Case: IT-04-82-A
Date: 12 January 2009

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE APPEALS CHAMBERS
Before: Judge Mehmet Güney, Pre-Appeal Judge
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. John Hocking, Acting Registrar

Date Filed: 12 January 2009

THE PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC - REDACTED

BRIEF OF JOHAN TARČULOVSKI

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No.: IT-04-82-T

THE PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

TARČULOVSKI APPELLATE BRIEF

1. This Brief was originally due on 23 October 2008. Pursuant to the extension granted in the Decision dated 22 October 2008, this Brief is presently due on 12 January 2009.

I. PROCEDURAL BACKGROUND

2. This is the only case concerning events occurring in Macedonia brought before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY").[1]

3. The Indictment covers the period from 12 August 2001 through 15 August 2001. It alleges that on 12 August, the village of Ljuboten came under a combined attack by the police and the army of Macedonia. In the course of the attack, the police allegedly shot seven Ljuboten residents. The Indictment further alleges that at least fourteen houses in the village were set on fire by the police and that a group of ethnic Albanian residents were seriously beaten.[2] It alleges that Johan Tarčulovski was individually criminally

[1] Macedonia is referred to as "The Former Yugoslavian Republic of Macedonia ("FYROM)," pursuant to a resolution of the UN General Assembly dated 8 April 1993. See *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (IT-04-82-T), Judgement, n.1. In this Brief, FYROM will be referred to as Macedonia.

[2] Amended Indictment.

responsible, pursuant to ICTY Article 7(1), because he "committed" the crimes as a member of a Joint Criminal Enterprise ("JCE"), and also was responsible for ordering, planning and instigating the charged crimes because, *inter alia*, he "was present and provided leadership and personal guidance in the ground attack and was present at the scenes of individual crimes charged in this Amended Indictment."[3]

4. Lujbe Boškoski, Minister of the Ministry of Interior ("MoI") of Macedonia, was charged with individual criminal responsibility under Article 7(3) of the ICTY Statute. The Amended Indictment alleges that, as a superior, he was criminally responsible for the commission of crimes of the regular and reserve police, as well as for the acts or omissions of those police. It alleges that he had exercised *de jure* and *de facto* control over the police that participated in the charged crimes and had knowledge of the crimes committed by his subordinates. Further, it alleges that from 12 August 2001 until May 2002, when the ICTY Prosecutor notified the Macedonian authorities of her decision to take primacy of, *inter alia*, the Ljuboten case, Boškoski had a duty as a superior to investigate the crimes committed and to impose punitive measures on the perpetrators, and that he did not do so.[4]

5. On 10 July 2008, Trial Chamber II rendered its Judgement in the Matter of *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (IT-04-82-T).

6. Boškoski was acquitted of all charges. The Prosecutor has appealed. The Trial Chamber found Johan Tarčulovski guilty of Murder, pursuant to Article 3 of the Statute (Count 1), Wanton Destruction of Cities, Towns Or Villages, pursuant to Article 3 (Count 2), and Cruel Treatment, pursuant to Article 3 (Count 3), for ordering, planning, and/or instigating all these crimes pursuant to Article 7(1) of the Statute.[5] Tarčulovski was convicted of three of the

[3] Amended Indictment, para. 9, incorporating paras. 6-6(i).
[4] Amended Indictment, paras. 11-17.
[5] Judgement, para. 607.

seven murders charged against him (Rami Jusufi, Sulejman Bajrami and Muharem Ramadani), and also was convicted of the wanton destruction of twelve civilian properties, and of the cruel treatment of thirteen villagers in two separate locations.

7. Tarčulovski was acquitted of aiding and abetting these crimes. He was also acquitted of committing the crimes by taking part in a JCE.

8. Tarčulovski was sentenced to a single sentence of twelve years imprisonment.[6]

II. INTRODUCTION

9. Tarčulovski respectfully submits that the Trial Chamber committed errors of law that have the effect of invalidating the Judgement and/or errors of fact that have occasioned a miscarriage of justice.[7]

10. In 2001, Albanian extremists – the "NLA" – began to take action in what had been, before that, a peaceful and sovereign nation. The United Nations Security Council ("UN Security Council") recognized the problem, and directed the Macedonian government to address it.

11. On 12 August 2001, two days after an NLA land mine killed eight police officers (and a determination by Macedonia's own Security Council that the problem had to be addressed), an operation was staged and conducted in Ljuboten by Macedonian police officers, employees of MoI, which resulted in the death or capture of several terrorists who had been hiding in that village, and the deaths of three other men who were not shown to have been terrorists. In the course of the operation, civilians were mistreated; a number of homes were destroyed.

12. Ultimately, Ljube Boškoski, then head of the MoI, and Johan Tarčulovski, a police officer who had provided security to the wife of Macedonia's

[6] Judgement, para. 608.
[7] *Oric* Appeals Judgement, para. 7.

president, were charged by the ICTY prosecutor and brought to trial for crimes alleged to have occurred in Ljuboten on 12 August.

13. Boškoski was acquitted, but Tarčulovski was held criminally liable for "planning, ordering, or instigating" some of the crimes charged, including the murders of the three residents of Ljuboten.

14. This appeal raises broad and important issues with respect to what a sovereign may do in response to terrorist activities committed within its borders by persons who live or hide among civilians. The Tribunal can exercise subject matter jurisdiction only if the sovereign's effort to defend itself against such terrorist activity violates clearly articulated, pre-existing "laws and customs of war." The issues raised in this appeal have not been the subject of prior prosecutions or definitive rulings by this Tribunal or other international courts. The Prosecution attempted to avoid these important and troubling questions, questions as to which there exists no consensus in the international community, by simply taking the position that this operation was "an attack upon civilians." If that were so, then the case would be an easy one. But that overly simplistic position skirts the profound issues this case poses.

15. Tarčulovski's convictions and twelve year sentence must be set aside. First, this case was not properly within ICTY's jurisdiction because the UN Security Council had directed Macedonia to address the NLA/terrorist problem and because the sovereign state of Macedonia was acting in self defense, and undertook a proper and proportionate response to the terrorist attacks it had suffered. Second, the Prosecution did not prove that Macedonia's acts of self-defense, though they resulted in civilian casualties, violated clearly articulated "laws or customs of war," or that Tarčulovski, individually violated the "laws or customs of war" when he followed lawful orders. Third, even if improper acts occurred while the operation was being carried out, Tarčulovski cannot be held criminally liable because, both as a

matter of fact and of law, his criminal liability was not established.

16. The Trial Chamber failed to grapple with the important legal and factual questions that arise whenever, as here, an individual is charged with crimes that he did not himself perpetrate, with his culpability premised on the theory that he "planned, ordered, or instigated" crimes that other people committed. In such a case, the Prosecution must prove that the Accused had both the requisite *mens rea* and committed the *actus reus* for planning, ordering, or instigating the crimes *and* that the perpetrator had both the requisite *mens rea* and committed the *actus reus* of the crime alleged. Here, the Trial Chamber failed to make the requisite findings, failing even to determine what it is that Tarčulovski is supposed to have planned, ordered or instigated. That is not surprising since the evidence adduced by the Prosecution failed to prove that Tarčulovski planned, ordered, or instigated anything, let alone that he planned, ordered or instigated any of the crimes for which he was convicted.

17. Article 21(3) of the ICTY Statute guarantees an Accused the presumption of innocence, and places the burden of establishing guilt on the Prosecution, on whom that critical burden remains "throughout the entire trial."[8] Rule of Procedure 87 requires that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."[9] The Trial Chamber, if it must, may rely on inferences drawn from the evidence, but the evidentiary standard of proof for an inference is high: an inference relied upon as evidence of guilt must be not only reasonably available from the evidence, but it must be *the only reasonable inference available*.[10] As the Trial Chamber acknowledged, if the evidence reasonably permits another inference that is inconsistent with guilt, "the onus and the standard of proof requires that an acquittal be entered in

[8] Judgement, para. 9.
[9] ICTY Rules, Rule 87(A).
[10] Judgement, para. 9.

respect of that count."[11] In this case, the inferences that were available to be drawn from the evidence were not only consistent with innocence, they were more consistent with innocence than guilt.

18. This vigorous protection of the Accused's rights to a presumption of innocence goes hand in hand with the fundamental principle of *in dubio pro reo*, which dictates that any doubt must be resolved in favor of the Accused.[12] That principle further holds that, at the conclusion of a case, the Accused is entitled to the benefit of the doubt as to whether an offense has been proved beyond a reasonable doubt.[13] As shown below, the Trial Chamber misapplied these cornerstone principles.

19. The Trial Chamber committed three categories of errors in evaluating the evidence, which pervaded the Judgement and which undermined its factual conclusions.

20. First, at the outset of the Judgement, in a section entitled, "Considerations Regarding the Evaluation of Evidence," the Trial Chamber articulated the relevant standards and principles for evaluating the evidence.[14] The Trial Chamber explained why it was appropriate to discount whole categories of testimony, such as testimony from village residents, members of the military, and members of the police, but, then, inconsistently, it relied on tidbits of testimony from persons in these categories that had been wrenched out of context to support the Judgement.

21. It was improper for the Trial Chamber to decide to dismiss categories of witnesses as unreliable rather than to evaluate the credibility of individual witnesses. Moreover, the Trial Chamber's rejection of the testimony of the military and police witnesses was particularly inappropriate because the

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[11] Judgement, para. 9.
[12] *Galić* Appeals Judgement, para. 77, and note 231.
[13] *Galić* Appeals Judgement, para. 77, and note 231.
[14] Judgement, paras. 9-19.

events of 12 August 2001 were a joint military and police operation. By rejecting military and police witnesses, the Trial Chamber made it virtually impossible for Tarčulovski to establish how and why the operation was planned and carried out, and how and why it conformed to the "laws and customs of war." It left the Tribunal in a position of relying upon speculation and suspect inferences to support its conclusion.

22. Second, the Trial Chamber improperly applied the presumption of innocence and reasonable doubt standard contained in Article 21(3) of the ICTY Statute and Rule 87 of the Rule of Procedure. It frequently shifted the burden of proof to Tarčulovski and improperly drew negative inferences from his silence. For example, the Trial Chamber recognized the "limited evidence" concerning Tarčulovski on 12 August 2001.[15] It attributed this to attempts by "more senior police" to protect the men involved.[16] These facts could be condemnatory of Boškoski as the head of MoI, but the "limited evidence" concerning Tarčulovski on 12 August 2001 should have gone far to showing a reasonable doubt existed as to Tarčulovski.

23. Additionally, on the critical question of whether the operation was targeted against members of the NLA, the Trial Chamber relied on the fact that Tarčulovski did not disclose what he was told and by whom to discredit the defense claim, supported by other evidence, that Tarčulovski had been told of the specific presence of members of the NLA in the specific targeted locations.[17] The Trial Chamber similarly relied upon the fact that Tarčulovski remained silent when asked who was with him in Ljuboten. This improperly shifted the burden to Tarčulovski to establish his innocence, in violation of his right to remain silent.

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[15] Judgement, para. 547.
[16] Judgement, para. 547.
[17] Judgement, para. 572.

24. Third, the Trial Chamber articulated the doctrine of *in dubio pro reo*, but, as implemented, with regard to material facts needed to prove an element of the offense,[18] frequently rejected reasonable inferences which supported the Accused, and drew the opposite inferences.

25. For example, the Trial Chamber inferred that the goal of the "operation" was to kill civilians because civilians were killed. This circular reasoning provided the framework for the ultimate conclusion – namely, that Tarčulovski must have intended to commit the crimes *because* crimes were committed. There was no other evidence to support the Prosecution's claim that the operation targeted civilians; to the contrary, all the affirmative evidence demonstrated that the operation targeted members of the NLA hiding in Ljuboten. Had the principle of *in dubio pro reo* been properly applied, there were many alternative reasonable inferences.

26. Tarčulovski maintains that this Appeal Chamber, in evaluating this case, must take into account these fundamental flaws in the Trial Chamber's evaluation of the trial evidence.

III. APPEAL GROUND 1: JURISDICTION (Judgement, paras. 173-303)

27. On 22 July 2005, the Appeals Chamber rendered a decision on Tarčulovski's Interlocutory Appeal on Jurisdiction.[19] Although the Appeals Chamber noted Tarčulovski's failure to identify precisely the alleged errors in the Trial Chamber's Impugned Decision,[20] it decided "as a matter of utmost fairness to the Appellant" to address his objections to the reasoning of the Trial Chamber,[21] and then addressed certain narrow points.

28. It first addressed whether the Tribunal's jurisdiction covers Macedonia. The Appeal Chamber determined that Macedonia was part of the territory of the

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[18] *Galić* Appeals Judgement, para. 113.
[19] *See* Jurisdiction Decision.
[20] Jurisdiction Decision, para. 4.
[21] Jurisdiction Decision, para. 5.

former Socialist Federal Republic of Yugoslavia and, therefore, that it was geographically covered. The Appeal Chamber next addressed the Tribunal's temporal jurisdiction, and decided that the Statute identifies a beginning date of 1 January 1991 with the end date "to be determined by the Security Council upon restoration of peace," and that no such end date had been determined.[22] Finally, the Appeal Chamber addressed whether the Tribunal had subject matter jurisdiction since Tarčulovski argued that there was no armed conflict in Macedonia; it agreed with the Trial Chamber that that was a factual issue which could not be resolved at an interlocutory appeal stage of the proceedings.

29. Tarčulovski now renews his jurisdictional challenge and notes that the facts, as shown by the evidence at trial, negate any jurisdictional authority of the Tribunal over the events in Ljuboten on 12 August 2001. The Trial Chamber erred in holding that the jurisdiction of the Tribunal was established, *ipse dixit*, based only on a factual determination of the existence of an armed conflict, after 1991, in a geographical area that was within the former Yugoslavia.[23] Rather, whether ICTY has jurisdiction must be evaluated in light of: (a) the provisions of the UN Charter; (b) the objective and purposes of the ICTY Statute; and (c) the express actions of the UN Security Council before the events at issue occurred.

30. Four provisions of the UN Charter are directly relevant to that jurisdictional evaluation. First, Article 2 provides that, "The Organization is based on the principle of the sovereign equality of all its Members."[24]

31. Second, Article 24 places authority to act with the UN Security Council, confirming that members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and

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[22] Jurisdiction Decision, para. 10.
[23] Judgement, paras. 173, 207.
[24] UN Charter, Chapter I, Art. 2, para. 1.

security."[25]

32. Third, Article 39 grants the UN Security Council power to enforce that responsibility, stating, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 [of Chapter VII], to maintain or restore international peace and security."[26]

33. Finally, and of particular importance, the UN Charter expressly recognizes a Member's rights to self-defense. Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[27]

34. Macedonia is a sovereign State and an independent Member of the United Nations. Macedonia voted for independence by referendum on 8 September 1991,[28] and it became a UN Member on 8 April 1993.[29] Significantly, the Trial Chamber acknowledged that Macedonia stood apart from other former Yugoslav republics in its peacefulness, noting that, prior to 2001, Macedonia "did not directly experience the hostilities which affected other parts of the Balkans."[30] It noted too that Macedonia's ethnic Albanian population, which, in 1994, comprised 22.7% of the country's population, had been politically represented and occupied positions in the government.[31]

35. In 2001, however, some members of the Macedonian ethnic Albanian community decided that they were under-represented in the military and

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[25] UN Charter, Chapter V, Art. 24, para. 1.
[26] UN Charter, Chapter VII, Art. 39.
[27] UN Charter, Chapter VII, Art. 51.
[28] Judgement, para. 21.
[29] Judgement, para. 21.
[30] Judgement, para. 22.
[31] Judgement, para. 26.

police,[32] and, in early 2001, an organization calling itself the NLA took responsibility for an attack on a police station.[33]

36. The UN Security Council specifically addressed these events and made recommendations for Macedonia to deal with its internal situation – statements that the Trial Chamber improperly disparaged.[34] Specifically, the UN Security Council deemed the NLA "armed ethnic Albanian extremists," and called upon the sovereign government of Macedonia to isolate the group.[35]

37. Under the four governing provisions of the UN Charter, *see supra* paras. 30-33, two separate but related threshold questions had to be addressed by the Trial Chamber before it could assert jurisdiction over this case:

i. whether the sovereign government of Macedonia lawfully ordered an operation to weed out terrorists that were living and/or hiding among villagers; and

ii. whether the exercise of jurisdiction by this Tribunal was precluded by the determinations and actions of the Security Council.

