 May 2002, 1 May 2002.
[1658] Public Redacted Version of the Prosecution's Respondent's Brief (Unredacted Version filed on 1 May 2002), 14 June 2002.
[1659] Prosecution's Clarifications to Its Respondent's Brief and Prosecution's Objections to the Scope of the Appellant's Reply Brief, 26 June 2002, confidential.

confidential response on 8 July 2002.[1660] The Appeals Chamber dismissed the Prosecution's motion in part and accepted the motion in part on 24 September 2002.[1661]

8. On 24 April 2002, the Appellant filed a motion seeking an extension of time and authorization to exceed the applicable page limit regarding his reply brief, which Judge Pocar, Pre-Appeal Judge, dismissed because it was filed prematurely.[1662] On 3 May 2002, the Appellant filed a motion seeking an extension of time and authorization to exceed the applicable page limit regarding his reply brief.[1663] On 7 May 2002, Judge Pocar, Pre-Appeal Judge, issued a decision granting the Appellant's motion and authorising the Appellant to file a reply brief of no more than sixty pages by 3 June 2002.[1664] Pursuant to Rule 113, the Appellant filed confidentially his Brief in Reply on 3 June 2002,[1665] and a public version on 14 June 2002.[1666]

9. On 1 December 2003, the Appellant filed confidentially his Supplemental Brief.[1667] Following an authorization to exceed the applicable page limit,[1668] he filed a redacted public version of his Supplemental Brief on 22 March 2004.[1669]

10. On 1 December 2003, the Prosecution filed a request for authorization to exceed the applicable page limit regarding its Supplemental Filing.[1670] On 8 December 2003, the Prosecution filed confidentially the "Prosecution's Re-filed Supplemental Filing." On 16 December 2003, the Appeals Chamber issued a decision rejecting the Prosecution's re-filed Supplemental Filing in its entirety because it did not adhere to the requirements of the Practice Direction on Length of Briefs and Motions, IT/184 Rev.1.[1671]

[1660] Appellant's Response to Prosecution's Clarifications to Its Respondent's Brief and Prosecution's Objections to the Scope of the Appellant's Reply Brief, 8 July 2002, confidential.
[1661] Decision on Prosecution's Clarification to Its Respondent's Brief and Prosecution's Objections to the Scope of the Appellant's Brief in Reply, 24 Sept. 2002.
[1662] Decision on the Appellant's Motion for Extension of Time and Page Limits Re Appellant's Reply Brief. 26 Apr. 2002.
[1663] Appellant's Motion for Extension of Time and Page Limits Re Appellant's Reply Brief, 3 May 2002.
[1664] Decision on Motion for Extension of Time and Page Limits for Appellant's Brief in Reply, 7 May 2002.
[1665] Appellant's Brief in Reply, 3 June 2002, confidential.
[1666] Public Version of Appellant's Brief in Reply, 14 June 2002.
[1667] Appellant's Supplemental Brief on Appeal, 1 Dec. 2003, confidential, ("Supplemental Brief").
[1668] Decision on Appellant's Application for Extension of Page Limits for Supplementary Brief on Appeal, 24 Nov. 2003.
[1669] Redacted Public Version of Appellant's Supplemental Brief on Appeal, 22 Mar. 2004.
[1670] Prosecution's Request for an Extension of Page Limit for its Supplemental Filing Pursuant to the Appeals Chamber's Scheduling Order of 31 October 2003, 1 Dec. 2003.
[1671] Decision on Appellant's Objection to Prosecution's Re-filed Supplemental Filing of 8 December 2003, 16 Dec. 2003.

B. Rule 115 Motions

11. During the appellate proceedings, the Appellant filed four separate motions pursuant to Rule 115,[1672] seeking to admit more than 8000 pages of material as additional evidence on appeal. The first motion sought the admission of government documents from the Republic of Croatia, including the Croatian Information Service, the Croatian Ministry of Defence, the Office of the President of Croatia, and the Croatian Community of Herceg-Bosna. The evidence sought to be admitted in the second motion consisted of thirteen documents disclosed to the Appellant by the Prosecution under Rule 68 of the Rules after the Trial Chamber issued the Trial Judgement: two documents from the Croatian State Archives, nine exhibits tendered in another trial, and portions of testimony of sixteen witnesses who testified in another trial. In general, the first two additional evidence motions purported to challenge certain conclusions of the Trial Chamber regarding the responsibility of the Appellant for crimes committed during April and July 1993 in Ahmići, Stari Vitez, Busovača, and Kiseljak. The third motion was filed confidentially. The fourth motion was filed confidentially; with a public redacted version, which contained evidence disclosed by the Prosecution pursuant to Rule 68, as well as documents from the archives of the Republic of Bosnia-Herzegovina.

1. First Rule 115 Motion

12. On 29 December 2000, the Appellant filed a motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules.[1673] The Prosecution filed a response to this motion on 8 January 2001.[1674]

13. On 19 January 2001, the Appellant filed a brief in support of his first motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules.[1675] On 22 January 2001, the

[1672] The version of Rule 115 applicable to this case is the text reproduced in the Rules of Procedure and Evidence IT32/Rev.19, of 19 January 2001, originally adopted on 11 February 1994. The applicable text reads as follows:

(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.

