



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

Case No.: IT-95-16-T

Date: 14 January 2000

Original: English

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**IN THE TRIAL CHAMBER**

**Before:** Judge Antonio Cassese, Presiding  
Judge Richard May  
Judge Florence Ndepele Mwachande Mumba

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Judgement of:** 14 January 2000

**PROSECUTOR**

v.

Zoran KUPRE[KI],  
Mirjan KUPRE[KI],  
Vlatko KUPRE[KI],  
Drago JOSIPOVI],  
Dragan PAPI],  
Vladimir [ANTI], also known as "VLADO"

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Franck Terrier  
Mr. Michael Blaxill

**Counsel for the Accused:**

Mr. Ranko Radovi}, Mr. Tomislav Pasari}, for Zoran Kupre{ki}  
Ms. Jadranka Slokovi}-Gluma}, Ms. Desanka Vranjican, for Mirjan Kupre{ki}  
Mr. Borislav Krajina, Mr. Želimar Par, for Vlatko Kupre{ki}  
Mr. Luko [u{ak, Ms. Goranka Herljevic, for Drago Josipovi}  
Mr. Petar Puli{eli}, Ms. Nika Pinter, for Dragan Papi}  
Mr. Petar Pavkovi}, Mr. Mirko Vrdoljak, for Vladimir Šanti}

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The trial of Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi}, Dragan Papi}, Vladimir [anti}, hereafter the "accused", before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 17 August 1998 and came to a close on 10 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber

**HEREBY RENDERS ITS JUDGEMENT.**



## I. INTRODUCTION

### A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",<sup>1</sup> and by the Rules of Procedure and Evidence of the International Tribunal, hereafter "Rules", adopted by the Judges of the International Tribunal on 11 February 1994, as amended.<sup>2</sup> Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>3</sup> Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

### B. Procedural Background<sup>4</sup>

2. On 2 November 1995 the Prosecutor of the International Tribunal for the Former Yugoslavia ("the Tribunal") issued an indictment charging Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Vladimir [anti}, Dragan Papi}, Drago Josipovi}, Stipo Alilovi} and Marinko Katava with grave breaches under Article 2(a), (c), (d) and (g) as well as violations of the laws or customs of war under Article 3 of the Tribunal's Statute. The basis of the indictment was the accused's alleged participation in the two conflicts in the village of Ahmi}i in the Lašva River Valley in Bosnia and Herzegovina on 20 October 1992 and 16 April 1993. During those conflicts, a large number of the Muslim citizens of that village were killed and expelled from their homes as part of a campaign of "ethnic cleansing" by the Croatian military.

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<sup>1</sup> S/RES/827 (1993).

<sup>2</sup> IT/32/Rev. 17.

<sup>3</sup> Art. 1 of the Statute.

<sup>4</sup> When the Trial Chamber speaks of Croatian or Croat forces in this Judgement it means the Bosnian Croatian forces and not those of the Republic of Croatia.

3. The indictment was reviewed and confirmed by Judge Gabrielle Kirk McDonald on 10 November 1995 against all accused. The Judge also issued an order for non-disclosure of the indictment on the same date. The latter order was vacated in part on 8 December 1995 by Judge Lal Chand Vohrah to allow the service of the arrest warrants against the accused and orders for surrender, signed by Judge Vohrah on the same day, on the Republic of Bosnia and Herzegovina. The non-disclosure order was further vacated by Judge McDonald on 3 April 1996 to allow the disclosure of the witnesses' names to law enforcement agencies designated by the Prosecution for purposes of the protection of those witnesses. On 26 June 1996 the non-disclosure order was fully vacated by Judge McDonald.

4. Due to difficulties with respect to the service of the indictments on the accused, Judge McDonald on 20 November 1996 issued an order under Rule 61 of the Rules of Procedure and Evidence, inviting the Prosecutor to submit a written report on the measures taken to effect the personal service of the indictment up until 4 December 1996. The time limit was extended by an order of 4 December 1996 until 13 December 1996.

5. The Registrar publicised the indictment on 11 December 1996 under Rule 60 of the Rules of Procedure and Evidence. On 13 December 1996 the Prosecution submitted its report on the measures taken. Judge McDonald then ordered the Prosecutor on 6 January 1997 to submit the indictment to Trial Chamber II for public examination.

6. The accused Marinko Katava (on 14 May 1997), the accused Mirjan and Zoran Kupre{ki} and the co-accused Drago Josipovi} (on 15 May 1997) and the accused Dragan Papi} (on 28 May 1997), through their counsel, requested the Tribunal to quash the arrest warrants and declared their preparedness to come to The Hague; they were, however, fearful that they would have to spend a long time in detention before their case came to trial. They thus expressed their willingness to be questioned in Vitez. These applications were denied by an order of Judge McDonald of 16 June 1997.

7. On 3 October 1997, the Prosecutor applied to the Tribunal for an order for the detention of the accused. The order was granted on 3 October 1997 with regard to all accused by Judge Saad Saood Jan. On 4 October 1997, the Prosecutor applied for an

order under Rule 59 *bis* of the Rules of Procedure and Evidence to allow her representatives to take any of the accused into custody and to transport them to the seat of the Tribunal. The application was granted by Judge Jan on the same date. The accused, with the exception of Vlatko Kupre{ki}, surrendered themselves on 6 October 1997.

8. On 8 October 1997 the accused, again with the exception of Vlatko Kupre{ki}, appeared before Trial Chamber I in accordance with Rule 62 of the Rules of Procedure and Evidence. They pleaded not guilty to the charges against them. Vlatko Kupre{ki} was arrested on 18 December 1997 and had his initial appearance before Trial Chamber II on 16 January 1998; he pleaded not guilty to all charges against him.

9. The Prosecution moved that the indictment against Marinko Katava be withdrawn, and leave to withdraw was granted on 19 December 1997 by a decision of Trial Chamber II of the same date, on the grounds that there was insufficient evidence against the accused to justify proceeding with his prosecution. On 23 December 1997, the Trial Chamber issued an order holding all pre-trial motions in abeyance on the grounds that the Prosecutor wished to amend the indictment. On the same date, the Trial Chamber granted leave to the Prosecution to withdraw the indictment against Stipo Alilovi}, because the accused had since died.

10. On 16 January 1998, a status conference was held before Trial Chamber II. It resulted in the scheduling order of 21 January 1998 regarding the filing of the Prosecution's pre-trial brief and other documents, as well as the Defence's response to them. On 22 January 1998 the Trial Chamber issued an order for the protection of five of the Prosecution witnesses under Rule 75 of the Rules of Procedure and Evidence.

11. On 9 February 1998, the Prosecutor filed a motion for leave to amend the indictment, in which she replaced the previous charges under Article 2 of the Tribunal's Statute with charges under Article 5(a), (h) and (i) of the Statute (murder, persecution and other inhumane acts) and changed the charges under Article 3 of the Statute by referring to Common Article 3(1)(a) of the Geneva Conventions (murder and cruel treatment).

12. Objections against the form of the indictment based on lack of specificity and cumulative charging were filed by counsel for the accused Dragan Papi} on

25 March 1998, for Vlatko Kupre{ki} on 29 March 1998, for Vladimir [anti} on 30 March 1998, for Zoran Kupre{ki} on 31 March 1998, for Drago Josipovi} on 2 April 1998 and for Mirjan Kupre{ki} on 16 April 1998. The Prosecutor replied to these motions on 21 April 1998. On 29 March 1998, the accused Vlatko Kupre{ki} moved to be provisionally released, and on 15 April 1998 requested a severance of the case against him. A motion for severance was also filed by counsel for the accused Mirjan and Zoran Kupre{ki} on 17 April 1998. The Prosecutor replied to these on 28 April 1998. By a decision of 15 May 1998, the Trial Chamber rejected the accused's motions as to defects in the form of the indictment. On the same day, the motions for severance of trials were also rejected and the motion of the accused Vlatko Kupre{ki} dismissed.

13. On 6 April 1998, the Prosecutor filed a motion to delay the disclosure of witness statements and witness identities on the grounds that some of the Prosecution witnesses had complained about being approached by persons on behalf of the accused and asked to provide exonerating witness statements in exchange for money; some witnesses were also fearful of reprisals. On 28 April 1998, the Trial Chamber issued a scheduling order setting 15 May 1998 as a hearing date on which oral argument was heard in closed session on the Prosecutor's motion of 6 April 1998 concerning the disclosure of witness statements and identities. On 21 May 1998, the Prosecution's motion for delaying the disclosure of witness statements and identities was denied, but certain safeguards for the witnesses and a procedure for contact with these witnesses by the Defence were established, including requests for assistance to the International Police Task Force (IPTF), SFOR and Bosnia and Herzegovina of 12 June 1998 in order to ensure compliance with the abovementioned decision.

14. A scheduling order of the Trial Chamber of 20 May 1998 set 17 August 1998 as the date for the commencement of the trial and requested the parties to finalise their pre-trial preparations.

15. On 13 July 1998 the Prosecution filed its pre-trial brief in which it summarised the factual allegations against the accused and their legal evaluation.

16. On 15 July 1998 the accused Vlatko Kupre{ki} moved that the indictment against him be withdrawn on the basis of insufficient evidence. The motion was dismissed by a decision of 11 August 1998, on the grounds that the issues raised by the accused could only be dealt with by a full hearing on the merits.

17. The trial began with the case for the Prosecution on 17 August 1998 before Trial Chamber II composed of Judges Cassese (presiding), May and Mumba. The case for the Prosecution in chief ended on 15 October 1998.

18. On 21 September 1998 the Trial Chamber handed down a guideline decision on communication between parties and witnesses, stating that as a matter of principle, once a witness had made the solemn declaration, none of the parties must approach him or her except with the leave of the Trial Chamber.

19. The President of the Tribunal authorised an on-site visit of the Trial Chamber to Ahmi}i by a decision of 29 September 1998. However, due to security concerns, this visit did not take place.

20. On 7 December 1998, counsel for the accused Vlatko Kupre{ki} filed a motion for withdrawal of the indictment against his client on the basis that the evidence of the Prosecution was insufficient. The Trial Chamber construed this request as a motion for a judgement of acquittal under Rule 98 *bis* of the Rules of Procedure and Evidence, and denied the motion by a decision of 18 December 1998. The accused repeated his motion on 21 December 1998, and this motion was also rejected by a decision of the Trial Chamber of 8 January 1999.

21. On 11 January 1999, the presentation of the Defence case in-chief began, ending on 23 July 1999. The Prosecution presented rebuttal evidence between 27 September and 4 October 1999, and the Defence led rejoinder witnesses on 5 and 6 October 1999.

22. The Trial Chamber issued a decision on the order of the presentation of the evidence on 21 January 1999, setting out the procedure for examination-in-chief, cross- and re-examination of witnesses, which restated the oral ruling of the Trial Chamber in the hearing of 15 January 1999.

23. On 3 February 1999, the Trial Chamber in a decision of the same date addressed the question put forward by the Defence as to whether the defence of *tu quoque* was available under international humanitarian law, answering the question in the negative, on the grounds that the obligations under humanitarian law were applicable *erga omnes*. The Trial Chamber restated its position in a decision of 17 February 1999.

24. On 11 February 1999, with the consent of the parties, the Trial Chamber issued a decision to proceed by way of deposition with the hearing of witnesses on 11 and 12 February 1999, as for medical reasons, Judge Cassese was temporarily indisposed. As Judge May was also temporarily indisposed on medical grounds on 24 February 1999, the Trial Chamber on 25 February 1999, at the request of the Prosecution but against the objections of counsel for Dragan Papi}, issued a further decision to proceed by way of deposition with the hearing of witnesses on 24, 25 and 26 February 1999. This latter decision was appealed by counsel for Dragan Papi} and reversed by the Appeals Chamber in its decision of 15 July 1999.<sup>5</sup> However, counsel for Dragan Papi} subsequently waived his right granted under the Appeals Chamber's decision to have the respective witnesses re-heard before the full Trial Chamber.

25. On 6 May 1999, the Trial Chamber granted provisional release to the accused Drago Josipovi} to attend the funeral of his mother who had died on 5 May 1999. The accused left the detention unit on 7 May 1999, accompanied by a staff member of the Tribunal, and returned there on 10 May 1999. Subsequently, the other accused also applied for provisional release: Drago Josipovi}, Mirjan and Zoran Kupre{ki} by an oral motion during the hearing of 22 July 1999 and Dragan Papi} by a written motion on 26 July 1999. All motions were denied by the Trial Chamber in its decision of 30 July 1999 on the grounds that while a majority of the Trial Chamber (Judge May dissenting) would be prepared to take exceptional circumstances into account, it nevertheless insisted that safety concerns be adequately addressed. In this regard, the relevant authorities of Bosnia and Herzegovina had refused to sign undertakings guaranteeing the return of the Kupre{ki} brothers to the detention unit and their arrest

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<sup>5</sup> IT-96-16-AR73.3 - Judge David Hunt appended a separate opinion, joining in the decision of the majority, but dissenting on some of the reasoning.

should they try to abscond, and thus the Trial Chamber could infer that such undertakings would also not be forthcoming with regard to the other two accused. Counsel for Drago Josipovi} sought leave to appeal this decision by a motion of 4 August 1999 and counsel for the accused Kupre{ki} by a motion of 6 August 1999. The Appeals Chamber, in two decisions of 18 August 1999,<sup>6</sup> denied leave to appeal, no exceptional circumstances having been shown, but stated that the Trial Chamber had erred in inferring from the refusal of Bosnia and Herzegovina to give undertakings for the accused Kupre{ki} that no such undertakings would therefore have been given for the appellant Josipovi} either.

26. The accused Vlatko Kupre{ki} applied anew for a judgement of acquittal under Rule 98 *bis* of the Rules of Procedure and Evidence on 23 July 1999; the request was denied by a decision of the Trial Chamber of 28 July 1999, which stated that Rule 98 *bis* only applied to a submission of no case to answer following the close of the case for the Prosecution, but was inapplicable once the evidence for the Defence had been put before the Court.

27. By decisions of 6 August 1999, the Registrar withdrew the assignment of defence counsel for all accused, on the basis that she had received information from the media that there had been an auction of paintings by Croat detainees organised by a Croatian support group, and that the revenues from this auction amounted to DM 4.300.000. From this the Registrar concluded that the accused were now able to pay for their own counsel. The accused objected to the withdrawal on the grounds that they had not received any significant financial support from that Croatian organisation apart from pocket money for the detention unit and support for their families. The Trial Chamber reversed the decisions of the Registrar by a decision of 3 September 1999; in the opinion of the Trial Chamber the burden of proof for the fact that the accused were no longer indigent was on the Registrar, and media reports alone could not be regarded as sufficient evidence for a court of law.

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<sup>6</sup> IT-95-16-AR65 for the accused Drago Josipovi}; IT-95-16-AR65.2 for the accused Mirjan and Zoran Kupre{ki}.

28. The accused Mirjan Kupre{ki} and Zoran Kupre{ki} filed another motion for provisional release on 3 September 1999, to which the application of Drago Josipovi} was joined on the same date. Their motions were denied by the Trial Chamber in its decision of 13 September 1999 for lack of exceptional circumstances under Rule 65 of the Rules of Procedure and Evidence. For the same reasons, the Trial Chamber denied the requests for provisional release of Dragan Papi} of 10 September 1999 and Vladimir [anti} of 9 September in its decisions of 14 September 1999.

29. The Trial Chamber, over 111 days, heard a total of 56 witnesses for the prosecution during their case in chief and another 4 during rebuttal, 96 witnesses for the Defence and one court witness. The accused Mirjan Kupre{ki}, Zoran Kupre{ki} and Vlatko Kupre{ki} also gave sworn testimony as witnesses in their own case between 14 and 23 July 1999. The three other accused chose not to testify on their own behalf.

30. The final trial briefs of the Prosecution and of all Defence counsel were submitted on 5 November 1999. Closing arguments were heard between 8 and 10 November 1999.



## II. THE CHARGES AGAINST THE ACCUSED

31. The Prosecutor alleged the following facts and charged the following counts:

32. The accused helped prepare the April 1993 attack on the Ahmi}i-Šanti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-Šanti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack, and by concealing from the other residents the fact that the attack was imminent.

33. Under COUNT 1 all six accused are charged with a CRIME AGAINST HUMANITY, punishable under Article 5(h) (persecution) of the Statute of the Tribunal, on the grounds that from October 1992 until April 1993 they persecuted the Bosnian Muslim inhabitants of Ahmi}i-Šanti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove all Bosnian Muslims from the village and surrounding areas. As part of this persecution, the accused participated in or aided and abetted the deliberate and systematic killing of Bosnian Muslim civilians, the comprehensive destruction of their homes and property, and their organised detention and expulsion from Ahmi}i-Šanti}i and its environs.

34. Under COUNTS 2-9 the accused Mirjan and Zoran Kupre{ki} are charged with murder as a CRIME AGAINST HUMANITY, punishable under Article 5(a) (murder) of the Statute of the Tribunal, and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions. When the attack on Ahmi}i-Šanti}i commenced in the early morning of 16 April 1993, Witness KL was living with his son, Naser, Naser's wife, Zehrudina, and their two children, Elvis (aged 4) and Sejad (aged 3 months). Armed with an automatic weapon, Zoran and Mirjan Kupre{ki} entered Witness KL's house. Zoran Kupre{ki} shot and killed Naser. He then shot and wounded Zehrudina. Mirjan Kupre{ki} poured flammable liquid onto the furniture to set the house on fire. The accused then shot the two children, Elvis and Sejad. When Witness KL fled

the burning house, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire. Naser, Zehrudina, Elvis and Sejad all died and Witness KL received burns to his head, face and hands.

35. Under COUNTS 10 and 11 Zoran and Mirjan Kupre{ki} are charged with a CRIME AGAINST HUMANITY, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions, on the grounds of killing Witness KL's family before his eyes and causing him severe burns by burning down his home while he was still in it.

36. Under COUNTS 12-15 the accused Vlatko Kupre{ki} is charged with murder and inhumane and cruel treatment as CRIMES AGAINST HUMANITY, punishable under Article 5(a) (murder), and Article 5(i) (inhumane acts) of the Statute of the Tribunal, as well as VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder and cruel treatment) of the Geneva Conventions. Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of the accused in Ahmi}i. When the attack commenced, several HVO units used his residence as a staging area. Other HVO soldiers shot at Bosnian Muslim civilians from the accused's house throughout the attack. Members of the Pezer family, who were Bosnian Muslims, decided to escape through the forest. As they ran by the accused's house toward the forest, the accused and other HVO soldiers in front of his house, aiding and abetting each other, shot at the group, wounding D'enana Pezer, the daughter of Ismail and Fata Pezer, and another woman. D'enana Pezer fell to the ground and Fata Pezer returned to assist her daughter. The accused and the HVO soldiers shot Fata Pezer and killed her.

37. Under COUNTS 16-19, Drago Josipovi} and Vladimir [anti} are charged with CRIMES AGAINST HUMANITY, punishable under Article 5(a) (murder) and 5(i) (inhumane acts) of the Statute of the Tribunal, as well as with VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder and cruel treatment) of the Geneva

Conventions. On 16 April 1993, numerous HVO soldiers, including the accused, attacked the home of Musafet and Suhreta Pušcul, while the family, which included two young daughters, was sleeping. During the attack, the accused and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafet Pušcul whilst holding members of his family nearby. As part of the attack, the HVO soldiers, including the accused, vandalised the home and then burned it to the ground.

### III. GENERAL BACKGROUND

#### A. The Origins of the Muslim-Croat Conflict (October 1992 - March 1994)

##### 1. The Case for the Prosecution

38. The events which are the subject of this judgement concern the Muslim-Croat conflict of 1992-1993 which took place in central Bosnia during the war of dissolution of the former Yugoslavia. Muslims, or Bosniacs, and Croats initially fought side-by-side to resist the Serb/JNA attack in eastern and western Bosnia and Herzegovina in 1992.<sup>7</sup> In central Bosnia, they maintained a front line against the Serbs in Turbe, near Travnik. As the conflict with the Serbs wore on, however, "ethnic cleansing" by Serb forces in Bosnia and Herzegovina drove Croat and Bosniac refugees into the interior of Bosnia, creating overcrowding and tension between the two nationalities and leading to a conflict between these former allies. The Muslim-Croat conflict ended only with the signing of the Washington Agreement on 2 March 1994, which created the Muslim-Croat Federation, an entity which exists to this day in the form of the Federation of Bosnia and Herzegovina, one of the two entities of Bosnia and Herzegovina under the Dayton Peace Agreement.

##### (a) General

39. The Prosecution contends that the attack on Ahmi}i of 16 April 1993, which is the principal subject of this judgement, took place as part of a campaign of "ethnic cleansing" waged by the Bosnian Croats during the Muslim-Croat conflict in order to create ethnically homogenous regions which could be united in an independent Bosnian Croat state. This autonomous region, under the control of the Bosnian Croat authorities and independent from the central control of the Government of the Republic of Bosnia and Herzegovina in Sarajevo, could eventually be annexed to the Republic of Croatia as part of a "Greater Croatia" in the mirror image of the "Greater Serbia" plan.

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<sup>7</sup> **Witness T**, Transcript page (hereafter abbreviated as "T.") 2978.

40. Croatia and Serbia's designs on the territory of Bosnia appear to be long-standing.<sup>8</sup> When, in April 1992,<sup>9</sup> the Republic of Bosnia and Herzegovina gained its independence, it appears that Serbia and subsequently Croatia put these designs into effect, with the use of their respective Bosnian Serb and Bosnian Croat agents.

