

## SUMMARY OF JUDGEMENT IN THE *KUPRESKIC* APPEAL

### ***Introduction***

The Appeals Chamber of this International Tribunal meets pursuant to a scheduling order issued on 8 October 2001, designating this date of October 23, 2001 as the day for delivery of Judgement in the appeal of *Prosecutor v Zoran Kupreskic and others*.

The Registrar will make copies of the written Judgement available to the parties towards the end of this hearing. I will not read out the text of the Judgement except for the Disposition. Following the practice of this Tribunal, I shall limit myself to a summary. I emphasise that the only authoritative account of the Appeals Chamber's conclusions and its reasons are to be found in the written Judgement.

### ***Background***

Around dawn on the morning of April 16 1993, Bosnian Croat forces engaged in a surprise attack on the Bosnian Muslim inhabitants of Ahmici, a small village located in central Bosnia. The Trial Chamber found that this was not a lawful combat operation, but rather a deliberate attack on civilian Muslims by the Croatian Defence Council (HVO) as part of a campaign to cleanse the village of Ahmici of its Bosnian Muslim inhabitants which, in turn, was part of a broader strategy of expelling Bosnian Muslims from the Lasva River Valley region. Specifically, the Trial Chamber found that over 100 civilians, including women and children, were killed in Ahmici and that 169 Muslim homes were destroyed along with the two mosques in the village. The Presiding Judge of the Trial Chamber concluded:

...what happened on April 16 in Ahmici has gone down in history as comprising one of the most vicious illustrations of man's inhumanity to man. Today, the name of that small village must be added to the long list of previously unknown hamlets and towns that recall abhorrent misdeeds and make all of us shudder with horror and shame: Dachau, Oradour sur Glane, Katijn, Marzabotto, Soweto, My Lai, Sabra and Shatila, and so many others.

This case is one of several emanating from the Ahmici massacre. Others have involved high level civic and military leaders from the region.

### ***The Accused***

The Trial Chamber here had before it six Bosnian Croat defendants, all of whom were inhabitants of Ahmici, or the surrounding area. Only one held a formal military command position. The rest worked in the local area. They were storeowners, factory workers and the like who, up until the war, lived out their lives in harmony with their Muslim neighbours. Two of the defendants, Zoran and Mirjan Kupreskic are brothers and a third, Vlatko Kupreskic, is their cousin.

### ***The Trial and Judgement***

One of the defendants, Dragan Papic, was acquitted of all charges following the trial. The remaining five defendants were all convicted of persecution as a crime against humanity. Zoran, Mirjan and Vlatko Kupreskic were acquitted of the remaining counts against them alleging murder, cruel treatment or inhumane acts as crimes against humanity or violations of the laws or customs of war. They were sentenced to ten, eight and six years of imprisonment respectively. In addition to persecution, Drago Josipovic and Vladimir Santic were each found guilty on one count of murder and one count of inhumane acts both as crimes against humanity, but acquitted on one count of murder and one count of cruel treatment as violations of the laws or customs of war. They were sentenced to a total of fifteen and twenty-five years of imprisonment respectively.

## ***General matters regarding the appeal***

Today the Appeals Chamber decides the appeals brought by the Prosecution and each of the defendants against the judgement rendered by the Trial Chamber in the present case. The Prosecution's appeal is confined to the issue of whether the Trial Chamber erred in declining to convict Josipovic and Santic for violations of the laws or customs of war under Article 3 of the Statute as well as for crimes against humanity under Article 5 of the Statute, based on the same underlying conduct.

Deciding the challenges levied against their convictions and sentences by the five Bosnian Croat villagers who were, almost two years ago, found guilty by the Trial Chamber, has been a fact-intensive exercise. This appeal was also characterised by an extremely complex pre-appeal process in which 26 separate motions to introduce new evidence on appeal were disposed of under Rule 115 of the Tribunal's Rules of Procedure and Evidence.

The conviction of one defendant, Vlatko Kupreskic, hinges upon a finely woven web of circumstantial evidence that was accepted as proof, beyond reasonable doubt, of his guilt. In the case of the remaining four defendants, their guilt has been determined principally on the basis of a single witness who placed them at a particular location when a murder or expulsion occurred. Most of these accused disputed the identification evidence given by the witnesses against them and claimed that the critical witness testimony is too slender a reed upon which to establish their participation in the Ahmici attack. Thus, the Appeals Chamber has been confronted with an issue that domestic jurisdictions have struggled with over centuries: the circumstances in which it is reasonable for a finder of fact to rely upon identification evidence given by a single witness.

In addition to their main contention that the evidence is too weak to support their convictions, several of the accused raised allied procedural challenges, which, they claim, cast serious doubt upon the fairness of their trials.

The function of this Tribunal is to decide the guilt or innocence of individual accused according to standards of procedure and evidence that commend themselves to all civilised nations. Its Statute requires that the accused be "informed promptly and in detail...of the nature and cause of the charges against him" and it has adopted a "beyond reasonable doubt" standard for conviction. Above all, it has striven to follow the principle laid down by the First Chief Prosecutor at Nuremberg that we must "establish incredible events by credible evidence". It is with these cautions in mind that we have examined the voluminous trial record on which the convictions of the five accused before us were based and come to the following conclusions.

## ***Summary of the findings of the Appeals Chamber***

The Judgement commences with a section in which we consider general issues common to all, or several, of the appeals brought by the defendants against their convictions. The Appeals Chamber underscores that its function is not to carry out a trial *de novo*, but rather is limited to considering specific errors of law or fact occasioning a miscarriage of justice. The appeal procedure is not a forum for the parties to air every complaint they have about the trial or the judgement regardless of how immaterial these matters are to the findings reached by the Trial Chamber.