38. The Trial Chamber never properly addressed these basic, preliminary jurisdictional issues.

A. <u>This Tribunal's Exercise Of Jurisdiction Over This Matter Is Improper Because The Tribunal Did Not Make A Threshold Determination As To Whether The Government Of Macedonia Lawfully Ordered The Operation To Weed Out Terrorists Living And/Or Hiding Among Villagers</u>

39. Macedonia, a sovereign nation, was acting in self-defense against a very serious internal attack and threat by extremists; thus, ICTY's jurisdiction was extremely limited. A sovereign's right to self-defense has been recognized not only in the provisions of the UN Charter and in the Security Council's

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[32] Judgement, para. 27.
[33] Judgement, para. 28.
[34] Judgement, para. 192.
[35] Ex. D230.

determinations and resolutions, but by this Tribunal, too, in the Appeal Chamber's Interlocutory Decision on Jurisdiction in *Tadić*.[36] Under those articulated principles, the ICTY Tribunal may exercise jurisdiction *only* if the action planned and taken by the sovereign was carried out in clear violation of the "laws or customs of war."

40. Purely domestic acts carried out in self-defense are outside the legitimate concern of the Tribunal. The scope of the acts that the international tribunal *can* address was described in *Tadić*:

> [T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for conduct. [...] Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilized nations.[37]

41. The Trial Chamber never addressed the issue of whether the operation ordered by Macedonia in self-defense on 12 August 2001 was subject to ICTY jurisdiction. Had it done so, it would have been required to determine that it had no subject matter jurisdiction over Tarčulovski.

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[36] *Tadić* Jurisdiction Decision, para. 55.
[37] *Tadić* Jurisdiction Decision, para. 57

42. We argue later that the Trial Chamber disregarded, improperly, virtually every witness who had knowledge of the situation *as perceived by* the Government of Macedonia on and immediately before 12 August 2001. Moreover, because of the President of Macedonia's death, the Trial Chamber could not be secure in determining whether he ordered the operation; thus, it did not credit the inferences that would flow from a finding that the operation was ordered by the head of the Government. Even so, the facts that the Trial Chamber found, as set forth in the Judgement, leave no doubt that Macedonia was acting within its sovereign rights and in self-defense on 12 August 2001.

43. The Trial Chamber found the following facts: Ljuboten, the majority of whose residents in August 2001 were ethnic Albanians,[38] is a village overlooking the Macedonian capital city of Skopje.[39] The village was of strategic importance to the NLA both because of its geographic relation to Skopje, and because it was on a main road between Skopje and Kosovo.[40] The NLA had sought to expand its combat operations into Skopje,[41] and extensive fighting took place in and around Skopje during the week before the 12 August events. The NLA cut off roads into the capital city.[42] The NLA engaged in terrorist activities, including, among other wrongful acts, the killing of ten soldiers on 8 August 2001, and the killing of eight soldiers and the wounding of others on 10 August 2001 by a land mine close to Ljuboten.[43] The Trial Chamber further concluded that the Government of Macedonia reasonably believed that some of the terrorists were living in Ljuboten,[44] and were being sheltered by its residents.[45] The Amended

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[38] Judgement, para. 30.
[39] Judgement, para. 30.
[40] Judgement, paras. 30-31.
[41] Judgement, para. 139, 232.
[42] Judgement, para. 232.
[43] Judgement, para. 229.
[44] Judgement, para. 138.
[45] Judgement, para. 103.

Indictment itself alleged that, on 12 August 2001, about ten to fifteen "armed Albanians combatants" were in Ljuboten, armed with automatic weapons and at least one machine gun.[46] And, on 10 August 2001, the Security Council of Macedonia held a meeting and concluded that "firm action should resume to eliminate any threat to the security forces and to the citizens of the Republic of Macedonia."[47]

44. Article 39 of the UN Charter, which permits the UN Security Council to determine the existence of any threat to the peace,[48] *see supra* ¶32, does not authorize this Tribunal's exercise of jurisdiction in the situation described above, given both the Charter's explicit recognition of a sovereign Member's right to self-defense, Article 51,[49] *see supra* ¶33, and the express actions of the UN Security Council in specifically addressing the NLA's terrorist threat within Macedonia.[50]

45. The Trial Chamber touched on these matters, but in an entirely different context. It included in the Judgement a lengthy section purporting to examine whether the events in Ljuboten were justified by military necessity.[51] However, apart from a few sentences, this whole section is largely irrelevant to the true jurisdictional questions because it focused only on whether the Macedonian military had come under attack from NLA fighters in *Ljuboten* prior to the events on 12 August 2001, and whether and from where NLA fighters were firing upon the military and/or police on that day.

46. Nevertheless, in that section, the Trial Chamber made critical findings acknowledging the legitimacy of Macedonia's belief that terrorists were hiding in Ljuboten, and that the operation on 12 August 2001 was intended

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[46] Judgement, para. 133.
[47] Ex. D249.
[48] UN Charter, Chapter VII, Article 39.
[49] UN Charter, Chapter VII, Article 51.
[50] *Infra* at 54-58.
[51] Judgement, Section E, paras. 132-72.

to and targeted those terrorists and the houses in which they were being sheltered:

> Turning next to the question of NLA presence in Ljuboten, the evidence suggests that a number of Ljuboten residents were NLA members, and that there were individual NLA members present in Ljuboten prior to and during the events of 10-12 August. Further, there is some evidence which could suggest that a number of Ljuboten residents were involved in the planting of the land mine at Ljubotenski Bačila on 10 August, resulting in the deaths of eight [Macedonian] soldiers.[52]
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> * * *
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> Having regard to the body of evidence briefly canvassed in the preceding paragraphs, and the acceptance by the Prosecution in the Indictment that there were 10-15 'armed Albanian combatants' in Ljuboten on 12 August, the Chamber records here its findings that at the relevant time individual NLA members were from Ljuboten village, and that a number of NLA were present in Ljuboten prior to and during the events on 10-12 August. ... *For this reason, the Chamber accepts that on the basis of the information available to the police, there were legitimate reasons for the police to enter the village of Ljuboten on 12 August because of a suspected terrorist or NLA presence.*[53]

[52] Judgement, para. 138.
[53] Judgement, para. 140 (emphasis added).

* * *

There is evidence that the police encountered resistance from a machine-gun at a house near a bridge.[54]

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While the Chamber accepts that M037 had discussions with the Accused Johan Tarčulovski about areas in the village of interest or concern to the police unit as it moved through the village, and that it could be the case that a sighting of men in black uniforms or clothing near to the bridge was mentioned, it notes that firing at the police from this position was not mentioned. Despite the inability to accept the truth of all that these witnesses say in their evidence, the Chamber is conscious of the extent of the evidence of a sniper firing on an army position from this general area, and of reports of a machine-gun, *and accepts it may have been believed that a sniper and a machine-gun was operating against the army or the police from this position.*[55]

* * *

While the Chamber has indicated its inability to accept the truth of all that some of these army witnesses say in their evidence about the events on 12 August, the Chamber is conscious that on the available evidence it cannot be certain that no army shells fell somewhere in the areas marked. *It accepts that it may have been believed by army personnel that there was*

[54] Judgement, para. 153 (emphasis added).
[55] Judgement, para. 153 (emphasis added).

> *outgoing fire from a house within the areas marked on photographs.*[56]
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> While conscious of the many variations and inconsistencies in the evidence (some of which will be further discussed), the demonstrated unreliability of some of the witnesses, the absence of a detailed inspection of the area on the day, the Chamber is unable to conclude that there was firing against the police or army from one or more of the houses of the Jashari family on the morning of 12 August. *On the balance of all the relevant evidence, however, it must be left open that there may have been outgoing fire, whether directed at the police in the village or the army positions at Smok and Bomba, or both.*[57]
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> There is other evidence to suggest that in the morning of 12 August, army positions in the hills above Ljuboten were fired upon from locations *outside* of Ljuboten, namely from Jecmeniste, Kuljm, Matejče, Raštanski Bačila, Bel Kamen, and in the Chamber's finding, most probably from a hill above Ljuboten called Pop Cesme.[58]

47. Startlingly, despite those factual findings, the Trial Chamber drew the following conclusion: "Apart from the events in the area of the Jashari family houses, there is no evidence that the actions of the police relating to the charges were in self defense or in the course of action against armed

[56] Judgement, para. 154 (emphasis added).
[57] Judgement, para. 161 (emphasis added).
[58] Judgement, para. 163.

opponents nor is there a foundation for a reasonable doubt that this may have been the case."[59]

48. That conclusion simply does not flow from the Trial Chamber's findings of the fact. Even if the only question was whether terrorists fired at the military from Ljuboten, the Trial Chamber's factual conclusion on this question was unsupported by the evidence. But the correct question is whether Macedonia was acting in self-defense in staging an operation against the terrorists hiding in Ljuboten. The facts as found mandate the conclusion that it was.

49. The Trial Chamber acknowledged multi-faceted NLA terrorist activity: that NLA lived in Ljuboten; that NLA may have been involved in planting the land mines that killed Macedonian soldiers; that NLA was in the area and launching attacks on the police; that (as noted elsewhere in the Judgement) there were legitimate fears that the NLA was threatening Ljubanci and the capital city of Skopje;[60] and, most importantly, that the Government of Macedonia had the right to enter Ljuboten to weed out the terrorists.[61] Yet the Trial Chamber failed to assess whether the Government's planned operation constituted legitimate self-defense. The Trial Chamber was obligated to answer that crucial question before it could hold Tarčulovski criminally liable for acts committed in the course of the operation. In short, though the Trial Chamber apparently recognized the right of the Government of Macedonia to conduct the operation into Ljuboten, it then ignored the obstacles to its criminal jurisdiction that flow from that right.

50. The Prosecution argued that the Government of Macedonia had *no* right to go into Ljuboten on 12 August 2001 – that it did not matter whether the Government honestly and reasonably believed that the NLA was in Ljuboten

[59] Judgement, para. 172.
[60] Judgement, para. 139.
[61] Judgement, para. 140.

and aimed the operation at the NLA.[62] According to the Prosecution, any military action into Ljuboten on 12 August 2001 was inappropriate because the NLA's killing of ten soldiers on 8 August, and eight soldiers near Ljuboten on 10 August had created an "incendiary climate."[63]

51. The Prosecution's argument is fundamentally flawed. If adopted, it would never be appropriate for a sovereign to respond to domestic terrorism because terrorist acts necessarily create a volatile situation. In essence, the Prosecution is arguing that the greater the need to act in self-defense, the less the right to do so. This position has never been adopted as a principle of international humanitarian law.

52. Moreover, Article 51 of the UN Charter, authorizing action in self-defense, precludes such second-guessing. Since it authorizes self-defense even in actions that operate across borders, *a fortiori*, a Member State may act in self-defense within its own territory.[64] "Because it violates a state's territorial integrity, a terrorist act occurring within a state's borders ... should be considered to constitute an inherently greater injury to that state's sovereignty than does an identical act abroad."[65]

53. The preliminarily evaluation of whether the contested "operation" was undertaken in self-defense by the sovereign Government of Macedonia – a decision indispensable to the proper exercise of this Tribunal's jurisdiction – was never undertaken in this case. Since the Prosecution has the burden of proof beyond a reasonable doubt on these preliminary matters, and in light of the principle of *in dubio pro rea*, which requires that doubts be resolved in favor of the Accused, the Tribunal lacked jurisdiction to hear this matter.

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[62] T. 11001-02.

[63] T. 10996.

[64] *See* Robert J. Beck and Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 Wisc. Int. L.J. 153 (Spring, 1994) (hereinafter "Beck and Arend"). "At one end of a broad, multi-hued spectrum lie publicists supporting a 'high threshold' for permissible armed response. Professor Francis Boyle, for example, has suggested that states may respond only to terrorist attacks within their own borders." *Id.* at 196.

[65] Beck and Arend, p. 217.

B. This Tribunal's Exercise Of Jurisdiction Over This Matter Is Improper Because It Is Contrary To The Determinations And Actions Of The Security Council

54. The UN Security Council recognized that it was Macedonia's responsibility to impose the rule of law in its territory.[66] In a 7 March 2001 statement, and in a press release, the President of the UN Security Council condemned the violence by these "extremists,"[67] calling upon all political leaders from Macedonia and Kosovo "to isolate the forces behind all violent incidents and to shoulder their responsibility for peace and stability in the region."[68] The statement went on to express support for the action taken by the Macedonian government,[69] and reaffirmed its sovereignty.[70] The President's statement said:

> The Security Council underlines the responsibility of the Government of the former Yugoslav Republic of Macedonia for the rule of law in its territory. It supports actions by the Government of the former Yugoslav Republic of Macedonia to address the violence with an appropriate level of restraint and to preserve the political stability of the country and foster harmony between all ethnic components of the population.
>
> The Security Council recalls the need to respect the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia.[71]

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[66] Ex. D230.
[67] Ex. D230; para. 1.
[68] Ex. D230, para. 2.
[69] Ex. D230, pp. 1-2.
[70] Ex. D230, pp. 1-2.
[71] Ex. D343.

55. The Statement, reissued on 12 March 2001,[72] additionally read:

> The Security Council strongly condemns recent violence by ethnic Albanian armed extremists in the north of the former Yugoslav Republic of Macedonia, in particular the killing of three soldiers of the armed forces of the former Yugoslav Republic of Macedonia in the area of Tanusevci. The Council regrets that the violence continues and calls for an immediate end to it.
>
> The Security Council expresses its deep concern at those events, which constitute a threat to the stability and security not only of the former Yugoslav Republic of Macedonia but also of the entire region. It calls on all political leaders in the former Yugoslav Republic of Macedonia and Kosovo, Federal Republic of Yugoslavia, who are in a position to do so to isolate the forces behind the violent incidents and to shoulder their responsibility for peace and stability in the region.[73]

56. On 21 March 2001, the UN Security Council adopted Resolution 1345, which again strongly condemned the terrorist and extremist actions of the NLA.[74]

57. Finally, on 26 September 2001, after the events at issue in this prosecution, the UN Security Council issued Resolution No. 1371:

> *Welcoming the steps taken* by the Government of The former Yugoslav Republic of Macedonia to consolidate a multi-ethnic society within its

[72] Ex. D230, pp. 9-10; Ex. D343.
[73] Ex. D230, pp. 9-10; Ex. D343.
[74] Ex. D230, pp. 11-12.

> borders, and expressing its full support for the further development of this process.[75]

58. These actions by the UN Security Council *expressly confirmed* that the dispute was domestic, and that it was the responsibility of the Government of Macedonia to address the problem. The Security Council recognized that the terrorists' actions required Macedonia to act. This separate and explicit instruction and guidance from the Security Council operated to place Macedonia's recognized *internal* conflict in its own category, removed from those ongoing conflicts in other regions, like Kosovo, that stemmed from the break-up of the Former Republic of Yugoslavia. By recognizing and addressing the Macedonian situation separately, *without* reference to Yugoslavia, the Security Council took this internal conflict *out of ICTY's jurisdiction.*

IV. APPEAL GROUND 2: THE EVENTS IN LJUBOTEN ON 12 AUGUST 2001 DID NOT VIOLATE PREVIOUSLY ESTABLISHED "LAWS OR CUSTOMS OF WAR" (Judgement, paras. 173-303, 392-393, 399-400, 537-585)

59. Acts of terrorism have become almost a daily event somewhere in the world. Terrorists events occur within countries, across borders, and even across oceans and continents. States victimized by terrorist activity often respond, claiming they are targeting only terrorists. States harboring the terrorists often claim that the "targets" were civilians. Whether a "victim" was a terrorist or civilian is often a matter of degree. An individual may engage in a terrorist act and then return to civilian status. A village may actively support and hide terrorists, or the villagers may be victims themselves, forced to harbor or shield terrorists. Each situation creates different concerns and the applicable rules that apply are hotly debated. Myriad international crises,

[75] Ex. D346.

including the United States' actions in Afghanistan, the Russian situation in Georgia and Chechnya, and the Israeli-Gaza conflict reflect a lack of consensus as to what is an acceptable response on an international level. What is an appropriate response to domestic terrorism is even more in dispute.