41. The Prosecution has argued in this case that the Bosnian Croats pursued a separatist agenda through their political and military authorities.<sup>10</sup> As regards the evidence adduced in this case of Bosnian Croat aspirations to statehood, a Prosecution witness, **Witness Q**, referred to a conversation with one of the accused, Vlatko Kupre{ki}, after an October 1992 attack on the Muslims in Ahmi}i, in which the accused stated that the Croats would now get their own State.<sup>11</sup> Similar evidence indicates that Bosnian Croats sought autonomy from the central government of the Republic of Bosnia and Herzegovina, based in Sarajevo.<sup>12</sup> Another witness, **Vlado Alilovi}**, said that while the so-called Croatian community of Herceg-Bosna was not conceived of as a State, it was thought of as a Croat community.<sup>13</sup>

(b) The Vance-Owen Plan

42. The Prosecution has suggested that one cause of the Muslim-Croat war was the Vance-Owen Agreement, which was formulated by the negotiators Cyrus Vance and David Owen in an attempt to solve the Yugoslav crisis. The Vance-Owen plan, which envisaged the partition of Bosnia into ethnically-based cantons, is said to have provided Bosnian Croats with the motive to "ethnically cleanse" Muslim minorities from what

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<sup>8</sup> "The concept of a Greater Serbia has a long history", Section II(A)(4) ("Greater Serbia"), *Prosecutor v. Tadic*, (IT-94-1-T), Opinion and Judgement, Trial Chamber, 7 May 1997 (hereafter *Tadic*, Trial Chamber Judgement, 7 May 1997), at para. 85.

<sup>9</sup> The Republic of Bosnia and Herzegovina was recognised by the European Community on 6 April 1992 (UN Doc. S/23793, Annex) and was admitted as a member of the United Nations on 22 May 1992 (GA Resolution 46/237).

<sup>10</sup> For example, see the Prosecution's cross-examination of **Zvonimir Cili}**, T. 5317-5319, in which the Prosecution referred to the separatist thesis put forward by a Croat writer, Anto Valenta, notably in his book "The Partition of Bosnia and its Political Future", published in 1991. The witness denied, however, that Valenta's ideas were representative of those of the Croatian people as a whole: "In other words, it reflected his own positions, and this was not the position of any institution or organisation of Croatian people". **Zvonimir Cilic**, *ibid.*, p. 5319.

<sup>11</sup> T. 2751.

<sup>12</sup> **Payam Akhavan**, T. 1341.

<sup>13</sup> T. 5579-5580.

would be, under the Vance-Owen plan, Croat-dominated cantons. The Vance-Owen plan, it is claimed, was regarded by the Croats as lending the stamp of legitimacy to "ethnic cleansing" for territorial gain.

43. Ahmi}i, the village in which the events that form the subject of this judgement took place, was situated in the Croat-dominated Canton 10. Certain witnesses have seen in this a motive for Bosnian Croat forces to attack it and to expel or kill its Muslim inhabitants.<sup>14</sup> As the witness **Lt. Col. Watters** explained, there was not only the motive but also the opportunity to do so on 16 April 1993.<sup>15</sup>

44. The attack on Ahmi}i, the Prosecution argues, represented one part of a coordinated plan of the Bosnian Croat authorities to "ethnically cleanse" Bosnian Muslims from the La{va River Valley,<sup>16</sup> and to secure a Croat-controlled route through Kiseljak.<sup>17</sup>

45. In April 1993, an ultimatum was addressed by the Croatian authorities of Bosnia to the authorities in Sarajevo to implement the Vance-Owen Plan immediately and to withdraw the Muslim troops from the provinces attributed to the Croats under the Geneva plan. Exhibit P333 is the report by Reuters of this ultimatum of 15 April 1993:

"If Izetbegovi} does not sign this agreement by the 15th of April, the HVO will unilaterally enforce its jurisdiction in cantons three, eight and ten".<sup>18</sup>

46. Exhibit P339 is a Joint Statement by the Representatives of the Croats and Muslims in the Vitez Municipality. Paragraph 4 states that "Both sides agree that in Vitez and Province 10, the Vance-Owen plan should be implemented even before it is signed by the Serbian side".

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<sup>14</sup> **Lt. Col. Watters**, T. 202; see also T. 233-234 and **Payam Akhavan**, T. 1340.

<sup>15</sup> **Lt. Col. Watters**, T. 202-205. See also **Payam Akhavan**, T. 1336.

<sup>16</sup> **Witness Y**, T. 3298-3299, mentioning the villages of Strane, Merdani, Loncari, Pezici, Rovna, Putis, Jelinak, all in the La{va Valley, in the Busovaca municipality, and the villages of Pezici, Rovna, Kovacevac, bordering on the municipality of Vitez, which were attacked by the HVO. The HVO expelled all the Muslims and burned their houses.

<sup>17</sup> **Lt. Col. Watters**, T. 202.

<sup>18</sup> Ahmi}i is in what would have been canton ten under the Vance-Owen Plan.

(c) Croat Nationalism, Militancy and Propaganda

47. The Prosecution has also sought to demonstrate that the attacks by Croats in Ahmi}i and in the La{va River Valley were committed in the context of an ideology of Croatian hegemony and that Bosnian Croats grew more militant and nationalistic from the spring of 1992 onwards. Young Croats allegedly began to appear in camouflage uniforms with the insignia of the HVO and its units,<sup>19</sup> sometimes with that of the "Usta{a", a Croatian fascist army unit during the Second World War. Croatian flags were said to have come to be prominently displayed by Croats in Ahmi}i.

48. The Prosecution explained the rise in discriminatory attitudes on the part of Bosnian Croats towards the Bosnian Muslims as, in part, the product of a campaign of virulent anti-Bosniac propaganda by the Bosnian Croat TV stations and authorities.<sup>20</sup> **Witness S** testified to the pro-Croatian and anti-Bosniac propaganda spread by Vitez TV under the patronage of the HVO, and the increasing emphasis on the division between Bosniacs and Croats.<sup>21</sup> **Witness DD** testified that once the Bosnian Croat political party was founded, the Bosniacs began to notice subtle changes, e.g. the fact that even small Croatian children had camouflage uniforms, made for them by their mothers.<sup>22</sup> **Witness S**, who had spent all his life in Ahmi}i until 16 April 1993, described the rise of Croat chauvinism in his area:

"When they started calling us *balijas* ... as soon as we started having different names in comparison to our previous names, we knew what was in store".<sup>23</sup>

This attitude in turn provoked Bosnian Muslim propaganda, as is described by **Witness S**.<sup>24</sup>

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<sup>19</sup> **Fahrudin Ahmi}**, T. 1111-1112.

<sup>20</sup> **Abdulah Ahmi}**, T. 269. See also **Witness S**, T. 2878.

<sup>21</sup> T. 2878-2882.

<sup>22</sup> T. 3895.

<sup>23</sup> T. 2881 (emphasis added).

<sup>24</sup> T. 2883.

## 2. The Case for the Defence

49. The Defence - with the exception of Vlatko Kupre{ki} - has presented an account of the Muslim-Croat conflict and its causes which is quite different from that presented by the Prosecutor. The Defence deny that the Bosnian Croats had any plan to create their own State and that they attacked or persecuted their Muslim neighbours to achieve this end. Witness **Vlado Alilovi}** said that Croats and Muslims voted overwhelmingly (99%) in favour of the integrity of Bosnia and Herzegovina in the referendum of February 1992, while the Serbs voted against.<sup>25</sup> Moreover, the Defence argue that it was the Muslims who, following the initial Serbian and JNA aggression, attacked the Croats in order to seize territory and to create a Muslim state:

"They wanted to take Vitez and the surrounding villages, that is to say this central part of the state as we would call it, this strategic part of the territory. Because they needed this territory so that they could link up. If you look at the map, before and after that, these Muslim villages were all around, Muslim towns and villages and it was only Central Bosnia that was missing. That was the only thing they needed, Vitez, Busovaca, part of Novi Travnik. [...]here wasn't much tension or hostility at the very outset. After all, we had lived together for many years. For example, the place where I lived, it was quite natural that we would go and visit each other. However, these tensions mounted after various minor incidents, after Slimena fell, when people got all these weapons. After the refugees came from Krajina and Jajce, the Muslims remained in our territory, whereas Croats mainly left and went to Herzegovina and further on. They probably felt that they were stronger than we were, and that they had outnumbered us, and it is only logical that they thought that they could take this territory for themselves".<sup>26</sup>

50. Other witnesses have found the origins of the conflict in the allegedly different attitude taken by the Croats to the conflict with the Serbs from that taken by the Bosniacs, as was explained by witness **Vlado Alilovi}**:

"A deterioration of relations between the Croats and the Muslims occurred [...] when quite opposing views were taken regarding the aggression on Croatia. The Croatian side thought that after the aggression against Croatia, Bosnia-Herzegovina would become the

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<sup>25</sup> T. 5598.

<sup>26</sup> **Dragan Stojak**, T. 6311-6312.



target of aggression. The official authorities of Bosnia-Herzegovina, or at least the high-level leaders, upheld the view that that was not Bosnia's war and that they were not interested in it but, rather, that this was a war exclusively between Serbs and Croats".<sup>27</sup>

### 3. Findings of the Trial Chamber

51. The Trial Chamber is only able to make very limited findings on these background aspects, as the trial did not focus on whether or not there was a "Greater Croatia" project or whether or not the conflict between the Croats and Muslims could be characterised as an international armed conflict.

52. Given the paucity of evidence adduced by the Prosecutor in this trial, the Trial Chamber is unable to find that there existed a "Greater Croatia" project or that Bosnian Croats nurtured aspirations to statehood at the relevant time.

53. As regards the nature of the armed conflict, it is not necessary for the purposes of this trial to determine whether the armed conflict was international or internal, since the indictment contains no counts relating to grave breaches of the Geneva Conventions, which would require proof of an international armed conflict.

54. By contrast, the Trial Chamber is satisfied that Croat nationalism and discrimination against Muslims was on the increase in central Bosnia in 1992-1993, due to a variety of factors, and that this may have contributed to the commission of the crimes forming the subject of this indictment. Whether there was equally a species of Muslim nationalism being preached does not affect this finding.

## **B. The Stages in the Muslim-Croat Conflict**

### 1. The Fall of Jajce to the Serbs and the Influx of Muslim and Croat Refugees

55. In late autumn 1992, Jajce, a Muslim-Croat town fell to the Serbs. "Ethnic cleansing" of Croats and Muslims by Serb forces followed and led to a surge of refugees

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<sup>27</sup> T. 5446.

into central Bosnia.<sup>28</sup> The fall of Jajce, moreover, gave Serb forces access to the road to La{va and Central Bosnia, where there were important military installations and factories which the Serbs were anxious to seize.

(a) The Case for the Prosecution

56. The Prosecution has cast doubt on the causal nexus that the Defence has sought to establish between the influx of Muslim refugees and the genesis of fear and mistrust between the Croats and the Muslims, which would be the precursor to the attacks of October 1992 and April 1993.

(b) The Case for the Defence

57. The Defence has maintained that the displacement of several thousand Muslims and Croats, who entered Vitez and its environs, added to the already substantial influx of refugees who had fled the Serb aggression in eastern and western Bosnia and exacerbated pre-existing tensions between the two nationalities.<sup>29</sup>

(c) Findings of the Trial Chamber

58. The fall of Jajce to the Serbs undoubtedly did contribute to mutual fears and suspicions among the Muslims and Croats in the Vitez area. For the purposes of the present judgement, however, it is not necessary to dwell on these matters extensively.

2. Attacks on Bosnian Croats in the La{va River Valley

(a) The Case for the Prosecution

59. The evidence adduced here was only led by the Defence; it appears that the Prosecution does not contest this evidence as to the facts.

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<sup>28</sup> **Vlado Alilovi}** testified T. 5539 that, when Jajce fell, "most of the territory of Bosnia-Herzegovina was cleansed of Croats and Muslims by the JNA, that is, by the Serbs".

(b) The Case for the Defence

60. The Defence contends that the Muslim-Croat war, and in particular events in the La{va River Valley, can only be truly understood in the light of certain, specific attacks perpetrated by Muslim forces against Bosnian Croats in early 1993,<sup>30</sup> chief among which was an attack on the village of Dusina, as one of the defence counsel explained.<sup>31</sup>

## (i) Dusina

61. On 25 January 1993, Muslim forces massacred some fourteen captured Croat soldiers and several civilians in Dusina. **Željka Raji}**,<sup>32</sup> whose husband was among those killed, testified concerning the attack. A videotape showing the victims' bodies was also admitted into evidence.<sup>33</sup>

62. On 25 January 1993, the village of La{va was attacked by the Muslims. Women, children and elderly persons left La{va because they were warned of the attack, but men, including the witness's husband, stayed. The women and elderly, including the witness, went to Dusina, where at 5 a.m., on 26 January 1993, the village was attacked by rocket-propelled grenades. There were many Muslims, in two groups. First, there was one group of 50 or so who spoke Serbo-Croatian, and then a group who seemed to be Mujahedin. All were in uniform and had the insignia of the BiH army. They took their captives to the Muslim part of the village, using them on the way as "human shields".<sup>34</sup> The group of captives which included the witness were mistreated by the Muslims. Elderly Croats were taken out in groups and beaten. Then five men were executed.<sup>35</sup> According to the witness, a BiH soldier called out Augustine Rados Raji} and executed

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<sup>29</sup> **Zvonimir Cili}**, T. 5141-5143; **Ivica Kupre{ki}**, T. 8014-8015; **Vlado Alilovi}**, T. 5460 and T. 5535; **Mirko Saki}**, T. 7606-7607; **Gordana Cui}**, née **Vidovi}**, T. 8181; **Dragan Vidovi}**, T. 8418; **Mirko Saki}**, T. 7606-7607 and T. 7683; **Gordana Cui}**, T. 8180-8181.

<sup>30</sup> See e.g. Defence's Closing Brief of Counsel for Mirjan Kupre{ki} at p. 12; Defence's Closing Brief of Counsel for Dragan Papi}, at p. 5 – 7.

<sup>31</sup> T. 6119-6121.

<sup>32</sup> T. 6097-6134.

<sup>33</sup> The videotape is Exhibit D62/2; the transcript of the videotape is D62 A/2 and the list of those killed in the incident is D63/2.

<sup>34</sup> T. 6112-6113 and T. 6115.

<sup>35</sup> T. 6116-6118.

him, and then boasted of having killed the witness's husband.<sup>36</sup> The witness's husband had indeed been murdered while trying to negotiate the release of the captives.<sup>37</sup> Others were killed in this same way. One at least was savagely tortured before being killed.<sup>38</sup> Subsequently, Croat houses in the village were torched. Today – it is alleged - not a single Croat lives in La{va or Dusina. In La{va where the Croats lived, Muslims moved into their houses. Many other Croat witnesses for the defence testified that the events in Dusina traumatised the Croat community.<sup>39</sup>

(ii) Busovaca

63. According to defence witnesses, there was also fighting between Muslims and Croats in Busovaca in 1992-1993. **Zvonimir Cili}** testified that all the Croats from that municipality were expelled at the end of a conflict between the BiH army and Croats.<sup>40</sup> This was confirmed by **Ljuban Grubesi}**.<sup>41</sup>

(iii) Kidnapping of Zivko Toti} and the Killing of his Bodyguards

64. In addition to the events in Dusina, La{va and Busovaca which occurred around January 1993, the kidnapping of Zivko Toti} and the killing of his escort on 15 April 1993 is said to have had a seriously destabilising effect on Muslim-Croat relations. Zivko Toti} was the head of the HVO Military Police in Zenica.<sup>42</sup> Four or five of Toti}'s bodyguards were killed during his kidnapping, allegedly by Muslim forces.<sup>43</sup> Zivko Toti} himself was not killed, however, and was eventually released.<sup>44</sup>

(iv) Attacks on Croats in Stari Vitez (Mahala)

65. The Defence have also pointed to the alleged militancy of the Muslims living in the Muslim quarter of Vitez (Stari Vitez) and Muslim attacks on Croats in Vitez.

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<sup>36</sup> T. 6122-6123.

<sup>37</sup> See Exhibit D62/2 (video of the witness's husband and other dead and mutilated bodies).

<sup>38</sup> **Željka Raji}**, T. 6125.

<sup>39</sup> E.g. **Rudo Kurevija}**, T. 5894.

<sup>40</sup> T. 5174-5175.

<sup>41</sup> T. 6235.

<sup>42</sup> **Lt.-Col. Watters}**, T. 147.

<sup>43</sup> The videotape relating to this episode is D34/2 the Croatian translation, D34A/2, and the English translation D34B/2.

<sup>44</sup> **Jadranka Toli}**, T. 6156-6158.

**Zvonimir Cili}** testified that the Muslims in Stari Vitez were literally digging in for a confrontation with the Croats.<sup>45</sup> He claimed that Vitez was shelled from Muslim positions on 16 April 1993.<sup>46</sup> He also produced several "Operations Reports" (Exhibits D40/2 and D41/2) during his testimony, which described a situation of complete panic in Vitez on 16 April 1993. A further Operations Report of 17 April 1993 (Exhibit D42/2) reported that Muslim forces were regrouping and fighting, in [anti]i among other places.

(v) Attacks on Croats in Zenica

66. Finally, the Defence have pointed to Zenica as a bastion of Muslim nationalism where Croats were mistreated, in order to demonstrate that Muslims were not, or not uniquely, the victims of discrimination and persecution. **Witness HH**, an investigator for Tadeusz Mazowiecki, the Special Rapporteur on the Human Rights situation in Bosnia and Herzegovina, testified that there were reports of harassment and arbitrary executions of Croats in Zenica.<sup>47</sup> **Jadranka Toli}**,<sup>48</sup> a nurse in Zenica general hospital and a Croat, testified about persecution of Croats in Zenica, where they were in a minority. Croats therefore began to leave Zenica.<sup>49</sup> **Zvonimir Cili}** also testified to the persecution of Croats in Zenica in 1992-1993.<sup>50</sup>

(vi) Croat Propaganda and Preparation for an Attack by Bosnian Muslim Forces

67. The Defence has produced evidence that the Croat forces feared an attack by Muslims in 1993.<sup>51</sup>

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<sup>45</sup> **Zvonimir Cili}**, T. 5425.

<sup>46</sup> An exhibit was produced to the witness (D39/2), which was allegedly a list of HVO soldiers killed and wounded (23 killed and 63 wounded) in Vitez. It emerged during cross-examination that not all the soldiers mentioned in the document were, however, from the Vitez brigade.

<sup>47</sup> *Second Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, by Mr. Tadeusz Mazowiecki (hereafter the *Mazowiecki Report*), UN Doc. E/CN.4/1994/4, 19 May 1993, Conclusions, paras. 37 and 40.

<sup>48</sup> T. 6142-6180.

<sup>49</sup> T. 6151" ... the life conditions were intolerable, but the main reasons were the attack on Dusina and the crimes in Dusina, and this horrified the citizens, Croats in Zenica, and other citizens. Then the attack on Busovaca. Then from that time Croats in Zenica felt very insecure. They were afraid for their own lives and the lives of their children".

<sup>50</sup> T. 5191-5199.

<sup>51</sup> **Zvonimir Cili}**, T. 5206-5207.

(c) Findings of the Trial Chamber

68. The Trial Chamber finds that there were undoubtedly attacks by Muslim forces on Croat villagers in early 1992, which contributed to a background of mutual fear. The Trial Chamber, however, does not find that compelling evidence has been produced to show that the BiH army or the Muslims in general were planning to launch an attack on the Croats on 15-16 April 1993.

69. The evidence of defence witness **Zvonimir Cili}**, who was a good friend of Mario Cerkez and who joined the latter on the municipal staff as a political officer to provide information for the troops and the members of the municipal staff of the HVO, is instructive in this regard. His testimony reveals a tendency on the Croat side to spread alarm among the Croat population. Exhibit D34/2, a videotape of a news programme reporting the kidnapping of Zivko Toti}, is also instructive. The broadcaster recites all the alleged crimes committed by the Muslims against the Croats in an apparent attempt to incite hatred against the Muslims and BiH army. This vitiates Zvonimir Cili}'s assertion that the Croat leadership was trying to achieve conciliation among ethnic groups.

70. Moreover, the "Operations Report" dated 16 April 1993, produced by **Zvonimir Cili}**, appears to be one-sided in that it only mentions attacks on "*Croatian* houses in Krcevine and Nadioci", and nothing about the assault on Ahmi}i and massacres of Muslim civilians. The Report complains of Muslim forces attacking from Preocica and states, *inter alia*, that "attacks by Muslim forces are becoming more ferocious and bestial". The Trial Chamber finds that this evidence is not conclusive in as much as it could prove either that the Muslims *were* preparing for an attack or that the Croat forces were creating misinformation and propaganda to prepare their own population for an attack on the Muslims. The correct interpretation depends on the true situation: whether the Muslims *were indeed* preparing for an attack or not.

### C. Muslim-Croat Relations in Central Bosnia

#### 1. The Case for the Prosecution

##### (a) Good Muslim-Croat Relations before October 1992

71. All the evidence shows that before the Muslim-Croat conflict in 1992-1993, Muslims and Croats got on very well together in Ahmi}i and its environs. Muslims and Croats would visit each other, go to each other's weddings and help each other out as good neighbours. **Witness KL** testified to this effect of his Croat neighbours Zoran Kupre{ki}, Mirjan Kupre{ki} and Vlatko Kupre{ki}.<sup>52</sup> Prosecution witnesses **Mehmed Ahmi}**,<sup>53</sup> **Fahrudin Ahmi}**,<sup>54</sup> **D**,<sup>55</sup> **L**,<sup>56</sup> **N**,<sup>57</sup> **S**,<sup>58</sup> **V**,<sup>59</sup> **W**<sup>60</sup> and **FF**<sup>61</sup> testified in a like manner.