In the Judgement, we discuss, at length, the standards for appellate court review of factual findings by a Trial Chamber. We think the time has arrived for a thorough discussion of this aspect of appellate review. It has become clear that more and more appeals before this Tribunal are focusing on the factual basis underpinning the judgements rendered by the Trial Chambers, as increasingly, the overriding legal issues become more settled with the escalating number of trials and appeals.

As to the circumstances in which an Appeals Chamber will intervene to overturn factual findings

made by a Trial Chamber, we reiterate that the Trial Chamber must be given a generous margin of deference and that the Appeals Chamber will intervene only if the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is "wholly erroneous". Nevertheless, we emphasise that a Trial Chamber is expected to be especially alert to the vagaries inherent in identification evidence, particularly where the purported identification has been made under difficult conditions. A common denominator in the approaches adopted by domestic jurisdictions around the world is the need to exercise extreme caution before proceeding to convict a defendant on the basis of a single identification witness (even the most confident and impressive of witnesses). Where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion".

A significant issue in this appeal has been the standards governing reconsideration of the Trial Chamber's factual findings in light of additional evidence admitted on appeal. During the past few years, the changing political climate in some of the states of the former Yugoslavia, resulting in the opening of war archives and the release of documents unavailable to the parties at trial, has prompted a deluge of applications for the admission of additional evidence under Rule 115, in this case, as well as in other appeals pending before this Chamber. The Appeals Chamber therefore takes this opportunity to clarify some of the standards governing the application of Rule 115. In particular, the standard to be applied by the Appeals Chamber in finally determining whether, in light of the additional evidence admitted, a miscarriage of justice has occurred, was the subject of strenuous debate by the parties in this case. After careful consideration, the Appeals Chamber has decided against importing tests from domestic jurisdictions, such as the so-called "would" and "could" tests. Rather, the relevant standard is whether the appellant has established that no reasonable tribunal of fact could reach a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings.

We turn now to the appeals against conviction and sentence of the five individual defendants before us.

### *Vladimir Santic*

At trial, Vladimir Santic vigorously contested his guilt, relying upon a defence of alibi: he was, he said, not in Ahmici during the 16 April 1993 attack. Since his conviction, Santic has admitted that he was the commander of the 1<sup>st</sup> Company of the 4<sup>th</sup> Battalion of the Croatian Defence Council (HVO) Military Police and that he was a member of one of the groups that descended upon Ahmici in the early morning hours of 16 April 1993. However, he maintains his objections to certain findings made by the Trial Chamber regarding the extent of his participation in the Ahmici events.

The Appeals Chamber considers that there was ample credible evidence before the Trial Chamber that Santic was both Commander of the 1<sup>st</sup> Company of the 4<sup>th</sup> Battalion of the HVO Military Police and the anti-terrorist unit, known as the Jokers, that was formed within the 4<sup>th</sup> Battalion. It was therefore reasonable for the Trial Chamber to infer, given the participation of these units in the Ahmici attack, that Santic carried out a command role during the attack. It was also open to the Trial Chamber to conclude, as it did for the purposes of sentencing, that, as part of his command role, Santic passed on orders relating to the attack from his superiors to his subordinates. The Appeals Chamber rejects Santic's claim that the evidence of Witness AT (a Prosecution witness in the *Kordic* case), admitted as additional evidence on appeal, casts doubt upon the Trial Chamber's findings regarding Santic's command role. For the purposes of Santic's appeal, Witness AT is not a credible witness whose testimony impugns the basis of the Trial Chamber's verdict. Furthermore, the Appeals Chamber emphasises that the interposition by Santic of a brand new defence after trial, through the testimony of Witness AT, must be viewed with extreme scepticism.

However, the Appeals Chamber does accept that the Trial Chamber was mistaken in inferring, for

the purposes of sentencing, that Santic was involved in the overall strategic planning of the attack. Simply put, the Prosecution adduced no evidence at trial that Santic was amongst the architects of the Ahmici assault strategy and this fact should not have been entered into his sentencing decision.

A related ground of appeal raised by Santic is that the Amended Indictment did not allege that he held a command position or played a command role during the attack. The Appeals Chamber emphasises that it would have been preferable for the Prosecution to allege, in the Amended Indictment, that Santic held a command position, rather than simply describing him as an HVO soldier. However, the charges brought against him were based upon his individual participation in the attack and not on any theory of command responsibility. While it is true that the Trial Chamber, nonetheless, relied upon his command role as an aggravating factor for the purposes of sentencing, there is no legal requirement that the Prosecution plead aggravating factors in an indictment. Furthermore, the Appeals Chamber underscores that, even after knowing the Prosecution had adduced evidence about his command role during the course of the trial, Santic made no effort to dispute it. Instead, he continued to defend himself by reliance upon a false alibi.

The Appeals Chamber also rejects Santic's claim that the Trial Chamber erred in its assessment that he played an active role in the attack on the Pusicul home on the morning of 16 April 1993. For reasons discussed in the Judgement, Witness AT's claim that Santic did not participate in the attack but held back and "leaned against the wall" is not sufficiently reliable to cast any doubt on the Trial Chamber's determination in this regard.

Turning to sentencing matters, Santic has argued that, since his conviction, he has accepted guilt and expressed sincere remorse for his participation in the attack on Ahmici and that he has co-operated substantially with the Prosecution by assisting them with their investigations. The Prosecution verified Santic's co-operation. The Appeals Chamber accepts that Santic has, to a limited degree, accepted responsibility for his role in the attack on Ahmici. Furthermore, although there is nothing in the Statute or Rules of this Tribunal expressly addressing the issue, the Appeals Chamber finds that, in appropriate cases, co-operation by an accused between conviction and appeal may justify a reduction in the sentence, depending on the circumstances of each case and the degree of co-operation rendered. In the present case, we find that a reduction in sentence is justified.