60. Terrorist acts and responses to terrorist acts raise difficult unanswered questions: scholars have struggled with questions of liability of terrorists for their actions under international law and, correspondingly, with questions of what appropriately may be deemed a lawful response, particularly if civilians die as a result of responsive acts. Whether a sovereign response, particularly to a domestic threat, will be deemed appropriate depends on many factors, including the seriousness of the attacks, the danger faced by the attacked nation, the timeliness of its response, the proportionality of the response, the target of the response, and the available alternatives. Yet, here, the Trial Chamber engaged in no consideration of these subjects. Instead, it improperly concluded that because people – who it cannot be proved were not terrorists – were killed or hurt during the course of a responsive action, that by itself delegitimized the sovereign's response.

61. Johan Tarčulovski was charged under the ICTY Statute pursuant to Article 7(1) for engaging in crimes under Article 3. Article 3 affords the ICTY Tribunal power to "prosecute persons violating the *laws or customs of war*." Article 3 then provides that such violations shall include, but not be limited to:

> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
>
> (d) seizure of, destruction or willful damages done to institutions dedicated to religion, charity and education the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property.

62. Notably, though Article 2, which addresses "grave breaches" of the Geneva Convention, enumerates as a crime both "willful killing" and "inhuman treatment," and though Articles 4 and 5, dealing with genocide and crimes against humanity, also specifically prohibit "murder" and "other inhumane acts," Article 3 does *not* on its face provide for prosecution based on the death or mistreatment of civilians.

63. Tarčulovski was charged with a violation of only one of Article 3's express provisions – the crime of "wanton destruction of cities, towns or villages."[76] Nonetheless, relying on the *Tadić* Jurisdiction Decision,[77] the Trial Chamber concluded that Article 3 – which prohibits violations of "laws or customs of war" – is a "residual clause" that incorporates the prohibitions of Common Article 3(1)(a) of the 1949 Geneva Convention, and thus includes any "serious violation of international humanitarian law" not otherwise covered by the Statute."[78]

64. Assuming that *Tadić* correctly concluded that Article 3 of the ICTY Statute incorporates Common Article 3, and that Common Article 3 gives rise to individual criminal liability when there is an armed conflict not of an international character, the Trial Chamber never addressed what well-

[76] Judgement, para. 297.
[77] *Tadić* Jurisdiction Decision; *see also Celebic* Appeals Judgement.
[78] Judgement, paras. 297-99.

established "laws or customs of war" were violated by the 12 August 2001 operation or by Tarčulovski, individually. In fact, there are no well-established "laws or customs of war" that govern how a sovereign State should or may respond to an internal terrorist threat.

65. Tarčulovski was found guilty for having implemented an operation, designed by a sovereign State in self-defense, to capture terrorists who had planted a land mine which killed eight soldiers and injured many more, and, who, the sovereign State justly believed, had retreated into a village, possibly with the knowledge and support of the villagers. Criminal responsibility for the consequences of the operation cannot be borne by a low-level, inexperienced policeman assigned the task of carrying out the operation. Notably, the Prosecution argued extensively below that Boškoski had both *de jure* and *de facto* control over the operation;[79] his acquittal does not justify, under pre-existing "laws or customs of war," shifting responsibility to Tarčulovski.

A. Application Of The Laws Or Customs Of War In Determining the Propriety Of A Sovereign's Response To An Internal Terrorist Attack

66. Whether the planning, ordering or instigating of this operation violated the "laws or customs of war" depends on what Common Article 3 outlaws in terms of a sovereign's response to a domestic terrorist attack when terrorists blend into a village. The Trial Chamber never addressed this fundamental question. In fact, there exists no settled body of international humanitarian law, no "laws or customs of war," that clearly delimit how a State may respond to international terrorist activity, let alone domestic terrorist activity, where the State has greater rights of self-defense.[80]

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[79] Prosecution's Final Brief, paras. 267-353.

[80] *See, e.g., The Public Committee Against Torture in Israel et al. v. The Government of Israel et al.*, Israel, Supreme Court, Judgement of 14 December 2006, HCJ 769/02 at para. 40, cited in Judgement, n. 738. (rejecting contention that targeted killing is always prohibited under customary international law).

67. Little has changed since 1994 – indeed the legal landscape may have become even murkier – when Professors Beck and Arend wrote:

> Contemporary legal scholarship ... has remained bitterly divided over the question of forcible state responses to terrorism. Nothing resembling a communis ipinio doctorum can be said now to exist, nor is any such consensus likely soon to emerge. Two obstacles to agreement [are] the lack of a common framework for analysis and a scholarly discourse preoccupied by incomplete appreciation of the "terrorism" phenomenon and the state's right to defend itself.[81]

68. In their work, Professors Beck and Arend raised some of the fundamental questions that remain unresolved, including what constitutes a proportionate response by a victim State to a terrorist act and what kinds of entities are permissible targets. Legal scholars have offered divergent answers to these important questions.[82] Indeed, the range of proffered and defensible views on these questions may have become even greater as terrorist acts – including the 9/11 attacks in New York and the recent events in Mumbai – have become more widespread and more heinous.

69. According to *Tadić*, whose logic the Trial Chamber adopted here, the "source" document is Geneva Convention Common Article 3, which concerns "armed conflict not of an international character" and prohibits the murder or cruel treatment of any person "taking no active part in the hostilities."[83]

70. Even if *Tadić's* wholesale incorporation of Common Article 3 into the ICTY Statute was correct, its principle should not have been applied in this unique

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[81] Beck and Arend, p. 28.
[82] *See generally* Beck and Arend.
[83] Judgement, paras. 298-300.

case. As the Trial Chamber acknowledged, NLA extremists were hiding in Ljuboten. The NLA themselves made it virtually impossible to distinguish who was actively involved in the hostilities. The NLA did not proclaim their identity; to the contrary, in violation of the Geneva Convention, they wore civilian clothes and hid in the homes of villagers.[84] Thus, the Macedonian forces could not focus their attack with pinpoint accuracy on the terrorists alone. Any attack in Ljuboten on the terrorists necessarily would endanger civilians.

71. Article 3 of the ICTY Statute does not make it a "war crime" *per se* when a civilian is killed or injured during the course of an anti-terrorist raid. Yet the Prosecution argued that the police forces in Ljuboten "targeted civilians" in violation of Article 50 of Additional Protocol 1 of the Geneva Conventions because that Article states, in part, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[85] Additional Protocol 1 does not cover armed conflicts "not of an international character," but relates only to *"the Protection of Victims of International Armed Conflict."* It has no bearing on this internal dispute.[86] But, even if it did, the Prosecution flatly ignored other Articles contained in Additional Protocol 1 which make it crystal clear that, though parties to an armed conflict should try to minimize the risk to civilians, because that risk cannot be wholly eliminated, death or injury to civilians is not always – or even usually – a violation of international humanitarian law.

72. Article 51 of Additional Protocol 1, for example, proscribes "indiscriminate" attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, [and/or] damage to civilian objects." More importantly, it adds this essential caveat: that it applies only if *"it would be*

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[84] Judgement, para. 285.
[85] *See* T. 10993-94.
[86] *See* Additional Protocol 1.

excessive in relation to the concrete and direct military advantage anticipated."[87] Article 57, again recognizing that risks to civilian populations are inevitable in military conflicts, sets forth certain precautions that must be taken to minimize these risks, including the choice of means and methods of attack.[88] In sum, even Additional Protocol 1, which applies to the very different problem of international armed conflict, does not preclude military or police action directed towards capturing terrorists even if, as a consequence, civilians are harmed.

73. Given a sovereign's right of self-defense, more leeway must be accorded when the sovereign is confronting domestic terrorism. To determine whether an operation designed to respond to internal terrorist activity violates the "laws or customs of war;" a Tribunal must focus on the objective of the broader operation, not on one particular bullet that is fired in the course of carrying out that operation. To argue, as the Prosecution does, and as the Trial Chamber seemingly accepted, that because a civilian was shot, the attack *must* have targeted civilians, intrudes on a sovereign State's unquestionable right to use force in self-defense.

74. Certainly, it was improper for the Trial Chamber to apply to Tarčulovski – retroactively – a reading of Article 3 that is not clear on its face, is not supported by the text of the Statute, and is inconsistent with the cornerstone principle of respect for the sovereignty of nations.

75. New principles of law are not to be applied retroactively. As the Trial Chamber in the *Vasiljević* case observed:

> From the perspective of the nullum crimen sine lege principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which,

[87] Article 51(5)(b) of Additional Protocol 1.
[88] Article 57 of Additional Protocol 1.

> taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.
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> * * *
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> Accordingly, the Tribunal's Statute was not intended to create new criminal offences. Instead, as stated by the Appeals Chamber, in establishing the Tribunal, the Security Council "simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility." The fact that an offence is listed in the Statute, or comes within Article 3 of the Statute through common article 3 of the Geneva Conventions, does not therefore create new law, *and the Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed. Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary.*[89]

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[89] *Vasiljević* Trial Judgement, paras. 193, 198 (emphasis added) (footnotes omitted).

76. Here, the Trial Chamber cited to no evidence (apart from its own circular reasoning that because crimes occurred, crimes must have been the objective) to support its conclusion that the object of the operation violated "customary international law" because it purportedly was aimed at civilians. Instead, the evidence plainly supports the opposite conclusion: that the goal of the operation was to "clean up Ljuboten from terrorists"[90] and to [REDACTED][91]

77. The Trial Chamber relied on notes of a meeting on 10 August 2001 to support its conclusions. But those notes indicate that those present, including Tarčulovski, "had been ordered" to "clean-up Ljuboten from terrorists," and that the "President knows that," and "they had asked [Major Despodov of the Army] for an opinion of an expert on how to perform that."[92] Despite this, the Trial Chamber refused to make a positive finding that the President, who had died before the trial, ordered the operation,[93] although under the doctrine of *in dubio pro reo* articulated by the Trial Chamber, which dictates that any doubt must be resolved in favor of the Accused, that finding should have been made. In fact, the one witness to the 10 August 2001 planning meeting whom the Trial Chamber credited confirmed that the sole goal was to [REDACED].[94] Again, under the doctrine of *in dubio pro reo*, that testimony should have been accepted.

78. The Trial Chamber assumed, wrongly, that its finding of an "armed conflict" was dispositive of the question whether the death of three civilians violated the "laws or customs of war."[95] *Tadić* and its prodigy distinguish between "an armed conflict" and "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian

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[90] Ex. P302, p. 28; Judgement, paras. 109, 113.
[91] T. 8554 (testimony of M052).
[92] Ex. P302, pp. 27-28.
[93] Judgement, para. 114.
[94] T. 8554 (testimony of M052).
[95] Judgement, para. 176.

laws."[96] But none of the cases cited in the Judgement addresses the issue of whether a sovereign's response to protracted domestic terrorism which has become an "armed conflict" is covered by international humanitarian law.[97] When, as here, terrorists, for strategic reasons, choose to live among civilians without distinguishing themselves, then it is the *terrorists* and/or those who give them sanctuary who create the threat to the civilian population, not the government forces. The instructive analogy is to a bank robbery where the robber takes a hostage: if the police aim at and shoot the robber, but kill the hostage, it is the *robber*, not the police, who is guilty of murdering the hostage. The Trial Chamber never addressed this issue.

79. Moreover, the Tribunal never addressed whether the civilians in the village voluntarily assumed the role of human shields.[98] Were that the case, they may well have been "actively involved in the hostilities" even if they were not actual combatants.[99]

80. The goal of the military police offensive on 12 August 2001 was to capture and/or drive out the terrorists – itself a legitimate goal. The Prosecution postulated that, because the NLA was hiding among civilians, the Government of Macedonia should have entertained doubts about the civilian status of each and every resident of the village and should not have engaged in any attack.[100] This position, if adopted by this Tribunal, would eviscerate a sovereign's right of self-defense.

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[96] Judgement, para. 175.

[97] *Čelebići* Trial Judgement, para 184; *Kordić and Čerkez* Appeals Judgement, para. 341; *Limaj* Trial Judgement, para. 84; *Haradinaj* Trial Judgement, para. 38.

[98] *Strugar* Appeals Judgement, paras. 177-79.

[99] Professors Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, *Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, Drafting Committee (Sanremo, 2006), p. 44. Available at www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill.pdf.

[100] T. 10993.

81. Professors Beck and Arend have noted that:

> In writings on the subject, virtually all publicists have begun with the fundamental premise that "innocents' should not be targeted *per se*. Victim states must strive in their forcible efforts, scholars have commonly held, to discriminate between terrorist targets and those uninvolved with terrorist activity. Professor Schachter argued, for example:
>
> Self-defense actions against terrorism are not exempt from the humanitarian rules applicable to armed conflict. Thus the general prohibition[s] against [targeting] non-combatants or excessive destruction of civilian property apply. *The fact that terrorist bases are found in the midst of cities, and may therefore be "shielded" by non-combatants, can give rise to a difficult dilemma.*[101]

82. No settled principles have emerged to answer the question of what a responding state may or may not do when that "difficult dilemma" arises. While the answer may be related to the issues of distinction and proportionality, posing the question leads to more questions than answers:

> Although publicists have generally agreed that a victim state's forcible response must be "proportionate," they have failed to agree on how "proportionality" should properly be calculated. Three basic approaches to the "proportionality" issue have been advanced. Some scholars have maintained that the victim state must

[101] Beck and Arend, p. 209, *quoting* Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 Hous. J. Int'l. L. 309, n.13 at 315 (1989) (emphasis added).

> respond proportionately to the specific prior act of terrorism. This first approach might be called: "eye-for-an-eye" or "tit-for-tat proportionality." Other scholars, meanwhile, have contended that the victim state's forcible measures should be proportionate to an aggregation of past illegal acts. This second approach might be called "cumulative proportionality." Still others have submitted that the victim state's use of force must be proportionate to the overall terrorist threat faced by the state. This third approach, which is future-directed, might be called "eye-for-a-tooth" or "deterrent proportionality."[102]

83. Certainly, when assessing an armed response to terrorist activities, notwithstanding principles of distinction and proportionality, as W.J. Fenrick, Senior Legal Adviser, ICTY-OTP, himself noted:

> It must be noted that an attack is not unlawful per se every time civilians are killed or injured or civilian objects are damaged. What is prohibited are attacks directed against civilians or civilian objects and attacks, which, although they are directed against military objectives, may be expected to cause excessive or disproportionate injury or damage to civilians or civilian objects. ... [F]requently and particularly in urban areas, military objectives are not conveniently separated from civilians and civilian objects. What must also be noted is that, except perhaps for properly maintained and aimed pistols and

[102] Beck and Arend, p. 207.

> rifles, projectiles are not delivered with pin point accuracy. *Except in unusual cases, it will not be practicable to reason inexorably from the fact that civilians have been killed or injured or that civilian property has been damaged to the conclusion that the actus reus of an offense has been committed.* An assessment of the surrounding facts will be essential to determine, among other things, whether or not the intended target was a military objective and whether or not the incidental damage or injury actually was or could be expected to be disproportionate.[103]

84. As Mr. Fenrick has also noted, if international courts are to prosecute cases involving events that have occurred during combat, prosecutors and tribunals:

> must develop the ability to present an honest and accurate picture of what happened during combat and the ability to assist the court to differentiate between lawful and unlawful acts in circumstances where both might result in death, injury and destruction. Unfortunately, war is a brutal business. Until it is abolished, one must accept that the purpose of the body of law which purports to regulate combat is to limit human suffering, not to eliminate it. Indeed, legal arguments which purport to eliminate violence in armed conflict may result in undermining the applicable law and rendering it ineffective. *For example, arguing that any civilian casualties are too many*

[103] W.J. Fenrick, *Crimes in Combat: the Relationship Between Crimes Against Humanity and War Crimes*, Guest Lecture Series of the Office of the Prosecutor, 5 March 2004, The Hague (hereinafter "Fenrick"), pp. 5-6 (emphasis added).