(B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

[1673] Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000, 29 Dec. 2000.
[1674] Prosecution Response to "Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000," 8 Jan. 2001.
[1675] Appellant's Brief in Support of Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000 ("First Rule 115 Motion"), 19 Jan. 2001.

Appellant filed an index of 288 new exhibits accompanying the First Rule 115 Motion.[1676] The Appellant filed his errata to this brief, concerning official English translations of the newly available evidence, on 22 March 2001.[1677]

14. Pursuant to orders granting extensions of time,[1678] the Prosecution filed confidentially on 19 April 2001, its response to the Appellant's First Rule 115 Motion.[1679] Pursuant to an order issued on 6 September 2001 by Judge Pocar, Pre-Appeal Judge,[1680] the Prosecution filed a public version of its response to the Appellant's First Rule 115 Motion on 13 September 2001.[1681]

15. Following decisions granting extensions of time,[1682] the Appellant, on 18 June 2001, filed confidentially his reply memorandum in support of his First Rule 115 Motion,[1683] along with the accompanying declarations and exhibits.[1684] On 13 September 2001, the Appellant filed a response to the 6 September 2001 order,[1685] in addition to a public version of his reply memorandum,[1686] and the declarations and exhibits attached thereto.[1687]

2. Second Rule 115 Motion

16. Upon authorisation to exceed the applicable page limit,[1688] the Appellant filed confidentially on 18 October 2001 his second motion to admit additional evidence on appeal pursuant to Rule 115

[1676] Exhibits to Appellant's Brief in Support of Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000, 22 Jan. 2001.
[1677] Errata to Appellant's Brief in Support of Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000, 22 Mar. 2001.
[1678] Order Granting Extension of Time, 20 Feb. 2001; Order Granting Extension of Time, 12 Mar. 2001.
[1679] Prosecution Response to Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 19 Apr. 2001, confidential.
[1680] Order, 6 Sept. 2001.
[1681] Public Version of Confidential Document Filed on 19 April 2001 – Prosecution Response to Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 13 Sept. 2001.
[1682] Decision on Appellant's Request for an Extension of Time and Authorization to Exceed the Page Limit on his Reply to the Prosecutor's Response to Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 20 Apr. 2001; Decision on the Appellant's Motion for Access to Confidential Tribunal Decisions, and for Additional Extension of Time, 24 May 2001.
[1683] Appellant's Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September, 18 June 2001, confidential.
[1684] Declarations and Exhibits in Support of Appellant's Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September, 18 June 2001, confidential.
[1685] Appellant's Response to Appeals Chamber's Order of 06 September 2001 Regarding the Filing of a Public Version of Appellant's 18 June 2001 Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence Pursuant to Rule 115, 13 Sept. 2001.
[1686] Appellant's Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000, 13 Sept. 2001.
[1687] Declarations and Exhibits in Support of Appellant's Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 26 September 2000, 13 Sept. 2001.
[1688] Decision on the "Appellant's Request for Authorization to Exceed the Page Limit for Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115," 18 Oct. 2001.

of the Rules.[1689] Following an order granting an extension of time and authorization to exceed the applicable page limit,[1690] the Prosecution submitted its response on 10 December 2001.[1691]

17. Following a decision granting an extension of time,[1692] the Appellant filed confidentially his reply brief in relation to his Second Rule 115 Motion on 7 January 2002.[1693] Public redacted versions of the Second Rule 115 Motion[1694] and the Prosecution's Response to the Appellant's Second Rule 115 Motion[1695] were filed on 7 March 2002. A redacted version of the Appellant's Reply Brief in Support of his Second Rule 115 Motion was also filed on 7 March 2002.[1696]

3. Third Rule 115 Motion

18. Upon authorization to exceed the applicable page limit,[1697] the Appellant filed confidentially his third motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules,[1698] and exhibits[1699] on 10 June 2002. Following two decisions granting an extension of time,[1700] the Prosecution, on 12 August 2002, filed confidentially its response to the Appellant's Third Rule 115 Motion.[1701]

19. Following an order granting an extension of time and authorization to exceed the applicable page limit,[1702] the Appellant filed confidentially his reply memorandum in support of his Third Rule 115 Motion on 9 September 2002.[1703] The Appellant also filed supplemental declarations in support

[1689] Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 ("Second Rule 115 Motion"), 18 Oct. 2001, confidential.
[1690] Order Granting Extension of Time, 1 Nov. 2001.
[1691] Prosecution Response to Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 10 Dec. 2001, made confidential on 11 Dec. 2001 ("Response to the Appellant's Second Rule 115 Motion").
[1692] Decision on Appellant's Request for Extension of Time and Page Limit to Reply to the Prosecutor's Response to Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 14 Dec. 2001.
[1693] Appellant's Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 Jan. 2002, confidential, ("Appellant's Reply Brief in Support of his Second Rule 115 Motion").
[1694] Redacted Version of Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 Mar. 2002.
[1695] Public Redacted Version of "Prosecution Response to Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115," 7 Mar. 2002.
[1696] Redacted Version of Appellant's Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 Mar. 2002.
[1697] Decision on the "Appellant's Request for Authorization to Exceed the Page Limit for Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115," 10 Apr. 2002.
[1698] Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 ("Third Rule 115 Motion"), 10 June 2002, confidential.
[1699] Exhibits to Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 10 June 2002, confidential.
[1700] Decision on Prosecution's Request for an Extension of Time and for an Authorisation to Exceed the Page Limit for its Response to the Appellant's Third Rule 115 Motion, 18 June 2002, confidential; Decision on "Prosecution Urgent Request for an Additional Extension of Time for Its Response to the Appellant's Third 115 Motion," 12 July 2002.
[1701] Prosecution Response to Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 12 Aug. 2002, confidential.
[1702] Decision on Motion for Extension of Time and Page Limits for Appellant's Reply, 28 Aug. 2002.
[1703] Appellant's Reply Memorandum in Support of Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 9 Sept. 2002, confidential.