In sum, we find that the Trial Chamber erred only in inferring that Santic assisted with the strategic planning of the Ahmici attack and then considering this as an aggravating factor in his sentence. In combination with Santic's acceptance of partial guilt and his substantial post-conviction co-operation with the Prosecution the Appeals Chamber considers him eligible for a reduction in sentence. The Appeals Chamber has found no merit in any of his other grounds of appeal regarding conviction and sentence.

### ***Drago Josipovic***

Drago Josipovic advanced four grounds in support of his appeal against conviction. First, he complained that the Trial Chamber erred by returning a conviction for persecution based on the evidence of Witness DD, who testified that Josipovic was a member of the group that attacked the house of Nazif Ahmic on 16 April 1993. This attack was not pleaded in the Amended Indictment. Zoran and Mirjan Kupreskic made a similar argument, to which we will turn later, regarding the vagueness of the persecution count in the Amended Indictment as it applied to them. It is therefore appropriate, at this juncture, to clarify some of the relevant general principles governing pleading practices before this Tribunal.

Each and every accused person brought before this Tribunal has the right to be informed of the nature and cause of the charges against him and to have a adequate time and facilities for the preparation of his defence. This guarantee, enshrined in Article 21 of the Tribunal's Statute, is at the very heart of an accused person's right to a fair trial. Accordingly, in each indictment, the Prosecution must set out the material facts underpinning the crimes alleged in enough detail to

clearly inform the accused of the charges against him, thereby enabling the accused to prepare his defence. In contrast, there is no requirement to include in the indictment any reference to the evidence by which such material facts are to be proved.

Precisely what constitutes a material fact, so as to require its inclusion in the indictment, cannot be determined in abstract. Where the Prosecution alleges that an accused personally committed a discrete number of criminal acts, the material facts will include matters such as the identity of the victim, the time and place of the events and the means by which the acts were committed. There may be other cases in which the sheer scale of the alleged crimes makes it impracticable for the Prosecution to include this level of detail. An example is where the prosecution alleges that an accused participated, as a member of an execution squad, in killing hundreds of men, or where, in exercising command authority, an accused ordered an attack on a town that resulted in hundreds of civilian deaths. The nature of such a case would not demand that each and every victim be identified in the indictment, although the Prosecution must do so to the extent that it is able. The present case, however, does not fall into this category.

In relation to Josipovic, the allegations against him in the Amended Indictment were broad ranging. He was accused of persecution based on the systematic killing of Bosnian Muslims and the comprehensive destruction of their property, as well as for the organised detention and expulsion of Bosnian Muslims from the area of Ahmici-Santici. However, at trial, the Prosecution sought only to prove that he participated in attacks on three specific Bosnian Muslim houses in Ahmici on the morning of 16 April 1993. The Prosecution could, and should, have included specific details in the Amended Indictment about the handful of attacks in which it sought to implicate Josipovic.

Admittedly, persecution, as a crime against humanity under Article 5 of the Tribunal's Statute, is a broad offence, often comprising a series of acts. However, the so-called "umbrella" nature of the crime does not release the Prosecution from its obligation to specifically plead in the indictment the material facts on which the persecution charge is based with the same detail required for other crimes. The crime of persecution cannot be regarded as a catch-all for any criminal conduct on the part of the accused that emerges during trial and that is not otherwise pleaded in the indictment. The Prosecution must particularise the material facts of the alleged criminal conduct of the accused that, in its view, define the defendant's role in the persecution. If it fails to do so, the indictment suffers from a material defect since such an omission precludes, or at least impacts negatively, on the ability of the accused to prepare his defence.

The Appeals Chamber finds that, without doubt, Josipovic's alleged involvement in the attacks on the homes of Musafir Pusic and Nazif Ahmic were material facts underlying the Prosecution's charge of persecution. Neither of these attacks was specifically pleaded as part of the persecution count: they should have been.

The Appeals Chamber does not, however, exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information setting out the factual basis of the charges against him or her. In this case, the Appeals Chamber accepts that Josipovic did have sufficient notice of his alleged involvement in the attack on the house of Musafir Pusic. Although this attack was not specifically referred to in the persecution count, it was pleaded elsewhere in the Amended Indictment as the basis for a charge of murder as a crime against humanity. In that situation, the Appeals Chamber finds that the failure to specifically plead the Pusic attack as part of the persecution count did not materially prejudice Josipovic in the preparation of his defence. Josipovic's participation in the attack on the house of Musafir Pusic can, therefore, serve as a legitimate foundation for his persecution conviction. By contrast, the Appeals Chamber does not accept that Josipovic received sufficient notice of his alleged participation in the attack on the house of Nazif Ahmic, which was omitted from the Amended Indictment altogether. For that reason, the Appeals Chamber accepts Josipovic's argument that the Trial Chamber was not at liberty to rely upon his participation in that attack as part of his persecution conviction.

The second ground of appeal advanced by Josipovic is that the Trial Chamber erred in accepting the evidence of Witness EE as a sufficiently reliable basis upon which to conclude that he participated in the attack on the house of Musafér Pused. In particular, the Trial Chamber accepted Witness EE's evidence notwithstanding that she was clearly found mistaken in her identification of two other men, whom she knew well, among the attackers.

Josipovic has not argued that the Trial Chamber failed to direct itself to any material aspect of the trial record that undermined the credibility of Witness EE. Rather, it is obvious from the Trial Judgement, that the Trial Chamber was fully aware that Witness EE was mistaken in her purported identification of at least two of the six attackers at the Pused house, but that it, nonetheless, chose to accept her evidence. Rather, Josipovic asks the Appeals Chamber to adopt a different conclusion on Witness EE's credibility from that of the Trial Chamber.