> *civilian casualties no matter how important the military objective being attacked would be counterproductive as such a standard, no matter how desirable in the abstract, would not be viable in military operations at the present time.*[104]

85. The Trial Chamber, though it did not directly address the "laws or customs of war" in this context, did review the "intensity" of the conflict[105] and the organization of the armed group. It specifically found that "the NLA was seen by the Macedonian government as presenting *a most grave threat* to the very survival of the country."[106] It noted that in situations falling short of an "armed conflict," the State can use even lethal force to uphold law and order,[107] provided it is proportionate.[108] The Trial Chamber then asserted that when "a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international law, where a different proportionality test applies."[109] But the Trial Chamber skirted the issue of what is considered proportionate in an "armed conflict" when the armed combatants on one side engage in terrorist activities and then hide among civilians, and the sovereign State, facing "a most grave threat," decides to capture (or kill) the terrorists.

86. Were Article 3 of the Statute to make it a "war crime" just because civilians have been killed or injured during the course of an anti-terrorist raid, no sovereign State confronting a terrorist army whose attacks are so protracted as to constitute an "armed conflict" would be able to engage in an offensive against those terrorists if, as the NLA did here, the terrorists hide among the

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[104] Fenrick, p. 2 (emphasis added).
[105] Judgement, para. 177-93.
[106] Judgement, para. 289 (emphasis added).
[107] Judgement, para. 178.
[108] Judgement, para. 178, n. 735.
[109] Judgement, para. 178.

civilian population. Any such offensive necessarily would risk endangering the civilian population and would constitute a violation of international law. Terrorists, in effect, would be given safe harbor provided they successfully melted into the civilian population.

87. The recent events in Afghanistan, Georgia and Gaza demonstrate that the Prosecution's position is not universally accepted as constituting the "laws or customs of war." With Hamas randomly firing rockets on civilians in Southern Israel, Israel had the right to engage in self-defense. Yet under the Prosecution's view, because Hamas was launching its rockets while hiding among civilians, Israel could not try to stop the rockets because Israel would have doubts as to whether it would hit civilians.[110]

88. With all due respect, it is not for the Prosecution or this Tribunal, *ab initio*, to determine that it is a violation of the "laws or customs of war" for a sovereign State faced with terrorists who themselves are violating international law, and who are hiding among civilians, to engage in an operation intended to root out the terrorists, even if it is foreseeable that civilians might be endangered, absent a pre-existing well-established "law or custom of war" outlawing the operation. The Trial Chamber never addressed this question and did not and could not find that the operation, and Tarčulovski, individually, violated Article 3 of the Statute.

B. Application Of The Laws Or Customs Of War In Determining Individual Criminal Responsibility For A Person Assigned To Carry Out A Plan Designed By A Sovereign

89. Tarčulovski also maintains that the Tribunal could not prosecute an individual policeman for alleged war crimes when the individual was properly carrying out a lawful self-defense operation ordered by his sovereign State. Absent a finding that Macedonia was not acting in self-defense or that

[110] Michael Walzer, *On Proportionality: How Much Is Too Much In War?*, The New Republic (January 8, 2009).

its actions were disproportionate to the very real threat the NLA posed, or that Tarčulovski exceeded his lawful orders, the Tribunal lacked jurisdiction over Tarčulovski and could not find that Tarčulovski, individually, violated the "laws or customs of war."

90. Those above Tarčulovski in the chain of command believed that the NLA was using Ljuboten as a base of operation. A plan was devised to root out the NLA from the village, but, as the Trial Chamber found, Tarčulovski was not "the person who originated the police operation in Ljuboten."[111] The Trial Chamber found that Tarčulovski "acted under orders,"[112] but could not make a finding as to *whose* orders or the terms of the orders.[113] The Prosecution maintained that *Boškoski*, not Tarčulovski, had both *de jure* and *de facto* control over the operation and events of 12 August 2001.[114]

91. Determining the nature of the order is indispensable to a determination of jurisdiction because, if the order had a legal basis and was directed towards self-defense, Tarčulovski, in carrying out the legal order, is neither subject to this Tribunal's jurisdiction, nor can be found to have individually violated the "laws or customs of war." If a nation, for example, decides to attack a Pakistani village from which missiles are being fired, those who carry out the mission cannot be held individually criminally responsible. Those who planned the mission *may* be held accountable if the mission violates international humanitarian law because it is foreseeable that civilians will be harmed and the risk of civilian deaths is disproportionate to the military gain. But the low-level soldier who carried out the mission is not the proper subject of an international court's jurisdiction. Here, the Trial Chamber itself found that "there is some evidence which suggests that the object of the operation

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[111] Judgement, para. 594.
[112] Judgement, para. 585.
[113] Judgement, paras. 541, 563, 585.
[114] Prosecution's Final Brief, paras. 267-353.

was law enforcement to locate and arrest or in some other way deal with NLA members, also described as 'terrorists', in the village."[115] It then found that Tarčulovski was "a relatively junior person in the Ministry of the Interior, carrying out orders," who "found himself torn between different views of right and wrong in the turmoil...."[116] Ordered to carry out an anti-terrorist operation, Tarčulovski "had no experience in criminal or terrorist investigation."[117]

92. Tarčulovski maintains that it is improper to apply retroactively a reading of Article 3 of the Statute that is not clear on its face; is not supported by the text of the Statute; and is inconsistent with principles of respect for sovereign nations. The question of how to address the complex problem of internal terrorism must not to be resolved on the back of a low-level policeman, such as Tarčulovski, who is himself carrying out orders. The "law and customs of war" in response to terrorists hiding among civilians must first be determined and accepted, and only then can be applied to Macedonia and its agents.

V. APPEAL GROUND 3: THE TRIAL CHAMBER ERRED IN ITS APPLICATION OF ARTICLE 7(1) WITH RESPECT TO PLANNING, INSTIGATING OR ORDERING (Judgement, paras. 392-393, 398-400, 537-585)

93. The Trial Chamber determined that Tarčulovski was "criminally responsible for ordering, planning and instigating" the murders of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani, for the destruction of certain houses, and for the cruel treatment of thirteen named men. This determination is not supported by the evidence. As shown below, the evidence presented was insufficient to prove guilt beyond a reasonable doubt.

94. Planning, instigating, and ordering are separate and different bases for criminal responsibility under Article 7(1) of the Statute; each requires its own

[115] Judgement, para. 571.
[116] Judgement, paras. 594, 601.
[117] Judgement, para. 571.

specific *actus reus*. However, the Trial Chamber, though it recognized the distinct elements of each of these forms of liability, failed to address these concepts separately and instead addressed them as one concept in the Judgement's section on "Responsibility of Johan Tarčulovski."[118] This in and of itself renders the Judgement infirm.

A. Planning

95. As the Trial Chamber wrote, "The actus reus of 'planning' requires that one or more persons plan or design, at both the preparatory and execution phases, the *criminal conduct* constituting one or more crimes, provided for in the Statute, which are later perpetrated."[119]

1. Plan Or Design At The Preparatory Phase

96. The Trial Chamber concluded that Tarčulovski had planned the "criminal conduct." None of its findings is supported by evidence beyond a reasonable doubt; none was arrived at by the proper application of governing principles of law. The Trial Chamber's found Tarčulovski guilty based on the following findings, many of which are unsupported by the evidence: The operation was planned on 10 August 2001 in direct response to the land mine killing of eight soldiers that day;[120] the predominate objective of the operation was to indiscriminately attack ethnic Albanians and their property.[121] Tarčulovski personally planned the operation, led the police operation on 12 August 2001, and was with the group of police as they moved through the village killing, beating and destroying the homes of ethnic Albanians.[122] According to the Trial Chamber, what was done by the police in this village "provides a significant and reliable guide to what was intended as the object

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[118] Judgement, paras. 561-79.
[119] Judgement, para. 398 (emphasis added), *citing, inter alia, Kordić* Appeals Judgement at para. 26.
[120] Judgement, paras. 562-563.
[121] Judgement, paras. 571-572.
[122] Judgement, para. 594.

of the operation by John Tarčulovski."[123]

97. The claim that what occurred shows what was planned constitutes circular reasoning: the idea that the plan can be ascertained from the result presupposes, among other things, that the person who engaged in the wrongful act had knowledge of the plan, and that there were no independent actors and no unanticipated events. Yet the Trial Chamber found no such facts.

98. In any event, the Trial Chamber's findings *undermine* any determination that the operation was intended to be an indiscriminate attack on ethnic Albanians. Seven people were killed. The Trial Chamber found that Xtalan Bajrami, Bajram Jashari and Kadri Jashari were fleeing and may have been taking "an active part in armed hostilities." Thus, under the Trial Chamber's own findings, three of seven persons killed that day were likely terrorists, hardly proof of a "indiscriminate" attack on civilians. In addition, the Trial Chamber found that the murder of Sulejman Bajrami was a *deliberate shooting of a civilian* from among a larger group of people removed from Adem Ametovski's house and that Bajrami's movement "may have been interpreted as an attempt to escape."[124] Thus, this shooting, if indeed in response to Bajrami's escape, was not a "random assault" against ethnic Albanians.

99. Moreover, as the Trial Chamber recognized, there was extensive testimony that the Ametovski and Jusufi houses were specific places where terrorists were living and/or hiding.[125] This testimony was improperly discredited: either categorically rejected because it came from a member of the military or police or discredited because Tarčulovski was silent as to his source. Both reasons are unacceptable as a matter of law.

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[123] Judgement, para. 565.
[124] Judgement, para. 320.
[125] See, *e.g.*, Judgement, paras. 145-46, and n. 594, 598-99.

100. The Trial Chamber improperly drew the inference that what occurred proved what was planned. But the Trial Chamber also found that the operation was designed in response to the NLA's land mine. It found that Tarčulovski's lacked experience, as did most of the composition of the force.[126] It found that Tarčulovski was not self-appointed to carry out this operation.[127] These facts lead to a reasonable alternative inference: that what occurred was not planned, but resulted because Tarčulovski, who was ordered to carry out an operation planned by others, was an inappropriate person to choose to carry out the operation.[128] This, among other alternative reasonable inferences, was available and should have been adopted.

101. The conclusion about what was "planned" was arrived at without the appropriate affirmative finding that *when* the operation was planned, its *goal* was the indiscriminatory attack on civilians. As previously noted, Macedonia believed that major attacks had been planned by the NLA against the Macedonian capital and the neighboring village of Ljubanci.[129] The Trial Chamber found that the land mine killing and the retreat by the NLA into the village of Ljuboten were part of an armed conflict.[130] Macedonia responded to the NLA actions. No evidence, except for the suspect claim that what occurred showed what was planned, supports the conclusion that the plan was to attack civilians indiscriminately.

102. As to whether Tarčulovski individually planned the operation, the Trial Chamber, using the passive voice – indicative of its own uncertainty – stated only that "*It was said that* Johan Tarčulovski had planned the operation."[131] It then found that "preparations for the police operation *appear to have*

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[126] Judgement, para. 571.
[127] Judgement, para. 594.
[128] Judgement, para. 594.
[129] Judgement, para. 139.
[130] Judgement, *e.g.*, para. 292.
[131] Judgement, para. 543, citing M052, T. 8270 (emphasis added).

commenced in the evening of the very day when the terrorists, believed to be NLA, killed and wounded many soldiers using a land mine at a location close to Ljuboten,"[132] and concluded both that Tarčulovski was present at a meeting convened on 10 August and that there was "haste in the organization of *the operation*."[133]

103. The evidence of what occurred at that 10 August meeting failed to support a conclusion that there was a plan to engage in criminal activity. There is no evidence, nor any finding by the Trial Chamber, that murder, wanton destruction of cities, towns or villages, or cruel treatment – or any crimes – were discussed, much less planned, at that meeting. In fact, all the evidence was to the contrary: notes prepared after the meeting show a discussion of the "clean-up [of] Ljuboten from terrorists."[134] Further, the one witness to the meeting who was credited, M052, testified that the sole objective was [REDACED].[135]

104. For the broad statement that "*it was said* that Johan Tarčulovski had planned the operation," the Trial Chamber relied exclusively on M052's testimony, despite having earlier raised serious questions about the value of evidence from such military witnesses.[136] In fact, M052's actual testimony does not support a conclusion beyond a reasonable doubt that "Tarčulovski had planned the operation."

105. M052 [REDACTED].[137] Under the Trial Chamber'sdetermination on how it would evaluate the evidence, his accusatory statements should have been discounted as reflecting his own efforts to distance himself from the events. Regardless, M052 did not truly implicate Tarčulovski. M052 testified

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[132] Judgement, para. 562. (emphasis added).
[133] Judgement, para. 563.
[134] Ex. P302.
[135] T. 8554.
[136] Judgement, paras. 15-19.
[137] T. 8239-41.

[REDACTED]. M052 then testified, summarily, that an action was planned by Tarčulovski to enter the village.[138]

106. On cross-examination, however, M052 clarified his statement that Tarčulovski had planned the operation by saying [REDACTED].[139] *In short, he did not know.* Therefore, M052's testimony, taken together, did not establish beyond a reasonable doubt that Tarčulovski planned or designed the preparatory phase of the activities charged as war crimes.

107. Furthermore, on cross-examination, M052 elaborated on the information [REDACTED]. Asked again specifically about the subject of the 10 August meeting, M052 confirmed that there was [REDACTED].[140]

108. Since M052 confirmed [REDACTED]. Nor did his testimony, upon clarification, provide a reliable basis for finding that Tarčulovski "planned" the operation. Rather, it is clear that the plan: (a) was made by others; and (b) was to eliminate terrorists threatening the sovereign. There is no basis for holding Tarčulovski responsible for planning the preparation of any of the crimes charged.

2. Plan Or Design At The Execution Phase

109. Nor is there is any basis for holding Tarčulovski responsible for planning the execution of any of the charged crimes. As previously noted, the Trial Chamber, engaging in extraordinarily circular reasoning, found that "what was done by the group of police in the village, in the presence of ... Tarčulovski, as the Chamber finds was the case, provides a significant and reliable guide to *what was intended as the object of the operation*, by Johan Tarčulovski."[141] Not just illogical, this conclusion further assumes, improperly, that the Prosecution established beyond a reasonable doubt: (a)

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[138] T. 8270.
[139] T. 8555-56.
[140] T. 8554.
[141] Judgement, para. 565 (emphasis added).

that Tarčulovski was present when the crimes occurred; (b) that he had previously planned the killings, fires and beatings; and (c) that the perpetrators acted in conformity with such a plan.

110. The Trial Chamber stated, without citation, that Tarčulovski "personally led the police operation on 12 August, *and was with the group of police as they moved through the village*," committing acts that included the "first act" at the Jusufi home, where an unarmed man was shot;[142] the deliberate setting of fires at other houses;[143] and the events at the Adem Ametovski house.[144] Recognizing that Tarčulovski "was not the actual perpetrator of any of the offenses,"[145] the Trial Chamber again strained to rationalize a finding of guilt through circular reasoning, concluding, again erroneously, that "the acts of murder, cruel treatment and wanton destruction ... *committed* during the operation demonstrate[] ... that [those] acts *were intended* by Johan Tarčulovski."[146]

111. *There is, however, no evidence – and the Judgement cites to none* – to support a finding that Tarčulovski was with the group of police who moved through the village from the Jusufi house to the Ametovski house. Indeed, there is no evidence that Tarčulovski was ever at the Jusufi house, or at any of the houses where, according to the evidence credited by the Trial Chamber, fires were set. The Trial Chamber itself acknowledged the "limited evidence" concerning Tarčulovski on 12 August 2001.[147]

112. The only testimony the Trial Chamber relied on about where Tarčulovski was on 12 August 2001 came from M037, who testified that Tarčulovski was *outside* the village – talking to M037 – at the very time that Rami Jusufi was

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[142] Judgement, paras 564, 567.
[143] Judgement, paras. 568, 569.
[144] Judgement, para. 570 (emphasis added).
[145] Judgement, para. 594.
[146] Judgement, para. 576 (emphasis added).
[147] Judgement, para. 547.

killed, as shown below.

113. M037 was in the Hermelin. Citing M037's testimony, the Trial Chamber stated that, at 0800 hours, "at Stranište checkpoint a person using the code-name 'Rudnik,' and understood to be the Accused Johan Tarčulovski ... radioed Stranište checkpoint to advise that 'colleagues' were about to enter the village of Ljuboten to conduct an action to destroy 'terrorists.'"[148] In fact, M037's statement was that [REDACTED] and an active participant that morning, M037 could easily have been found culpable, and, therefore, had substantial reason to distance himself from the actions and to point the finger instead at Tarčulovski; in that sense, he fell precisely into the category of witnesses that the Trial Chamber announced should be deemed suspect. Nonetheless, the Chamber accepted only his inculpatory testimony and *rejected* his subsequent clarification that it was only an assumption that Tarčulovski was on the radio.