72. An expert witness who testified at the request of the Trial Chamber, the Norwegian anthropologist **Dr. Tone Bringa**, pointed out that before 1992, relations between Croats and Muslims were good. Except for religious practices, where they of course followed different habits and rituals, they did share aspects of their daily lives. They co-operated in the running of their villages, they visited one another at life-cycle events (weddings, funerals, etc) and they took an interest in each other's lives. Normally neighbours got along well, irrespective of whether they were Croats or Muslims. There were of course misunderstandings or quarrels, but they did not have to do with the ethnic community to which the neighbours belonged.<sup>62</sup>

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<sup>52</sup> T. 1893-1894.

<sup>53</sup> T. 640-641.

<sup>54</sup> T. 1150-1151.

<sup>55</sup> T. 1015.

<sup>56</sup> T. 2340.

<sup>57</sup> T. 2538.

<sup>58</sup> T. 2877-2878.

<sup>59</sup> T. 3180-3181 and T. 3202.

<sup>60</sup> T. 3164.

<sup>61</sup> T. 4311.

<sup>62</sup> T. 10921-10924.

73. According to the same expert witness, there was nevertheless potential for conflict. The Muslims and the Croats did not intermarry. There was therefore potential for having two opposite groups, each based on kinship ties, which coincided with ethnic ties or ethnic identification. As the witness put it:

“...so in a conflict, which could be anything from a quarrel about sheep that run into your property, these kinds of conflicts, relatives would often have strong loyalties to each other and they would stand up for each other. So you would have conflicts where people who were related sided with each other against the person that they were then in conflict in (sic)”.<sup>63</sup>

(b) Deterioration in Relations after October 1992 and the Separation of the Village Guards

74. According to Prosecution witnesses, it was chiefly the Croats who were to blame for the split between the Muslims and Croats in 1992. **Fahrudin Ahmi}** said it was the Croats who started to arm themselves and appeared menacing. **Witness F** said that Croats told him that Ahmi}i would be “another Vukovar”, i.e. that it would be destroyed and its inhabitants killed.<sup>64</sup>

75. **Dr. Bringa**, the expert witness called by the Trial Chamber, testified as to her experiences and conclusions from the times she had spent with a Muslim family in a village in central Bosnia. Dr. Bringa visited the former Yugoslavia several times between 1987 and 1997 for a total of 15 months. She noticed the gradual shifting of allegiance from the neighbourly relations between Muslims and Croats to a more ethnicity-oriented affiliation and self-identification of sections of the Bosnian population.<sup>65</sup>

76. When asked for an explanation of whether and in what manner she had noticed the beginnings of ethnic divisions, the witness stated that originally it was not so much ethnic hatred as a growing fear of the events which were threatening the villagers from

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<sup>63</sup> T.10923.

<sup>64</sup> **Fahrudin Ahmi}**, T. 1128–1129; **Witness F**, T. 1373.

<sup>65</sup> T. 10923–10925.



outside their close-knit community.<sup>66</sup> As Yugoslavia disintegrated, nationalist ideologies gradually brought about a change in the attitude of each group. Nationalist propaganda fuelled a change in the perception and self-identification of members of the various ethnic groups. Gradually the "other" persons, i.e. members of other ethnic groups, who were originally perceived merely as "diverse", came to be perceived as "alien" and then as "enemy". More specifically, they were perceived as potential enemies who were threatening to the identity or future prosperity of one's group.<sup>67</sup> The witness also felt that oppressive tactics such as checkpoints and interrogations were being used predominantly by the Croats and less by the Muslims.<sup>68</sup>

77. Other prosecution witnesses testified that the Bosnian Croat authorities set up checkpoints, for example at Dubravica, where they arrested Bosniacs, and otherwise tried to provoke them, that they would seize humanitarian aid bound for Tuzla, and do all they could to undermine the Bosniacs. The authorities would not investigate murders of Bosniacs, thus creating a culture of impunity and lawlessness.<sup>69</sup> Linked to this deterioration in relations was the separation of the joint village guards into Muslim and Croat guards in the spring of 1992.

## 2. The Case for the Defence<sup>70</sup>

78. Witnesses for the Defence agreed with prosecution witnesses that Muslims and Croats in Ahmi}i had excellent neighbourly relationships prior to the events which are the subject of the indictment.<sup>71</sup>

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<sup>66</sup> T.10937.

<sup>67</sup> T. 10938-10940 and T. 10957-10961.

<sup>68</sup> T. 10963-10964.

<sup>69</sup> **Witness B**, T. 737-741; **Witness AA**, T. 3735-3738 saw Miroslav Bralo when they were both in prison; Bralo being in prison for the Salkic slaying in Nadioci. He related how Bralo was permitted a considerable degree of freedom and was allowed to assault some Arabs who were there in the prison. Shortly after his release, the witness was sent back to Kaonik prison on somewhat trumped-up charges. This second time he was again in prison with Miroslav Bralo, who was still there. The witness and Bralo were sent on trench digging details but they did not really dig the trenches – the Muslims did this - with the witness and Bralo sitting by, drinking and joking. The witness provoked the Muslims by saying things to them. Bralo beat them with his hands and spade. Bralo couldn't understand why he was in prison "only because of one Balija". Bralo was in prison for some two months, but he was allowed to visit his wife, drink, etc. The cell was never locked.

<sup>70</sup> See e.g. Closing Argument of the Counsel of the Accused Zoran Kupre{ki}, 5 Nov. 1999, at p. 43.

79. Where prosecution and defence witnesses differ is on the question of who bore the responsibility for the split between the two nationalities. The majority of defence witnesses (who were mostly Croats) maintained that it was the Muslims who wished to separate themselves from the Croats.<sup>72</sup>

### 3. Findings of the Trial Chamber

80. The Trial Chamber finds that there was a split between Croats and Muslims in 1992, no doubt for a combination of the reasons adduced by prosecution and defence witnesses, the precise cause of which it is not necessary to determine for the purposes of this Judgement.

#### D. Persecution – Alleged Facts

##### 1. The Case for the Prosecution

###### (a) General

81. The Prosecution maintains that the attacks on Ahmi}i in October 1992 and April 1993 were part of a systematic attack on the civilian population of the La{va River Valley intended to “cleanse” the area of Muslims.

82. **Witness AA**, a Muslim member of the “Jokers” i.e. of the Croatian Military Police, provided key evidence for this contention:

Q. And what was the purpose of the Busovaca campaign by the HVO as you understand it?

A. My conclusion was that it should be cleansed, and at that time I believed it too. Later on, my colleagues with whom I was, and we said that the air should be rid of Balijas, you know, that it should be ethnically cleansed, and we talked about it, and that we would go to Vitez the next time.

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<sup>71</sup> **Niko Saki}**, T. 8224; **Jozo Alilovi}**, T. 8332; **Vlado Alilovi}**, T. 5442.

<sup>72</sup> **Dragan Stojak**, T. 6322; **Vlado Alilovi}**, T. 5551.

Q. Vitez would be the next target, is that what you're saying? That was the understanding?

A. Yes. Yes, this is what we talked about, we in the Military Police.

Q. When you talked about Vitez being the next place to be ethnically cleansed, did that include Ahmici as well? Was that also understood?

A. Yes, of course.

Q. Why do you say "of course"?

A. Because Ahmici was practically on the road between Busovaca and Vitez, and there were Muslims there too, the majority was Muslim, it had to be cleansed or removed. They simply had to be removed from there. Something had to be done, because they were a hindrance.

Q. Was the BiH army in Ahmici?

A. I never saw a single member of the BiH army in Ahmici, never. I say that because I passed there many times. So never. But I do know that most of them went to fight against the Serbs in Vlačić, Visoko, somewhere else, but not -- they were not stationed in Ahmici.

Q. When BiH soldiers came home on leave, what would they do with their weapons, as far as you knew?

A. Most of them would leave them at the front, leave the weapons at the front. I know that, because I talked to some of the members that I knew, and they always complained that they didn't have enough weapons. And they even went in civilian clothes.

Q. Now, you say that you knew that the BiH army was not in Ahmici. Did you think that was common knowledge in your group, in the Military Police, that there was no threat from the BiH army in Ahmici?

A. Yes. Yes. Had there been a Bosnian army in Ahmici, we would have known of it, or we would have at least seen someone in uniform or some other side, a member of the other side, but I never saw them, and everybody knew that. It was common knowledge.

Q. Which army was all around Ahmici at this time?

A. The HVO, on all sides more or less...<sup>73</sup>

(b) Discriminatory Acts from October 1992 until April 1993

83. The Trial Chamber has reviewed Prosecution evidence, which tends to show various factual elements that may be taken to constitute persecution of Muslims. In addition to these elements, the following material should be taken into account.

84. After the October 1992 attack, the HVO allowed Bosniacs to return to Ahmići, but the situation was evidently very tense. It would seem that the local Croats provoked and discriminated against the Muslim population. The Croats were in control of Ahmići

after the October 1992 attack,<sup>74</sup> and “everything became Croatian”. As **Witness G** testified: “... when we were allowed to go back home, everything was according to the Croats. For instance, at school I had to study the Croatian language, history was called Polviest, the Croatian term for it, instead of the subject musical culture, it was given another name. The money that was used was the Dinar, the Croatian money, instead of the previous currency”.<sup>75</sup> The HVO demanded the total surrender of Muslim forces and the right to re-locate, to disarm and to impose a curfew on them.<sup>76</sup> The Jokers, a special HVO unit referred to above, was notable for its persecution of the local civilian Muslim population.<sup>77</sup>

85. According to the Prosecution, Bosnian Croat persecution of the Bosnian Muslim population was designed to dehumanise the latter so that it would be easier to commit acts of violence against them. Croats started to call Muslims by the derogatory term “balijas”, expel them from their homes, threaten them and otherwise harass them on the sole basis of their ethnicity.<sup>78</sup>

86. In the view of the Prosecution the following examples of persecution of Muslims during this time are illustrative.

87. **Fahrudin Ahmi}** testified that he was told by Dragan Papi} and Vinko Vidovic, when he tried to return to his home following the attack of October 1992, that he needed permission to do so. The following day, Papi} and Vidovi} threatened Fahrudin Ahmi}. Dragan Papi} approached Ahmi} holding the fuse of a bomb, and addressed him with the

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<sup>73</sup> T. 3717-3719.

<sup>74</sup> **Abdulah Ahmi}**, T. 270.

<sup>75</sup> **Witness G**, T. 1544.

<sup>76</sup> **Witness FF**, T. 4329–4330, testified that her husband had to surrender his weapons to Nenad Šantic, the local HVO commander and the brother-in-law of Drago Josipovic. She testified that Nenad Šantic took weapons from others too. Witness CA, T. 4577–4579, testified that her son was told to hand his weapon – one of the burnt weapons from Slemenij - to Nenad Šantic, and to tell others to hand in their weapons in Pirici.

<sup>77</sup> **Lee Whitworth**, T. 4271–4274.

<sup>78</sup> **Witness D** T. 1013-1019; **Witness I** T. 1778 (generally), T. 1783 (freedom of movement was restricted), T. 1799 (witness was threatened by a Croat soldier who put a knife to his neck and said “This is what is going to happen to your neighbours [...]”); **Fahrudin Ahmi}**, T. 1113: Muslims were intimidated and insulted in order to force them to leave Ahmi}i.

words "Why don't you monkeys surrender?" in reference to the Muslims. As a result of this intimidation, Fahrudin Ahmi} left his home the next day, fearing that it might be bombed if he stayed.<sup>79</sup>

88. Other instances of provocation were recounted by **Witness A**, who recalled a conversation which he had at the house of Ivo and Dragan Papi}, in which the Papi}s blamed the Muslims for the war-time problems.<sup>80</sup> **Abdulah Ahmi}** referred to a conversation with Dragan Papi} in which the latter expressed admiration for Adolf Hitler and said that Hitler's methods should be applied to Bosnia.<sup>81</sup> **Witness G** told of the appearance of Croatian flags flying above Ivo and Dragan Papi}'s house, as if to suggest that Ahmi}i was now part of the territory of Croatia.<sup>82</sup> Conversely, the flag of the Republic of Bosnia and Herzegovina was dragged along the road behind a motorcycle ridden by two HVO soldiers, according to the testimony of **Fahrudin Ahmi}**, whose sister-in-law witnessed this incident.<sup>83</sup>

89. **Witness I**, a Muslim who lived in the part of Ahmi}i known as [anti}i, where about 80% of the houses were owned by Croats, referred to the fact that Muslims were discriminated against in petrol rationing. The witness would have to go to the Hotel Vitez in order to get a certificate from the HVO for petrol. Other Muslims would not go to the Hotel Vitez for such a certificate, as they were afraid.<sup>84</sup>

90. **Witness U**, a Bosniac refugee who left Karaula because of Serb aggression, arrived in a village adjoining Ahmi}i around February 1993. This neighbouring village consisted mostly of Croat inhabitants, and he was forced to leave there after only 45 days due to Croat harrassment. He described the pressures put on Bosnian Muslims by the Bosnian Croats in the village, who stole from the Muslims, seized their property, searched their houses for weapons and generally mistreated them in such a way as to

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<sup>79</sup> T. 1113.

<sup>80</sup> T. 542-545.

<sup>81</sup> T. 262.

<sup>82</sup> T. 1544-1545.

<sup>83</sup> T. 1212.

<sup>84</sup> T. 1790-1791.

make it impossible for them to continue to live in the village.<sup>85</sup> His house was searched three times by the HVO Military Police. The witness also described the murder in the village of a Bosniac, Esad Salkić, which finally provoked his flight to Ahmići in February 1993. He went to Ahmići precisely because it was a Muslim village. There were approximately 150 other refugees in Ahmići, all of whom were Bosnian Muslims. During this period in Ahmići, the Bosnian Croats would say that they could not guarantee the Muslims' safety because of "extremist" Croats, who wore HVO insignia.

91. **Witness V** referred to regular "drive-by" shootings by Bosnian Croats in Ahmići before the conflict of April 1993.<sup>86</sup> **Witness Y** confirmed this pattern of harassment of Bosniacs in the period from October 1992 until April 1993 in Ahmići and surrounding villages – with houses being burnt, Bosniacs expelled, and drive-by shootings in Ahmići practically every night at dusk. Muslims were also expelled from surrounding villages such as Strane, Merdani, Pezici, Kovacevac, Rovna and Lončari.<sup>87</sup> The witness explained that the BiH army did not defend those villages because "all those who were armed and uniformed and members of the army were up at the frontlines towards the Serbs".<sup>88</sup>

92. **Witness AA**, a Muslim who served in the HVO, was 23 years old in 1993. He had known Vlado [anti] since childhood. Vlado [anti] had most recently been his superior in the police force. The witness grew up in the municipality of Vitez, in a mostly Croat village with mostly Croat friends despite the fact that he was himself a Muslim. Surprisingly for a Muslim from a Muslim family, Witness AA joined the HVO in the spring of 1992. He joined the 4<sup>th</sup> battalion of the Military Police, assigned to provide security to the Hotel Vitez, which was being used as the Headquarters for the HVO in central Bosnia and where [anti] had an office. [anti] wore a uniform and was in charge of investigating crimes committed by HVO soldiers. The HVO stole from Serbs, Muslims and the BiH army. Vlado [anti] knew these crimes were being committed but he did not investigate them.

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<sup>85</sup> T. 2990-2991.

<sup>86</sup> T. 3209.

93. From late 1992 until early 1993, when Witness AA was sent by Vlado [anti] to Busovaca, he saw in Kaonik, 2-3 km from Busovaca, Muslim houses which had been set on fire and that Muslim civilians had been sent to dig trenches. On the same trip, the witness saw that the village of Strane had been "ethnically cleansed" of Muslims: "not a single Muslim man, woman or child had remained there. All of them were expelled" by the HVO.<sup>89</sup> The same was true of Busovaca<sup>90</sup> and Merdani.<sup>91</sup> The witness, who participated in the campaign, stated that the purpose of the Busovaca campaign was "ethnic cleansing" – "to rid the place of the Balijas".<sup>92</sup>

94. **Captain Stevens** attested to the climate of persecution in the Vitez area in April 1993. After Easter 1993, Zenica, overwhelmingly a Muslim town, was shelled by the HVO. Also in mid-April 1993, a petrol tanker exploded in the Muslim part of Vitez. Captain Stevens arrived on the scene the day after this explosion and heard that the tanker had been placed near what was thought to be a munitions dump. Local militia-type forces told him that two Muslims had been strapped into the cab of the tanker and that the HVO fired RPG 7 rounds to cause the explosion. Captain Stevens saw the effects of the explosion, namely massive destruction to the Muslim part of town (the western part of Vitez). These can be seen in Exhibit P160. This incident, referred to also in Lt.-Col. Watters' testimony, led immediately to a mass exodus of some 400 Muslims from Stari Vitez. Captain Stevens also saw the results of "ethnic cleansing" by local HVO forces in Nova Bila towards the end of his tour of duty.

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<sup>87</sup> T. 3291-3292.

<sup>88</sup> T. 3292-3293.

<sup>89</sup> T. 3712-3713.

<sup>90</sup> T. 3713-3714.

<sup>91</sup> T. 3715-3716.

<sup>92</sup> T. 3717-3718.

## 2. The Case for the Defence

### (a) General

95. The Defence and defence witnesses have frequently pointed out, as the Prosecution did, that prior to October 1992, relations between Muslims and Croats in the La{va River Valley were very good.

### (b) Croat Nationalism

96. Defence witnesses have downplayed the significance of Croat nationalism, for example the flying of the Croat checkerboard flag from Croat houses, including the Papi} house, in Ahmi}i. **Ivo Vidovi}** said that flags were flown simply to celebrate religious holidays, and that the Muslims also displayed flags.<sup>93</sup> This statement is supported by other witnesses. Several Croats flew a Croat flag in Ahmi}i, as **Ljubica Milicevi}** testified,<sup>94</sup> including Ivo Papi}, Slavko Milicevi} and Dragan Papi}. She also explained that even though Ivo Papi} flew a Croatian flag and never a Muslim one, the sympathy of the Papi} family lay with both communities.

97. By the same token, defence witnesses placed less emphasis upon the importance of Bosnian Croats donning uniforms. **Goran Papi}**, the younger brother of the accused Dragan Papi}, testified that Dragan Papi} wore a black uniform – which was a gift – simply in order to make it easier for him to pass the black-shirted HOS checkpoints in Zenica.<sup>95</sup>

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<sup>93</sup> T. 6977.

<sup>94</sup> T. 7325 and 7351.

<sup>95</sup> T. 7056–7057: “Q. Are you aware that he owned and occasionally wore a black uniform? A. Yes, he did own a black uniform. It was given to him as a present by somebody whose vehicle he had prepared, because it was useful if he went to Zenica or somewhere else, he would not be stopped at the checkpoints, and that’s why he would wear it sometimes though it was too small for him. So I saw him wearing it very rarely. Q. So it was a good idea to wear a black uniform if you went to Zenica? A. Yes, because the HOS was the only organised force in Zenica at the time, and all of them were wearing black uniforms. Q. And why did he wear the camouflage uniform? A. He wore it because everybody was wearing it. All young men were wearing uniforms. It was the fashion at the time just before the war. Q. So young people who were not members of any particular units -- A. Yes, they would get them from their friends and they would wear them”.



98. **Zvonimir Cili}** testified that the Press Service of the Muslim-Croat Crisis Staff,<sup>96</sup> where he worked after the break-up of the SFRY in 1991, was composed of three Croats and two Muslims. The purpose of the Staff was to deal with the crisis which had arisen due to attacks being launched on Bosnian Croats and Muslims by the Serb-dominated JNA in 1991-1992. The crisis staff was staffed in proportion to the nationalities present in the Vitez municipality, i.e. Muslims, Croats, Serbs, Yugoslavs and others.

99. In her everyday life, **Gordana Cui}** stated that she never noticed any intolerance towards Muslims, nor a desire to "cleanse" Ahmi}i of Muslims or to burn their houses.<sup>97</sup>

100. The Defence for **Zoran and Mirjan Kupre{ki}** has also emphasised that both accused did not only have generally good relations with Muslims, but that they were especially friendly with a number of Muslims who, like the accused, were members of a folklore society. Both accused have testified that this society and socialising with the other members meant very much to them. **Zoran Kupre{ki}** explained at length how he kept up his interest and involvement in folklore from secondary school until 15 April 1993.<sup>98</sup> The group had performances on the occasion of Muslim and Croatian festivities (Bajram and Easter) up until March and April 1993.<sup>99</sup> Counsel for the accused submitted four photographs showing both accused in the company of the other members of the society and during performances.<sup>100</sup>

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<sup>96</sup> T. 5076-5077.

<sup>97</sup> T. 8171.

<sup>98</sup> T. 11179 and T. 11182-11183: "Q. Did you go on with your folklore activities while you were in the JNA? A. Yes. I was a dancer, a folklore dancer, and I was at the head of this folklore section in the JNA, and I also played in the orchestra."