of his reply memorandum confidentially on 9 September 2002.[1704] The Prosecution filed a confidential request for leave to file a supplemental response to the Appellant's Third Rule 115 Motion on 9 October 2002,[1705] and the Appellant filed a confidential response to this request on 21 October 2002.[1706] The Prosecution's request was denied on 31 October 2002.[1707]

20. The Prosecution filed a confidential motion to disallow evidence filed for the first time in the reply brief to the Appellant's Third Rule 115 Motion on 18 September 2002.[1708] The Appellant filed a response to this motion confidentially on 30 September 2002,[1709] and the Prosecution filed a confidential reply on 4 October 2002.[1710] The Appeals Chamber issued a confidential decision on the Prosecution's motion on 28 November 2002.[1711]

4. Fourth Rule 115 Motion

21. Upon authorization to exceed the applicable page limit,[1712] on 12 May 2003, the Appellant filed confidentially his fourth motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules.[1713] On 20 May 2003, the Appellant filed confidential exhibits in support of his Fourth Rule 115 Motion.[1714] The Appellant filed a confidential, corrected version of his Fourth Rule 115 Motion on 13 June 2003;[1715] a public redacted version on 8 August 2003;[1716] and exhibits in support of his motion on 11 August 2003.[1717]

[1704] Supplemental Declarations Filed in Support of Appellant's Reply Memorandum in Support of Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 9 Sept. 2002, confidential.
[1705] Prosecution's Request for Leave to File Supplemental Response and Supplemental Response to Appellant's Third Motion to Admit Additional Evidence on Appeal, 9 Oct. 2002, confidential.
[1706] Appellant's Response to Prosecution's Request for Leave to File Supplemental Response and Supplemental Response to Appellant's Third Motion to Admit Additional Evidence on Appeal, 21 Oct. 2002, confidential.
[1707] Order on Prosecution's Request for Leave to File Supplemental Response, 31 Oct. 2002.
[1708] Prosecution Motion to Disallow Evidence and Arguments Filed for First Time in Reply Brief to Appellant's Third Additional Evidence Motion, 18 Sept. 2002, confidential.
[1709] Appellant's Response to Prosecution Motion to Disallow Evidence and Arguments Filed for First Time in Reply Brief to Appellant's Third Additional Evidence Motion, 30 Sept. 2002, confidential.
[1710] Prosecution Reply to "Appellant's Response to Prosecution Motion to Disallow Evidence and Arguments filed for First Time in Reply Brief to Appellant's Third Additional Evidence Motion," 4 Oct. 2002, confidential.
[1711] Decision on Prosecution's Motion to Disallow Evidence and Arguments Filed for the First Time in Reply Brief to Appellant's Third Additional Evidence Motion, 28 Nov. 2002, confidential.
[1712] Order, 8 May 2003.
[1713] Appellant's Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 ("Fourth Rule 115 Motion"), 12 May 2003, confidential.
[1714] Exhibits in Support of Appellant's Fourth Motion to Admit Additional Evidence on Appeal pursuant to Rule 115, 20 May 2003, confidential.
[1715] Appellant's Corrected Fourth Motion to Admit Additional Evidence on Appeal pursuant to Rule 115, 13 June 2003, confidential.
[1716] Redacted Public Version of Appellant's Corrected Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 8 Aug. 2003.
[1717] Exhibits in Support of Redacted Public Version of Appellant's Corrected Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 11 Aug. 2003.

22. Upon authorization to exceed the applicable page limit,[1718] the Prosecution filed confidentially its response to the Appellant's Fourth Rule 115 Motion on 18 June 2003.[1719] A corrected version of its response was filed on 30 June 2003,[1720] and a public redacted version on 21 August 2003.[1721]

23. Upon authorization to exceed the applicable page limit,[1722] the Appellant filed his confidential reply brief in support of his Fourth Rule 115 Motion on 30 June 2003.[1723] Pursuant to an order issued by the Appeals Chamber on 28 January 2004,[1724] the Appellant filed on 9 February 2004, a supplemental redacted reply brief in support of his Fourth Rule 115 Motion,[1725] and a supplemental redacted corrected version of his Fourth Rule 115 Motion.[1726]

5. Other

24. On 27 July 2004, the Appellant filed confidentially a "Request for Emergency Hearing", whereby he submitted that the Prosecution had produced exculpatory evidence and requested a hearing on the matter.