114. Moreover, M037 testified to a time line which, if believed, actually exonerated Tarčulovski as to the Jusufi killing. [REDACTED] The Jusufi killing was held to have occurred around 8 a.m.[149] M037's testimony shows he entered the village around 11 a.m. If Tarčulovski followed M037 and the Hermelin into the village, at around 11 a.m., as M037 and others testified,[150] then Tarčulovski was not present when Jusufi was shot.

115. M037's testimony also refutes any finding that Tarčulovski was present at the Ametovski house when the crimes occurred. He testified that Tarčulovski was present outside the Ametovski house after the men were taken out of the basement, [REDACTED]. M037's testimony – the only evidence of Tarčulovski's whereabouts – is insufficient to support the Trial Chamber's conclusion that he was at the Ametovski house when the crimes occurred.

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[148] Judgement, para. 36.
[149] Judgement, para. 43.
[150] Judgement, para. 44, n. 108.

116. Since the Trial Chamber's conclusion that Tarčulovski was guilty of the crimes rested solely on the notion that Tarčulovski was with the group of police in the village while a series of shootings and burnings occurred at various houses, and because that notion is wholly unsupported by the evidence, the determination of criminal liability cannot stand. Under the principle of *in dubio pro reo*, Tarčulovski is entitled to the benefit of the doubt, at the conclusion of his case, as to whether an offense has been proved beyond a reasonable doubt.[151]

B. Instigating

117. As the Trial Chamber noted, "instigating" has been defined to mean "prompting another to commit an offence."[152]

118. The Trial Chamber nowhere found that Tarčulovski prompted any person to commit a crime. It found no evidence that he "instigated" any others to commit an offense.

119. If the actual perpetrators had been known, the Trial Chamber would have had to identify the evidence proving that Tarčulovski specifically instigated the actual shootings. If the individual perpetrators were not known, but identified as part of a particular group, the Trial Chamber would still have to identify evidence establishing that Tarčulovski instigated the group to commit the crimes. There was no such evidence.

120. For example, had there been evidence identifying Tarčulovski as the person who allowed Bajrami to leave the group of detainees outside the Ametovski house (which there was not), there would still have to be evidence that he then "instigated" the police to shoot him. But the Trial Chamber identified no such evidence and made no such finding. The Prosecution's argument that Tarčulovski's presence, words and actions at the different locations constituted encouragement, and that he was aware of the legal effect of his

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[151] *Galić* Appeals Judgement, para. 77; *Čelebići* Trial Judgement, para. 601.
[152] Judgement, para. 399.

words and presence on the perpetrators,[153] falls fatally flat: the Prosecution did not cite to any words or actions by Tarčulovski at any of the locations that could be deemed encouragement. In fact, as previously noted, there is insufficient evidence to confirm that Tarčulovski was present at any of the locations when the crimes occurred. There is no basis in law or in fact for holding Tarčulovski liable for instigating the charged crimes.

C. Ordering

121. As the Trial Chamber itself recognized, the *actus reus* for "ordering" requires that a person in a position of authority instruct another person to commit an offense.[154]

122. A causal link between the act of ordering and the physical perpetrating of a crime also needs to be demonstrated as part of the *actus reus* of ordering.[155]

123. The Trial Chamber nowhere found – and there was no evidence from which it could find – that Tarčulovski "ordered" the unidentified perpetrators to commit the criminal acts. At most, a weak inference could be drawn that he ordered the operation, not that he ordered the crimes. That he ordered the crimes is based solely upon circular reasoning coupled with speculation.

124. The Trial Chamber concluded that Tarčulovski held no *de jure* leadership role.[156] As to any claim that he had *de facto* authority, such authority had to be conferred by his superiors and, at most, might indicate that he had authority to conduct the "operation." There was no evidence he had *de jure* or de *facto* authority to order killings, burnings, or beatings, or any evidence that any perpetrator believed he had such authority or followed his orders.

125. The Trial Chamber did not identify any order that Tarčulovski gave for the crimes to be committed. To the contrary, the Trial Chamber concluded, inconsistently, that Tarčulovski "*was ordered* to lead the police in a planned

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[153] Prosecution's Final Brief, para. 265.
[154] Judgement, para. 400.
[155] *Strugar* Trial Judgement, para. 332.
[156] Judgement, para. 574.

operation in Ljuboten" which took place on 12 August 2001.[157]

126. The Trial Chamber held Tarčulovski criminally liable, not because he "ordered" the crimes or even the operation, but because he "personally led *the police operation* on 12 August."[158] Whatever this means, it cannot substitute for evidence (of which there is none) that Tarčulovski *ordered the specific crimes* that were committed, or evidence (of which there is none) that he *ordered* the police operation with awareness of a substantial and unjustifiable likelihood that these crimes would occur. Indeed, one of the few witnesses partially credited, M037, who was in the Hermelin, testified [REDACTED].[159]

D. The Trial Chamber's Improper Expansion Of The *Actus Reus* And *Mens Rea* Of Planning, Ordering And Instigating Liability

127. The Trial Chamber appears to have convicted on the ground that it is sufficient for "planning, instigating, or ordering" liability if the accused planned, instigated, or ordered "an operation" – not necessarily a "crime" – *if* crimes were committed by others who carried out the operation, and the Accused was aware of the substantial likelihood that, though the goal of the operation was legitimate (to capture terrorists), a crime would be committed in the execution of the plan.[160]

128. The Trial Chamber's position is both factually and legally defective. The Trial Chamber concluded that Tarčulovski was ordered to lead the operation, but, critically, it could not determine either who ordered the operation or the substance of the order.[161] Consequently, the Trial Chamber could not address the issue of who might be chargeable for ignoring the "substantial likelihood" that the crime would be committed. In short, a finding that Tarčulovski

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[157] Judgement, para. 541 (emphasis added).
[158] Judgement, para. 564 (emphasis added).
[159] T. 868.
[160] Prosecution's Final Brief, paras. 246, 248, 249, 250; Judgement, para. 576.
[161] Judgement, para. 541.

"personally led the police operation" cannot substitute for evidence (of which there is none) that Tarčulovski *ordered* the specific *crimes* that were committed.

129. The Trial Chamber, without citing to the Appeals Judgements in *Blaškić* and *Kordić*,[162] apparently relied on a broad reading of those decisions to support its finding of guilt as to Tarčulovski.[163] *Blaškić* and *Kordić* do not hold that the *actus reus* for planning (or instigating or ordering), is satisfied by any conduct short of planning, instigating, or ordering conduct that constitutes a crime. The *actus reus* element certainly is not satisfied if what is planned or ordered is a legal operation.

130. In fact, *Blaškić* and *Kordić* do not even address the *actus reus* for planning, instigating, or ordering, only the *mens rea* for those forms of liability. As stated in *Blaškić*, the issue was "whether a standard of mens rea 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."[164]

131. In *Blaškič*, the Appeals Chamber articulated a *mens rea* for "ordering" related to, but different from, the common law principle of "recklessness." The Appeals Chamber made clear, both from the authorities that it cited and its rejection of the Trial Chamber's various articulations of the requisite *mens rea*, that knowledge of a risk that a consequence will occur or will probably occur is *not* sufficient for the imposition of criminal responsibility for serious violations of international humanitarian law.[165] If that were so, then "any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur."[166] Instead, *Blaškić* set a higher standard: to avoid the unacceptable result of too broad a

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[162] *Blaškić* Appeals Judgement, *Kordić and Cerkez* Appeals Judgement.
[163] Judgement, para. 576.
[164] *Blaškić* Appeals Judgement, para. 32.
[165] *Blaškić* Appeals Judgement, paras. 34-42.
[166] *Blaškić* Appeals Judgement, para. 41.

criminal liability, *Blaškić* insisted that "an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard."[167] In *Kordić*, the Appeals Chamber extended the *Blaškić* holding to liability for instigating and planning.[168]

132. *Blaškić* held that, to be criminally liable under a *mens rea* standard akin to recklessness, the accused must know not only that there is a possibility or even a substantial possibility that a crime will be committed; he must be aware of a "substantial likelihood" that a crime will occur, and consciously disregard it.[169] A "substantial likelihood" is more than a "possibility" – the standard on which the Trial Chamber apparently relied.

133. For recklessness to constitute the criminal *mens rea*, the actor must appreciate and ignore a risk that he knows is unjustified by the circumstances. Under *Blaškić*, "the risk must be unjustifiable or unreasonable."[170] Here, the Trial Chamber barely addressed the actual and perceived threat the NLA posed to Skopje, to Ljubance, or to the military, let alone found that the risk of crimes being committed under the circumstances was unjustifiable or unreasonable.

134. Moreover, even if *Blaškić* and *Kordić* had expanded the *actus reus* for ordering, planning, or instigating liability (which they did not); their holdings may not be applied retroactively. Due process protects a defendant from an unforeseeable and retroactive judicial expansion of a criminal statute.[171] Application of any *Blaškić* expansion would be unjust because that expansion was not part of the charged crime at the time of the acts: August 2001. Under the doctrine of *nullum crimen sine lege*, an act cannot be deemed a crime – that is, no crime can be committed – if the action did not violate a

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[167] *Blaškić* Appeals Judgement, para. 41.
[168] *Kordić and Cerkez* Appeals Judgement, paras. 29-32.
[169] *Blaškić* Appeals Judgement, paras. 41-42.
[170] *Blaškić* Appeals Judgement, para. 38.
[171] *Bouie v. City of Columbia*, 378 U.S. 347, 350-53 (1964), citting Hall, General Principles of Criminal Law, 61 (2d ed. 1960).

penal rule in place at the time the action was done.

135. This fundamental principle of justice stems back to the International Military Tribunal in Nuremberg,[172] and has been a vital part of international jurisprudence since then.[173] Notably, it has been codified by the International Criminal Court, in Article 22 of its Rome Statute, which states in pertinent part:

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court; [and]
>
> 2. *The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*[174]

136. In sum, under a proper reading of *Blaškić* and *Kordić*, the Trial Chamber could not find that Tarčulovski's liability rested on his having "planned, ordered, or instigated" an "operation" absent a finding that he "planned, ordered or instigated" a criminal act.

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[172] *Milutinovic* Jurisdiction Decision, para. 37.
[173] *Milutinovic* Jurisdiction Decision, paras. 37-39; *Vasiljević* Trial Judgement, para. 193.
[174] Rome Statute, Article 22 (emphasis added).

VI. APPEAL GROUND 4: THE EVIDENCE WAS INSUFFICIENT TO FIND MURDER, WANTON DESTRUCTION, OR CRUEL TREATMENT BEYOND A REASONABLE DOUBT

A. Murder
(Judgement, paras. 304-328, 537-585)

137. The Trial Chamber erred in law and/or fact in finding beyond a reasonable doubt that Tarčulovski was criminally responsible for the three murders charged in the Amended Indictment.

138. It is unknown who shot at and killed Rami Jusufi, Sulejman Bajrami and Muharem Ramadani. The Trial Chamber made no specific findings on those issues. Thus, it remains unknown what was in the mind of the perpetrator or perpetrators – whether that person (or persons) believed the victim to be an NLA terrorist, or believed (rightly or wrongly) that the victim posed a threat. There was certainly no evidence before the Trial Chamber that any of the three men were intentionally shot by the unknown perpetrator *because* the perpetrator believed that he was a civilian; that is pure surmise.

139. For murder to be punishable under Article 3 of the Statute, the Prosecution must show both that the victim was a person taking no active part in the hostilities, *and* that the perpetrator "was aware or should have been aware of this status of the victim."[175]

140. As the Appeals Chamber held in *Strugar*:

> [A] Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual

[175] *Halilović* Trial Judgement, para. 36.

> circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party. If a reasonable doubt subsists as to the existence of such a nexus, then a Trial Chamber cannot convict an accused for an offence committed against such a victim under Article 3 of the Statute."[176]

141. Where there is doubt about the status of the person attacked, the Prosecution must show that a reasonable person *"could not have believed that the individual he or she attacked was a combatant."*[177] Though the victim might turn out to be a civilian, the Prosecution has the heavy burden of proving that no reasonable person could have concluded otherwise. Additional Protocol 1, applicable in international situations, does not alter that burden of proof. It provides that, in international situations, in case of doubt, an individual should be presumed to be a civilian. But that does not apply in the context of a criminal trial involving an internal conflict where the burden to establish the facts – including the state of mind of the perpetrator – remains at all times with the Prosecution.[178]

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[176] *Strugar* Appeals Judgement, para. 178.
[177] *Halilović* Trial Judgement, para. 36, citing *Galić.*
[178] *Blaškić* Appeals Judgement, para 111.

142. Here, the Trial Chamber specifically found that NLA members did not always distinguish themselves; indeed, that "not all NLA members had a uniform. Some wore black clothing or other civilian clothes."[179] Thus, it was particularly crucial for the Prosecution to have proven beyond a reasonable doubt and for the Trial Chamber to have expressly found that the perpetrators, and by extension, Tarčulovski, could not have believed that their victims, dressed in black as the NLA often dressed, were NLA members. The Prosecution did not meet its proof. More importantly, the Trial Chamber made no such findings.

1. Rami Jusufi

143. As to the death of Rami Jusufi,[180] the Trial Chamber found that Jusufi died as he tried to close his front door, from shots to his stomach that were fired by "attackers," who also kicked the front door of the house and started a fire in the yard, and then left.[181]

144. Subsequently, the Trial Chamber stated that "a number of persons who entered the yard and shot at the [Jusufi] house ... were members of the police," and that "the actual perpetrators ... who fired at the house" were "members of the police."[182] *But the Trial Chamber never found which police were present or involved.* The evidence demonstrates that there were multiple groups of "police" roaming in the village that morning. The Trial Chamber found that Tarčulovski was with a group of men wearing camouflage uniforms,[183] but conveniently disregarded witness MO37's testimony that it was "20, 30 or maybe 40 people," in favor of its own "finding there were some 60-70."[184] That unit, the Trial Chamber found,

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[179] Judgement, para. 285.
[180] Judgement, paras. 43-47. Later discussions of the events, for example at paras. 306-48, cite back to these findings; the findings set forth at Judgement, paras. 553-54 offers virtually no citations to testimony or documents at all.
[181] Judgement, paras. 43-44.
[182] Judgement, para. 312.
[183] Judgement, para. 41.
[184] Judgement, para. 41, fn 111.

without citation, "entered Ljuboten;"[185] but "as it did so," "intensive shooting" was already heard coming from the vicinity of the Orthodox Church – which, the Chamber found, "was firing by the police."[186] Therefore, since there was already police firing near the Church when Tarčulovski's group supposedly entered the village, there must have already been another, *second* team of armed police in Ljuboten that morning.

145. Then, a *third* team of five other police officers – "mostly reservists," and also wearing camouflage uniforms[187] – came into the village "soon after" Tarčulovski's unit.[188] These officers "materially assisted" and "supported" the police who were with Tarčulovski.[189]

146. At least a fourth group of "armed men dressed in police camouflage uniforms, members of the police unit," were also present in the village.[190] Although this group included employees of the "Kometa" security agency,[191] it is also referred to – just like Tarčulovski's unit or the armed men riding in the Hermelin – simply as "the police."[192] Some of the armed men in the village that morning wore shoulder insignia, some did not; some had face masks and some did not; however, in the Judgement, they are all called "the police." A *fifth* and *sixth* group of armed police (the "Tigers" and the "Lions") may also have been in the village.[193]

147. Accordingly, given that there were many different sets of "armed police" in Ljuboten on the morning of 12 August, and no findings as to which of them were the "attackers" at the Jusufi house and fired the shots that struck Rami

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[185] Judgement, para. 42.
[186] Judgement, para. 42.
[187] Judgement, para. 36.
[188] Judgement, para. 42.
[189] Again, the Chamber rejects as self-serving MO37's testimony that the Hermelin patrol waited more than an hour after 8:00 a.m. before entering the village to avoid mortar fire (Judgement, paras. 36, 42 fn 117), but accepts the admittedly biased statements of the victim's father regarding the sequence of events. (Judgement, paras. 43-44)
[190] Judgement, para. 56.
[191] Judgement, para. 56.
[192] Judgements, paras. 52, 56.
[193] Judgement, para. 58.