<sup>99</sup> T. 11192-11193: "Can you tell us when your folklore group had a performance at a Muslim celebration last? When was the last time, a purely Muslim celebration? A. Well, I remember we had a performance, it was to celebrate the Muslim festival of Bajram, and it was in March 1993 at the fire brigade building at the Mahala in Vitez. I remember that. Q. When was Bajram? A. It was March 1993, at the end of March sometime. Q. After that, did you have performances of any kind together with your Muslim members at an exclusively Croatian celebration? A. Not for a long time afterwards. I remember several days before the conflict, we had a performance with the same group in Mosunj to celebrate the Catholic holiday of Easter. That was in April, the 10<sup>th</sup> or 11<sup>th</sup> of April, somewhere around there".

<sup>100</sup> Exhibits D16/1 to 19/1.

101. The accused **Mirjan Kupre{ki}** told the Trial Chamber that even a number of marriages across ethnic divides originated in that society.<sup>101</sup> He himself had very close personal contacts with members of the folklore society who came from a different ethnic background, namely Fahrudin Ahmi}, a Muslim, who was his best friend, and two Serbs who were the best men at his wedding.<sup>102</sup> In his view, the first conflict in October 1992 brought the members of the society even closer together.<sup>103</sup>

(c) Muslim Nationalism and Persecution of Croats

102. In contrast to the Prosecution case, the Defence have also painted a picture of Muslim nationalism and belligerence.

103. **Witness DB/1,2**, who lived in Kruščica, near Vitez, stated:

“Ever since the SDA party came into beginning () and when I stopped working and they would turn their heads away from us and they would wave their flags and call out, “Alija, SDA, this will be a Muslim state”. They started this kind of thing from May, 1992, which is when I first began to be afraid”.

104. **Jadranka Toli}** testified at length<sup>104</sup> about the persecution of Croats by Muslims in Zenica.<sup>105</sup>

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<sup>101</sup> T. 11564: “Q. When you got married and the rest of them married, were you best men to one another? A. Yes, of course, particularly those of us who were together in this folklore company, and we were together. Yes, of course, we were best men to one another, and, of course, we married between us. I could mention three or four marriages which were the product of that friendship in that folklore company. Q. You mean marriages between Croats and Muslims; is that so? A. Between Croats and Croats, and Croats and Muslims, and Croats and Serbs. They all intermarried, all variations”.

<sup>102</sup> T. 11565–11566: “Q. Who were those closest friends? A. Fahrudin Ahmi}, the late Fahrudin Ahmi}. I don’t think I should waste any words about that. He was not only a friend from the folklore company, but he was also a man who was in the band with me together, that is, we had various things that we did together, which brought us together. ... There was also Ibrahim Salkic, another dancer, Veljko Cato, who was my best man, and he’s a Serb. Miro Vujinovic, another Serb, and he was also my best man”.

<sup>103</sup> T. 11566: “Q. Did any changes happen in your relations after the first conflicts in 1992? A. I can say that after that first conflict, that those—that it may have brought us even closer together. Because of all those events, we simply did not want anything like that to affect us in any way, and we were all very eager to come even closer together in view of that”.

<sup>104</sup> T. 6135-6228.

<sup>105</sup>T. 6194: “Q. You said that in the Croatian areas homes were usually torched after the Croats were expelled. Did I understand you right? A. Yes. The houses were torched after the Croats were expelled, but this happened on the 18th of April. Q. Okay. So now we see that you don’t know anything about the 16th.

(d) Absence of an Official Plan or Policy on the Part of the Bosnian Croat Political and Military Institutions to Persecute Muslims

105. Defence witnesses testified that the official organs of the Croatian community of Herceg-Bosna did not systematically or as a matter of policy discriminate against Bosnian Muslims.<sup>106</sup>

106. **Vlado Alilovi}** testified that the Croatian Community of Herceg-Bosna was not intended to be a separate State and nor did it aspire to be a State. Alilovi} conceded that the Croatian Community of Herceg-Bosna was, at a minimum, a Croatian autonomous region, but referred to the referendum on the integrity of Bosnia and Herzegovina in which 99% of the Muslims and Croats voted in favour of the integrity of Bosnia and Herzegovina, with Serbs voting against. This would, in his view, tend to demonstrate that the Croats of Bosnia and Herzegovina were not opposed to the existence of Bosnia and Herzegovina as a State and did not have designs on parts of Bosnia and Herzegovina as prospective Croatian autonomous regions.

107. **Zvonimir Cili}** stated that Ivan [anti}, head of the HVO in Vitez and commander of the crisis staff of Vitez municipality,<sup>107</sup> was working to achieve peaceful co-existence with the Muslims. The Defence produced various exhibits to **Zvonimir Cili}** to show that attempts were continually made to promote inter-ethnic harmony.<sup>108</sup>

108. **Rudo Vidovi}** testified that there was no discrimination against the Muslims at the Post Office, a public service in Vitez, where he was chief. After the incident of

So now we're going to talk about the conduct of Muslim forces after they captured Croatian villages. What happened with the Croatian churches after the Muslims captured a Croatian village? A. Well, they would shoot at the churches. The church in Cajdras is full of bullet holes. The priest and two nuns were abused in Cahrcici".

<sup>106</sup> See e.g. the Defence's Closing Brief of Counsel for Dragan Papi}, section D.

<sup>107</sup> Exhibit D17/2.

<sup>108</sup> T. 5132-5133 and T. 5135; Exhibit D25/2 (minutes of meeting signed by Blaškic); Exhibit D26/2 (document of a meeting between representatives of the UNHCR, UNPROFOR, SDA, BiH army, the HVO government, the HVO headquarters, and public security station in Vitez. "From this document, we can see that attempts were continually made to re-establish the joint police station and joint government. Yes. This is one of these attempts and attempts were made continuously ... the municipal war government which is

20 October 1992 – which he said resulted from a “misunderstanding” between the Muslims and Croats - the Muslims did not show up at work for seven days, because they were afraid, but they were not disciplined for not showing up, even though by law an employee could be fired for being absent without leave for five days. Moreover, Vidovi}’s deputy was a Muslim who remained employed throughout 1992-1993. There was no attempt at the Post Office to impose an HVO oath of loyalty on employees.<sup>109</sup>

(e) Whether the Croatian Community of Herceg-Bosna had a Separatist Agenda

109. In cross-examination, **Zvonimir Cili}** was asked about the separatist ambitions of Herceg-Bosna. The witness admitted that he was familiar with the arguments of a book by Anto Valenta entitled THE PARTITION OF BOSNIA AND THE FIGHT FOR ITS INTEGRITY, which advocated the creation in Bosnia, through re-settlement, of ethnically pure and homogenous regions in order to prevent civil war. Cili} said that the Vance-Owen plan proposed the same arrangement, but he averred that this was never the policy of the HVO and nor was it official policy. While the money and language and so forth in the Croatian Community of Herceg-Bosna was to be Croatian, this was only in contradistinction to the Cyrillic script and Serbian symbols, which the people did not wish to have imposed on them by the Serbs. The aim of the Croat authorities, he said, was not secession, although differences between Croats and Muslims were created by the Vance-Owen plan, which was accepted by the Bosnian Croats but rejected by the Bosnian government.<sup>110</sup> The witness added that “they [the Bosnian Muslims] felt, and this is my personal view, of course, they felt that they could gain from Croats what they had lost from the Serbs”, and because of that they refused to sign the Vance-Owen plan.<sup>111</sup>

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mentioned in item 3, it was not called Croatian or HVO? A. No, it was literally called Vitez municipality - the municipal war government of Vitez, so it was ethnically neutral”.

<sup>109</sup> T. 6640–6641 and T. 6656-6657.

<sup>110</sup> T. 5328–5329.

<sup>111</sup> T. 5330.

(f) Whether the Bosnian Croat Authorities Condoned Persecution of Muslims by Private Individuals

110. The Defence introduced evidence to rebut the Prosecution's allegation that the Bosnian Croat authorities condoned atrocities committed against Bosnian Muslim civilians. Exhibit D51/2 – produced to Vlado Alilovic<sup>112</sup> – shows the HVO authorities trying to conduct an investigation into violations of international humanitarian law on 24 April 1993. Under item 2, it is stated that the HVO government of Vitez unanimously condemns all recorded crimes committed during the conflict between the BiH army and the HVO by any party.

111. **Zvonimir Cili}** stated that at this time, the civilian police were not functioning, as they did not have the necessary power. Nevertheless, they tried to enforce law and order and to protect Muslims and Croats alike. In this connection, the Defence produced Exhibit D29/2, a public announcement that a Croat had been killed in Novi Travnik while resisting arrest by Novi Travnik HVO for seriously wounding a Muslim citizen.

112. Similar evidence was led as to the diligence of the HVO civilian police in investigating offences against Muslims in relation to the Salki} slaying.

113. **Zoran Strukar**, a civilian police officer in Vitez at the relevant time, testified at length on this point. He stated that there was an atmosphere of general lawlessness in Vitez, and that explosions and other such occurrences were happening practically every evening, with Croat houses being blown up as well as Muslim houses.<sup>113</sup>

114. As mentioned above, before October 1992, the police forces in Vitez were jointly Croat and Muslim, but thereafter they split into Muslim and Croat police forces. Strukar

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<sup>112</sup> Hearing of 20 Jan. 1999.

<sup>113</sup> See Exhibits D31/2, D78/2, T. 6795: "Q. Also, they mention here what you mentioned as well, that there is armed robbery, people are being wounded, and also sabotages in the town, in cafes, and so far there have been armed robberies in six houses (two Croats, one Serb, and three Muslims). Did the military police make any kind of attempt to deal with the security situation? Did you reach any kind of agreement with them? A. There were some discussions to the effect that there should be a ban on carrying weapons in town. I know that the chiefs talked about this, but agreement was never reached on this matter. Perhaps there was something on paper, but it was not carried out".

said that the "Vitezovi", a special unit, took over the Vitez police station.<sup>114</sup> There were then plans to once again merge the two police forces. As part of the negotiations, the Muslims demanded that Pero Skopljak resign. In return the Croats asked the Muslim police chief to resign. Skopljak resigned because he did not want to be an obstacle to reconciliation. According to the witness, the Muslims did not, however, sack their chief, as promised, so an end was put to this *rapprochement*. The Muslim and Croat forces were severed, and the witness started to receive his salary from Mostar rather than from Sarajevo. Consequently, investigations split up – Croat police dealt with Croat areas and Muslim police with Muslim areas. Nevertheless, Muslims and Croats continued to conduct some investigations together.

115. The witness said that the situation was out of control. Everyone was in danger and afraid. In village areas, both Muslims and Croats, and some Serbs, set up a village guard at night, to ensure safety, because people realised that the police could not do much. As regards the killing of Muslims, Strukar stated that there were Croats killing Muslims, but also Muslims killing Muslims, and Croats killing Croats. Where Muslims were killed by Croats, investigations *were* carried out. An example was the Salkić slaying. The perpetrator was a Croat - Miroslav Bralo, alias Cicko – who was arrested and imprisoned in Kaonik. However, in the event he was treated leniently during his incarceration, as other witnesses have testified.<sup>115</sup> In short, Strukar testified that in his work as a civilian policeman, he did not have a different attitude towards a situation when the victim was a Croat from when the victim was a Muslim.<sup>116</sup>

(g) Whether State Enterprises Discriminated Against Muslims

116. In the geographical area of Vitez and Ahmići, a large segment of the population was employed in the times relevant to this indictment in large State-run factories and enterprises, such as the Princip factory in Vitez, or Vitezit, and Impregnacija. The evidence is that these factories, though allegedly under Bosnian Croat control, did not

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<sup>114</sup> T. 6783–6785.

<sup>115</sup> See the testimony of **Witness AA**, at T. 3735-3738, who was imprisoned with Bralo, and saw that Bralo was allowed to move about freely and to abuse Muslim prisoners while incarcerated.

<sup>116</sup> T. 6874.

discriminate against Bosnian Muslims, but on the contrary, throughout the war maintained equitable proportions of Muslim and Croat workers in the workforce.

117. Defence witness **Vlado Divkovi}** was general manager of the Vitezit factory at the relevant time. He testified that there was no discrimination in lay-offs at the Vitezit factory against Muslims or on any ethnic or national basis. Lay-offs were occasioned by the Serb aggression, since Serbs bombed the factory complexes and cut off the supply of raw materials from eastern Bosnia (e.g. Gorazde), reducing output. The ethnic make-up of the factory reflected the national make-up in terms of percentage of Muslims, Croats and Serbs right through until 15 April 1993.<sup>117</sup> Divkovi} added that Muslim workers did not have to sign an oath of allegiance to the HVO.<sup>118</sup>

(h) Whether Relief Supplies were Distributed Equally to Muslims

118. **Vlado Alilovic** stated that Muslims and Croats were equally able to obtain goods in Vitez in 1992-1993.<sup>119</sup> Defence witnesses also pointed out that Caritas, the Catholic charity, treated Muslims and Catholics, i.e. Croats, completely equally. **Zeljko Blaz**,<sup>120</sup> for example, a resident of Vitez who worked for Caritas from 1991 after he was made redundant by the Princip factory in Vitez, testified that Caritas helped all of those in need – refugees, old people - regardless of their ethnicity or religion. Merhamet, on the other hand, was a religious organisation which tended only to help Muslims. Blaz testified that Caritas continued to help both Muslims and Croats after Merhamet had been established. After the Muslim-Croat conflict started, Caritas still helped some 50 Muslim families in Vitez. Moreover, there was no attempt by any political or military body to influence Caritas to refuse assistance to Muslim families. **Vlado Alilovi}** testified to the same effect – that Caritas helped everyone, Muslims and Croats alike, but that Merhamet only

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<sup>117</sup> T. 5784–5785.

<sup>118</sup> T. 5789–5790.

<sup>119</sup> T. 5457.

<sup>120</sup> T. 6895-6896.

helped Muslims - adding that Ivan [anti}, the HVO President in Vitez, requested aid for villages, e.g. Preocica, which were exclusively Muslim.<sup>121</sup>

(i) The Fact that Croat Civilians were also the Victims of Attacks by Bosnian Muslims

119. Defence counsel emphasised that atrocities were also committed against Croat civilians by Muslim forces. In particular, they drew attention to a particularly horrendous episode which took place in Miletici, a remote Croat hamlet in the mountains of central Bosnia, in April 1993. This was testified to by **Witness HH**<sup>122</sup> and **Mr. Kujawinski**.

120. **Witness HH** visited Miletici during his fact-finding mission for the United Nations Special Rapporteur Tadeusz Mazowiecki. In Miletici, he entered a room which was badly damaged, and which had blood on the floor and walls. He was told by locals that apparently five foreign Mujahedin had stayed there. These Mujahedin had tortured and killed five young Croats. As a consequence, most of the Croatian inhabitants of the village had fled.<sup>123</sup>

121. **Witness HH** also testified that there were reports of harassment and arbitrary executions of Croats in Zenica.<sup>124</sup>

122. **Mr. Kujawinski**, a British army NCO, visited Miletici on 27 April 1993. He was dispatched with two Warriors and a UNHCR Land Rover. It was very high in the hills, a "very, very small village". He saw dried blood by the entrance to a pink house in the village. The villagers were reticent, but eventually said that soldiers had come to the village, rounded everyone up and separated the few men of fighting age, who were then taken into the pink house. Eventually Kujawinski gained access to the house and found congealed blood everywhere, pillows that had been used, he thinks, to muffle shots, and clumps of hair and bone strewn on the walls. He was told that five men had been tortured or killed there.

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<sup>121</sup> T. 5458 and T. 5556–5557.

<sup>122</sup> In this connection, see section 2, para. 37 of the *Mazowiecki Report*.



123. Kujawinski went back to the hamlet the next day with a van and coffins and crosses. He managed to get the bodies, which had been there for several days and were therefore in a state of decomposition. He noted their names and took the bodies to a Catholic Church in Guca Gora, where he handed over the bodies to a monk for burial. The bodies were in a "shocking state" - one had his neck cut all the way around with a blunt instrument. Another had his fingers bent all the way backwards. On the second day, the witness was told that Mujahedin had been to the area – people whom they had never seen before. Mileti}i is 15-20 km from Ahmi}i.

124. It would appear that the events in Mileti}i may have been in reprisal for the events in Ahmi}i.

### 3. Findings of the Trial Chamber

125. The Trial Chamber considers that there is compelling evidence to the effect that, starting in mid-1992, tensions and animosity between Croats and Muslims rapidly escalated. This mutual animosity came to the fore in October 1992, when the episodes referred to earlier occurred. Between October 1992 and April 1993, relations between the two groups worsened and each group increasingly engaged in a policy of discrimination against the other. Whether the Croats pursued this policy in a more fierce and ruthless way and on a larger scale is a question that may be left unresolved for the purpose of this case: as the Trial Chamber has stated below in the section on the applicable law, the fact that the adversary engages in unlawful behaviour and persecutes or kills civilians cannot be a justification for similar and reciprocal conduct. As these trial proceedings concern Croats accused of having taken part in such a policy, the issue of the extent to which the Muslims also persecuted Croats is not material.

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<sup>123</sup> T. 4531-4536; See also *ibid.*, at paras. 37, 40 and Conclusions and Exhibit P. 82.

<sup>124</sup> T. 4539.

## E. Governmental and Armed Forces in Bosnia and Herzegovina in 1992-1993

### 1. General

126. There were three principal governmental or quasi-governmental entities in Bosnia and Herzegovina in 1992-1993: the Government of the Republic of Bosnia and Herzegovina based in Sarajevo, the Croatian Community of Herceg-Bosna based in Mostar and the Republika Srpska based in Pale. Although the Sarajevo government was the legitimate government of Bosnia and Herzegovina, many Croats perceived it as Muslim-dominated.<sup>125</sup> Corresponding to these governmental or quasi-governmental divisions, there were various armed forces, Military Police, civilian police, paramilitary formations and village guards operating in central Bosnia in 1992-1993, which were at different times either joint or formed along ethnic lines. There was, first, the Army of the Republic of Bosnia and Herzegovina, or the BiH army, which was perceived by certain Croats and Serbs to be Muslim-dominated. On the Croat side was the HVO and its armed forces. The Serbs fought in Bosnia through the JNA and later through their own Bosnian Serb army. There was also the Territorial Defence of Bosnia and Herzegovina which was essentially a Muslim force and which was later incorporated, at least on paper, into the BiH army. The Muslims then had some irregular formations, such as the Mujahedin. There were also special units of the Croats such as the Vitezovi. There was also a Croat Military Police (which included special units such as the Jokers), the Muslim Military Police, the Croat civilian police and the Muslim civilian police. In addition to the various armies, there were the village guards or patrols, which were initially joint

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<sup>125</sup> A defence witness, **Vlado Divkovi**, T. 5791-5794, believed there were problems with the Government of Bosnia-Herzegovina in 1992 in that it was not really operating because it was not possible to reach Sarajevo and also because the BiH government was boycotted by the Serb representatives. Accordingly a directive from the Government of Bosnia and Herzegovina sent to the witness as manager of the Vitezit factory and directing that those who sided with the aggressor against Bosnia and Herzegovina, i.e. nationalist Serbs, should be fired, was ignored. The witness felt that the Government did not have the right to issue such a directive because Vitezit was socially-owned, rather than a public corporation, so only the Workers' Council of the enterprise could make such a move. **Vlado Divkovi**, T. 5794: "Q. You said that that is why you did not pay attention to this document. A. Yes, of course. In view of the composition of the government at the time, it could not be respected throughout the territory of Bosnia-Herzegovina. And, anyway, the document was passed without any legal grounds. Vitezit was never declared a public corporation. It was not an enterprise that the government could appoint the managers of".

Muslim-Croat operations but which split shortly before the conflict of October 1992 into separate patrols.

## 2. The Bosnian Croat forces

### (a) The Bosnian Croat Leadership in Vitez

127. The two most important positions in the political leadership of Vitez were divided between the Croats and Muslims. Ivan [anti], HVO President in Vitez and a Croat, was President of the municipality and Head of the Crisis Staff as a representative of the HDZ, while Fuad Kaknjo, a Muslim, was the President of the executive body. The other positions were shared out to correspond to the results in the elections. Ivan [anti]'s deputy was Pero Skopljak, a Croat, who was thus Vice-President of the HVO in the Vitez municipality.<sup>126</sup> According to **Alilovi**}, harmonious relations were maintained between the Croats and Muslims between October 1992 and April 1993.<sup>127</sup> However the Muslims and Croats eventually split up and formed parallel governments, the Croats basing theirs in Vitez, the Muslims in Mahala (Stari Vitez).

### (b) The HVO and the Vitez Brigade

128. The HVO (Croatian Defence Council) was formed on 10 July 1992 in Vitez as a civil authority in order to most effectively organise defences against possible aggression. It was an executive authority.<sup>128</sup> While the Prosecution has portrayed the HVO as an instrument of Muslim oppression, the Defence has argued that it was primarily a defence council formed because of regional insecurity and the threat from the Serbs. The Defence have also argued that the HVO soldiers received instruction on the laws of war.<sup>129</sup> The HVO had various brigades in central Bosnia, including the Vitez brigade,

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<sup>126</sup> **Vlado Alilovi**}, T. 5451.

<sup>127</sup> T. 5488-5489.

<sup>128</sup> **Vlado Alilovi**}, T. 5450-5451.

<sup>129</sup> **Zvonimir Cili**}, T. 5152-5153: "A. Fifteen days after I joined the command as a political officer, on orders of Colonel Tihomir Bla{ki} which went through the municipal staff and other staffs, Mario Cerkez, the chief of staff, I was sent on this date, 19 Oct., to a seminar in Busovaca which was organised by the representatives of the Red Cross in Geneva. Q. What was the topic of this seminar? A. This seminar was

with Mario Cerkez as its Commander, while Tihomir Blaškić was Commander of the HVO Central Bosnia Operative Zone.