A Trial Chamber is at liberty to reject part of a witness' testimony whilst accepting the remainder. In this case, the Trial Chamber's decision to rely on Witness EE's identification of Josipovic as a participant in the Pused attack is supported by various other aspects of the trial record. Most significantly, the Trial Chamber had before it evidence that Josipovic had participated in an additional attack of a similar nature to the attack on the Pused house, occurring in the same neighbourhood and during the same time period. The Appeals Chamber has already determined that the fact that Josipovic participated in the attack on the house of Nazif Ahmic cannot serve as a legitimate basis for his persecution conviction, because that incident was not pleaded in the Amended Indictment. However, Witness DD's evidence of his participation in that attack can be considered as evidence corroborating Josipovic's participation in the attack on the house of Musafér Pused.

Josipovic has pursued only one challenge to the credibility of Witness DD and that is based upon a statement made by Witness CA and admitted as additional evidence on appeal. The Appeals Chamber does not accept that this additional evidence undermines Witness DD's credibility to the extent that it renders her identification of Josipovic as one of the attackers on the home of Nazif Ahmic unsafe. In sum, we have heard no argument on appeal that would expose, as unreasonable, the Trial Chamber's reliance upon Witness DD's evidence as corroboration of Witness EE's evidence.

Another factor supporting Witness EE's credibility is Santic's own subsequent admission that he was present during the Pused attack, demonstrating that Witness EE was correct in her earlier identification of him as one of the group of attackers. The Appeals Chamber finds no justification for interfering with the Trial Chamber's assessment of Witness EE's credibility and no ground for over-turning its finding that Josipovic participated in the Pused attack.

The fourth ground of appeal raised by Josipovic is that the additional evidence of Witness AT, admitted by the Appeals Chamber under Rule 115, calls into question the safety of his conviction. Witness AT testified before the *Kordic* Trial Chamber that he was present during the attack on the house of Musafér Pused and that Witness EE was mistaken about a third person she identified amongst the attackers at the house of Musafér Pused. Witness AT also claimed categorically that Josipovic was not amongst the group. The Appeals Chamber rejects Josipovic's argument that this new evidence fatally undermines the Trial Chamber's conclusion that he was involved in the attack. In admitting Witness AT's evidence, the Appeals Chamber emphasised that it was credible insofar as it concerned the preparation and planning of the Ahmici attack. However, the Appeals Chamber credited the *Kordic* Trial Chamber's determination that Witness AT did not tell the full truth about the extent of his own involvement in the attack. The Appeals Chamber concludes that, insofar as Witness AT's evidence relates to other participants in the attack, it is similarly unreliable. Josipovic has failed to establish that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appeal proceedings.

Although formally abandoned by Josipovic during the appeal process, the Appeals Chamber has, nonetheless, determined that the interests of justice compel consideration of whether there was sufficient evidence before the Trial Chamber to justify the conclusion that Josipovic played a command role over soldiers during the Ahmici attack. In our view, there was not sufficient evidence and the Trial Chamber erred in drawing such a conclusion on the basis of the trial record.

Thus, in the case of Josipovic, we find that the Trial Chamber erred in only two respects: in returning a conviction for persecution based, in part, on his role in the attack on the house of Nazif Ahmic, which was not pleaded in the Amended Indictment; and in making a factual finding that he held a command position *vis a vis* other soldiers involved in the attack. For these reasons, the Appeals Chamber considers that the sentence imposed upon Josipovic should be reduced. The Appeals Chamber has found no merit in any of his other grounds of appeal regarding conviction and sentence.

### ***Zoran and Mirjan Kupreskic***

Throughout the trial and in the Trial Judgement, the cases of the brothers Zoran and Mirjan Kupreskic were closely linked, as based upon similar allegations of participation in the Ahmici events. Their appeals raised many joint issues and it is convenient to address them together.

Zoran and Mirjan Kupreskic have argued that the Trial Chamber erred in convicting them of persecution based on material facts that were not contained in the Amended Indictment. In particular, the Trial Chamber accepted the evidence of Witness H that the brothers were present in the house of Suhret Ahmic shortly after he and Meho Hrstanovic were killed and shortly before the surviving occupants of the house were expelled and the house set on fire. The Amended Indictment was utterly silent as to the alleged participation of Zoran and Mirjan Kupreskic in these events on 16 April 1993.

The principles of pleading detailed earlier apply equally here. The attack on the house of Suhret Ahmic was a material fact in the Prosecution case against Zoran and Mirjan Kupreskic: at trial it was one of only two incidents as to which the Prosecution alleged their participation on that fateful day. The Trial Chamber, however, rejected their participation in the other attack, thus their involvement in the attack on the house of Suhret Ahmic became the nucleus of their persecution conviction. The omission of any reference to the Ahmic attack in the Amended Indictment had to constitute a material defect. The Appeals Chamber notes that the Prosecution expressly chose not to further amend the indictment to include the attack on Suhret Ahmic's house in the interests of expediency. The goal of expediency can never be allowed to over-ride the fundamental rights of the accused to a fair trial.

The Appeals Chamber must conclude then, that the trial of these two defendants was rendered unfair as a result of the defects in the Amended Indictment. In particular, the Appeals Chamber is not persuaded by Prosecution arguments that any defect was remedied by providing Zoran and Mirjan Kupreskic with adequate notice of the allegations concerning the house of Suhret Ahmic prior to trial. The pre-trial brief, so heavily relied upon by the Prosecution during the course of argument on appeal, is extremely general and makes no reference to particular attacks or murders implicating the Kupreskic brothers. Even during its opening address at trial, the Prosecution made no reference to the attack on the house of Suhret Ahmic. Indeed, on the second to last day, the Presiding Judge was still struggling to understand the precise relevance of Witness H's evidence to the case against Zoran and Mirjan Kupreskic. On the other hand, Defence counsel consistently objected to the form of the Amended Indictment throughout the trial proceedings. In this case, the vagueness of the persecution count in the Amended Indictment goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet.