6. Rebuttal Material

25. The Appeals Chamber instructed the Prosecution to file material rebutting the clearly admissible evidence identified in the Scheduling Order dated 31 October 2002, by 6 January 2003.[1727] On 7 January 2003, the Prosecution filed a request for an extension of time for filing its rebuttal material and accompanying arguments and for authorisation to exceed the applicable page limit,[1728] and its rebuttal evidence and arguments in relation to the Appellant's first three Rule 115

[1718] Decision on Prosecution's Request for an Extension of Time and for Authorization to Exceed the Page Limit for Its Response to the Appellant's Fourth Rule 115 Motion, 29 May 2003.
[1719] Prosecution's Response to Appellant's Fourth Additional Evidence Motion Pursuant to Rule 115, 18 June 2003, confidential.
[1720] Corrected Version of Prosecution's Response to Appellant's Fourth Additional Evidence Motion Pursuant to Rule 115, 30 June 2003, confidential; Corrigenda to Prosecution's Response to Appellant's Fourth Additional Evidence Motion Pursuant to Rule 115, 30 June 2003, confidential.
[1721] Public Redacted Version of the Corrected Version of the Prosecution's Response to the Appellant's Fourth Additional Evidence Motion Pursuant to Rule 115, 21 Aug. 2003.
[1722] Decision on Appellant's Request for Extension of Page Limits, 26 June 2003.
[1723] Appellant's Reply Brief in Support of Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 30 June 2003, confidential.
[1724] Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 January.
[1725] Appellant's Supplemental Redacted Reply Brief in Support of Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 9 Feb. 2004, confidential.
[1726] Appellant's Supplemental Redacted Corrected Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 9 Feb. 2004, confidential.
[1727] Scheduling Order, 22 Nov. 2002.
[1728] Prosecution's Request for Extension of Time for Filing its Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal and Variation of Page Limits, 7 Jan. 2003.

Motions.[1729] The Appeals Chamber recognised the First Filing as valid on 9 January 2003.[1730] A public redacted version of its First Filing was filed on 24 January 2003.[1731]

26. Following two decisions granting extensions of time,[1732] the Appellant filed confidentially his opposition to the First Filing on 3 March 2003.[1733] A public redacted version of the Appellant's Opposition to the First Filing was filed on 7 April 2003.[1734]

27. Judge Pocar, Pre-Appeal Judge, held a status conference on 24 June 2003, at which the parties agreed that the Prosecution would file its rebuttal material regarding the Appellant's Fourth Rule 115 Motion within three weeks of that date. On 16 July 2003, the Prosecution filed confidentially its rebuttal material and arguments in response to the Appellant's Fourth Rule 115 Motion.[1735] On 22 August 2003, the Prosecution filed a public redacted version of its Second Filing.[1736]

28. On 24 July 2003, the Appeals Chamber granted an extension of time for the Appellant to file his response to the Prosecution's Second Filing.[1737] The Appellant filed confidentially his response to the Prosecution's Second Filing on 4 August 2003.[1738]

29. On 15 August 2003, the Prosecution filed confidentially its reply to the Appellant's Opposition to the Second Filing[1739] and a public redacted version on 22 August 2003.[1740] On 25

[1729] Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal, 7 Jan. 2003 ("First Filing").
[1730] Decision on the Prosecution's Request for Extension of Time for Filing its Rebuttal Evidence and Variation of Page Limits, 9 Jan. 2003. The Prosecution filed confidentially the "Prosecution's Notice of Redactions and Corrigenda to Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal Dated 6 January 2003" on 24 Jan. 2003.
[1731] Public Redacted Version of the Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal (Dated 6 January 2003), 24 Jan. 2003.
[1732] Decision on Appellant's Application for Extension of Filing Deadline and Page Limits, 15 Jan. 2003; Decision on Appellant's Application for Further Extension of Filing Deadline, 6 Feb. 2003, confidential.
[1733] Appellant's Opposition to Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal, 3 Mar. 2003 ("Appellant's Opposition to the First Filing").
[1734] Public Redacted Version of Appellant's Opposition to Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal, 7 Apr. 2003.
[1735] Prosecution's Rebuttal Evidence and Arguments in Response to Appellant's Fourth Additional Evidence Motion on Appeal, 16 July 2003, confidential ("Second Filing").
[1736] Public Redacted Version of the Prosecution's Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 22 Aug. 2003; Notice Regarding the Redaction of the Prosecution's Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 22 Aug. 2003.
[1737] Decision on Appellant's Request for Extension of Page Limits and Filing Deadline, 24 July 2003.
[1738] Appellant's Opposition to Prosecution's Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 4 Aug. 2003, confidential ("Appellant's Opposition to the Prosecution's Second Filing").
[1739] Prosecution's Reply to the Appellant's Opposition to Prosecution's Rebuttal Evidence and Argument in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 15 Aug. 2003, confidential ("Prosecution's Reply to the Appellant's Opposition to the Prosecution's Second Filing").

August 2003, Judge Pocar, Pre-Appeal Judge, issued an order recognizing as valid the filing of the Prosecution's Reply to the Appellant's Opposition to the Prosecution's Second Filing and directing the Appellant to file a further reply by 1 September 2003.[1741] On 1 September 2003, the Appellant filed confidentially a further reply.[1742] A confidential supplemental redacted Sur-Reply was filed on 9 February 2004.[1743]

30. On 27 July 2004, the Prosecution filed confidentially the "Prosecution's Urgent Motion for the Admission of Rebuttal Evidence", in which it sought to admit a report. On 28 July 2004, the Appeals Chamber issued the confidential "Decision on Prosecution's Urgent Motion for the Admission of Rebuttal Evidence," rejecting the motion.