129. The Defence has called a number of witnesses to show that the Vitez brigade, into which several of the accused were apparently conscripted on or after 16 April 1993, was barely operational and still in the process of being set up on 16 April 1993. The Defence therefore submits that it could not, and did not, have any role in the atrocities committed in Ahmići, which were instead the work of the Military Police, and in particular a specialist anti-terrorist unit thereof known as the Jokers.<sup>130</sup>

(c) Croatian Paramilitary Formations

130. In addition to regular HVO units, such as the Vitez brigade, there were Bosnian Croat paramilitary formations and Special Purpose Units (PNNs) such as the Vitezovi.<sup>131</sup> The Jokers – a special anti-terrorist unit of the Croat Military Police headquartered in the Bungalow in Nadioci – were also an élite unit functioning outside the traditional HVO structure, in this case operating through the command of the Military Police rather than

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held for the representatives of the HVO, and as I found out -- and this was a full-day seminar; a similar one had been also organised for the representatives of the BiH army, and the topic of the seminar was the International Conventions on the Laws of War. We received a lot of promotional material in English and Croatian. We also saw films on the activities of the Red Cross, and many of us, for the first time, learned more about the history of the Red Cross and its goals and ... Q. Did the seminar also include a discussion of the Geneva Conventions? A. Yes. It was about the rights of prisoners, about the rights of prisoners of war, and I have to say that this seminar left a great impression on me. I asked myself, why are they showing us this? Because they were showing us a number of films from countries in Africa, South America, and they were very disturbing images. Q. And you thought that this could not happen in your region? A. Yes. I thought that it was very far removed and I thought that it could never happen in our country".

<sup>130</sup> **Witness DA/5**, T. 5639; **Dragan Stojak**, T. 6277-6278; **Mario Rajic**, T. 6374 and T. 6384; **Vlado Alilović**, T. 5542. Several defence witnesses had difficulty explaining why their names appeared on HVO membership lists (Exhibit P353), when they did not consider themselves to have been members of the HVO. It seems they signed these lists simply in order to receive shares. As **Zdenko Rajić** testified, T. 7431: "A. Honesty was not at issue here. What was at stake here was to match the number of shares which the BiH army members were getting. [...] By including the names of elderly and women in this list as if they had been mobilised, meant increasing the number of people receiving shares. [...] Q. What is the relationship with the compensation that was received by the army of Bosnia-Herzegovina? A. Because of the fact that [...] they received many more shares. We tried to get as close to that number, to increase the number, to match their numbers, so that when these shares were distributed, that we would get as close to the number that they were getting".

<sup>131</sup> **Mario Rajic**, T. 6385; **Zoran Strukar**, T. 6762.

the HVO. The Defence asserts that these private armies and paramilitary groups were responsible for much of the lawlessness rampant at the time in Vitez and its environs.<sup>132</sup>

131. The Defence argued that even Tihomir Blaškić, the regional commander of the HVO, could not issue orders to forces such as the Vitezovi. The Defence contends that the general situation was anarchic, with crimes being committed by both Muslims and Croats, but generally in the pursuit of petty criminality rather than for reasons linked to the struggle for ethnic hegemony.

(d) The Military Police and "The Jokers"

132. It appears that the Jokers were a specialist, anti-terrorist unit of the Croatian Military Police based locally in the Bungalow in Nadioci. Both the Jokers and HOS members wore black shirts and appeared to have assumed a "special operations" profile, replete with face paint, advanced weaponry, etc.

133. Both prosecution and defence witnesses have testified to the presence of members of the Jokers in Ahmići on 16 April 1993, and prosecution witnesses in particular also witnessed individual Jokers committing killings of unarmed civilians. A prosecution witness, **Mr. Kujawinski**, an non-commissioned officer in the British army, saw a large group of soldiers celebrating at the Bungalow on 16 April 1993, and inferred that they were responsible for what had happened there that day. Members of the Jokers also confirmed to **Captain Lee Whitworth** that they had been involved in the assault on Ahmići.<sup>133</sup>

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<sup>132</sup> **Zoran Strukar**, T. 6761–6765, T. 6851-6852 and T. 6855-6858, emphasised that the Vitez police force was multi-ethnic: the commander of the police was a Muslim and the chief of police was a Croat (Pero Skopljak). The ethnic composition of the police more or less reflected the ethnic composition of the population, roughly 50-50. See Exhibit D75/2: "What occurred reflects negatively among the Croatian population and is perceived as powerlessness of the legal organs and institutions of the HVO to counteract crime and criminals. In the ranks of [the] BiH [army] they could hardly wait for this, and it is commented upon as an open clash among the divided HVO forces. They follow further developments with satisfaction and expect such further clashes, which influences their morale considerably and they offer their "help". Signed by Pasko Ljubici, Commander of IV Battalion VP, Vitez. The Seal of the communiqué is "Republic of Bosnia and Herzegovina/Croatian Community Herceg-Bosna". See also Exhibits D30/2 and D31/2, which are Reports on these crimes.

<sup>133</sup> **Lee Whitworth**, T. 4271-4273.

134. **Witness AA**, a member of the Jokers, testified that he was invited to join this unit in January 1993 by the accused Vladimir [anti], who was the commander of the company to which the unit belonged - the 1<sup>st</sup> company of the 4<sup>th</sup> battalion of the HVO. [anti] told him that the unit would be better armed, equipped, paid and trained than the regular HVO and that it would be based in the "Bungalow" in Nadioci. The witness went to report there after the Busovaca campaign, where he witnessed the destruction of Muslim villages.<sup>134</sup> He saw [anti] at the Bungalow virtually every day. On the instructions of [anti], the members of the unit equipped the Bungalow by looting from Muslim houses in Busovaca. [anti] also told them to find a name for the unit and they came up with the name Jokers which he approved; the Jokers could do nothing of significance without the orders of Vladimir [anti].<sup>135</sup> The Jokers came from Vitez, Busovaca, Nadioci, Vidovici, etc. As far as **Witness AA** knew, none of the Jokers were from Ahmi}i. The Bungalow itself was 5-10 minutes on foot from Ahmi}i.

135. **Lee Whitworth**, who served in the British army in Bosnia from May to November 1993 also spoke of the Jokers as an élite police unit based in the Bungalow. The witness was a liaison officer, tasked with building rapport with the local political, military and civilian leaders in the Bosnian government army and HVO. In that capacity, the witness met Vladimir [anti] as a senior military policeman in Vitez, at the 4<sup>th</sup> Battalion Military Police Headquarters of the HVO in the Hotel Vitez.<sup>136</sup> The witness also had occasion to pass by the Bungalow – which he referred to as the "Swiss Cottage" – and to converse with eight to ten soldiers. These soldiers described themselves as an élite police unit that was active in all the military successes of the HVO in the La{va River Valley. They were predominantly dressed in black. They referred to themselves as Jokers – "Jokeri" – and they were very aggressive at first and made the witness's Muslim interpreter very fearful. Lee Whitworth wanted to meet the commander of the Jokers, and thus went to the Hotel Vitez. Vladimir [anti] came out in response to Whitworth's

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<sup>134</sup> T. 3810-3811.

<sup>135</sup> T. 3724-3728.

<sup>136</sup> T. 4269. **Captain Stevens**, T. 2143, among many others, testified that the HVO commanders were based in the Hotel Vitez, which does not seem to be in dispute. **Witness B**, T. 740-742, who was a 37-year old ex-JNA captain (1<sup>st</sup> class), also testified, *inter alia*, that the directives and orders for the HVO seemed to come from the Hotel Vitez and the Commander, Mario Cerkez.

request to meet a senior police chief. He was introduced as the senior military police commander in the area. It later became apparent to the witness, throughout his tour, that in each of the municipalities - Vares, Zepce, Busovaca, Travnik, Novi Travnik and Vitez - there would be a company group of the 4<sup>th</sup> Battalion. Hotel Vitez, it appears, was both a Battalion Headquarters and a Company Headquarters. Vladimir [anti] was head of the Company Headquarters, with the Jokers a part of that Company, while Pasco Lubici} was head of the Battalion Headquarters. The Jokers were set up as an anti-terrorist unit; they were part of the Military Police.<sup>137</sup>

### 3. The Bosnian Muslim Forces

#### (a) The Army of Bosnia and Herzegovina (BiH army)

136. The Republic of Bosnia and Herzegovina had its own army, namely the army of Bosnia and Herzegovina or the government forces. The Bosnian army was overwhelmingly deployed during the relevant period in the front-line against the Serbs, while the HVO was engaged to a lesser extent against the Serbs, being deployed instead in the La{va River Valley.<sup>138</sup> In Ahmi}i, there were no BiH battalions before April 1993.

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<sup>137</sup> **Zvonimir Cili}**, T. 5143-5144: "... there was the civilian police as well, as well as the municipal authorities who sought in every possible way to maintain law and order, because this situation put the citizens in a very difficult position, and many of them sought ways to abandon the area. I think it was in January that the municipal government, the Croatian government in Vitez, took the decision to form an intervention squad. This intervention squad was composed of selected young men who had been tested in terms of their morals and also physically, they were mentally in good health, they had no criminal record, and they were ready to intervene physically and with force of arms to maintain law and order. A decision was even taken that they should have (*sic*) certain compensation. At the time it was quite considerable, because salaries were very low, whereas I think the members of the squad received up to 400 or 500 German marks, which was an extremely high salary for a month. For comparison's sake, the regular salaries in enterprises were about 50 marks".

<sup>138</sup> **Witness Y**, T. 3321: "Q. So according to this map, there were some HVO forces along the frontline with the Chetniks? A. Yes, as you can see, but very few. Q. Does the map indicate where the majority of HVO forces were during this time period which is marked on the map Dec. '92 and Jan. '93? A. Yes. Q. Where does this map indicate that the majority of the HVO forces were located? A. (Indicating). The La{va Valley". See also Exhibit P227, which shows the deployment of the BiH army, HVO and Serb forces.

137. This characterisation of the BiH army and HVO deployment has been contested by the Defence.<sup>139</sup>

(b) Muslim Paramilitary Formations

138. Defence witnesses have described several Muslim defence forces: the Patriotic Legion, the Green Legion, the 7<sup>th</sup> Muslim Brigade, and the MOS (Muslim Defence Forces) which was formed by the Mujahedin.<sup>140</sup> The genesis of these organisations coincided with what the defence witnesses perceived to be the formation of the BiH army by the Muslim people.<sup>141</sup> It has also been contended by defence witnesses that these structures acted in concert<sup>142</sup> and fell under the mandate of the BiH army.<sup>143</sup>

(c) Mobilisation of Muslims

139. After the events of October 1992 described below, the Croats saw signs of what they perceived to be Muslim militancy.<sup>144, 145</sup>

(d) The Territorial Defence

140. The Bosniac Territorial Defence was incorporated into the BiH army in December 1992, but this produced no real change in how the Ahmi}i patrols were

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<sup>139</sup> **Vlado Alilovi}**, T. 5476-5478, testified that on 16 April 1993, the BiH army tried to capture Vitez, the La{va River Valley and central Bosnia, as they did in Bugojno, Gornji Vakuf and other places. Muslim forces wanted to divide Busovaca.

<sup>140</sup> **Jadranka Tolic**, T. 6148.

<sup>141</sup> **Jadranka Tolic**, T. 6148.

<sup>142</sup> **Jadranka Tolic**, T. 6149, testified that "All the units being formed, I would call them altogether by one name, Muslim forces, including the BiH army, the Green Legion, the Patriotic Legion, and the MOS, Mujahedin organisation. These were all Muslim forces. They operated together in coordination and that's how they carried out their tasks".

<sup>143</sup> **Jadranka Tolic**, T. 6154: "Q. So the BiH army carried out the negotiations and exchanged Zivko Toti} for Mujahedins. What does this tell you? A. Well, I said already earlier that these were Muslim forces, and they did everything in coordination. Both the Mujahedin and the BiH army. These were not separate structures. The Mujahedin were part of the BiH army".

<sup>144</sup> **Gordana Cuic**, T. 8144-8147.

<sup>145</sup> **Jozo Alilovi}**, T. 8335-8336, testified that the situation was very dangerous. The young men would shoot at anything. The witness had to inform his superiors that he no longer felt safe as a gamekeeper because of the possibility that he would be shot by these youths. Under cross-examination, he stated that the youths would take the automatic rifles with them while tending sheep, and shoot at birds.



conducted.<sup>146</sup> There was some military training in the BiH army, but it was not a sophisticated military operation and it lacked equipment, supplies and manpower.<sup>147</sup>

(e) Bosnian Muslim Roadblocks and Checkpoints

141. The Prosecution has argued that Croat forces erected roadblocks at which Muslims were systematically harassed.<sup>148</sup> The Defence has sought to establish, however, that the practice of setting up roadblocks,<sup>149</sup> at which civilians were subject to harassment, was as much a practice of the Bosnian Muslim forces as of Bosnian Croat forces. The Prosecution has not disputed the latter fact.

(f) HOS

142. **Zvonimir Cili}** stated that, at least until 15 April 1993, the HOS was a joint Muslim and Croat force. HOS members, like the Jokers, wore black uniforms. However, after the Muslim-Croat split in October 1992, the Muslim part of the HOS remained as the HOS while the Croat element of the HOS became the Vitezovi, as distinct from the regular HVO's Vitez brigade.<sup>150</sup>

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<sup>146</sup> **Abdulah Ahmi}**, T. 341-342; **Fahrudin Ahmi}**, T. 1099-1102.

<sup>147</sup> This was confirmed by several witnesses. See for example **Abdulah Ahmic}**, T. 341. **Witness V}**, T. 3050-3051, who was on leave from the front-line with the Cetniks, above Turbe, at the time of the events the subject of this indictment, and said that the Bosniac territorial defence was simply a patrol. Bosniac soldiers coming home from the frontline on leave would initially take their weapons home with them, but they ceased to do so as relations with the Croats grew tense, because the weapons were needed at the frontline for the next shift and because at checkpoints the HVO would confiscate the weapons from Bosniacs. **Zvonimir Cili}**, T. 5202, testified that, due to a shortage of uniforms on the Muslim side, it was common to come across people who were armed but not in uniform or only partly in uniform, and **Witness V}**, T. 3085-3086 also confirmed that few Bosniacs had uniforms and that some went to the front in civilian clothes.

<sup>148</sup> See for example Prosecutor's Pre-Trial Brief of 13 July 1998, at para. 18.

<sup>149</sup> See for example the opening statements of Counsel Radovi}, T. 5031, counsel [u{ak, T. 5051, and of counsel Puli{eli}, T. 5061.

<sup>150</sup> **Zvonimir Cili}**, T. 5429: "Q. Did members of HOS ever become members of the Vitez Brigade? A. No, they never did. Q. Which unit did they become members of, which special purpose unit? A. They all became members of the Vitezovi special purpose unit".

#### 4. Comparative Strength of the Muslim and Croat Forces

##### (a) The Prosecution Case

143. **Major Michael Dooley**, an UNPROFOR Platoon Commander in Bosnia from October 1992 to 1993, noticed that the army of Bosnia and Herzegovina was very poorly armed compared to the HVO.<sup>151</sup> There were no BiH army soldiers in the region of Ahmi}i, and very few in Vitez. The majority of the BiH army soldiers were towards Travnik on the Serb front.<sup>152</sup>

##### (b) The Defence Case

144. The Defence, on the other hand, claim that the BiH army was better equipped than the HVO, and certainly had more manpower due to the greater concentration of Muslims in central Bosnia than Croats.<sup>153, 154</sup>

145. Defence witnesses also claimed that the Vitez armaments factory, Vitezit, continued to supply *both* the HVO and the BiH army during the conflict.<sup>155</sup> Defence witness **Anto Raji}** alleged that after the dissolution of the Anti-aircraft Defence (PZO), the Muslim contingent, which was apparently reabsorbed by the Territorial Defence, obtained two anti-aircraft guns from the Impregnacija explosives factory in Vitez and was allocated half of the cannons.<sup>156</sup> Nonetheless, defence witness **Divkovi}** conceded that Vitezit was, after 16 April 1993, exclusively under HVO control and indeed that its production and supply to the HVO had a decisive impact on the latter's war effort against

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<sup>151</sup> T. 2468.

<sup>152</sup> **Payam Akhavan**, T. 1336.

<sup>153</sup> **Vlado Alilovic**, T. 5550-5551.

<sup>154</sup> **Witness DA/5**, T. 5648-5649.

<sup>155</sup> See Exhibit D55/2 – invoices of supplies. Defence witness **Ivan Taraba**, T. 8734-8735, a worker at the SPS company in Vitez, also testified that the ethnic composition of the factories in Vitez was balanced to reflect the ethnic composition of the general population - approximately 50% Croats, 50% Muslims, and a few Serbs – and remained so throughout the conflict.

<sup>156</sup> T. 8681.

the BiH army.<sup>157</sup> Defence witnesses did not contest that it was easy for the Bosnian Croats to arm themselves.<sup>158</sup>

## 5. Findings of the Trial Chamber

146. The Trial Chamber finds that, in the La{va River Valley, the HVO was, by and large, better armed and equipped, and was able to set up more checkpoints than the Bosnian Territorial Defence. The Defence contention that the BiH army was better equipped than the HVO is contradicted by all the UN observers who testified, and the Chamber does not find it to be a credible assertion.

### F. The Events of 19-20 October 1992, in Particular in Ahmi}i

147. Ahmi}i is located in central Bosnia, in the La{va River Valley, between Vitez and Zenica. The area of Ahmi}i is approximately 6 km<sup>2</sup> and falls within the Vitez Municipality. Adjacent to its boundaries are the villages of Nadioci to the south-east, [anti}i to the south-west, and Piri}i to the north-west. In the La{va Valley the town of Vitez is at the centre. It is approximately four kilometres from the centre of Vitez to the Ahmi}i area.

148. There exist traditional names for the various parts of the village. Lower Ahmi}i is referred to as Donji Ahmi}i, the most commonly referred to landmarks are the Catholic cemetery along the main Busovaca/Vitez road, the primary school and the lower mosque on the secondary road leading off into Ahmi}i. This road goes up towards to Upper Ahmi}i or Gornji Ahmi}i, but between the upper and lower parts of Ahmi}i is an area

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<sup>157</sup> T. 5806-5807: "Q. Did you at any time receive orders to stop deliveries of material to the Muslim side, meaning to the armed forces of Bosnia and Herzegovina? A. I never received such an order. I don't know if anybody amongst my colleagues received such an order. Q. And according to your information, deliveries continued until the beginning of the war? A. Yes. Deliveries went on until April '94 -- excuse me, '93". T. 5836-5837: "Q. [...] what is the main reason that the La{va Valley or the part that remained under HVO control was not captured by the BiH army during the conflict? A. Probably the main reason which contributed to the defence of this area was this factory and the vast amount of explosives in it, so that we could continue to produce those military ammunitions during the war, and that was the main factor that made it possible for the people there to defend themselves. Q. Even though the superiority of the BiH army was quite significant in manpower? A. Yes, five, six, or seven times superior in numbers".

<sup>158</sup> **Dragan Vidovic**, T. 8412-8413.

called the Sutre or Grabovi, where the Kupre{ki} houses and the Sutre warehouse are situated. The upper mosque, which did not have a minaret is the landmark of Upper Ahmi}i. The area of Zume around [anti}i was predominantly an area inhabited by Croats and the landmark most frequently referred to is the Pican café. In Nadioci, the principal landmark is the Bungalow.

149. In the 1991 census, the population of Ahmi}i-[anti}i-Piri}i-Nadioci was 2173. Of these 4 villages, Muslims represented 32% of the population, Croats 62%, and minority groups made up 5%. A number of Muslim refugees came to the village in 1992. The total Muslim population of the Ahmi}i area was around 600 at the time. Ahmi}i is a small rural village similar to many others in the La{va Valley. It is a village where entire families live under one roof. Children attend primary school there, but due to its rural character, most residents at the time of the events covered here worked in the larger towns of Zenica and Vitez. Many of them worked in the Slobodan Princip Seljo factory (SPS) in Vitez which employed 2,400 persons, constituting 50% of the workforce in Vitez, with an estimated 70% of the population of Ahmi}i working there. Around the village, employment consisted mainly of manual labour and small-scale agriculture, mainly for the support of the families, many of whom would have a cow or two for milk, a few hens for eggs, and other livestock.

#### 1. The Case for the Prosecution

150. On 19 October 1992, the Bosniacs in Ahmi}i erected a road-block by order of the Headquarters of the Territorial Defence in Vitez to prevent the HVO from going to Novi Travnik.<sup>159</sup> As was stated by **Witness Z**, “we established this checkpoint in the evening. It was dusk, rather, in order to prevent a large concentration of the Croatian Defence Council, and they started from Poculica, Kiseljak, Busovaca towards Novi Travnik”.<sup>160</sup>

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<sup>159</sup> **Witness B**, T. 816 and T. 827-828. See also **Witness V**, T. 3196-3198.

<sup>160</sup> T. 3643.