The Appeals Chamber, having upheld the objections of Zoran and Mirjan Kupreskic based on the vagueness of the Amended Indictment, confronted the question whether the appropriate remedy would be to remand the matter for retrial. The Appeals Chamber might be, understandably, reluctant to allow a defect in the form of the indictment to finally determine the outcome of a case in which there is strong evidence pointing towards the guilt of the accused. However, Zoran and Mirjan Kupreskic have raised a number of objections to the factual findings of the Trial Chamber, which fatally undermine the evidentiary basis for their convictions. We turn now to these objections.

Foremost among these concerns, is that Witness H, who was 13 years old at the time of the Ahmici attack and 18 years old at the time she gave evidence before the Trial Chamber, was not a sufficiently reliable witness from which to conclude that they participated in the attack on the house of Suhret Ahmic. The Trial Chamber's decision to accept the evidence of Witness H was very heavily influenced by her confident demeanour in court and her personal certainty that she was correct in her identification of the Kupreskic brothers that morning. There was no other evidence deemed credible by the Trial Chamber, to directly corroborate Witness H's observations.

Witness H is a young woman who, in the wake of the Ahmici massacre in April 1993, has assumed a significant degree of responsibility for her surviving family members and her undeniable courage was reflected in her testimony before the Trial Chamber. That such a witness should make an enormous and positive impression upon the Trial Chamber is not surprising.

However, after a careful review, the Appeals Chamber must conclude that the Trial Chamber's assessment of Witness H's evidence was critically flawed. This was a witness who purported to identify the defendants under extremely difficult circumstances. The attackers descended upon her house in the early morning hours while she and her family were sleeping. Her father was killed as she and the other occupants of the house hid in the basement. The attackers had masked their faces with paint in order to camouflage themselves. In such circumstances, it was clearly incumbent upon the Trial Chamber to proceed with extreme caution prior to accepting Witness H's identification evidence as the basis upon which to conclude that the defendants were involved in the attack on the house of Suhret Ahmic. Although Witness H was a confident and impressive in-court witness, a Trial Chamber must take into account the fact that, when it comes to identification evidence, the degree of certainty expressed by a witness is not necessarily an indicator of its reliability. Rather, a Trial Chamber must thoroughly and carefully consider the evidentiary record as a whole prior to reaching a conclusion about the credibility of the witness. Such caution is not sufficiently reflected in the treatment accorded to the evidence of Witness H.

Most significantly, the Trial Chamber failed to direct itself at all to another material piece of evidence, namely the statements made by Witness SA, a close relative of Witness H who was also present during the attack on the house of Suhret Ahmic. Throughout the trial, Zoran and Mirjan Kupreskic were insistent that Witness SA be called to testify. She was, they said, the only other eyewitness who could shed light upon the events in the Ahmic house and she had made prior statements that cast doubt upon important aspects of Witness H's in-court testimony. At first it appeared that the Prosecution would itself call Witness SA as part of its own case. Later, when the Prosecution abandoned this idea, the Trial Chamber, acknowledging the reality that the Kupreskic brothers would have little chance of securing her attendance as a defence witness, named Witness SA a court witness. However, the Trial Chamber subsequently retracted that decision upon being informed by a staff member of the Tribunal's Victims and Witnesses Section that Witness SA could not attend for health reasons. In so doing, the Trial Chamber fell into error. Although the Rules of this Tribunal provide a Trial Chamber with wide discretion in deciding who it will name as a court witness, having decided to call Witness SA, the Trial Chamber should not have retracted that decision, to the detriment of the defence, in the absence of certification from a qualified health professional demonstrating that the witness was medically unfit to attend.

In an attempt to compensate for Witness SA's non-appearance before the Tribunal, the Trial



Chamber agreed to admit six of her prior written statements. The Trial Judgement reveals, however, that it subsequently reviewed these six statements only in the narrow context of whether they provided support for Witness H's evidence. The Trial Chamber failed to take the critical step of considering whether the statements made by Witness SA cast doubt upon the identification evidence of Witness H. The Appeals Chamber finds that they do. Among other things, these statements raise the distinct possibility that Witness H's identification of Zoran and, particularly, Mirjan Kupreskic as participants in the attack on her house gradually developed in the months following the April 1993 atrocity. The trial record reveals that, immediately following the April 1993 attack, there was extensive speculation amongst the Bosnian Muslim members of Ahmici and, in particular, Witness H's family, about the involvement of their Croat neighbours in the attack. The Trial Chamber should have evaluated the possibility that Witness H, a child at the time, was influenced in her belated identification by this speculation within her family circle.

The Trial Chamber also failed to direct itself to material discrepancies between witness H's in-court testimony and the prior statement that Witness H herself made which, among other things, cast doubt upon her claim of an adequate opportunity to identify Zoran and Mirjan Kupreskic during the early morning attack. Additionally, Witness SA's statements provide no support for Witness H's claim that she had such an opportunity. The Trial Chamber omitted to make any specific factual findings about these and other crucial matters affecting Witness H's credibility, such as her outright denial that she had made a prior inconsistent statement to an investigating judge in Zenica and her mistaken claim that she recognised Zoran Kupreskic as an employee of a shop she frequented. The Trial Chamber also did not account for the distinct likelihood, stemming from Witness H's description of the Kupreskic brothers' physical appearance that day, that she may have mistaken them for two members of the Jokers unit, of which they were not members. We did not find that sufficient attention was paid to these crucial identification questions by the Trial Chamber to permit us to conclude that its obligation to provide a reasoned opinion had been fulfilled. The Appeals Chamber has also had the benefit of the additional evidence of Witness AT which has illuminated certain matters regarding the organisation of the Ahmici attack and served to highlight some of the difficulties associated with the Trial Chamber's treatment of Witness H's evidence.