7. Oral Argument

31. On 21 November 2002, and pursuant to the Scheduling Orders of 31 October 2002 and 14 November 2002, the Appeals Chamber held a hearing during which the parties presented oral argument on whether the clearly admissible evidence justified a new trial by a Trial Chamber, on some or all of the counts charged in the Indictment.[1744] The Appellant filed his Book of Authorities on 15 November 2002,[1745] and the Prosecution filed its Book of Authorities on 18 November 2002.[1746] On 31 October 2003, the Appeals Chamber ruled that a re-trial was not warranted.[1747]

8. Appeals Chamber Decisions on the Rule 115 Motions

32. On 31 October 2002, the Appeals Chamber set out those items of additional evidence submitted on appeal which it considered were "clearly admissible."[1748] On 31 October 2003, the Appeals Chamber issued its decision on the Appellant's First, Second, and Fourth Rule 115 Motions, whereby it admitted 108 items as additional evidence and rebuttal material.[1749] On 28 July 2004, the Appeals Chamber issued a confidential "Decision on Appellant Tihomir Blaskic's

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[1740] Public Redacted Version of the Prosecution's Reply to the "Appellant's Opposition to Prosecution's Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal," 22 Aug. 2003.
[1741] Order, 25 Aug. 2003.
[1742] Appellant's Sur-Reply to Prosecution's Reply to the Appellant's Opposition to Prosecution's Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 1 September 2003, confidential ("Sur-Reply").
[1743] Appellant's Supplemental Redacted Sur-Reply to Prosecution's Reply to Appellant's Opposition to Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal, 9 Feb. 2004, confidential.
[1744] Scheduling Order, 31 Oct. 2002.
[1745] Appellant's Notice of Lodging of Book of Authorities in Accordance with the Appeals Chamber's Scheduling Order of 31 October 2002, 15 Nov. 2002.
[1746] Prosecution's Book of Authorities for 21 Nov. 2002 Hearing, 18 Nov. 2002.
[1747] Decision on Evidence, 31 Oct. 2003.
[1748] Scheduling Order, 31 Oct. 2002.

Request for Emergency Hearing," whereby the Appeals Chamber interpreted the Appellant's request as a motion pursuant to Rule 115 of the Rules with respect to two of the exhibits proffered therein, and rejected the request.

C. Applications Pursuant to Rule 75 of the Rules

33. The Appeals Chamber has been seised of several requests for access to confidential material pursuant to Rule 75 of the Rules filed by the Prosecution, the Appellant, and other accused and appellants, particularly from related Lašva Valley cases. In addressing these numerous requests, the Appeals Chamber issued twenty decisions and orders, regarding access to confidential material and variation of protective measures.[1750]

D. Assignment of Judges

34. On 12 April 2000, the then-Vice President of the International Tribunal, Judge Mumba, exercised the functions of the President pursuant to Rule 21 of the Rules, issuing an order assigning the following Judges to the Appeals Chamber, subject to Rule 22(B) of the Rules: Judges Vohrah, Nieto-Navia, Wald, Pocar, and Liu.[1751] On 8 June 2000, the then-Presiding Judge, Judge Vohrah, designated Judge Pocar as the Pre-Appeal Judge in this case.[1752]

35. On 23 November 2001, pursuant to Article 14 of the Statute of the International Tribunal and Rule 27 of the Rules, Judge Jorda, the then-President of this Tribunal, issued an order

[1749] Decision on Evidence, 31 Oct. 2003. A separate confidential decision regarding the Third Rule 115 Motion was issued on 31 Oct. 2003.
[1750] In light of the numerous decisions and orders issued, only some representative examples will be referenced here. *See, e.g.*, Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber Regarding Redaction of the Statement of "Witness Two" for the Purposes of Disclosure to Dario Kordić Under Rule 68, 4 Mar. 2004, confidential; Decision on Joint Defence Motion of Enver Hadžihasanović and Amir Kubura for Access to Further Confidential Materials in the Appeal Proceedings of the Blaškić Case, 3 Mar. 2004; Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 Jan. 2004; Decision on "Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadžihasanović, Alagić and Kubura of 24 January 2003, 26 May 2003; Decision on Dario Kordić and Mario Čerkez's Second Supplemental Request for Access to Confidential Material, 25 Feb. 2003; Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić*, 27 Jan. 2003; Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits, 4 Dec. 2002; Decision on Appellant Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Protected Information, 20 Nov. 2002; Decision on Appellants Dario Kordić and Mario Čerkez's Supplemental Request for Assistance in Gaining Access to Non-Public Post Trial Submissions, Appellate Briefs, and Hearing Transcripts Filed in *The Prosecutor v. Blaškić*, 16 Oct. 2002; Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in *The Prosecutor v. Blaškić*, 16 May 2002; Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits from the Aleksovski Case, 8 Mar. 2002; Decision on the Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits, 4 July 2001.
[1751] Order for the Assignment of Judges to the Appeals Chamber, 12 Apr. 2000.
[1752] Order Appointing a Pre-Appeal Judge and Scheduling Order, 8 June 2000.