The barricade was not heavily guarded. This act nevertheless provoked the fury of the HVO and led to an attack.<sup>161</sup>

151. Around 4.30 a.m., on 20 October 1992, a shell was fired from the direction of Zume and hit the top of the minaret. Heavy shooting then broke out. This went on until about 12 p.m. Houses, sheds and barns were set alight. The Bosniacs returned fire.<sup>162</sup>

152. During the attack, Upper Ahmi}i was shelled and the minaret, among other buildings, was hit by shells.<sup>163</sup> A Muslim boy was killed, apparently by a sniper bullet. The attack was mostly one-sided, with the Croatian assault predominating, although according to Abdulah Ahmi} there were some 30-40 armed Bosniacs resisting, and some unarmed Bosniacs, as well as some assistance from the BiH army. Due to conflicting accounts, it is difficult to estimate precisely how many Bosniacs were defending the barricade that day. It was also rumoured that some Croats were killed.<sup>164</sup>

153. During the attack, **Mehmed Ahmi}**'s house was destroyed. Mehmed Ahmi} was awakened that morning by the sound of an explosion. His house lay across the road from the Papi} house on the main road in Ahmi}i. By gaining control of the house, Bosnian Croat forces could thus control the main road from both sides.<sup>165</sup> A burst of gunfire was directed at Mehmed Ahmi}'s house, apparently from the direction of Ivo and Dragan Papi}'s house. His house was directly hit and set on fire with inflammable bullets. He crawled out of his house with his family, whilst being shot at by several soldiers from the direction of the Papi} house and the woods, including, allegedly, by Dragan Papi} himself from both locations, who used, *inter alia*, an anti-aircraft gun.<sup>166</sup> The witness and his family managed to escape without fatalities.

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<sup>161</sup> **Abdulah Ahmi}**, T. 327-331.

<sup>162</sup> **Witness Z**, T. 3646-3647 and T. 3680.

<sup>163</sup> **Witness B**, T. 918; **Mehmed Ahmi}**, T. 642.

<sup>164</sup> **Abdulah Ahmi}**, T. 336-339. **Mehmed Ahmi}**, T. 643-645.

<sup>165</sup> T. 646.

<sup>166</sup> T. 646-650.

154. **Witness D** was also a victim of this attack. Bosnian Croat forces burned down her house and severely beat her husband for trying to save his cows. Witness D and her husband abandoned the village after their house was burned down.<sup>167</sup>

155. **Fahrudin Ahmi}** heard a detonation and an explosion, and saw that a fellow Muslim's barn had been set alight. He noticed shots being fired from the direction of the forest and the Papi} house.<sup>168</sup> The witness himself was seriously wounded in the arm by a gunshot during the attack.

156. Anti-aircraft guns were evidently used by the Bosnian Croats in the attack, fired from the vicinity of the Papi} house. According to **Witness Y**, the HVO seized the anti-aircraft guns from the Princip factory.<sup>169</sup> **Witness Z** confirmed that there was shooting from an anti-aircraft gun mounted on a flat-bed truck.<sup>170</sup>

157. More than half the Muslim population of the village fled Ahmi}i after the attack.<sup>171</sup> **Witness B** testified that the Bosniac population which was chased out came back between then and April 1993,<sup>172</sup> pursuant to an agreement reached with the Bosnian Croat authorities. Despite this, however, Muslim-Croat relations significantly worsened after the attack.<sup>173</sup>

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<sup>167</sup> T. 1018.

<sup>168</sup> T. 1103-1104 and T. 1133-1134.

<sup>169</sup> Photographic Exhibit P228 shows the damage done to a building by an anti-aircraft gun, namely large holes in the walls of the building. **Witness Y**, T. 3317-3318, testified that this same kind of weapon caused damage to the witness's house and the Kermo house.

<sup>170</sup> T. 3680.

<sup>171</sup> **Fahrudin Ahmi}**, T. 1107-1108.

<sup>172</sup> T. 775.

<sup>173</sup> **Witness G**, T. 1557-1558; **Witness D**, T. 1013-1020, recounting how, between Oct. 1992 and April 1993, relations deteriorated: " [...] Especially we in the lower part of Ahmi}i, we were in very great danger. [...] here would be an incident almost daily. They would insult us if they meet (sic) a woman wearing pantaloons, they would say, "You balija woman". [...] He would come by in the car and shout, "We will not have pantaloons walking here". They would call out "Balijas". In the evening, we would be sitting together, then they would throw grenades into our meadows [sic]. The people closer to the road would have their windows broken. We were sorrowful, we didn't know what was happening. And so on, it went on like that. We saw that relations were not what they used to be. Before, we would exchange visits, and then suddenly, they somehow separated. They were doing something in secret. We didn't know what they were doing. But we saw that things were not what they used to be" (T. 1014).

## 2. The Case for the Defence

### (a) The Muslims in Ahmi}i Caused the Conflict of 20 October 1992

158. The Defence, by contrast, have argued that the conflict of 20 October 1992 was the Muslims' fault,<sup>174</sup> on the basis that they had erected a barricade to prevent Bosnian Croat forces from travelling on the Vitez-Busovaca road to fight the Serbs in Jajce, with the eventual result that Jajce fell to the Serbs.<sup>175</sup> Another reason for the conflict was given by defence witness **Pero Papi}**. He was allegedly told by Muris Ahmi} that the latter had been ordered to chase out the Croats, with permission to remove anything and to set the Croat's houses on fire so that the Croats could not return.<sup>176</sup> Hence, it would seem that the Croats of Ahmi}i claim that the 20 October 1992 attack was a pre-emptive strike against their Muslim neighbours, who for their part were preparing an attack on their Croat neighbours. According to **Goran Males**,<sup>177</sup> a further possible rationale for the roadblock was that the Vitez-Busovaca road on which the roadblock was situated is the main communication route, and "just at the crossroads near Kaonik it links on to the Sarajevo to Zenica main road".

### (b) The Conflict of 20 October 1992

159. Croat witnesses have presented a largely uniform account of the 20 October 1992 attack. They maintain that it occurred as a result of the establishment of the barricade by

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<sup>174</sup> **Goran Papi}**, T. 7047, the younger brother of the accused Dragan Papic, starkly blamed the Muslims for this conflict: "the Muslims caused the conflict on that day and that conflict is their fault".

<sup>175</sup> This view was expressed by defence witnesses **Ivo Vidovi}**, T. 6945; **Ivica Kupre{ki}**, T. 7944; **Zdenko Raji}**, T. 7440; **Anto Raji}** T. 8681–8682 and **Zdravko Vrebac**, T. 7763 (who stated that local Croats from Ahmi}i- [anti}i were not involved in the conflict). **Goran Males** passed through the roadblock in question on 19 Oct. 1992, on his way from Podjele to Rijeka, although he had been warned by some Croats not to go towards Ahmi}i, because the road was blocked. He saw approximately 100 men at the roadblock, most of whom wore camouflage uniforms. He identified them as armed members of the BiH army, as well as a few civilians. The men at the roadblock insulted and threatened him, saying, "Let's kill him. [...] Gouge his eyes out," until a person went to fetch the commander, whom he identified as Fikret Ahmi}. The witness answered when the latter asked his first and last names, and he was let through. The roadblock consisted of fences and was built to prevent circulation from Busovaca to Jajce. He confided these occurrences to a friend who corroborated the statement. Although Goran Males, T. 7261–7267, acknowledged that he did not know why the roadblock had been erected, he stated that he believed that the reason for the roadblock was to prevent people from Busovaca from going to Jajce.

<sup>176</sup> T. 7202.

the Muslims and that it was considered as the first serious conflict between the HVO and the BiH army.<sup>178</sup> They say that the attack took the local Croats by surprise. Before dawn, there was heavy gunfire which woke them up and which continued for about ten minutes, with bullets flying everywhere. The shooting appeared to come from the HVO positions in Hrasno, which forms part of the municipality of Busovaca, across the La{va River.<sup>179</sup> They also heard explosions.<sup>180</sup> A number of Croat witnesses state that around 5 a.m., they heard music from the mosque followed by an announcement: "Croats surrender – this is a holy war – jihad – you are surrounded, you have no chance".<sup>181</sup> This broadcast could be heard from 5-10 kilometres away, implying that some loudspeaker device must have been used.<sup>182</sup> Explosions lasted until around 9:30 a.m., and gunfire stopped in the afternoon.<sup>183</sup> The mosque's minaret was hit. Around 7:30 p.m., when there was a lull in the shooting, the local Croats were able to move to a shelter in Mirko Saki}'s basement<sup>184</sup> and Anto Bralo's shelter.<sup>185</sup> The Military Police of the HVO were involved in dismantling the barricade, assisted by members of the unit that was going to Jajce from Busovaca and Kiseljak. There were approximately 15 soldiers defending the barricade, assisted by about 50 soldiers constituting "outside help".<sup>186</sup> The Croats from Ahmi}i, [anti}i and Pirici did not take part in the conflict.<sup>187</sup> Some houses were damaged, including the houses of Pero Papi} and Mehmed Ahmi},<sup>188</sup> and some barns were set on fire. A few Croats fled in the direction of Donja Rovna. They saw Muslims fleeing

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<sup>177</sup> Goran Males, T. 7296–7297.

<sup>178</sup> Zvonimir Cili}, T. 5158–5160.

<sup>179</sup> Anto Rajic, T. 8678–8679.

<sup>180</sup> Dragan Vidovic, T. 8403; Ivica Kupre{ki}, T. 7930; Pero Papic, T. 7195.

<sup>181</sup> Milutin Vidovic, T. 7491; Ivica Kupre{ki}, T. 7929–7930; Ljubica Milicevic, T. 7301; Pero Papic, T. 7195; Zdenko Rajic, T. 7386.

<sup>182</sup> Zdenko Rajic, T. 7386–7387. The witness stated that he was given a telephone order around 5.00 am from Grabovac to go to Ahmi}i to prevent the forces from the BiH army should they start moving from the direction of Gornja Rovna, Kovacevac and Pezici towards the barricade which had been set up by the Muslims. He was in charge of a squad of about ten men, which was deployed in the forest near the Topola cemetery, but he did not take part in the conflict. He did not actually see the barricade. (T. 7382–7388).

<sup>183</sup> Dragan Vidovic, T. 8407; Milutin Vidovi}, T. 7495; Ivica Kupre{ki}, T. 7940.

<sup>184</sup> Mirko Sakic, T. 7600-7601: His father woke him around 4:30 a.m., and later on people came to his shelter which had been used previously during air attacks.

<sup>185</sup> Ljubica Milicevic, T. 7303.

<sup>186</sup> Zvonimir Cili}, T. 5158–5159.

<sup>187</sup> Anto Rajic, T. 8682.



towards Upper Ahmi}i.<sup>189</sup> There were not too many casualties during this conflict, although they heard that a Muslim and a Croat had been killed.<sup>190</sup>

(c) Croat Neighbours Helped Muslims to Return to Ahmi}i after 20 October 1992

160. After the attack, the Muslims from Ahmi}i fled, some of their houses and barns having been damaged or destroyed. They started to come back, however, only four days after the conflict.<sup>191</sup> According to the Defence, the Croats did all they could to assist their former Muslim neighbours to return in peace. **Ivica Kupre{ki}** testified that the Croats protected the homes of the Muslims while they were away and that they arrested and reported a thief who tried to steal from one of the temporarily abandoned Muslim houses.<sup>192</sup> **Ljubica Milicevi}** testified that the mayor of Vitez insisted that the Muslims come back. She was never aware of any complaints from the Muslims that their property had been plundered.<sup>193</sup> A coordination commission was formed to protect the interests of citizens and which assisted in the reconstruction of destroyed houses.<sup>194</sup> Meetings were held in the village to create peace between Muslims and Croats. Every attempt was made to find a solution and to return to the situation as it had been before the first conflict.<sup>195</sup>

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<sup>188</sup> **Milutin Vidovic**, T. 7521 and T. 7546. He saw smoke coming from Mehmed Ahmi}'s house which was on fire.

<sup>189</sup> **Mirko Sakic**, T. 7603–7604; **Milutin Vidovi}**, T. 7496.

<sup>190</sup> **Milutin Vidovic**, T. 7495; **Anto Raji}**, T. 8682.

<sup>191</sup> **Mirko Sakic**, T. 7604; **Zdravko Vrebac**, T. 7759.

<sup>192</sup> **Ivica Kupre{ki}**, T. 7915 and T. 7942-7943.

<sup>193</sup> **Ljubica Milicevi}**, T. 7304.

<sup>194</sup> **Zvonimir Cili}**, T. 5167-5168: "A. I said that the conflict was very fierce, a number of houses were damaged, mostly Bosniac houses because most of the houses there were Bosniac, and the first task of that coordination body for the protection of citizens was to issue an appeal to the public and to institutions of the civilian government in Vitez, and people with means to collect funds and material assistance to repair the damages (sic) done in the conflict, and this applied to homes and business premises, and the response was beyond many expectations. A large number of people, and I must underline this, these were damaged Muslim houses, but a large number of Croat citizens whole-heartedly contributed to this collection campaign to repair those houses and a number of those houses were repaired".

<sup>195</sup> **Zdravko Vrebac**, T. 7759–7761; **Mirko Saki}**, T. 7604–7605; **Ivica Kupre{ki}**, T. 7941–7942.

(d) Muslim-Croat Relations from October 1992 to April 1993

161. Despite these efforts, it appears from the entirety of the testimony that Croat-Muslim relations deteriorated significantly after the first conflict.<sup>196</sup> The two communities no longer trusted each other and tensions remained high.<sup>197</sup>

(e) Findings of the Trial Chamber

162. In the view of the Trial Chamber, it is apparent from the evidence that the establishment of the road-block by the Muslims on 19 October to prevent the passage of HVO troops heading toward Novi Travnik was the act that sparked the armed conflict of 20 October. In this regard, the Defence assertion that the conflict was caused by the Muslims seems to be persuasive. It would also seem to be established that the armed conflict occurred primarily between HVO armed forces from outside Ahmi}i and Muslim soldiers belonging to the BiH army. Nevertheless, some local Muslims and Croats either took part in the conflict or assisted those who were fighting.

163. The evidence also shows that the principal victims of the armed confrontation of 20 October were the Muslims. A number of their houses and barns were destroyed or set on fire or damaged, while fewer Croatian houses were damaged. That the local Muslims suffered most from the shelling and firing is borne out *inter alia* by the fact, admitted by both parties, that at the end of the armed clashes, most of the Muslim population of Ahmi}i fled the village, whereas no Croats left.

164. The Trial Chamber also finds that when the conflict was over, the Croatian population of the village endeavoured to encourage the Muslims of Ahmi}i to return and actually helped them to do so.

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<sup>196</sup> **Milutin Vidovi}**, T. 7502: "After the first conflict the Croatian-Muslim relations became more tense, and there was a certain amount of mistrust, the one towards the others. The village guards were separated. There were separate Croat-Muslim guards and Muslim village guards, and each separate group would stand guard in front of their own houses. The people working with me at the market I felt of a certain amount of distrust towards me. You couldn't do any work with them (sic) as you could before the conflict".

<sup>197</sup> **Zdravko Vrebac**, T. 7760.

## G. The Events of 16 April 1993 in Ahmi}i

### 1. The Case for the Prosecution

#### (a) Croat Preparations for the Attack of 16 April 1993

165. The Prosecution alleges that the attack on Ahmi}i was carefully planned and that local Croats knew that it was going to take place and were evacuated before the offensive was launched. Many Muslim witnesses testified that on 15 April 1993, they saw many signs of a possible forthcoming attack or the harbingers of forced expulsion from the village. However, almost none of the Muslims took any precautionary measures, nor was the population evacuated, because, as **Witness B** put it, no-one expected the Croats to attack the Bosniacs in such a brutal manner.<sup>198</sup>

#### (i) The Croats' Military Preparations

166. **Major Woolley**, a British army officer in UNPROFOR, said that there was "tangible evidence that clearly there was a Croatian aggression starting"<sup>199</sup> on 15 April 1993 – a general offensive which preceded the assault on Ahmi}i - when HVO soldiers in Putis, a village about 7 km to the east of Vitez and far from the Serb frontline, fired over his troops' heads.

167. **Esad Rizvanovi}** testified that on 15 April 1993, in the early morning, he saw many vehicles moving about on the road from Vitez to Busovaca. He saw men in uniform, but did not see any women or children.<sup>200</sup> **Witness B** said that he noticed a lot of activity in the Bungalow on 15 April 1993. He heard that a young ex-HVO soldier, Zoran [anti}, stated that he heard that Vladimir [anti} had said, before the attack of 16 April 1993, that no men from 12 to 70 years of age should be left alive during the attack.<sup>201</sup>

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<sup>198</sup> **Witness B**, T. 786.

<sup>199</sup> **Major Woolley**, T. 3476.

<sup>200</sup> **Esad Rizvanovic**, T. 465.

<sup>201</sup> T. 791.

168. **Witness I** noticed the signs of an imminent attack on 13-15 April 1993. On 13 April 1993, he was stopped and provoked by men in uniform, who would not let him go home. He was called into a bar by Nikica Plavci} who threatened him with a knife and then tried to shoot at him with an automatic rifle.<sup>202</sup>

169. **Witness L** described how, on 15 April 1993, he was working in Zume, in the direction of [anti}i. He passed by the Sutre shop of Vlatko Kupre{ki}, between 4 p.m. and 7 p.m. that evening, where he saw Ivica Kupre{ki}, Vlatko Kupre{ki} and two other men who he did not know standing outside the shop. As he passed by Vlatko Kupre{ki}'s house that evening, the witness saw 20 to 30 uniformed soldiers on his lower balcony.

170. **Witness M** referred to the fact that on 15 April 1993, she saw 5-6 soldiers going into the basement of Vlatko Kupre{ki}'s house.<sup>203</sup>

171. On 15 April 1993, **Witness O** went to Zume, where he saw an anti-aircraft gun covered by tarpaulin. He also saw 5-6 soldiers in front of Vlatko Kupre{ki}'s house.

172. **Witness T** related how, on 15 April 1993, her husband was in Stari Vitez. That evening he made a telephone call to the wife of her husband's uncle to find out about the situation in Ahmi}i, because in Vitez the Croats were arresting Muslims and taking them away. He passed the message to his family that they should not go anywhere out of the house and to take care. He also asked whether they had noticed anything. Witness T said that it was the only night which was so quiet that nothing could be heard. By contrast, on every other night shooting could be heard, but not on that particular night.<sup>204</sup>

173. **Witness V** recounted how his suspicions were aroused on 15 April 1993, when, around 5 p.m., he saw a group of approximately ten soldiers wearing camouflage

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<sup>202</sup> **Witness I**, T. 1799. "When I turned around, he pulled out a knife, which was a large knife, and placed it on the left side of my neck. I slapped him on the wrist and I said, "What are you doing with this?" And he told me, "This is what is going to happen to your neighbours, and as you worked at my brother's, you and your children will not be touched". I got up. I saw what the situation was. I never experienced anything like that before, and I started for the exit door. He pointed an automatic rifle at me, and I thought, "This is the end". He pulled the trigger, but, fortunately for me, there was no bullet in it, and I went out".

<sup>203</sup> **Witness M**, T. 2440-2441.

uniforms and with weapons, as well as two civilians, between the houses of Zoran Kupre{ki} and Ivica Kupre{ki}. The witness did not, however, see Zoran or Mirjan Kupre{ki}.<sup>205</sup>

174. **Witness X** on one occasion saw Croat soldiers in Ahmi}i. When she asked where they were going, they replied, "We're going to Busovaca, to take care of the balijas there".<sup>206</sup> On 15 April 1993, a Croat came and urinated on her fence and laughed at her family.<sup>207</sup>

175. **Witness Y** did not notice anything on 15 April 1993, but Nermin Kermo and Suad Ahmi} came to his place and said that they had noticed a large number of HVO soldiers in uniform around the Kupre{ki} houses and that as a result they had decided to double the night patrols to four men.<sup>208</sup>

176. **Witness CA** testified that, on 15 April 1993, she was drinking coffee with her husband at 3.30 p.m., and watching a television programme on which Dario Kordi} and Tihomir Bla{ki} were saying that their combatants had been attacked in the Bungalow, that there would be no more negotiations and that they "had only to wait for the order". Her son came to her house at 9 p.m., and said that Vitez television was showing the same provocative material.<sup>209</sup>

(ii) Signs of Impending Danger

177. **Witness F** noticed certain unusual and disturbing events on 15 April 1993. His Croat friends did not come to play football as usual that evening. He also saw Ivo Papi} leaving Ahmi}i with some women in a red Lada and Ivica Kupre{ki} leaving Ahmi}i with his wife and children at 4-5 p.m., on 15 April 1993.<sup>210</sup> **Witness G** said that many students, mostly Croatian, were not at school on 15 April 1993. That day he also

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<sup>204</sup> **Witness T**, T. 2958.

<sup>205</sup> T. 3041-3042.

<sup>206</sup> T. 3238-3239.

<sup>207</sup> T. 3240.

<sup>208</sup> T. 3303.

<sup>209</sup> T. 4555-4556.

overheard his parents saying that vehicles were constantly coming and going from the Papi} house.<sup>211</sup> Some Croats hinted to their Muslim neighbours of what lay ahead. **Witness EE**, for example, related how, before 16 April 1993, Drago Josipovi} had said to Fahrudin Ahmi}, "Pity about these two houses down here", indicating the witness's houses and thereby displaying that he knew in advance of the attack and that he knew that it would involve the unnecessary destruction of civilian dwellings.<sup>212</sup>

178. **Witness Z** described an ominous atmosphere on 15 April 1993:

"Ogn the 15th of April [...] The silence was unbearable. One cannot describe it, this atmosphere, the way it was, as if there were no birds around. You could only hear a car or two pass by. ...g We were all tense. We were all nervous. We were all afraid as to what would happen, what would not happen, whether there would be a war, whether there would not be a war. No one trusted anyone anymore".<sup>213</sup>

The witness went to bed in uniform around 2 a.m.