The task before the Trial Chamber in this case was difficult. It was confronting problems triggered by a trial record that contained important omissions, such as the live testimony of Witness SA: a key eyewitness who was closely related to Witness H and who had made statements raising doubts about aspects of Witness H's evidence. A Trial Chamber must proceed with great caution before convicting an accused person based upon a trial record that contains patent omissions. The difficulty of obtaining all the relevant evidence, unfortunately inherent in so many cases that come before this Tribunal, cannot reduce the Prosecution's burden of proving the guilt of the accused "beyond reasonable doubt".

To recapitulate, we recall that the Kupreskic brothers were prejudiced as a result of first, the Prosecution's failure to allege the attack on Witness H's house in the Amended Indictment, and second, the late disclosure of her earlier statements. The defence had only a few weeks to prepare for the cross-examination of this witness who turned out to be the lynchpin in the case against them.

If Witness H's testimony is discounted, the cases against Zoran and Mirjan Kupreskic cannot stand. The Trial Chamber drew some support for Zoran Kupreskic's participation in the Ahmici attack from the evidence of Witness JJ. According to this witness, Zoran Kupreskic told her that, on the day of the Ahmici attack, under threat by the Jokers, he shot into the air in the pretence of shooting at civilians. However, without Witness H's evidence, Witness JJ's observations are an insufficient basis upon which to attribute criminal responsibility to him. The Trial Chamber's finding that Zoran and Mirjan Kupreskic provided local knowledge and the use of their houses as bases for the attacking troops is similarly unsustainable. Even if all evidence in the trial record is credited, it was a tenuous foundation for such a finding, based as it was, on a single witness' testimony that he had seen a group of soldiers at the junction outside Zoran Kupreskic's house in the late afternoon of 15 April

1993. The additional evidence of Witness AT, previously credited by the Trial Chamber in the *Kordic* case, fatally undermines this finding. Witness AT revealed that the decision to attack Ahmici, was not made until the afternoon of 15 April and that, to his knowledge, there was no military reconnoitring associated with the attack that afternoon. The assignment of groups to particular sections of the town did not occur until the early morning hours of 16 April 1993. It is also apparent from the Witness AT material that the military police were not reliant upon the assistance of local Croat inhabitants to plan the attack.

Finally, the Appeals Chamber can find no basis for the Trial Chamber's finding that Zoran and Mirjan Kupreskic were involved in a persecutory campaign stemming back to October 1992. The Trial Chamber provided no description of what illegal conduct it attributed to the defendants during the period between October 1992 and 15 April 1993, when they were alleged to have been involved in the preparation and implementation of the 16 April 1993 Ahmici attack. Hence, this finding must be rejected due to the absence of any evidentiary basis to support it. In totality, the Appeals Chamber concludes that the convictions of Zoran and Mirjan Kupreskic have occasioned a miscarriage of justice and must be reversed.

### ***Vlatko Kupreskic***

Among all five defendants before the Appeals Chamber, the evidence to support the conviction of Vlatko Kupreskic was the least compelling. The Prosecution did not allege that he was directly involved in any specific attacks on Bosnian Muslim houses on the morning of 16 April 1993. Rather, his conviction was based on a web of circumstantial evidence grounded on the Trial Chamber's findings that he was a police operations officer. This led the Trial Chamber to conclude that he had aided and abetted the preparation of the Ahmici attack.

On appeal Vlatko Kupreskic has argued that the Trial Chamber's factual findings about his involvement in the attack had no basis in the evidence to begin with and, second, that additional evidence admitted on appeal served to underscore the extreme weakness of the case against him.

We accept that, on the basis of the trial record, it was reasonable for the Trial Chamber to conclude that Vlatko Kupreskic was a police operations officer. The Trial Judgement suggests that this finding was an important factor in its decision to convict him of persecution. From his status as a police officer, the Trial Chamber inferred that conduct, innocent in its own right, was directed towards assisting, encouraging or lending moral support to the crime of persecution. However, the totality of the evidence, namely the trial record and the additional evidence admitted on appeal, overwhelmingly suggest that any police duties undertaken by Vlatko Kupreskic ceased in February 1993. There is no satisfactory evidence that his employment with the police continued until the time of the April 1993 Ahmici attack.

As to the Trial Chamber's finding that Vlatko Kupreskic assisted the attack by providing his house as a base for the attacking troops, we accept that this too was reasonable on the basis of the original trial record. The evidence of troop movement in and around the defendant's house came from four separate sources. However, the Appeals Chamber admitted additional evidence on this point. The evidence of Witness ADA, who said that he was sitting on a hill outside Vlatko Kupreskic's store throughout the afternoon and early evening of 15 April and saw neither Vlatko Kupreskic nor any troop activity, was not compelling. However, the evidence of Witness AT that the plan to attack Ahmici was not announced until the afternoon of 15 April 1993 and that troops were not deployed to the Bungalow until late into the night between 15 and 16 April 1993, makes it unlikely that another set of troops would have been dispatched to Vlatko Kupreskic's house much earlier in the day in order to prepare for the attack. Consequently, the Appeals Chamber must conclude that there is serious doubt as to whether there were troops at Vlatko Kupreskic's house in the early evening of 15 April 1993 preparing for the attack the following morning.