composing the bench of the Appeals Chamber in this case as follows: Judges Hunt, Güney, Gunawardana, Pocar, and Meron.[1753]

36. On 18 June 2003, Judge Meron, President of the International Tribunal, issued an order assigning Judge Weinberg de Roca to replace Judge Gunawardana on the case and composing the bench of the Appeals Chamber in this case as follows: Judges Meron, Pocar, Hunt, Güney, and Weinberg de Roca.[1754]

37. On 6 August 2003, Judge Meron, President of the International Tribunal, issued an order pursuant to Articles 12(3) and 14(3) of the Statute of the International Tribunal and Rule 27 of the Rules, assigning Judge Schomburg to replace Judge Hunt on the bench of the Appeals Chamber and composing the bench of the Appeals Chamber in this case as follows: Judges Meron, Pocar, Güney, Schomburg, and Weinberg de Roca.[1755]

38. On 9 September 2003, Judge Meron, President of the International Tribunal, issued an order pursuant to Articles 12(3) and 14(3) of the Statute of the International Tribunal and Rule 27 of the Rules, assigning Judge Mumba to replace himself on the bench of the Appeals Chamber and composing the bench of the Appeals Chamber in this case as follows: Judges Pocar, Mumba, Güney, Schomburg, and Weinberg de Roca.[1756]

39. On 3 October 2003, Judge Pocar issued an Order noting that, pursuant to Rule 22(B) of the Rules, he had been elected as Presiding Judge of the Appeals Chamber in this Appeal and reaffirming his status as the Pre-appeal Judge, pursuant to Rule 65*ter* and Rule 107 of the Rules.[1757]

E. Status Conferences

40. Status Conferences were held in accordance with Rule 65*bis* of the Rules on 4 July 2000; 26 October 2000; 21 February 2001; 18 June 2001; 18 October 2001; 14 February 2002; 3 June 2002; 3 October 2002; 26 February 2003; 24 June 2003; 28 October 2003; and 29 March 2004.

F. Hearings

41. After issuing its decision on the admission of additional evidence on appeal, and in light of the fact that transcripts of witness testimony were admitted pursuant to Rule 115 of the Rules, the

[1753] Order of the President on the Composition of the Appeals Chamber for a Case, signed 23 Nov. 2001, filed in French on 23 Nov. 2001, filed in English on 12 Dec. 2001; Corrigendum, signed on 27 Nov. 2001, filed in English on 12 Dec. 2001.
[1754] Order Assigning a Judge to a Case Before the Appeals Chamber, 18 June 2003.
[1755] Order Replacing a Judge in a Case Before the Appeals Chamber, 6 Aug. 2003.
[1756] Order Replacing a Judge in a Case Before the Appeals Chamber, 9 Sept. 2003.
[1757] Order Affirming the Pre-Appeal Judge, 3 Oct. 2003.

Appeals Chamber decided to hear six witnesses during the evidentiary portion of the hearing on appeal, which took place from 8 to 11 December 2003, pursuant to the Appeals Chamber's Scheduling Order of 31 October 2003[1758] as amended by the Scheduling Orders of 18 November 2003[1759] and of 2 December 2003.[1760] The Appeals Chamber heard final oral arguments on 16 and 17 December 2003.

G. Other Issues

42. On 13 April 2004 the Appellant filed a confidential Notice of Substitution of Counsel, informing the Appeals Chamber that he had substituted Mr. Russell Hayman and McDermont, Will and Emery as his attorney of record and that, consequently, Mr. Andrew Paley and Latham and Watkins LLP were no longer appearing as co-counsel for the Appellant.[1761]

[1758] Scheduling Order, 31 Oct. 2003.
[1759] Scheduling Order, 18 Nov. 2003.
[1760] Scheduling Order Amending Prior Scheduling Order and Setting the Schedule for the Final Arguments, 2 Dec. 2003.
[1761] Notice of Substitution of Counsel, signed 8-9 Apr. 2004, filed 13 Apr. 2004, confidential.

XVII. ANNEX B: GLOSSARY OF TERMS

A. List of International Tribunal and Other Decisions

1. International Tribunal

ALEKSOVSKI

Aleksovski Trial Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T, Judgement, 25 June 1999
Aleksovski Appeal Judgement	*Prosecutor v. Zlatko Aleksovski,* Case No.: IT-95-14/1-A, Judgement, 24 March 2000

BABIĆ

Babić Sentencing Judgement	*Prosecutor v. Milan Babić*, Case No.: IT-03-72-S, Sentencing Judgement, 29 June 2004

BLAŠKIĆ

Trial Judgement	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-T, Judgement, 3 March 2000

ČELEBIĆI

Čelebići Trial Judgement	*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No.: IT-96-21-T, Judgement, 16 November 1998
Čelebići Appeal Judgement	*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No.: IT-96-21-A, Judgement, 20 February 2001

FURUNDŽIJA

Furundžija Trial Judgement	*Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998
Furundžija Appeal Judgement	*Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000

GALIĆ

Galić Trial Judgement	*Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-T, Judgement and Opinion, 5 December 2003