179. **Witness FF** noticed that on the evening of 15 April 1993, there were no lights in the Croat houses, which was unusual. The Muslim houses were lit as usual.<sup>214</sup>

(b) The Attack on Ahmi}i on 16 April 1993<sup>215</sup>

(i) International Observers

180. **Lt.-Col. Bryan Watters** stated that the attack on Ahmi}i seemed to be part of a pre-emptive attack by Croat forces up and down the La{va River Valley against Muslim civilians and Muslim forces, which proved to be very successful as it took the Bosniacs

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<sup>210</sup> T. 1373-1377.

<sup>211</sup> T. 1445-1448.

<sup>212</sup> T. 4094.

<sup>213</sup> T. 3602-3603.

<sup>214</sup> T. 4314.

<sup>215</sup> The factual descriptions which follow are restatements of what the witnesses testified. Even though some of them may be phrased in the indicative, only the Trial Chamber's findings are relevant as to the facts underlying the judgement.

completely by surprise.<sup>216</sup> The witness was in Ahmi}i on 16 April 1993 and was an eye-witness to the total destruction of the village and the massacre of civilians. In particular, he saw the bodies of 20-30 men, women and children on the roads, in the fields and outside the houses, including in an area across from the Catholic cemetery which BRITBAT designated as "the killing field" due to the number of bodies found there. He also saw 4-5 bodies placed nearby in a neat line by the road, as he drove towards the Busovaca junction.<sup>217</sup> Lt.-Col. Watters noticed that despite the almost total destruction of the village of Ahmi}i, the Croat houses had been left untouched. By contrast, the Muslim houses had been "systematically destroyed"; the inhabitants killed and the houses then burned. Not only had the people and houses been destroyed but also crops, animals, etc. The witness concluded that, without a doubt, what had happened was a systematic and organised attempt to "ethnically cleanse" the village.<sup>218</sup> Lt.-Col. Watters also noticed the destruction of the two mosques in Ahmi}i in the lower and upper parts of the village.<sup>219</sup> Lt.-Col. Watters averred that Ahmi}i was not a military target;<sup>220</sup> there were no barracks or military installations in the village. In spite of this, the village was attacked with an arsenal of heavy weaponry, including at least one anti-aircraft weapon.<sup>221</sup> Lt.-Col. Watters concluded that the significance of Ahmi}i was more symbolic than real, and lay within its tradition of producing a great number of Muslim leaders or Imams and teachers in Bosnia.<sup>222</sup>

181. **Payam Akhavan**, an international human rights lawyer who at the time was working for the United Nations Centre for Human Rights, now a Legal Adviser in the Office of the Prosecutor of this Tribunal, was in Ahmi}i on 1, 2 and 6 May 1993 as part of an investigative team, with witness HH, to compile information for a report of the Special Rapporteur on Human Rights, Tadeusz Mazowiecki. Akhavan spoke of the degree of destruction inflicted upon Ahmi}i as "total and all-embracing":

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<sup>216</sup> T. 160. See also **Payam Akhavan**, T. 1313 (stating that the operation was not a small one but rather was a concerted and organised military operation).

<sup>217</sup> T. 160-162.

<sup>218</sup> T. 199-202.

<sup>219</sup> T. 186-188.

<sup>220</sup> T. 216-217.

<sup>221</sup> T. 229-230 and T. 238-239.

"I believe that from approximately 150 to 200 homes in the village, there were fewer than 20 which had not been destroyed. The scale of destruction was extensive, there were homes which some 2 weeks after the attack ... were still smouldering. And there was also a real -- what would I describe as a smell of death really in the village. One could sense that there were still many bodies which had not been recovered from underneath the rubble. There was virtually not a living creature in the village. Even dogs and cats and cattle had been killed and were lying all over the roads. So I think on the whole, what struck me was the total and all-embracing form of the destruction of this village and its inhabitants".<sup>223</sup>

182. Payam Akhavan also visited the "killing field" described by Lt.-Col. Watters, which lay across the road from the Catholic cemetery and where the bodies of some 20 civilians had been found who had apparently been killed on the spot. He also noticed what appeared to be a sniper's nest with spent cases strewn about. Akhavan inspected various houses in Ahmi}i. On average, he found 30-50 shell casings in the vicinity of each destroyed home, as well as spent casings of anti-aircraft guns and casings of grenade launchers. He also found broken bottles that had apparently been used to carry gasoline or another flammable liquid for setting homes on fire. He concluded on the basis of the extensive incendiary damage that the houses had been deliberately set on fire, since the houses showed signs of small arms fire, not of heavy artillery, which would not in themselves spark a fire. Akhavan, and his colleague Witness HH, spoke to various survivors in Zenica of the attack on Ahmi}i and heard their stories of "ethnic cleansing". The survivors recounted that the attackers had been soldiers in HVO uniforms. When he tried to speak to Croatian inhabitants of Ahmi}i, however, Akhavan and his group came under sniper fire. Subsequently, in order to hear the explanation of the Bosnian Croat authorities, Akhavan met the military and political leaders of the Bosnian Croat community - Tihomir Bla{ki}, Mario Cerkez and Dario Kordi} – who admitted to being in control of the area, but denied responsibility for the attack on Ahmi}i, claiming that the attack had been committed by the Serbs or by the Muslims themselves in order to attract international sympathy. Since Ahmi}i was only 4 kilometres from the HVO military

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<sup>222</sup> T. 200-201. Some witnesses, however, denied that there was anything significantly Islamic about Ahmi}i *vis-à-vis* other villages. See, for example, **Witness EE**, T. 4240-4241.



Headquarters in Vitez, however, Akhavan concluded it was not the Serbs or the Muslims who had carried out the assault, but the HVO.

183. Akhavan shared the view of Lt.-Col. Watters that Ahmi}i was not a military target but an undefended village and that the civilian inhabitants who were victims of the attack offered no military resistance. The attack on Ahmi}i lasted only one day, with the take-over and destruction completed on 16 April 1993. The exact number of victims was impossible to determine with certainty since many bodies could not be recovered from the rubble due to the danger of unexploded mines and booby-traps. Three hundred of the original Muslim inhabitants were still missing and in addition to these locals there had also been a large number of refugees in Ahmi}i on the day of the attack who had yet to be accounted for. Akhavan stated in cross-examination that although there were atrocities against Croats, for instance the beheading of a Croat in Mileti}i apparently committed as a reprisal for Ahmi}i by rogue Mujahedin, looking at central Bosnia as a whole, the Muslims were disproportionately victimised. There was a climate of fear and terror in the region that everyone experienced, but allegations of large-scale atrocities committed against Croats, for example in Zenica, were not credible at the time.<sup>224</sup> The attack on Ahmi}i was part of a pattern, according to Akhavan, namely that of establishing control by means of "ethnic cleansing" and there had been simultaneous and concerted attacks on Ahmi}i and surrounding villages.

184. **Witness HH** was at the time working at the United Nations Centre for Human Rights in Geneva and was fluent in Bosnian/Croatian/Serbian. The witness visited Ahmi}i on 2 May 1993 with BRITBAT. He saw that most of the homes in Ahmi}i were destroyed, except for what he was told were Croat homes. He and Akhavan attempted to speak to a woman with two children but they were shot at and fled. One soldier was wounded in this incident. Witness HH investigated one incident in particular, namely the attack on the house of Witness KL. Witness HH was told that he would find bodies at

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<sup>223</sup> **Payam Akhavan**, T. 1227-1228.

<sup>224</sup> **Payam Akhavan**, T. 1330-1331. and T. 1241-1242.

KL's house,<sup>225</sup> which he visited with BRITBAT. The house was gutted by fire and there were human remains – a charred backbone and other fragments that appeared to be human.<sup>226</sup>

185. **Captain Charles Stevens**, who was in central Bosnia from November 1992 to May 1993, provided personal security to Colonel Bob Stewart, the commander of BRITBAT. Captain Stevens accompanied Col. Stewart to Ahmi}i on three occasions at the end of April and early May 1993. The first visit took place on or around 17 April 1993. As BRITBAT arrived in Ahmi}i, the place was totally devastated, to an extent which was worse than the witness had hitherto seen elsewhere in central Bosnia. The minaret of the mosque had been destroyed by explosive charges which had been placed at its base in such a way as to cause it to fall onto and damage the mosque. There was no sign of life in Ahmi}i at all. As Captain Stevens moved up towards Upper Ahmi}i, where there were some fires still burning and some smouldering. Around the houses there were, in general, a large number of spent AK-47 cases. In the doorway of one house, he found two burnt bodies, one of a man and one that appeared to be a child.<sup>227</sup> On further investigation, he found the bodies of at least two other adults and a number of children in the cellar of the building.

186. During this visit, Captain Stevens met someone called "Dragan", who was armed with an AK-47 and who, by means of sign language and by drawing with a stick in the sand, intimated proudly that he, or he and his friends, had killed thirty-two Muslims. "Dragan" wore a camouflage jacket and darker civilian trousers, and was clean-shaven. The witness could not conclude whether "Dragan" claimed to have killed the thirty-two Muslims in Ahmi}i or elsewhere, for example, on the battlefield.

187. The next day, the witness went back to Ahmi}i in the light of reports that BRITBAT had received from people who had fled. Captain Stevens went to Witness KL's house. The building was totally gutted, fire damage having destroyed the roof.

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<sup>225</sup> **Witness HH**, T. 4477-4479.

<sup>226</sup> See video Exhibit P83, which shows Witness HH and Akhavan visiting the house with Col. Bob Stewart.

<sup>227</sup> T. 2148-2149.

There were red tiles covering the floor, charred wooden beams, and the witness saw the burnt upper body of an adult, and further back in the room, on the other side, what appeared to be the body of a smaller person, perhaps a child.<sup>228</sup> Overall, Captain Stevens got the impression of a pure "ethnic cleansing" operation having taken place in Ahmi}i on 16 April 1993.<sup>229</sup>

188. **Corporal Skillen**, a member of the British army who was based in Vitez as a United Nations peacekeeper from November 1992 to May 1993, went to Ahmi}i twice on or around 22 April 1993 when he heard rumours of killings. The witness noticed the fallen minaret of one of the Ahmi}i mosques. He saw that the majority of the houses in Ahmi}i were totally destroyed or damaged beyond repair. Corporal Skillen visited one house, slightly above the mosque, which contained burnt bodies. On the outside of the house were two burnt bodies, one small<sup>230</sup> and one large male.<sup>231</sup> Downstairs there were the burnt corpses apparently of one adult and two small humans, the gender of which could not be determined due to the carbonisation of the bodies.<sup>232</sup> The whole cellar of the house was burnt and the windows smashed. Based on his expertise, the witness thought that the damage had been caused by a blast. The only people whom Corporal Skillen saw alive in Ahmi}i that day were a woman and a small child, sitting on the balcony of a house which stood out because it had sustained no damage at all, although the house was surrounded by buildings which had been destroyed. The woman and child were acting as if everything was normal and they were ignoring UNPROFOR. They did not ask for any assistance. The witness identified the house from photographs as Vlatko Kupre{ki}'s house.<sup>233</sup> Passing the same house later, Corporal Skillen noticed two males in their mid-twenties, in matching uniform, casually passing the time of day. Corporal Skillen

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<sup>228</sup> T. 2160-2161.

<sup>229</sup> T. 2154-2155.

<sup>230</sup> Exhibit P22 (photograph of burnt body (child) by the steps of the house).

<sup>231</sup> Exhibit P17 (photograph of burnt body (adult) by the steps of the house).

<sup>232</sup> Exhibits P18-21 (photographs of burnt bodies being removed from the cellar). Corporal Skillen was not present during the clearing-up operation shown in these photographs, which took place later.

<sup>233</sup> See Exhibit P32.

considered that the operation on Ahmi}i of 16 April 1993 transgressed all the principles and rules of warfare.<sup>234</sup>

189. **Mr. Kujawinski**, a Non-Commissioned Officer in the British Army was stationed in Vitez from November 1992 to April/May 1993 as a Platoon Sergeant in charge of a platoon equipped with four Warrior armoured fighting vehicles. He was sent to Ahmi}i on the afternoon of 16 April 1993, around 2.40 p.m. His mission was to recover a broken-down "Scimitar" (a light-weight vehicle used for reconnaissance). He saw palls of smoke from the turn-off to the mountain road to Zenica and many houses destroyed or on fire. Women and children who appeared to be dead were lying out in the open. He saw about 13 bodies. Then as he passed the cemetery, a woman, whom he later evacuated, jumped out with her hands in an imploring gesture. Kujawinski then went up past the Bungalow where he saw many soldiers, more than he had hitherto seen in one group during his tour in Bosnia. He estimated it was a company group, i.e. 100 soldiers. Everyone was dressed in very dark uniforms. They also bore an insignia which he was unable to identify – a red, white and blue shield, with an arch across the top - which he did not recognise as an HVO patch. He only recalled seeing that one unidentifiable patch that day. The soldiers had a lot of weapons and were very joyful, drinking beer and waving their weapons in the air as if to toast or celebrate what had happened. The witness "put one and one together" and concluded that these soldiers, who were 400-500 metres from the scenes of recent killings of women and children and of the destruction of the houses which he had just seen, had committed those acts.

190. The witness carried a camera everywhere with him and took photographs.<sup>235</sup> From the Bungalow, the witness drove through Ahmi}i, noticing dead cattle on the way and finding the broken-down Scimitar. At this point he could hear gunfire behind his soldiers and could see cattle being shot in a cruel manner in the fields. The witness towed the Scimitar back to the garage, and then returned to the village to rescue four women and a child, and in the event picked up 13 women and 2 children. Another vehicle accompanying him also collected a number of people with their belongings,

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<sup>234</sup> T. 2655-2656.

<sup>235</sup> See Exhibit P53.

including one man in civilian clothes who crawled out from behind a chained fence and boarded the vehicle. The witness did not hear shots at that time. He took the refugees to Travnik Hospital. The witness concluded that there had not been two sides to the conflict in Ahmići that day - merely one group of soldiers at the Bungalow and no defences in the village. The witness did not see any men in uniform or armed in Ahmići that day, neither of the HVO nor of the BiH army.

191. **Major Michael Dooley**, UNPROFOR Platoon Commander in Bosnia, testified that he went to Ahmići to investigate the situation there around noon on 16 April 1993. He led four armoured vehicles into the village. He saw many dead people by the side of the road and no signs of life, much less of resistance. Occasional shots were to be heard, which Major Dooley determined, on further passes through the village, represented a one-sided shooting into the village, rather than fighting between two sides. Major Dooley further ascertained that, despite the absence of any armed resistance, an anti-aircraft gun appeared to have been used in the attack: he saw large holes in the buildings from 0.5 calibre fire and 0.5 calibre shells, which is the calibre used by either a light anti-aircraft gun or the heaviest automatic fire.

192. As Major Dooley and his armoured vehicles continued to move through the village, the shooting around them intensified. Major Dooley and his soldiers themselves came under fire. He also saw ten HVO soldiers, lying in a ravine, who looked like a "cut-off" group.<sup>236</sup> Major Dooley and his troops collected some twenty bodies in the three passes, but they saw many more dead, perhaps as many as fifty, who were civilian men and women, and included elderly persons, who appeared to have been shot at close range.<sup>237</sup> He considered that the initial attack was over by the time he arrived at noon. In

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<sup>236</sup> **Major Dooley**, T. 2480 and T. 2509, determined that the soldiers were of the HVO on the basis of their uniforms. The soldiers were wearing the American-style camouflage uniforms worn by the HVO. The American-style camouflage uniforms of the HVO were different from those of the BiH army, which were more like the Malaysian camouflage outfits. The witness said that these soldiers were unquestionably members of the Croatian army.

<sup>237</sup> T. 2481–2482: "A. The ones that we collected were male and female. All of them were in their civilian clothes. ... I saw no children killed, but there were certainly male and female, and quite a few older people. Q. Did you see any weapons close to those bodies? A. They were all civilians. And perhaps an important point to note here was that the number of bullet wounds in each of the victims was great, which would suggest to me that the shooting was from a very close proximity". - When challenged on this last point under cross-examination, T. 2500, the witness clarified: "A. ... Obviously a great deal of our training is

his opinion, the assault on Ahmi}i was a very well coordinated attack by the Croats, executed by someone with a good grasp of military tactics.

193. The witness denied that there was any resistance by the Muslims in Ahmi}i. He did not see any BiH army soldiers in Ahmi}i, only Croat soldiers, and the victims he saw were all civilians, without weapons by their bodies. The witness conceded that he knew from Northern Ireland that terrorists could wear civilian clothes, but in these circumstances he believed the victims were not soldiers in civilian clothes because many had no shoes and none had any weapons besides them.

194. Under cross-examination, the witness admitted that it was strategically important to control the road to Travnik which cut through Ahmi}i. There were Mujahedin trying to get to Travnik; therefore it was important to the Croats to cut them off. Ethnically, the region was "like a dart-board – enclave followed by enclave". The witness admitted that it was a legitimate military tactic to cut the opponent's lines of communication to stop reinforcement. He also agreed that surprise is always condoned in warfare; "surprise is the name of the game".

195. **Major Woolley** was deployed to Bosnia in November 1992 as a British army captain with UNPROFOR. During his stay in Bosnia, Major Woolley was mostly based in Vitez. On the morning of 16 April 1993, he was informed by a colleague that Vitez was a battle zone and that there were dead civilians and soldiers in the streets. Up until then, there had been nothing which indicated a Muslim-Croat conflict. He was despatched to Ahmi}i, with 2 Scimitars and a Warrior. He arrived at the village at around 11.30 a.m., and saw plumes and pillars of smoke.<sup>238</sup> He did not form an impression of what had happened until he spoke to a survivor, a Muslim woman, in a Muslim house by

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shooting at wooden targets and so you get a feel for grouping for shooting. These victims all had maybe half a dozen rounds in each and the bullet wounds were maybe two to three inches apart straddling their bodies. Now, to get such a grouping in one area as a line, you would have to be very close, and I would say "very close" would be maybe within ten feet of them. You'd be very close, as close as maybe you and I are together, in order to do that".

<sup>238</sup> See Exhibit P229, showing six points of interest in Major Woolley's tour of Ahmi}i: two burnt out houses (points a & b), the point where he rescued five casualties (at IV), and the point where he picked up five dead bodies (at VI).

the lower mosque.<sup>239</sup> From what she told Major Woolley and from what he had seen, he gathered that there had been a Croat offensive, starting around 6 a.m. Major Woolley saw an injured man who had suffered a gunshot wound to the back and elbow and who had lost a lot of blood. He spoke to survivors in one house. The people were all old women and children, in a state of shock, panic and fear. Major Woolley administered first-aid, and then went up the road. He saw that about 20% of the houses were burning, while the road and entire area appeared to be deserted. He did not see any military activity until he reached location II on Exhibit P229, where he saw soldiers dressed in green and carrying Kalashnikovs, whom he assumed belonged to the HVO because of their positioning outside the village.

196. Major Woolley then went into house no. 2 on Exhibit P229, where he saw a woman on a makeshift stretcher. She had a head wound evidently inflicted by a gunshot. He dressed the wound but she died. The other persons in the house were in great distress. The witness then went to the house belonging to Nermin Kermo where some thirty people were gathered:

“The cellar was very dark, there was no lighting. There was an awful smell generally of, I suppose, wounds, and there was also smoke from people smoking. There were people crying, there was a woman breastfeeding, there were elderly people, women and children, and there was about up to 30 people probably in the cellar, five of whom had significant injuries”.<sup>240</sup>

197. There was a wounded 12 or 13 year old girl, two elderly men and some other wounded, all in civilian clothing. All were very scared and in shock. None of the men in the cellar had weapons. The most severely wounded were evacuated in the Warrior, while the others stayed in the house.<sup>241</sup> At one point, Major Woolley saw a wooden barn

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<sup>239</sup> Point I – House 14 – on Exhibit P229.

<sup>240</sup> T. 3507-3508.

<sup>241</sup> **Major Woolley**, T. 3507-3508, identified Exhibit P193 (showing the entrance to the cellar, from the back, and the Warrior vehicle as they prepare to evacuate the wounded), Exhibit P74 (also showing the scene of the wounded in the cellar), Exhibit P194 (showing the witness by the cellar), and Exhibit P195 (showing the evacuation of the girl, D' enana Pezer). Each photograph which was produced to the witness as a prosecution exhibit was taken either by the witness or the military photographer using his camera, so as to keep a record of what was occurring. See also Exhibits P134, P137, P155, P235, P236, P237, P238, and

burning which he estimated had been set on fire around 3 p.m. A photograph taken by the witness<sup>242</sup> shows the minaret of the mosque still intact at 3 p.m., on 16 April 1993, which supports the conclusion that the minaret had been deliberately dynamited after and not during the morning offensive.