The remaining evidence against Vlatko Kupreskic provides an insufficient basis upon which to

conclude that he aided and abetted persecution. At trial, a witness gave evidence that, in October 1992, he saw Vlatko Kupreskic unloading "weapons" from his car and taking them into his house. There was no evidence that the "weapons", what kind or how many was not disclosed, were ever used during, or had any connection with, the 16 April 1993 Ahmici attack, which occurred six months later. In the Appeals Chamber's view, it was unreasonable for the Trial Chamber to infer, on the basis of this scant evidence, that Vlatko Kupreskic had engaged in acts specifically directed to assist, encourage or lend moral support to persecutory acts against Muslim neighbours that occurred some six months later.

The Trial Chamber also found that Vlatko Kupreskic was in the vicinity shortly after the attack on Suhret Ahmic's house and thereby concluded that he was ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge. This finding was based on the evidence of Witness H, corroborated by Witness KL, who testified to seeing Vlatko Kupreskic after the attack on the Ahmic house in front of the garage. In the Appeals Chamber's view, this evidence, even if believed, is an insufficient basis for the Trial Chamber to conclude that Vlatko Kupreskic was assisting in the attack. He lived in the village. In the context of such a small town as Ahmici, it is risky to draw inferences of guilt simply from the fact that a person was seen in the area of an attack, especially if it is close to his own home. It constitutes only the merest of circumstantial evidence that he was a participant in the attack and is an insufficient basis upon which to found his conviction for persecution.

Next, we turn to the evidence given by a witness at trial that he had seen Vlatko Kupreskic in front of the Hotel Vitez (the headquarters of the Croatian Defence Council in central Bosnia) in mid-afternoon of 15 April 1993. The Trial Judgement referred to, but did not clarify, the significance of this circumstance. In the Appeals Chamber's view, it is an insufficient basis from which to infer that Vlatko Kupreskic aided and abetted persecution.

We conclude, on the whole, that the conviction of Vlatko Kupreskic has occasioned a miscarriage of justice and must be reversed.

We turn finally, to the Prosecution's appeal against the Trial Judgement.

### ***Prosecution Appeal***

The least contentious of all issues before the Appeals Chamber was the Prosecution's claim that the Trial Chamber erred in failing to enter convictions for Josipovic and Santic under Article 3 based on the same underlying conduct as their convictions under Article 5 of the Statute. In the intervening period between the rendering of the Trial Judgement and the hearing of this appeal, the issues of cumulative charging and convictions have been clarified considerably in the Tribunal's jurisprudence. Following the appeal judgements in the *Celebici* and *Jeliscic* cases, it is now beyond dispute that cumulative charging is generally allowed and that cumulative convictions under Article 3 and Article 5 are permitted. For that reason, we uphold the Prosecution's appeal and find that the Trial Chamber erred in failing to convict Josipovic and Santic of murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute. However, given that the Prosecution specifically stated that it was only seeking a reversal of the acquittals, and not an increase in the terms of imprisonment imposed on each of the accused, these additional convictions have not been considered for the purposes of sentencing.

The formal orders made by the Appeals Chamber in the Disposition section of the Judgement, are as follows:

## **DISPOSITION**

### **The appeals of Zoran and Mirjan Kupreskic against conviction**

The Appeals Chamber unanimously:

ALLOWS Zoran and Mirjan Kupreskic's ground of appeal objecting to the Trial Chamber's decision to return convictions under count 1 of the Amended Indictment on the basis of material facts not pleaded therein, namely participation in the attack on the house of Suhret Ahmic on 16 April 1993.

ALLOWS Zoran and Mirjan Kupreskic's ground of appeal objecting to the Trial Chamber's decision to rely upon the identification evidence of Witness H to conclude that Zoran and Mirjan Kupreskic participated in the attack on the house of Suhret Ahmic on 16 April 1993, thereby committing an act of persecution under count 1 of the Amended Indictment.

In light of additional evidence admitted on appeal, ALLOWS Zoran and Mirjan Kupreskic's ground of appeal objecting to the Trial Chamber's finding that they provided local knowledge and the use of their houses as bases for the forces attacking Ahmici on 16 April 1993, thereby committing an act of persecution under count 1 of the Amended Indictment.

ALLOWS Zoran Kupreskic's ground of appeal objecting to the Trial Chamber's finding that he bears criminal responsibility for persecution stemming back to October 1992, under count 1 of the Amended Indictment, and applies this finding also to Mirjan Kupreskic.

DISMISSES or DECLINES TO CONSIDER all other grounds of appeal raised by Zoran and Mirjan Kupreskic.

Accordingly, the Appeals Chamber REVERSES the convictions of Zoran Kupreskic and Mirjan Kupreskic for persecution under count 1 of the Amended Indictment and FINDS Zoran Kupreskic and Mirjan Kupreskic not guilty on this count.

### **The appeal of Vlatko Kupreskic against conviction**

The Appeals Chamber unanimously:

In light of additional evidence admitted on appeal, ALLOWS Vlatko Kupreskic's ground of appeal objecting to the Trial Chamber's finding that he was an Operations Officer for the Prevention of Crimes of Particular State Interest at the time of the 16 April 1993 Ahmici attack.

ALLOWS Vlatko Kupreskic's ground of appeal objecting to the Trial Chamber's finding that he assisted with the 16 April 1993 attack on Ahmici by unloading weapons from his car in October 1992 and that he thereby aided and abetted persecution under count 1 of the Amended Indictment.

ALLOWS Vlatko Kupreskic's ground of appeal objecting to the Trial Chamber's inference that, merely by virtue of his presence outside the Hotel Vitez at around 2 p.m. or 3 p.m. on 15 April 1995, he thereby aided and abetted persecution under count 1 of the Amended Indictment.

In light of additional evidence admitted on appeal, ALLOWS Vlatko Kupreskic's ground of appeal objecting to the Trial Chamber's finding that there were troops at his house in the early evening of 15 April 1993 and that he thereby aided and abetted persecution as charged in count 1 of the Amended Indictment by allowing his house to be used as a staging area for the attacking forces.