JELISIĆ

Jelisić Trial Judgement	*Prosecutor v. Goran Jelisić*, Case No.: IT-95-10-T, Judgement, 14 December 1999
Jelisić Appeal Judgement	*Prosecutor v. Goran Jelisić*, Case No.: IT-95-10-A, Judgement, 5 July 2001

JOKIĆ

Jokić Sentencing Judgement	*Prosecutor v. Miodrag Jokić*, Case No.: IT-01-42/1-S, Sentencing Judgement, 18 March 2004

KORDIĆ AND ČERKEZ

Kordić Trial Judgement	*Prosecutor v. Dario Kordić & Mario Čerkez*, Case No.: IT-95-14/2-T, Judgement, 26 February 2001

KRNOJELAC

Krnojelac Trial Judgement	*Prosecutor v Milorad Krnojelac*, Case No.: IT-97-25-T, Judgement, 15 March 2002
Krnojelac Appeal Judgement	*Prosecutor v Milorad Krnojelac*, Case No.: IT-97-25-A, Judgement, 17 September 2003

KRSTIĆ

Krstić Trial Judgement	*Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-T, Judgement, 2 August 2001
Krstić Appeal Judgement	*Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-A, Judgement, 19 April 2004

KUNARAC

Kunarac Trial Judgement	*Prosecutor v. Dragoljub Kunarac et al.,* Case No.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Kunarac Appeal Judgement	*Prosecutor v. Dragoljub Kunarac et al.,* Case No.: IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002

KUPREŠKIĆ

Kupreškić Trial Judgement	*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić, a.k.a. "Vlado*, Case No.: IT-95-16-T, Judgement, 14 January 2000
Kupreškić Appeal Judgement	*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić*, Case No.: IT-95-16-A, Judgement, 23 October 2001

KVOČKA

Kvočka Trial Judgement	*Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No.: IT-98-30/1-T, Judgement, 2 November 2001

NALETILIĆ

Naletilić Trial Judgement	*Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No.: IT-98-34-T, 31 March 2003

PLAVŠIĆ

Plavsić Sentencing Judgement	*Prosecutor v. Biljana Plavšić,* Case No.: IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003

SIKIRICA

Sikirica Sentencing Judgement	*Prosecutor v. Duško Sikirica et.al.*, Case No.: IT-95-8-S, Sentencing Judgement, 13 November 2001

SIMIĆ

Simić Trial Judgement	*Prosecutor v. Blagoje Simić et.al.*, Case No.: IT-95-9-T, Judgement 17 October 2003

STAKIĆ

Stakić Trial Judgement	*Prosecutor v. Milomir Stakić*, Case No.: IT-97-24-T, Judgement, 31 July 2003

TADIĆ

Tadić Jurisdiction Decision	*Prosecutor v. Duško Tadić*, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadić Trial Judgement	*Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Judgement, 7 May 1997
Tadić Appeal Judgement	*Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Judgement, 15 July 1999
Tadić Judgement in Sentencing Appeals	*Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000

TODOROVIĆ

Todorović Sentencing Judgement	*Prosecutor v. Stevan Todorović*, Case No.: IT-95-9/1-S, Sentencing Judgement, 31 July 2001

VASILJEVIĆ

Vasiljević Trial Judgement	*Prosecutor v. Mitar Vasiljević*, Case No.: IT-98-32-T, Judgement, 29 November 2002
Vasiljević Appeal Judgement	*Prosecutor v. Mitar Vasiljević*, Case No.: IT-98-32-A, Judgement, 25 February 2004

2. ICTR

AKAYESU

Akayesu Trial Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No.: ICTR-96-4-T, Judgement, 2 September 1998
Akayesu Appeal Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No.: ICTR-96-4-A, Judgement, 1 June 2001

BAGILISHEMA

Bagilishema Appeal Judgement	*Prosecutor v. Ignace Bagilishema*, Case No.: ICTR-95-1A-A, Judgement (Reasons), 3 July 2002

KAMBANDA *Kambanda*	*Prosecutor v. Jean Kambanda,* Case No.: ICTR-97-23-S, Judgement and Sentence, 4 September 1998

KAYISHEMA AND RUZINDANA

Kayishema and Ruzindana	*Prosecutor v. Clément Kayishema & Obed Ruzindana*,

Trial Judgement	Case No.: ICTR-95-T, Judgement, 21 May 1999
Kayishema and Ruzindana Appeal Judgement	*Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No.: ICTR-95-1-A, Judgement (Reasons), 1 June 2001

MUSEMA

Musema Trial Judgement	*Prosecutor v. Alfred Musema*, Case No.: ICTR-96-13-T, Judgement, 27 January 2000
Musema Appeal Judgement	*Prosecutor v. Alfred Musema*, Case No.: ICTR-96-13-A, Judgement, 16 November 2001

SERUSHAGO

Serushago Sentencing Judgement	*Prosecutor v. Omar Serushago,* Case No. ICTR-98-39-A, Sentence, 5 February 1999

3. Other Decisions

THE GERMAN HIGH COMMAND TRIAL

The German High Command Trial	Case No. 72, Law Reports of the Trials of War Criminals, (30 December 1947 – 28 October 1948), Vol. XII, p. 1.
Law Reports Digest of Laws and Cases	Law Reports of the Trials of War Criminals, (30 December 1947 – 28 October 1948), Vol. XV