Jusufi, any conclusion that Tarčulovski – acquitted of JCE – was part of the group of "police" that killed Rami Jusufi is absolute conjecture.

148. As to the circumstances surrounding the death of Rami Jusufi, there were serious disputes as to whether he was an active participant in the armed conflict; what he was wearing when shot; where he was shot; and who killed him.[194]

149. The Trial Chamber determined that Jusufi was not a member of the NLA by crediting the written statement of Fatmir Kamberi, a resident of Ljuboten,[195] who, the defense claimed, was a member of the NLA,[196] and therefore fit into the category of those witnesses the Trial Chamber had deemed suspect.[197] Yet the Trial Chamber rejected the testimony of Captain Grozdanovski (whom it had previously credited)[198] that there was an NLA checkpoint at the Jusufi house, stating without citation, that his testimony and that of M2D-008 (because they were army witnesses) were not accepted.[199]

150. The Trial Chamber also disregarded M037's testimony [REDACTED] – the Trial Chamber's description of how the NLA often dressed[200] – [REDACTED] (which would be close to Jusufi's house), as well as his testimony that he saw Tarčulovski [REDACTED] about three hours *after* the Jusufi shooting.

151. The Trial Chamber concluded, "Taking into consideration, in particular, the fact that evidence discloses there was no resistance, the fact that Rami Jusufi was shot at close range from outside the house as he was at the open door, that he was unarmed at the time, in civilian clothes, and the number of bullets

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[194] Judgement, paras. 307, 309.
[195] Ex. P426.
[196] Judgement, para. 310.
[197] Judgement, para. 11.
[198] *See, i.e.*, Judgement, para. 31, n. 69; para. 45, n. 131; para. 99, n. 392, 393, 394.
[199] Judgement, para. 310. The Trial Chamber frequently relied on M2D-008, *i.e.*, Judgement, paras. 103, n.422, 423; 138, n. 536; 141, n. 574, 577.
[200] Judgement, para. 285.

fired from the front yard and patio area at the house in the vicinity of the doorway in which Rami Jusufi was standing, the Chamber finds that those who fired at the house, *i.e.*, members of the police who were the actual perpetrators, did so with the intention to kill Rami Jusufi, or alternatively, with the knowledge that his death would be a probable consequence of their actions. The identity of these police members has not been established, nor does the evidence identify any one of them as "the firer of the shot which caused the death of Rami Jusufi."[201]

152. This finding is legally insufficient. It does not address the *mens rea* of the perpetrator (or of Tarčulovski) as to Jusufi's status– that is, whether he knew that Jusufi was a civilian or could not have reasonably believed otherwise. There was no evidence that the perpetrator saw what Jusufi was wearing, or knew that he was unarmed.[202] No finding about what the perpetrator believed could be made on this record.

153. Moreover, only the assertion that he "was shot at close range" can be used to support *any* inference (although not an inference that the perpetrator had to have realized that Jusufi was a civilian), and there are no citations to support this assertion. Rather, the description of the events states, "No bullets or fragments were retrieved from the body. The [autopsy] report does not express conclusions as to the cause of death."[203] Thereafter, the Trial Chamber refers to M171, but he did not testify to the proximity of the shooter.[204] The autopsy report notes advanced decomposition and mummification, but does not support the conclusion of a shooting at close range,[205] only that the "changes" were caused by projectile discharged from

[201] Judgement, para. 312.
[202] Judgement, para. 312.
[203] Judgement, para. 306.
[204] Judgement, para. 306; T. 3436.
[205] Ex. D78.

a firearm.[206] M171 testified that [REDACTED]. Further, the Trial Chamber found:

> The evidence does not exclude that Rami Jusufi could have been shot by a person from any number of positions close to the entrance of the house, whether or not the person was lying or crouching down. While on the basis of the evidence the Chamber is unable to establish the precise position from where Rami Jusufi was shot, it is satisfied and finds that he was shot from outside the house when he was at the entrance of the house.[207]

154. Thus, there is no evidence to support any finding relating to the position of perpetrator, and, equally importantly, the knowledge or *mens rea* of the perpetrator.

2. Sulejman Bajrami

155. The same fundamental vagueness problems pervade the Trial Chamber's findings with respect to Sulejman Bajrami's death. The Trial Chamber concluded that unidentified "[a]rmed uniformed police" came to Adem Ametovski's house and ordered the men there to leave the basement.[208] After that, the Trial Chamber found that "Sulejman Bajrami was hit or kicked badly in the head;"[209] which "police" did this is speculation, given that the witnesses' heads were covered.[210] Then, "shortly afterwards," the covered men "heard gunshots" – again from an unidentified source – and then, "[i]n

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[206] Ex. D78, p. 3.
[207] Judgement, para. 308.
[208] Judgement, para. 51.
[209] Judgement, para. 55.
[210] Judgement, para. 54. The Trial Chamber itself recognized that "[t]here is no evidence about this event from any members of the armed police unit which was present at the time.... The evidence from these survivors [whose heads were covered] varies and some appears to be unreliable. For the most part they could not see what happened. It was apparent that in many respects they have interpreted the sounds they heard to decide what occurred." Judgement, para. 315.

the Chamber's finding, Sulejman Bajrami, who had commenced to walk or run away, was lying dead on the right side of the road ... He had been shot many times and died from police gunfire."[211]

156. As with Rami Jusufi, there is no finding as to who shot Sulejman Bajmani, or any proof that Tarčulovski was present with the armed "police" responsible for his death. To the contrary, the numerous descriptions of the "police" that were present at the Ametovski house – as many as "200 or 300 men in the yard"[212] – clearly establish that there were multiple other armed "police" units present that did not match the description of Tarčulovski and his men as wearing "camouflage uniforms with no insignia on them."[213] The 200-300 police in the Ametovski yard were wearing uniforms of "black or dark colour" or camouflage uniforms "with shoulder insignia;" yet others were identified as members of special police units "Tigers" and "Lions," some with word "Lions" written on them in Macedonian.[214]

157. To the extent that the Trial Chamber accepted that "*the police unit including Mr. Tarčulovski* arrived at the house of Adem Ametovski *following* the Hermelin APC"[215] (which is the *only* testimony placing Tarčulovski in the village), that testimony came from witness M037. But as already noted, the Trial Chamber plucked this snippet of testimony from the otherwise-wholly-rejected testimony of M037 about the time line of events, which placed Tarčulovski elsewhere at the time of this killing.

158. The Trial Chamber also rejected the defense claim that Bajrami was a member of the NLA and was shot while seeking to escape.[216] The Trial Chamber noted that "For the most part they [the village witnesses] could not

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[211] Judgement, paras. 55, 313, 320.
[212] Judgement, para. 59.
[213] Judgement, para. 41.
[214] Judgement, paras. 58-59.
[215] Judgement, para. 59, fn 200 (emphasis added).
[216] Judgement, para. 314.

see what happened. It was apparent that in many respects they have interpreted the sounds they heard to decide what occurred."[217] Nonetheless, despite this dearth of relevant evidence, the Trial Chamber concluded, "The evidence does not provide any basis for any conclusion other than that, at the time he was killed, Sulejman Bajrami was an unarmed civilian taking no active part in the hostilities. While his actions may have been interpreted as an attempt to escape, the attempt was not regarded by the police as posing any real risk of escape. Instead, he was allowed to move for a time and then, repeatedly and deliberately, he was shot and he died. He was shot with the intention of his death serving as an example. The murder of Sulejman Bajrami has been established."[218]

159. Again, the Trial Chamber relied solely upon villagers' testimony – testimony it found unreliable – and then came to a conclusion unsupported by the testimony.[219] The Trial Chamber concluded that it was hopeless for Bajrami to try to escape,[220] yet the Trial Chamber never addressed whether the perpetrator had no reasonable cause to fear that Bajrami, a potentially dangerous NLA terrorist, was trying to escape. Therefore, the Trial Chamber could not and did not make a finding that the perpetrator had the requisite *mens rea*. And if Tarulovski was not even present when the shooting occurred, there is no basis for finding that he possessed the necessary *mens rea*.

160. Accordingly, because there is no firm evidence as to who shot Mr. Bajrami, or that the perpetrator had the requisite *mens rea*, or that Tarčulovski was present when the shooting occurred, there is not evidence beyond a reasonable doubt sufficient to hold Tarčulovski liable for this killing.

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[217] Judgement, para. 315.
[218] Judgement, para. 320.
[219] Judgement, paras. 315-16.
[220] Judgement, para. 319.

3. Muharem Ramadani

161. As to the third man, Muharem Ramadani, the Trial Chamber conceded that the date and time of his death, and even how he died and who killed him, are unknown: "The Chamber notes that there is no specific evidence as to the circumstances in which Muharem Ramadani was killed."[221] In fact, the Trial Chamber expressly accepted the autopsy findings, *which could not record a specific cause of death*, and thus found that how Ramadani died could not be confirmed. Even under the scenario accepted by the Trial Chamber – based on its own piecing together of circumstantial evidence that is largely unsupported by references to the record – not only is there is no evidence that Tarčulovski was present when Ramadani was shot, there is a complete absence of evidence as to the origin of the shot(s) and the circumstances of his death.

162. Still, the Trial Chamber concluded that "Muharem Ramadani died from gunshot wounds on 12 August in front of Adem Ametovski's house, the fatal shots being fired by one or more unidentified members of the police who had him in their custody at the house."[222]

163. There is no support for a conclusion that Tarčulovski was present when Ramadani was shot, nor any reasoned basis for attributing culpability to Tarčulovski, when there is no evidence as to who killed Mr. Ramadani or why. The Trial Chamber rejected an OSCE report's suggestion that Mr. Ramadani may have been killed during a different operation, deeming that possibility "merely conjectural,"[223] and relied instead on an autopsy report, prepared from the body following exhumation after eight months.[224] The Trial Chamber's insistence on creating an entirely circumstantial explanation that inculpated Tarčulovski, instead of drawing other reasonable inferences

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[221] Judgement, para. 324.
[222] Judgement, para. 325.
[223] Judgement, para. 324.
[224] Judgement, para. 322.

that were permissible from the evidence, had the effect of shifting the burden of proof and violating Mr. Tarčulovski's right to a presumption of innocence.

B. Wanton Destruction (Judgement, paras. 34-80, 537-585)

164. The Trial Chamber erred in law and/or fact by finding that the elements of wanton destruction had been established beyond a reasonable doubt, that twelve houses had been intentionally destroyed without military necessity,[225] or that Tarčulovski had the requisite *mens rea* for that offence.[226] The elements, identified in the Judgement, are as follows:

> (i) the destruction of property occurs on a large scale;
>
> (ii) the destruction is not justified by military necessity; and
>
> (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[227]

165. In finding Tarčulovski guilty of this crime, the Trial Chamber disregarded the statements of military and police personnel that they were specifically targeting houses that harbored NLA terrorists – which demonstrated that the Government's actions were justified by military necessity and in response to the military having been fired upon from locations in Ljuboten. Evaluating a military/police operation while disregarding all testimony from military and police witnesses places an impossible burden on the Accused. Because of the wholesale rejection of those military/police statements, Tarčulovski could not possibly defend himself.

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[225] Judgement, paras. 349-80.

[226] Tarčulovski was convicted of damage to houses belonging to: Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevxhet Jusufovski, Nazim Murtezani, Abdullua Lutfiu, Harun Rexhepi (Redžepi), Ismet Rexhepovski (Rexhepi, Redžepi), Qani Jashari, Afet Jashari, and Ramush Jashari. Judgement, para. 577.

[227] Judgement, para. 351.

166. The Trial Chamber did not point to any evidence that established beyond a reasonable doubt that the houses were set afire by the police. To the contrary, it was wholly unclear from the evidence *how* these houses were damaged, *why* or *when* the damage was inflicted, or *by whose hand*. The Trial Chamber overlooked substantial evidence that the damage could have resulted from fire by cannon, mortar, grenade or bombing, by an attack on a different date, and/or by an attack by others, including members of the NLA itself. M037, who was relied upon to show Tarčulovski was present at least at the Ametovski house, said he never saw any security members [REDACTED].

167. Moreover, the Chamber acknowledged that some houses in Ljuboten – including those near the Orthodox Church, the primary area at issue here – sustained damage on 16 or 17 August, such that the houses listed in the Amended Indictment "could have been burned on 16 or 17 August and not on 12 August 2001, as alleged in the Indictment."[228] It also acknowledged that the army fired into Ljuboten on 10 August 2001.[229]

168. The Trial Chamber's principally relied on witness statements,[230] but almost none of the witnesses personally saw how the houses were destroyed.[231] For example, one witness stated that he saw "men in camouflage uniforms" setting fire to hay.[232] That does not establish which of the police units perpetrated these crimes.[233] The Trial Chamber's almost exclusive reliance on those witness statements is particularly arbitrary given the Chamber's finding, at the outset, that there was an inherent prejudice and unreliability on the part of the witnesses who were Ljuboten residents.[234]

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[228] Judgement, para. 362.
[229] Judgement, para. 103.
[230] Judgement, paras. 45-49, 363-68.
[231] See, e.g., Exhibits P426, para. 20; P219.1, para.4; P372, para. 8.
[232] Ex. P372, para. 8.
[233] See *supra*, paras. 144-47.
[234] Judgement, para. 11.

169. The Trial Chamber also failed to credit the critical evidence that many of the villagers stored their agricultural equipment, such as tractors, together with fuel, and hay and the harvested wheat – all highly combustible – in their barns and stalls, which in turn were connected to the houses. Fire could easily spread to and burn a home or family compound that was never hit by anything.[235] Indeed, several damaged houses were located next to each other.[236]

170. The failure to acknowledge the presence of combustible items in the area becomes particularly important because: (1) several of the listed houses may have been used that morning by three to five persons to fire upon the army – meaning that potentially incendiary weapons were used from within those structures; (2) Captain Grozdanovski's army unit fired upon the houses and vicinity "with mortar shells, a sniper rifle and a machine gun;" and (3) the Trial Chamber observed that "at least some damage ... may have been caused by the army."[237]

171. Thus, the strong possibility that damage to this densely inhabited part of Ljuboten came from either earlier or later shelling or bombing by the army, or even by NLA members themselves, precludes a finding *beyond a reasonable doubt* that the damage was caused by fires set by the police on the morning of 12 August 2001. Even the Prosecution acknowledged that damage to at least eight of the fourteen houses stemmed from grenades, mortar shells, cannon bombs and/or bullets.[238]

172. The Trial Chamber also failed to consider the substantial evidence that NLA terrorists were improperly using this civilian property to hide themselves from the military and the police. It failed to even consider whether, under those circumstances, the Macedonian forces were justified in firing at certain

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[235] Judgement, para. 361.
[236] Ex. P411.
[237] Judgement, para. 377-79.
[238] Amended Indictment Schedule A Wanton Destruction Victims.

houses. The Defense, for example, claimed that the Jusufi house was an NLA checkpoint, and that, on the morning of 12 August, there was "outgoing fire" coming from the row of houses in which the Jusufi family lived, just northeast of the Orthodox Church; Captain Grozdanovski's evidence suggested that a group of terrorists were firing from the balcony and windows of the houses.[239] Those firings were offered as justification for retaliatory mortar fire from the army on those houses.

173. The Trial Chamber, however, rejected Grozdanovski's evidence (which came from his contemporaneous military report and testimony).[240] Instead, the Trial Chamber credited the testimony of Peter Bouckaert that the damage to the houses was caused by burning. Bouckaert observed that the chimneys of the damaged houses were still standing, indicating to him that the damage was not from the explosion of mortar shells.[241] Even if he were correct that the visible damage reflected burning, that does not disprove that there also was gunfire coming from the Jusufi houses. Yet the Chamber "accepted that there was no outgoing fire from these houses ... on 12 August."[242]

174. The Trial Chamber similarly rejected the evidence given by Henry Bolton that he heard the detonation of 120 millimeter mortar shells at about 8:00 a.m., and that he saw rising smoke from the area of a building near the Orthodox Church.[243] Bolton noted that there were potential targets for the NLA in that area, including a police post near the Church, and, since he understood that the Macedonian forces in the area did not have mortar shells of that size, he believed the NLA was launching the attack.[244] Without citation, apparently now relying on the previously discredited Captain

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[239] Judgement, para. 145.
[240] Judgement, para. 146.
[241] Judgement, para. 146.
[242] Judgement, para. 146.
[243] Judgement, para. 148.
[244] Judgement, para. 148.