ALLOWS Vlatko Kupreskic's ground of appeal objecting to the Trial Chamber's inference that, on the basis of witness testimony placing him outside the house of Suhret Ahmic after it was attacked on 16 April 1993, he was ready to lend assistance to the attacking forces and that he thereby aided and abetted persecution as charged in count 1 of the Amended Indictment.

Accordingly, the Appeals Chamber REVERSES Vlatko Kupreskic's conviction for persecution under count 1 of the Amended Indictment and FINDS Vlatko Kupreskic not guilty on this count.

## **The appeals of Drago Josipovic against conviction and sentence**

### ***Conviction***

The Appeals Chamber unanimously:

ALLOWS Drago Josipovic's ground of appeal objecting to the Trial Chamber's decision to return convictions under count 1 of the Amended Indictment on the basis of material facts not pleaded therein, namely participation in the attack on the house of Nazif Ahmic, but FINDS that no remedy follows except with respect to his sentence (addressed below).

ALLOWS Drago Josipovic's ground of appeal objecting to the Trial Chamber's inference that he was in a position of command during the Ahmici attack on 16 April 1993.

DISMISSES all other grounds of appeal raised by Drago Josipovic's against his conviction.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Drago Josipovic on count 1, count 16 and count 18 of the Amended Indictment (adjustments to his sentence are set out below).

### ***Sentence***

The Appeals Chamber unanimously:

Having previously found that the Trial Chamber erred in concluding that Drago Josipovic played a commanding role during the attack on the house of Nazif Ahmic, FINDS that the Trial Chamber erred in relying upon this in aggravation of Drago Josipovic's sentence.

Having previously found that the Trial Chamber erred in considering Drago Josipovic's participation in the attack on the house of Nazif Ahmic as part of his persecution conviction under count 1, FINDS that the bases for Drago Josipovic's conviction under count 1 are now reduced.

DISMISSES all other grounds of appeal raised by Drago Josipovic against his sentence.

Accordingly, the Appeals Chamber REVISES Drago Josipovic's total sentence from FIFTEEN years of imprisonment to TWELVE years of imprisonment.

## **Appeals of Vladimir Šantic against conviction and sentence**

### ***Conviction***

The Appeals Chamber unanimously:

ALLOWS Vladimir Santic's ground of appeal objecting to the Trial Chamber's implicit finding (referred to in the sentencing section of the Trial Judgement) that he assisted in the strategic planning of the 16 April 1993 Ahmici attack.

DISMISSES all other grounds of appeal raised by Vladimir Santic against his conviction.

Accordingly, the Appeals Chamber AFFIRMS the convictions of Vladimir Santic under count 1, count 16 and count 18 of the Amended Indictment (adjustments to sentence are set out below).

### ***Sentence***

The Appeals Chamber unanimously:

Having previously found that the Trial Chamber erred in finding that Vladimir Santic assisted in the strategic planning of the entire Ahmici attack, ALLOWS his ground of appeal objecting to the Trial Chamber consideration of this factor in aggravation of his sentence.

ALLOWS Vladimir Santic's ground of appeal based on the argument that his sentence should be reduced in light of his acceptance of guilt and his substantial co-operation with the Prosecution.

DISMISSES all other grounds of appeal raised by Vladimir Santic against his sentence.

Accordingly, the Appeals Chamber REVISES Vladimir Santic's total sentence from TWENTY-FIVE years of imprisonment to EIGHTEEN years of imprisonment.

**The Prosecution's appeal on the issues of cumulative charging and cumulative convictions based on the same acts relating to Drago Josipovic and Vladimir Šantic**

The Appeals Chamber unanimously:

ALLOWS the Prosecution's appeal against the Trial Chamber's ruling that counts 17 (murder as a violation of the laws or customs of war under Article 3 of the Statute) and 19 (cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute) were improperly charged cumulatively with the counts containing Article 5 charges for murder and for inhumane acts as crimes against humanity.

ALLOWS the Prosecution's appeal against the Trial Chamber's acquittal of Drago Josipovic and Vladimir Santic under counts 17 and 19 of the Amended Indictment on the basis of cumulative convictions considerations.

Accordingly, the Appeals Chamber REVERSES the Trial Chamber's acquittal of Drago Josipovic and Vladimir Šantic under counts 17 and 19 of the Amended Indictment and FINDS Drago Josipovic and Vladimir Santic GUILTY on each of these counts.

**The appeal of Drago Josipovic on the issue of cumulative convictions**

The Appeals Chamber unanimously:

DISMISSES Drago Josipovic's ground of appeal by which he complains that he was impermissibly charged and convicted cumulatively of murder and other inhumane acts as crimes against humanity.

DISMISSES Drago Josipovic's ground of appeal by which he complains that he was impermissibly charged with both murder and persecution as a crime against humanity based on the same underlying conduct.

**Credit for time served**

Pursuant to Rule 101 (C) of the Rules, an accused is entitled to credit for time spent in custody "pending surrender to the Tribunal or pending trial or appeal." Accordingly, both Drago Josipovic and Vladimir Santic are entitled to credit for the time they have each spent in custody since their surrender to the Tribunal on 6 October 1997.

**Enforcement of Sentences**

In accordance with Rules 103 (C) and 107 of the Rules, the Appeals Chamber orders that Drago Josipovic and Vladimir Santic are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfers to the State(s) where their respective sentences will be served.

In accordance with Rule 99 (A) of the Rules, the Appeals Chamber orders that Zoran Kupreskic, Mirjan Kupreskic and Vlatko Kupreskic, be released immediately from the United Nations Detention Unit.

The Appeals Chamber's reasons for these orders are now published.