B. Other Abbreviations

According to Rule 2 (B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

21 November 2002 Hearing	Oral submissions by the parties on issue of whether a new trial was warranted.
ABiH	Armed Forces of the Government of Bosnia and Herzegovina
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
Appellant	Tihomir Blaškić and his counsel on appeal

Appellant's Brief	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Brief on Appeal (confidential), 14 January 2002; the revised, redacted version was filed on 4 July 2002. All references to the Appellant's Brief in the Judgement are references to the revised, redacted version filed on 4 July 2002.
AT	Transcript of the appeal hearing
BCS	Bosnian Croatian Serbian language
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina
Brief in Reply	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Brief in Reply (confidential), 3 June 2002; the public version was filed on 14 June 2002
BRITBAT	UNPROFOR British Battalion
Cassesse, A. *International Criminal Law*	Cassesse, A. *International Criminal Law* Oxford (2003)
CBOZ	Central Bosnia Operative Zone
Commentary to Geneva Convention III	Commentary, III Geneva Convention relative to the Treatment of Prisoners of War (1949), International Committee of the Red Cross, Geneva, 1960
Commentary to Geneva Convention IV	Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), International Committee of the Red Cross, Geneva, 1958
Common Article 3	Article 3 of Geneva Conventions I through IV
Croatia	Republic of Croatia
D	Defence, as in Ex. D999 denotes Defence Exhibit 999
Decision on Evidence	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Decision on Evidence, 31 October 2003
Defence exhibits	Exhibits tendered by the Defence and admitted into evidence by the Chamber
Džokeri or Jokers	A unit within the 4th Battalion of the Military Police
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
ECMM	European Community Monitor Mission
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
Eur Ct HR	European Court of Human Rights
Ex.	Exhibit
First Filing	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal, (confidential) 7 January 2003

First Rule 115 Motion	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Brief in Support of Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, in Accordance with the Appeals Chamber's Decision of 6 September 2000, filed on 19 January 2001
Fourth Rule 115 Motion	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Fourth Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, (confidential) 12 May 2003
FRY	Federal Republic of Yugoslavia
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
Hague Convention IV	The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907
HDZ	Croatian Democratic Union
HDZ-BiH	Croatian Democratic Union of Bosnia and Herzegovina
HOS	Croatian Defence Forces (military wing of the Croatian Party of Rights)
HR H-B	Croatian Republic of Herceg-Bosna
HV	Army of the Republic of Croatia
HVO	Croatian Defence Council (army of the Bosnian Croats)
HZ H-B	Croatian Community of Herceg-Bosna
Rome Statute	Rome Statute of the International Criminal Court, Adopted at Rome on 17 July 1998, PCNICC/1999/INF/3
ICCPR	International Covenant on Civil and Political Rights, 1966

ICRC Commentary(Additional Protocols)	Y. Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (International Committee of the Red Cross, Geneva, 1987)
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ILC Report	Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UNGA, Official Records, 51st Session, Supplement No.10 (A/51/10)
Indictment or Second Amended Indictment	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-T, Second Amended Indictment, filed 26 March 1999
International Convention against the taking of hostages	International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979, U.N.T.S. Vol. 1316
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav Peoples' Army
Jokers or Džokeri	A unit within the 4th Battalion of the Military Police
MP 4th Battalion	Fourth Battalion of the Military Police
MUP	Ministry of the Interior Police
NŠZ Brigade	Nikola Šubić Zrinski Brigade
PA	Evidence admitted in the present appeal to rebut the additional evidence admitted by the Appeals Chamber pursuant to the 31 October 2003 Decision on Evidence; as in Ex. PA99 denotes Prosecution Rebuttal Material number 99.
P	Prosecution, as in Ex. P999 denotes Prosecution Trial Exhibit 999
Prosecution	The Office of the Prosecution
Prosecution Exhibits	Exhibits tendered by the Prosecutor and admitted into evidence by the Chamber
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808/1993

Respondent's Brief	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Prosecution's Response to the Defence Appeal Brief (confidential), 1 May 2002; the public version was filed on 14 June 2002
Rule 115 Decision	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Decision on Evidence, 31 October 2003
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the Tribunal
SDA	Party of Democratic Action
Second Filing	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Rebuttal Evidence and Arguments in Response to the Appellant's Fourth Additional Evidence Motion on Appeal (confidential), 16 July 2003
Second Rule 115 Motion	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellants' Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, (confidential) 18 October 2001
SFRY	*Former* Socialist Federal Republic of Yugoslavia
SIS	HVO Security and Information Service
Supplemental Brief	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Supplemental Brief on Appeal (confidential), 1 December 2003; redacted, public version was filed on 22 March 2004
T	Transcript of the trial hearings in the present case. All transcript pages referred to in this Judgement are taken from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Third Rule 115 Motion	*Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, (confidential) 10 June 2002
TO	Territorial Defence
Tribunal	*See* International Tribunal
UNPROFOR	United Nations Protection Forces
Viteška Brigade	*See* Vitez Brigade
Vitez Brigade	An HVO regular brigade located in Vitez and commanded by Mario Čerkez
Vitezovi	A special purpose unit located at the Dubravica school, and commanded by Darko Kraljević and his deputy Niko Križanac. Its members were former HOS members.