Grozdanovski, the Trial Chamber decided that the Macedonians *did* have 120 millimeter mortar shells.[245]

175. A reasonable inference from all of the evidence is that shellings by the military or by the NLA caused all or at least some of the fires. The failure of the Trial Chamber to consider this logical inference violated Tarčulovski's right to the presumption of innocence and the Trial Chamber's own standard of evidentiary evaluation: that where more than one inference is reasonable on a given set of facts, the Chamber must acquit if one reasonable inference available on the facts is "inconsistent with the guilt of the Accused."[246]

176. It was error for the Trial Chamber to find that the elements of wanton destruction were proved beyond a reasonable doubt. Moreover, because there was no evidence showing that Tarčulovski was even present when the fires occurred or that he in any way planned, ordered, or instigated others to destroy the ethnic Albanians' property, the Trial Chamber could not conclude, beyond a reasonable doubt, that Tarčulovski was responsible for any of the damage or possessed the *mens rea* for that offense.

C. Cruel Treatment
(Judgement, paras. 381-391, 537-585)

177. The Trial Chamber erred in law and/or fact in finding Tarčulovski criminally responsible for the cruel treatment of the thirteen persons listed on Schedule B to the Amended Indictment. There was no legal or factual basis for such liability. The Trial Chamber found that, when mistreatment of a detained person took place at the hands of police who were not acting under the "authority or direction" of Tarčulovski, he could not be held criminally responsible. Thus, because the perpetrators were not under his control, Tarčulovski was acquitted of mistreatment of Atulla Qaili.[247] In adopting that

[245] Judgement, para. 149.
[246] Judgement, para. 9.
[247] Judgement, para. 575.

line of reasoning, the Chamber acknowledged that, for Tarčulovski to be criminally culpable, the Prosecution had to prove beyond a reasonable doubt that Tarčulovski was present when the mistreatment occurred and that the persons conducting the abuse were under his control or that he previously ordered that such mistreatment take place.

178. As to the mistreatment committed outside the Ametovski house, the Trial Chamber made no such findings. To the contrary, only M037 placed Tarčulovski at the scene outside the Ametovski house and he only testified that he saw Tarčulovksi present [REDACTED]. Then, according to M037, he returned to the Hermelin, where, after hearing shots, he joined Tarčulovski in the field behind the house. Thus, according to M037, Tarčulovski probably was not present during any of the abuses. If the Chamber relied on M037's testimony to put Tarčulovski at the Ametovski house, it also had to accept his testimony that he saw no mistreatment at that time, and that Tarčulovski was in the field when the mistreatment presumably took place.

179. As to cruel treatment that took place at the Braca house, there is no evidence that the men who were there abusing the villagers were under Tarčulovski's control; therefore, there is no legal basis for holding him criminally responsible for events that took place there. Significantly, the Trial Chamber found that Ljube Boškoski *was* present at the Braca house;[248] therefore, given the presence of the senior Minister, it is unclear under what theory Tarčulovski would be responsible for the beatings even if he had been present. At the most, testimony showed Tarčulovski [REDACTED] Boškoski, who, the Prosecutor argued, controlled the whole operation.[249] In the absence of evidence of Tarčulovski's responsibility or active involvement in the events at the Braca house, there is no basis for his liability.

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[248] Judgement, para. 72.
[249] T. 875 (Testimony of M037).

VII. APPEAL GROUND 5: THE BURDEN OF PROOF WAS IMPROPERLY SHIFTED TO THE DEFENSE AND THE TRIAL CHAMBER MISAPPLIED THE PRINCIPLE OF *IN DUBIO PRO REO*

(Judgement, especially, paras. 9-19, 73, 95, 106, 108, 111, 161, 208-292, 301, 307-309, 318-320, 353-366, 392, 507, 513-514, 572, 582)

180. Tarčulovski incorporates by reference paragraphs 17-25 above which categorize the Trial Chamber's evidentiary errors. As noted, the presumption of innocence in ICTY proceedings "places on the Prosecution the onus of establishing the guilt of the accused, a burden which remains on the Prosecution throughout the entire trial.[250] Nonetheless, the Trial Chamber erred in fact and/or law by shifting the burden of proof to Tarčulovski and relied for its determination of guilt on Tarčulovski's failure to testify or otherwise present evidence.

A. The Trial Chamber Applied The Wrong Standards In Evaluating The Evidence

181. The Trial Chamber observed, "As Common Article 3 protects persons taking no active part in the hostilities, *it must be established* that the victims of the alleged violation were not taking an active part in the hostilities at the time the crime was committed."[251] This was the wrong standard. It is the Prosecution, specifically, that *must* prove beyond a reasonable doubt: (1) that the victim was not actively involved in the hostilities; and (2) that the perpetrator could not have believed otherwise. As set forth in *Halilovic*, *Galic* and *Strugar*, the Prosecution must show:

> that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian [in international conflict]. However,

[250] Judgement, para. 9.
[251] Judgement, para. 301. (emphasis added)

> in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.[252]

182. The Prosecution did not meet this burden, and the Trial Chamber did not make any findings to support a conclusion that it did.

183. In addition, the Trial Chamber arbitrarily concluded that the *predominant* purpose of the police operation was to "indiscriminately attack ethnic Albanians and the property of ethnic Albanians."[253] That conclusion violated the principle of *in dubio pro reo*. The Trial Chamber had already recognized that there was evidence to support a contrary finding: that the purpose of the operation was to "locate and arrest or in some other way deal with NLA members, also described as 'terrorists,' [who were present and hiding] in the village."[254] That finding, which favored Tarčulovski, should have controlled the Judgement.

184. Significantly, the Trial Chamber made its finding about the "predominant" purpose by drawing an impermissible negative inference against Tarčulovski. The Trial Chamber noted that, "This does not exclude that in some cases Johan Tarčulovski may have been told of some possible NLA affiliation of a member of a household, which encouraged actions against that person or the home of that person or of his family. *But this is not able to be demonstrated from the evidence as Johan Tarčulovski has not disclosed what he may have been told or by whom.*[255]

185. This reasoning squarely (and improperly) placed the burden on Tarčulovski to present evidence of his innocence. That was legal error. The burden "remains on the Prosecution" and never shifts to the Accused. No inference

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[252] *Halilović* Trial Judgement, para. 36, citing *Galić*.
[253] Judgement, para. 572.
[254] Judgement, para. 571.
[255] Judgement, para. 572 (emphasis added).

may be drawn against an Accused based on his failure to testify or present evidence.

186. By rejecting evidence reasonably permitting an inference that the operation had a legitimate purpose (to root out terrorists) in favor of an inference supportive of guilt (that the purpose of the operation was to attack civilians), the Trial Chamber violated both the principle of *in dubio pro reo* and its own articulated standards of evidentiary review.[256]

B. The Trial Chamber Improperly Rejected The Testimony Of Entire Categories Of Witnesses, And Then Selectively Used Supposedly Rejected Testimony

187. Further, the Trial Chamber made a number of sweeping determinations that several categories of witnesses were inherently biased and therefore entirely unreliable.

188. First, the Trial Chamber found that the testimony of the residents of Ljuboten, as a group, was suspect because they testified as witnesses who had been prepared, and thus had "a tendency to speak as if with one voice."[257] Nor, according to the Trial Chamber, could it credit the testimony of villagers "with ethnic Albanian roots," because of the emphasis in their cultural background on "group values, honour and family loyalty."[258] The Trial Chamber found particularly troubling the villagers' testimony on topics such as: 1) whether there were NLA members in the village; 2) the circumstances under which certain deaths occurred; and 3) the identity of the Macedonian forces that entered the village on 12 August 2001.[259]

189. Then, the Trial Chamber dismissed as unreliable virtually all of the testimony of members of the Macedonian police and army, and former or current employees of the Ministry of Interior. The Chamber found that, as a group,

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[256] Judgement, para. 9.
[257] Judgement, para. 11.
[258] Judgement, para. 11.
[259] Judgement, para. 11.

these witnesses left the "clear impression" that they were seeking in their evidence "to distance themselves from any wrongdoing by Macedonian forces or to exculpate their own behaviour or the conduct of the police or army."[260] The Trial Chamber further was concerned that some military/police witnesses gave testimony inconsistent with prior statements, perhaps to preserve their own careers.[261]

190. It was improper, as a matter of law, to dismiss entire categories of witnesses as unreliable rather than to evaluate the credibility of individual witnesses, particularly all military/police witnesses. The operation in Ljuboten on 12 August 2001 was a military/police operation. The Trial Chamber's conclusion that all military and police witnesses were suspect violated Tarčulovski's due process right to defend himself, making it almost impossible to establish that terrorists lived and were hiding in the village and that the "operation" was undertaken by Macedonia to weed out terrorists – and not to attack civilians.

191. Worse still, the Trial Chamber applied this principle unfairly and in a flagrantly result-oriented fashion, consistently crediting snippets of testimony that it needed to find guilt, but condemning the rest as unreliable. Despite reservations about the reliability of the "village" witnesses, the Trial Chamber relied almost exclusively on their testimony to make factual findings that would permit it to find Tarčulovski guilty. The Trial Chamber cited to the testimony of *individual* residents to formulate a factual sequence of events that was consistent with guilt – particularly in determining the events underlying the conclusion that Rami Jusufi was not a member of the NLA, the events surrounding the death of Sulejman Bajrami, and the wanton destruction and cruel treatment convictions. The Trial Chamber relied on the villagers' communal view of events, although that was precisely the basis for

[260] Judgement, para. 12.
[261] Judgement, para. 13.

deeming their testimony unreliable in the first place.

192. In addition, though the Trial Chamber should not have rejected all military/police testimony, if the rejection was premised on the reason that the military/police witnesses would distance themselves from any potential liability by pointing an accusatory finger at Tarčulovski, then their exculpatory testimony should have inured to Tarčulovski's benefit. For example, M052 was [REDACTED] distanced himself from the operation by asserting that Tarčulovski had planned it. He later clarified that his statement was only an assumption, but he was still credited only as to the single snippet of inculpatory testimony.

193. Similarly, both M052 and M037's testimony, when read *in toto*, supports Tarčulovski. Yet only their inculpatory testimony – which allowed them to distance themselves from the events– was credited.

194. The Trial Chamber also misapplied evidentiary principles when it evaluated whether the NLA's terrorist activities and Macedonia's response in self-defense rose to the level of an "armed conflict."[262] The Trial Chamber compiled a catalogue of the terrorist attacks and resulting clashes with Macedonian military and police, which provided evidence of Macedonia's need to respond in self-defense.[263] Yet the Trial Chamber then relied on this evidence only for its conclusion that an armed conflict existed, and not as evidence to support the Defense theory that the operation was not directed at civilians but at NLA terrorists.

195. So, too, throughout the section, "Possible NLA Target Positions in Ljoboten on 12 August,"[264] the Trial Chamber frequently acknowledged that there was a conflict in evidence and that, as a result, it could not reach a factual conclusion. Yet, the Chamber failed to recognize that a conflict constituted

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[262] Judgement, para. 292.
[263] Judgement, paras. 208-292.
[264] Judgement, paras. 145-72.

a failure of proof on the part of the Prosecution and, in effect, mandated a verdict of acquittal.[265]

196. The Trial Chamber repeatedly violated the principle of *in dubio pro reo* – which dictates that any doubt must be resolved in favor of the Accused – when it accepted negative inferences over other, reasonable alternative inferences that were favorable to the Accused. As the Chamber itself noted, reliance on an inference as evidence of guilt must be not only reasonably available from the evidence, it must be *the only reasonable inference available*.[266] If the evidence reasonably permits another inference that is inconsistent with guilt, "the onus and the standard of proof requires that an acquittal be entered in respect of that count."[267]

197. This principle repeatedly was ignored. A few examples establish this:

a. The Trial Chamber inferred that the goal of the "operation" was to kill civilians because civilians were killed. There was no other evidence to support the prosecution's claim that civilians were targeted by the operation undertaken on 12 August 2001 and extensive evidence to the contrary.

b. On the death of Sulejman Bajrami, the Trial Chamber inferred that Tarčulovski was present because M037 placed Tarčulovski at Ametovski's house at a time prior to Bajrami's death. An alternative reasonable inference supported, in fact, by M037's testimony, was that Tarčulovski left that location and was at the house of Qani Jashan when Bajrami was killed.

c. The Trial Chamber inferred that Tarčulovski planned the operation and the crimes because he attended the meeting on 10 August 2001, but discounted the alternative reasonable inference, supported by

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[265] *See specifically*, Judgement, paras. 154, 161, 166, 169 and 171.
[266] Judgement, para. 9.
[267] Judgement, para. 9.

evidence, that others, in particular the President of Macedonia or higher officials in the MoI, planned the operation.

d. The Trial Chamber inferred that at the meeting on 10 August a plan was made to commit the crimes charged. An alternative reasonable inference, supported by evidence, was that the sole goal discussed at the meeting was to capture the terrorists.

e. The Trial Chamber inferred that Tarčulovski was present when Jusufi was killed because it inferred that he was the leader of the operation and that he followed the Hermelin into the village. The alternative reasonable inference supported by testimony was that the "operation" began while Tarčulovski was outside the village, that other police units entered at or before 8:00 a.m., and that Tarčulovski entered the village between 10 and 11 a.m., *after* Jusufi was killed.

f. The Trial Chamber recognized that Tarčulovski claimed that the operation was ordered by the President, Boris Trajkoski, with whom Tarčulovski had a longstanding and trusted relation, and noted that this was "consistent with what occurred and with the involvement of Johan Tarčulovski.... whose seniority and usual duties ... would not normally be such that he would be chosen to lead an operation of this nature."[268] Though a reasonable inference favorable to Tarčulovski was available from that evidence, the Trial Chamber opted against that "positive finding" because of the intervening death of the President."[269]

198. Given the Trial Chamber's broad statements[270] rejecting as biased nearly all the potential eyewitnesses to events of 12 August 2001 (the villager witnesses) and all the persons who supposedly carried out the military

[268] Judgement, para. 114.
[269] Judgement, para. 114.
[270] Judgement, paras 9-17.

operation (the police and army witnesses), such that the testimony of those persons is essentially unavailable, the Prosecution could not establish guilt beyond a reasonable doubt. The Trial Chamber could find Tarčulovski guilty only by ignoring its own stated principles for evaluating the evidence. This Appeals Chamber must review the findings of fact made by the Trial Chamber with a recognition of this fundamental error.

VIII. APPEAL GROUND 6: TARČULOVSKI'S STATEMENTS TO THE COMMISSION WERE IMPROPERLY ADMITTED/USED (Decision on Motion to Admit; Judgement, paras. 538, 555-559; Transcript 5135-5146)

199. The Trial Chamber erred in fact and/or law when it permitted Tarčulovski's statements to be admitted and used against him.

200. In May 2002, the Prosecutor informed the Macedonia authorities of her decision to assume primacy over the events which occurred in Ljuboten on 12 August 2001.[271] By decision dated 4 October 2002, a Trial Chamber formally requested the Government of Macedonia to order its courts to defer the Ljuboten investigation.[272] In March 2003, Boškoski's successor at the MoI established a Commission to investigate what had occurred in Ljuboten.[273] Tarčulovski was twice called before the Commission. He appeared once voluntarily and without a lawyer on 5 May 2003, and then again pursuant to a summons, with an attorney, on 12 November 2003, by which time he was a civilian, no longer employed by the Ministry.[274] He answered questions on both occasions.

201. Over Tarčulovski's objection, three documents were admitted into evidence which contained or purported to contain statements that Tarčulovski made to

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[271] Judgement, para. 6.
[272] Judgement, para. 6.
[273] See Judgement, para. 467, n. 1818. "The Commission was not able to conclude what happened in Ljuboten, nor who was responsible."
[274] See Decision on Motion to Admit, para. 38.

the Commission.[275] The first was an "Official Note" handwritten and signed by Tarčulovski. Though it bore the date of 3 March 2003, the Prosecution maintained that the date was erroneous, and that it was created in connection with Tarčulovski's appearance before the Commission on 5 May 2003.[276]

202. The second document, titled "Minutes," was prepared by witness Tatjana Groseva after the meeting of 12 November. It purports to summarize certain questions put to Tarčulovski at the Commission's 12 November meeting, and Tarčulovski's answers to those questions. It appears to bear Tarčulovski's signature.[277] The third document, titled "Information" and dated 25 November 2003, purports to summarize the information Tarčulovski provided at the 12 November 2003 meeting, and does so in terms similar, but not identical, to the 12 November 2003 "Minutes."

203. The documents, though not identical in all respects, contained Tarčulovski's essentially consistent and exculpatory accounts of what had occurred in Ljuboten on 12 August 2001. He described a limited police operation to find the terrorists in the village, based on information about the houses in which they might be found, during which there was firing on the police from village houses.[278]

204. Thus, in the Official Note, Tarčulovski stated that, "There was intelligence from the villagers that Džavid ASANI was in the village and several houses in which he could have been were pointed out. Early in the morning, we entered the village with only 20 men, with the aim of going into the houses in which he could have been put up, but we had to wait until daylight because we came under fire from the other side. We then attacked the locations from which we had come under fire. ... [W]e only entered those which, according

[275] See Decision on Motion to Admit, p. 24.
[276] Ex. P379.1; Prosecution's Submissions Regarding Admission into Evidence, para. 6 and n. 7.
[277] Ex. P379.2.
[278] Ex. P379.1; P379.2.

to information we had, were occupied by Džavid and the terrorists and two or three houses from which we had come under fire."[279] The Minutes and Information record a similar account.[280] Each of the statements post-dates the ICTY Prosecutor's assertion of jurisdiction over the events in Ljuboten.

205. The admission of these Statements and their use as evidence against Tarčulovski violated Rule 89(B) of the Rules of Procedure and Evidence.

206. Though the Rules of Procedure and Evidence do not expressly address the admissibility of an Accused's out-of-court statements,[281] Rule 89(B) provides that: "In cases not otherwise provided for in [the Rules of Evidence], a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

207. A fair determination of the matter requires that any evidence that is admitted be both relevant and reliable.[282] The Trial Chamber purported to follow that teaching. It determined that the Official Note was "an apparently reliable record of the Accused's understanding of these events" and admitted it on that basis.[283] It ruled that the November Minutes and Information were also sufficiently reliable to be admitted in evidence.[284]

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[279] Ex. P379.1.

[280] Ex. P379.2.

[281] Rule 92 deals with a subset of defendant's statements: confessions by the accused given during questioning by the Prosecutor. Provided that the requirements of Rule 63 as to questioning by the Prosecutor of an accused were strictly complied with, such a confession is presumed to have been free and voluntary unless the contrary is proved.

[282] *Kvočka* Appeals Judgement, para. 128 ("must be shown that the relevant evidence is reliable.")

[283] Decision on Motion to Admit, para. 41.

[284] Decision on Motion to Admit, paras. 43-44.

208. But, after having admitted the documents as reliable, and after having found that Tarčulovski's account of what had occurred in Ljuboten was "an apparently reliable record of the Accused's understanding of these events," the Trial Chamber, in the Judgement, proceeded to reject virtually all of what the statements said. Moreover, it determined that the falsity of the accounts – and the omissions they contained – were itself evidence of his guilt.[285]

209. This constituted error. If, as the Trial Chamber concluded, the Official Note was a reliable record of Tarčulovski's understanding of the events, then it was exculpatory and should not have been used as evidence *against* him. If it was a "reliable record of the accused's understanding of these events" and, therefore, admissible, his statements should have been given credence.

210. Additionally, the admission of all these documents as evidence was inconsistent with the "spirit of the Statute and the general principles of law."

211. The Statute was enacted to facilitate the bringing to justice of those who are alleged to have committed serious violations of international humanitarian law.[286] That purpose is substantially *undermined* by the admission into evidence of statements made by those who voluntarily give information to national bodies investigating possible war crimes, particularly when such an investigation is taking place after the ICTY Prosecutor has assumed jurisdiction over the matter.

212. The statutory purpose is consonant with *encouraging* responsible national bodies to investigate possible violations of international law so that, if it is appropriate, the perpetrators of such crimes may be prosecuted and punished by the appropriate national authorities. Indeed, under the Statute, liability may itself rest on a failure to investigate and take necessary steps to punish offenders.[287]

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[285] Judgement, paras. 556-559.
[286] *Kordić and Cerkez* ,Decision on Motion to Admit Evidence, para. 12.
[287] Judgement, paras. 404-418.

213. The Trial Chamber's admission and use of Tarčulovski's statements will render internal investigations far more difficult. Persons will decline to appear before, or answer the questions of, investigatory bodies if their statements – though inadmissible in the courts of that nation[288] – can and will be admissible against them in ICTY prosecutions. That is particularly true in a case such as this one where the ICTY Prosecutor had assumed primacy before Tarčulovski appeared before the Commission.

214. Moreover, the use of the statements was not consonant with "general principles of law."[289] The Prosecution witness Vilma Ruskovska confirmed that statements such as Tarčulovski's statements cannot be brought in front of the Court and only the Investigative Judge or Presiding Judge was able to take such statements.[290] Another Prosecution witness, Tatjana Groševa, a member of the Commission, confirmed this and went further by saying that these very documents produced by her and the Commission, subject of this Response, could not be used in court as evidence at all.[291]

215. The evidentiary rules of most legal systems sometimes exclude even relevant, reliable, and probative evidence in order to further other important interests. The Appeals Chamber should recognize and adopt a privilege excluding statements made during national investigations of suspected or possible war crimes or violations of human rights in order to encourage persons to cooperate with such investigations.

A. The Statements, Even If Admissible, Were Misused By The Trial Chamber

216. Even assuming Tarčulovski's statements were properly admitted, the Trial Chamber misused them, committing legal error and/or an abuse of the Trial Chamber's discretion.

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[288] See *infra*, paras. 215-16.
[289] See ICTY Rule 89(B).
[290] T. 1536.
[291] T. 4757, 4760.

217. Though it purported to have determined that his statements were reliable, the Trial Chamber then rejected virtually all of what Tarčulovski disclosed in those statements. Trial Chamber rejected his general account of why he went to Ljuboten and what occurred there on 12 August 2001.

218. Rather than finding probative value in what Tarčulovski had to say, the Trial Chamber found probative value in the fact that (according to the Trial Chamber) Tarčulovski's accounts were deficient or untrue.

219. For example, the Trial Chamber stated that, at the 12 November 2003 meeting, "although expressly asked who was with him in Ljuboten, Johan Tarčulovski replied that he 'had decided to withhold their names.'"[292]

220. The Trial Chamber improperly used this against Tarčulovski. The drawing of inferences against the Accused based on his failure to give information that might be used to blame or prosecute others is a blatantly improper. Tarčulovski was under no obligation to answer all questions, and no inference can be drawn from his failure to do so. He had an absolute right to remain silent for any reason, or for no reason at all. His exercise of that right could not properly be used as evidence against him.

221. Perhaps the Trial Chamber's most egregious misuse of the evidence was its finding that there was probative value in Tarčulovski's exculpatory statements because he "[e]ntirely omitted ... the fact that men were murdered and cruelly mistreated and that many houses were deliberately set on fire."[293] This reasoning is straight out of Alice in Wonderland.

222. An Accused has an absolute right to put the Prosecution to its proof. Neither Tarčulovski's denial of wrongdoing (whether accurate or not) – nor his failure to confess wrongdoing or to accept the Prosecution's evidence or its version of the events – can be used against him as evidence of his guilt, which is precisely what the Trial Chamber did.

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[292] Judgement, para. 557.
[293] Judgement, para. 558.

B. The Legal Error Invalidated The Judgement

223. Paragraphs 555 through 559 show that the Trial Chamber relied heavily on Tarčulovski's own statements. The Trial Chamber referred to Tarčulovski's statements as "significant evidence" in this case.[294]

224. The Trial Chamber expressly relied on that which Tarčulovski "omits to disclose"[295] as evidence of his guilt, and on its view that Tarčulovski was not forthcoming with respect to the role of others.[296] The Trial Chamber's discussion of these matters, and its placement immediately before the Chamber set forth its final conclusion with respect to the "role of Johan Tarčulovski,"[297] show that the Trial Chamber improperly relied on its view that Tarčulovski's statements were incomplete and false as substantive evidence of Tarčulovski's guilt.

IX. APPEAL GROUND 7: TARČULOVSKI'S SENTENCE SHOULD BE REDUCED (Judgement, paras. 586-604)

225. The Appeal Chamber will intervene in the exercise of the Trial Chamber's discretion with regard to sentence where there is "discernible error."[298] A Trial Chamber's sentencing decision may be disturbed on appeal if the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account.[299]

226. Here, discernible error occurred. Though the Trial Chamber considered "the general practice regarding prison sentences in the courts of the former Yugoslavia," as it was obligated to do under Rule 101(B)(iii) of the Rules of

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[294] Judgement, para. 556.
[295] Judgement, para. 559.
[296] Judgement, para. 559.
[297] Judgement, paras. 556-559, 560
[298] See, e.g., *Tadić* Judgement in Sentencing Appeals, para. 22.
[299] *Nikolić* Judgement on Sentencing Appeal, para. 9, citing *Čelebići* Appeals judgement, para. 780.

Procedure and Evidence, the Trial Chamber erred in its determination of what sentence the laws of Macedonia would have permitted for the crimes at issue here. The Trial Chamber erroneously determined that, under Macedonian law, the minimum sentence that could be imposed was a sentence of ten years.[300] The Trial Chamber overlooked another provision of Macedonia's Criminal Code, Article 40, also contained within Exhibit P81, which permits more lenient punishments when there are extenuating circumstances.

227. The record is clear that Tarčulovski believed that he was carrying out a directive given him by authorized personnel higher up in the Government of Macedonia. This is an extenuating and mitigating circumstance the Trial Chamber failed to consider in its sentencing determination.

228. The Trial Chamber also failed to consider that Macedonia later granted amnesty to persons on both sides of the Macedonia-NLA conflict. Throughout 2001, deaths occurred. According to the Judgement, on 10 August 2001, the army killed civilians.[301] There was no prosecution. According to the Judgement, the NLA engaged in persistent terrorist activities, resulting in military, police and civilian deaths. There was no prosecution. Ultimately, both sides were granted amnesty. The only person ever charged and convicted in connection with this "armed conflict" is Tarčulovski, though he was neither principally nor solely responsible for the events in Ljuboten. Basic principles of fairness mandate that Tarčulovski, a relatively low level police officer, not be made the scapegoat for a situation which he did not create, and in which he played only a small part.

229. Finally, Tarčulovski submits that, even if this Appeal Chamber finds no discernible error in the exercise of sentencing discretion, if it accepts some, but not all of the legal arguments advanced above, and sets aside any part of the Trial Chamber's Judgement, Tarčulovski's sentence must also be

[300] Judgement, para. 603, citing Ex. P81, Article 404 of the FYROM Criminal Code.
[301] Judgement, para. 766.

reconsidered and reduced to reflect the modified conviction.

X. CONCLUSION

230. Tarčulovski submits that the Appeals Chamber should consider each of these alleged errors individually since each and all errors of fact identified above resulted in a miscarriage of justice and/or each and all errors of law identified above invalidates the Judgement.

231. Tarčulovski submits that the Appeals Chamber should consider the cumulative effect of these errors since each and all errors of fact identified above resulted in a miscarriage of justice; each and all errors of law identified above invalidates the Judgement.

232. Tarčulovski submits that for the reasons set out in his Appeals Brief, the Appeals Chamber should reverse the Judgement of the Trial Chamber and find him not guilty on all counts and order that he be immediately released from custody.

233. If the Appeals Chambers does not reverse the Judgement in its entirety, Tarčulovski submits that the Appeals Chamber should reduce his sentence.

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Tarčulovski's Glossary

Pleadings, Orders, Decisions, etc., from Prosecutor v. Johan Tarčulovski, Case No. IT-04-82

Abbreviation used in Tarčulovski Brief	**Full Citation**
Amended Indictment	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-PT, Amended Indictment, 2 November 2005 (Public)
Judgement	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008 (Public)
Jurisdiction Decision	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Interlocutory Appeal on Jurisdiction, 22 July 2005
Prosecution's Final Brief	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-T, Confidential Prosecution's Final Brief, 24 April 2008
Decision on Motion to Admit	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution's Motion for Admission into Evidence of Documents MFI P251, P379 and P435, 7 December 2007
Prosecution's Submissions Regarding Admission into Evidence	*Prosecutor v Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-PT, Prosecution's Submissions Regarding Admission into Evidence of the Exhibits Marked for Identification as P00379, P00435 and P00251 with Public Annexes A, B, D and E and Confidential Annex C, 26 September 2007

Other ICTY Authorities

Abbreviation used in Tarčulovski Brief	**Full Citation**
Blaškić Trial Judgement	*Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-T, T.Ch., Judgement, 3 March 2000
Blaškić Appeal Judgement	*Prosecutor v Tihomir Blaškić*, Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
Čelebići Trial Judgement	*Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* Case No. IT-96-21-T, T.Ch., Judgement, 16 November 1998
Čelebići Appeals Judgement	*Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* Case No. IT-96-21-A, App. Ch., Judgement, 20 February 2001
Galić Appeals Judgement	*Prosecutor v Stanislav Galić*, Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006
Halilović Trial Judgement	*Prosecutor v Sefer Halilović*, Case No. IT-01-48-T, Trial Judgement, 16 November 2005
Haradinaj Trial Judgement	*Prosecutor v Ramush Haradinaj*, Case No. IT-04-84-T, T.Ch., Judgement, 3 April 2008
Kordić and Čerkez Trial Judgement	*Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Tr.Ch., Judgement, 26 February 2001
Kordić and Čerkez Appeals Judgement	*Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004
Kordić and Čerkez Decision on Motion to Admit Evidence	*Prosecutor v Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, T.Ch., Decision of the Prosecution Application to Admit the Tulica Report and Dossier Into Evidence, 29 July 1999

Kvočka Appeals Judgement	*Prosecutor v Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
Limaj Trial Judgement	*Prosecutor v Fatmir Limaj*, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, T.Ch., Judgement, 30 November 2005
Milutinović Jurisdiction Decision	*Prosecutor v Milan Milutinović*, Case No. IT-05-87, Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
Nikolić Judgement on Sentencing Appeal	*Prosecutor v Dragan Nikolić*, Case No. IT-94-2-A, App.Ch., Judgement on Sentencing Appeal, 4 February 2005
Orić Appeals Judgement	*Prosecutor v Orić*, Case No. IT-03-68-A, App.Ch., Judgement, 3 July 2008
Strugar Appeals Judgement	*Prosecutor v Strugar* , Case No. IT-01-42-A App.Ch., Judgement, 17 July 2008
Tadić Appeals Judgement	*Prosecutor v Duško Tadić aka "Dule,"* Case No. IT-94-1-A, App.Ch., Judgement,15 July 1999, Corrigendum 19 November 1999
Tadić Sentencing Appeals Judgement	*Prosecutor v Duško Tadić aka "Dule,"* Case No. IT-94-1-A and IT-94-1-A bis, App.Ch., Sentencing Judgement, 26 January 2000
Tadić Jurisdiction Decision	*Prosecutor v Duško Tadić aka "Dule,"* Case No. IT-94-1-A, App.Ch., Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, 2 October 1995
Vasiljević Trial Judgement	*Prosecutor v Mitar Vasiljević*, Case No. IT-98-32-T, T.Ch., Judgement, 29 November 2002
ICTY Statute	Statute of the International Tribunal for the former Yugoslavia
ICTY Rules	Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia

Other United Nations Authorities

Abbreviation used in Tarčulovski Brief	Full Citation
UNDOC S/25704	United Nations Document S/25704 dated 3 May 1993: Report of the Secretary-General pursuant to ¶2 of Security Counsel Resolution 808 (1993)
FYROM	Former Yugoslav Republic of Macedonia
SFRY	Socialist Federal Republic of Yugoslavia
Geneva Convention of 1949	Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949)
UN Charter	Charter of the United Nations
Additional Protocol I	Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
Additional Protocol II	Additional Protocol II to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
Rome Statute	Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998)

Other Abbreviations

Abbreviation used in Tarčulovski Brief	Full Citation
T.	Trial Transcript