198. Based on his own observations, on the report of a woman in the village, and on the fact that "most deliberate offensives conducted by military men are done at dawn, because that's the time when the people are at least alertness, probably in their beds," Major Woolley believed that the attack on Ahmi}i was a dawn raid. He also confirmed that the dead bodies he found were all civilians. For example, at location VI on his map, he found five civilian bodies, which included elderly persons, who had died from multiple wounds.<sup>243</sup> These dead bodies were not in uniform, nor "mixed dress", i.e. with one or two items of uniform, which the witness was accustomed to seeing on Bosnian soldiers. Nor were there any guns anywhere near any of the victims. Moreover, each victim appeared to have sustained more than one gunshot wound, one looking as if he had been shot with automatic fire. Besides these evacuations, Major Woolley affirmed that he had picked-up many other bodies. Major Woolley's conclusion was that what happened in Ahmi}i was not a military operation but a "slaughter".<sup>244</sup>

(ii) Bosnian Muslim Eye-witnesses

199. The Chamber heard evidence from more than thirty-five Bosnian Muslims, former inhabitants of Ahmi}i who were victims of the attack of 16 April 1993. Their testimony, while each describing separate tragedies and losses, converges on the major points of the offensive and tells one coherent story. In general, witnesses were awoken around dawn, between 5 a.m. – 5.30 a.m., on 16 April 1993 by the sound of loud

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P239 (showing two Muslim men of fighting age with rifles, who were not soldiers as such. There were approximately five victims around that house).

<sup>242</sup> Exhibit P235.

<sup>243</sup> See Exhibits P56 and P57.

<sup>244</sup> **Major Woolley**, T. 3554: "...whether there had been any soldiers in this village at all, [...] at the end of the day, these houses, these civilian houses, had been burnt down, were on fire - these were not houses that had any signs of being defended by soldiers or had any fortifications - and I think when you see 12 year old girls with bullet wounds and even men who could fight with gunshot wounds in their backs or women with gunshot wounds in their heads, it tells me that this is a slaughter of civilians".



detonations followed by gunfire, often in the immediate vicinity of the witness's house. The witness would typically look out the window and see houses burning – notably the house of Witness KL which seems to be one of the first set alight – and HVO soldiers running around in camouflage uniforms and with heavy weapons. A common description was that bullets were flying everywhere and many witnesses testify that an anti-aircraft gun was used in the attack. The victims either managed to flee or were forced out of their houses by heavily armed HVO soldiers, often using insulting and threatening language, who would then proceed systematically to burn down the house, barns or any other outbuildings, killing the livestock in the process. At this point, many witnesses lost family members, who were either killed at close range by the soldiers in or around their houses, or gunned down as they ran from house to house. Those who survived either fled to the upper village and thence to Vrhovine and then Travnik or Zenica, or were rescued by UNPROFOR or collected by local Croats and deported to Dubravica School, where the Bosnian Croats ran a camp for Bosniac refugees. At Dubravica School, persons were mistreated, and there were accounts of rape and of refugees being used to dig trenches at the front lines.

200. The witnesses' accounts also agree on this point: that the conflict on 16 April 1993 was a one-sided offensive by heavily-armed HVO soldiers or paramilitaries against mostly unarmed civilian men, women and children. The witnesses all agree that there was no Bosnian Army in Ahmi}i on 16 April 1993, that the village was undefended and that the only defence which took place that day were some gunshots from 2 or 3 Bosniacs around Nermin Kermo's house to defend that house and, more importantly, the many refugees in the basement, from massacre.

201. **Abdulah Ahmi}** was awakened before dawn by loud detonations which went on for approximately 15 minutes.<sup>245</sup> He heard one extremely loud detonation which possibly killed his brother, Muris, outside their house. Then his father and he were led out of their house by Bosnian Croat soldiers and shot at point-blank range, following a repeated command by one soldier to another to carry out his orders. The witness's father

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<sup>245</sup> T. 279-290.

died – the witness saw his father's brains blown out before his eyes - but the witness himself miraculously survived when the bullet entered one cheek and passed out the other side.

202. The witness stated that both he and his father were wearing civilian clothes at the time and were clearly not soldiers. The Bosnian Croat soldiers who shot them were well-armed, with automatic rifles and bullet-proof vests. The witness and his father offered no resistance at all.

203. After being shot, Abdulah Ahmi} played dead, and then ran off and hid, semi-submerged, in a river under a bridge. From that position, he saw HVO forces being deployed in accordance with what appeared to be a plan, with 80-100 men moving in from the north side and 50-60 men from the south side. The witness saw both HV (army of the Republic of Croatia) and HVO soldiers among these men.

204. Subsequently, Abdulah Ahmi} left his position under the bridge and hid in a house, where he was attacked with a grenade which a soldier threw into the house. The witness was eventually rescued by Ivo Papi} and then taken to Dubravica school. While he was held in the Dubravica school, some Bosniac men were killed and he heard rumours of Bosniac women being raped.

205. The witness lost his father, mother and 3 sisters, who were 24, 23 and 16 years old.

206. **Witness A** was also a refugee in Ahmi}i, who had been driven away from Fo-a,<sup>246</sup> in eastern Bosnia, by the Serbs. He heard explosions and bombs and bullets flying about. Then he heard a loud banging on the door of his house. Soldiers entered, who were heavily armed and wearing camouflage uniforms, with painted faces and ribbons on their sleeves., A soldier asked Witness A's brother-in-law how old he was and left him alone when he replied that he was only fourteen years old. The soldiers, however, took the witness, who was older, with them.

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<sup>246</sup> T. 524.

207. As Witness A left the house, he saw houses burning and heard non-Muslims taunting dispossessed Bosniacs, saying that the "Balijas" were "burning down their own houses". The witness was made to put on a uniform and to walk ahead of a soldier who was wearing a Jokers patch. As he walked along, the witness saw five bodies lying against a fence: his father, the Paca family – a father and two sons - and a refugee from Zenica.<sup>247</sup> Witness A himself was, however, spared. He was told to identify the Croat houses and the Muslim houses, for the purposes of their selective destruction.<sup>248</sup>

208. **Witness B** testified that he heard a loud explosion and falling shells from 6 a.m. onwards. He saw HVO troops shooting, killing, and torching houses. The witness saw the slogan "48 hours of ashes" written by Croats as graffiti on the fallen minaret shown in Exhibit P66, and elsewhere.<sup>249</sup> He testified that the BiH army was not in the La{va River Valley at all on 16 April 1993. There were no Bosniac military units, because they were all away fighting the Serbs, nor were there any Bosniac civilian police.

209. **Witness C** was 13 years old in April 1993 and lived in the lower part of Ahmi}i with his family, two boys, two girls and his mother and father. The witness and his brother were woken by the sound of gunfire. Bullets broke the window of their room and plaster fell on them. The family took refuge in the larder. Soldiers then came into the front yard and set everything on fire, including the stable where the family cow and sheep lived. A soldier then entered the house. He was wearing a Jokers patch, and the HVO insignia with checkerboard flag and a "U" for Usta{a. The soldier took the witness's brother to the balcony of the house. The witness then heard 3-4 gunshots being fired. Next the witness was taken out to the balcony with his mother and told to jump, whereupon he saw his dead brother on the ground below the balcony. The witness jumped next to his dead brother and then ran off. As he ran away, the witness saw a soldier trying to force the mother to jump by threatening her with a knife. Other soldiers in camouflage uniforms stood below the balcony, armed with knives and guns, and

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<sup>247</sup> These bodies were shown in the photographic exhibits, Exhibits P53-56.

<sup>248</sup> T. 566.

<sup>249</sup> T. 802.

laughed and shouted, "Jump, jump" at the witness's mother.<sup>250</sup> As the witness ran towards the road, shots were fired at him, but he survived by zig-zagging and thus managed to reach the road where he was rescued by a man driving a Lada and was subsequently helped to flee by a Croat called Jozo.

210. **Witness D**, witness C's mother, said that the first thing she heard was bullets whizzing into her house. She fled to the larder. She then heard someone in the yard saying, "Burn everything here". The stable was set alight, and the animals burnt alive. Soldiers then entered the house and made her elder son jump from the balcony and shot him dead in the process. The soldiers then tried to make the witness jump, using the insulting term, "Baliija", shouting "Jump, baliija, jump!" A gun was put to her temple to force her to jump onto her murdered son and the soldiers were "laughing as if they were having fun".<sup>251</sup> She told the soldiers to kill her there and then, if they were going to kill her as she was not able to jump. However, the soldiers did not shoot her.

211. Among her family members, the witness's husband was shot in the shoulder and one son was murdered. Her daughter was slapped with a Koran and later was in a state of shock, trembling and covered in sweat. The soldiers looted the witness's house and shouted at her family, "Give me your money!" and "If I find more money, I'll cut you into pieces!"<sup>252</sup> Later the witness managed to escape to the Upper Ahmi}i with her daughter. Witness D did not see a single armed Muslim in Ahmi}i on 16 April 1993.

212. **Fahrudin Ahmi}** testified that he awoke to the sound of gunfire. Shells were falling and all kinds of weapons were being fired. As he ran from his house, he was shot. Women and children were with him when he was shot, and thus also in the line of fire. The witness went into a house where UNPROFOR administered first-aid to him, but he was not taken to hospital because UNPROFOR said that the Croatian army had ordered that no-one was to be helped.<sup>253</sup> Shortly after UNPROFOR left, the house was nearly set on fire by incendiary bullets. The injury sustained by the witness was very serious: his

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<sup>250</sup> T. 964.

<sup>251</sup> T. 1030.

<sup>252</sup> T. 1041.

<sup>253</sup> T. 1135.

hand was almost blown off and he remained in intense pain for months. He still has severe problems with his arm.

213. Fahrudin Ahmi}, like all the other victims of the attack who testified before the Trial Chamber, testified that he was not in uniform, nor had he any weapon with him; he had never possessed a weapon. The witness did not hear of any Croatian soldier being killed on 16 April 1993. He affirmed that there was neither a BiH army presence in Ahmi}i in April 1993, nor any Bosniac combat lines. The Croats, on the other hand, were well organised.

214. **Witness E** was 15 years old in 1993 and a refugee from Travnik. He was woken by shooting at 5.50 a.m. Soldiers threw grenades into his house, whereupon he left the house with his mother, sister and father, seeing two dead bodies as he emerged. He and his family members were told by soldiers to put their hands up and to keep their heads bowed. The witness then saw a further two dead bodies. The soldiers whom the witness saw were in camouflage uniforms, with automatic rifles and anti-tank rocket launchers. The witness's father, an elderly man, was called out of the line as they walked along and the witness never saw him again. The witness then saw another two soldiers, one wearing a balaclava, the other with his face painted black and both in camouflage uniforms. The soldiers had Military Police insignia. The witness walked very slowly with his mother and sister amidst heavy shooting from both sides, and from Croatian houses, to Upper Ahmi}i, from where they were later evacuated with women and children to Zenica.

215. **Witness F** was 14 years old in 1993, and lived in Ahmi}i with his 4-year-old sister, 8-year-old brother and his mother. Witness F lost his mother and brother. On that morning, he was awakened by heavy shooting. A grenade was thrown into the house. His mother tried to throw the grenade back but it exploded in her hand, blowing off her arm and at the same time killing the witness's brother. Another grenade was then thrown in which exploded and injured the witness in the lower part of his body, followed by a third grenade. Next, a soldier came in, dressed in a camouflage uniform and with his face

painted black, carrying an automatic rifle and a rocket launcher on his back. The soldier had an orange armband, which was identified through Exhibit P103 as HVO insignia.<sup>254</sup> This soldier asked Witness F where his father was. Explosions erupted upstairs and the witness and his family hid in the pantry. The witness's mother was then hit by a bullet in the stomach. The family fled to the barn, with the witness carrying his dead brother and his sister. His mother joined them in the barn and died there some fifteen minutes later. The witness passed out in the barn, which was set on fire by soldiers.

216. While the witness was in the barn, he heard a soldier outside saying that they had killed everyone in Lower Ahmi}i (around the lower mosque) and that they should move to the upper mosque. The soldiers saw the witness and his sister in the barn, next to the corpses of his brother and mother. The soldiers threw in a grenade to kill the livestock; they threw a grenade under the cow and then killed it with a rifle. The soldiers also killed a lamb. The witness testified that the soldiers were using a radio or mobitel to stay in touch with each other.

217. The witness sustained 18 injuries from the three grenades, including shrapnel wounds all over his body.

218. Later the witness returned to his house and collected some food and clothes. As he left, he saw Melissa Zec, a young child, lying next to her dead mother. She refused to leave her mother's side. Witness F also saw the body of Husein Ahmi} lying in his backyard. Witness F tried to go to Upper Ahmi}i, but he was turned back by a large group of soldiers with Jokers insignia, camouflage uniforms and automatic rifles, who said, "You cannot go up there. [The] HVO is up there. They don't distinguish between women, children and men. They kill everyone". Later, walking through the woods, he saw the dead body of Fata Pezer. The witness was taken to Dubravica school with his sister and Melissa Zec. There he saw HOS and other HVO soldiers. In the school, the witness saw Dzemila Ahmi} who was taken out and came back an hour later crying and saying she had been raped. Like other witnesses, Witness F did not see or hear of any

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<sup>254</sup> **Witness F**, T. 1388–1389. These were identified via Exhibit P103 (HV insignia), Exhibit P104 (HVO insignia), and Exhibit P118 (Vitezovi insignia). The witness recalled the Jokers insignia on soldiers in

Bosniac line of defence. If any such line existed, the witness said, it was a spontaneous defence – people standing before their homes to defend their families.

219. **Witness G** was thirteen years old in April 1993 and lived in Lower Ahmi}i with his father, mother and two sisters. The witness and his family were all asleep when they were woken by heavy fire, explosions, and bullets coming through the windows of their rooms and through the roof tiles. The witness heard his parents running down the hallway yelling, “Children, get up and get dressed!” The whole family ran downstairs to avoid the bullets coming through the ceiling. They went into a little room on the ground floor. An incendiary bullet then hit the house, but his mother managed to extinguish the fire. His father then said that they should go to the next-door neighbours’ house. His father was unarmed and the whole family was in civilian clothes.

220. Witness G’s family left the house one-by-one, with the witness in front. The witness ran towards their barn and some other houses. He heard a very loud burst of gunfire as he ran. He saw a neighbour, Zahir, lying dead in his garden, in civilian clothes – possibly in pyjamas - and a soldier in camouflage uniform and with insignia, and his face painted black, standing over Zahir with a rifle.

221. The witness next saw three soldiers wearing camouflage clothing and carrying rucksacks who were shooting at the upper village. These soldiers had insignia, possibly of the HV. The witness also saw Dragan Papi} standing with a rifle. The soldiers told the witness to run back and as he turned to run, they shot him in the back of the legs and he fell. He could see his parents and sisters running from the house.<sup>255</sup> His father, mother and elder sister were all killed.

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Ahmi}i on 16 April 1993, although not necessarily in the form of Exhibit P45.

<sup>255</sup> T. 1469-1470. “As I fell, my parents had more or less reached these spots marked with the Xs, and my father spotted this soldier who was next to Zahir’s house, who had come out to the corner of Zahir’s house. He spotted him and these other soldiers, and he said, “Men, what are you doing? Let me pass. Let the women and the children pass and kill me”. However, one of these who had shot at me who were behind my back ordered three times this person, this soldier who was there, to shoot at them, and he said, “Kill them. Kill them. Kill them”. And he cursed at him, as if saying, “What are you waiting for?” And he fired two short bursts of fire, and my parents fell. I just managed to raise myself on my elbow, after which I fell to the ground altogether and stayed there immobile. I was conscious but I wasn’t quite all there. Q. Did

222. The witness lay where he was and played dead all day. During that time he heard several explosions and sounds of attack and saw soldiers in camouflage uniforms, with rifles and rucksacks, passing by, including Dragan Papi}. He noticed insignia of the Vitezovi, the Jokers, the HVO and the HV. Some soldiers were in black uniforms. None of the soldiers tried to assist the witness, his parents or his sisters. While lying there, among other things, the witness saw two soldiers setting a house on fire and heard female screams and other sounds of people being killed, some of whom, he subsequently discovered, were his relatives. He saw a man killed in cold blood at close range, after his wife, son and daughter had been told to walk away. This happened right in front of the witness. The witness saw incendiary bullets being shot at a Bosniac, Hidajet's, house, which set it on fire. That night Witness G saw about 30 soldiers. The soldiers set Elvir's house on fire. On the radio he heard the soldiers saying: "How are you doing in Piri}i? Do you need any assistance? There's plenty of us over here", and then, "Please send us explosives for the lower mosque in Ahmi}i".<sup>256</sup>

223. When the soldiers had gone, the witness staggered over to a barn where he lost consciousness. He was woken by a powerful explosion which he believed was the mosque being blown up. The witness then went into another smouldering house – Elvir's - and collapsed there. According to his watch, he spent two days and two nights on the landing of the house, unconscious, and stayed in the house seven days in total, leaving on the eighth day. While in the house, he survived on water from a pipe and some marmalade. From the house he could see several bodies, including the bodies of his father, mother and older sister (the witness's little sister had disappeared but had not, in fact, been killed as the witness had believed), and the bodies of two others whom he believes were refugees. From his vantage point in Elvir's house, the witness also saw the Croatian families coming back to Ahmi}i after the assault with their livestock and belongings and continuing to live normal lives among the carnage as if nothing had happened. The witness could see that the Muslim houses had been destroyed while the

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you see what happened to your sisters? A. Yes, I could see that they just fell together with my parents, and they were all on the ground. They were all lying down.

<sup>256</sup> T. 1481.



Croat houses remained intact. The witness was finally rescued by UNPROFOR on the eighth day following the attack on Ahmi}i, and he was later reunited with his only surviving family member, his youngest sister.

224. **Witness H** was thirteen years old in April 1993 and belonged to a family of five, comprising herself, her father, mother, and two twin sisters who were five years old at the time. The witness was a next-door neighbour of Zoran, Mirjan and Vlatko Kupre{ki}.

225. Between 5.15 - 5.30 a.m., the witness was woken by a burst of gunfire which shattered the glass of the children's room. Her parents told her to go down into the basement, which was a shelter in which they had previously hidden during air-raids by the Serbs in 1992. From the shelter, the witness heard people running about in their house. Two grenades detonated; one in the kitchen and one in the living-room. The witness heard voices in front of the garage, telling her father to open the door. The witness thought the voices were friends wanting to enter the shelter, because they had fine relations with their neighbours, so she told her father to open the door. Her father went to open up the garage door. As he did so, there was a burst of gunfire in the hallway and a scream. The voices outside then said "Balija, come out", and her father started crying, saying "Please don't kill me". She then heard a burst of gunfire. The lid of the basement was then lifted and a voice said, "Is there anyone down there?" The witness replied, "Yes, me and my sisters".

226. Besides the Kupre{ki} brothers, there were three other soldiers, one of whom began to set the witness's house on fire by pouring petrol and setting it alight with a match while another soldier was looking through their closets. The witness got on her knees, begging Zoran Kupre{ki} for mercy. She tried to put the fire out but was abruptly ordered to stop and sent out of the house. As the witness left the house, she had to step over the corpse of Meho Hrustanovi}, a neighbour, who had been killed. She saw blood on his chest and realised that he had been killed by gunfire. The witness also saw the corpse of Hrustanovi}'s wife, Zafra, lying in front of her own house where she had been killed. She then saw the corpse of her own father. The witness, with her mother and sisters who were barefoot and in pyjamas, escaped to Upper Ahmi}i; then, amidst much shooting and shelling, to Vrhovine, and finally on foot to Zenica.

227. **Witness I** was woken in his home in Zume, a part of Ahmi}i, on 16 April 1993 by a powerful explosion. He saw that all the Muslim houses in Ahmi}i were on fire. He also noticed that his Croatian neighbours were hiding in Jozo Vrebac's shelter. An HVO soldier ordered him out of his house. The soldier had an automatic rifle and a "Scorpio", and wore a white belt. The witness surrendered two hand grenades to the soldier. The soldier said, "You see this house? ...This is no longer yours, and don't you dare come back here". The witness locked up his house and gave the keys to the soldier and left Zume. A Croat from Busovaca now lives in his house.

228. **Witness J** testified that she awoke at 5.15 a.m. At 5.25 a.m., shelling started, and the mosque was fired upon. Around 5.30 a.m., she saw that Witness KL's house was on fire, as well as neighbouring houses, including that of Fahrudin Ahmi}. She heard a lot of shooting and hid in her pantry. Then soldiers broke down her door and started breaking everything. There were five soldiers, including Nenad [anti}, who was a neighbour, and whose face was painted black. The other soldiers did not have their faces painted. The soldiers were in camouflage uniforms, with HVO patches, and had rifles. They killed her husband and left. The witness then saw that the house was on fire, as well as all the surrounding Muslim houses, but apparently it did not burn down. She came out of her house towards dusk to feed the cow and saw her husband's body. She spent the night there. The next day, she was taken by Bosnian Croats to Dubravica, where there was rape and "a lot of terrible things going on".<sup>257</sup>

229. **Hendrikus Prudon**, a crime scene officer, corroborated Witness KL's account of what happened in his home on the morning of 16 April 1993. Prudon was commissioned by the Office of the Prosecutor to compile a ballistic-incendiary report on Witness KL's house amongst others, and he investigated the ruins for signs of fire damage, gunfire and explosives. During his investigation, Prudon found bullets and cartridge cases in various parts of the house, including anti-aircraft projectiles (Exhibit P170). He also found textiles and bone fragments. Prudon's Report concluded that the bones were of a child (of ten or eleven years of age) charred by a temperature of 1,000° – 1,600° celsius. In three

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<sup>257</sup> T. 1866-1872.

areas of the house, there were holes in the floor, which appear to be where the sofas and table had burned and fallen through the floor.<sup>258</sup>

230. **Witness K** lost her husband and son on 16 April 1993. Her family consisted of her husband and three children: a son aged ten and two daughters aged six and four years. She was awoken by gunfire in the morning. Bullets were coming into the room in which she and her husband slept with all their children. She heard gunfire outside, as well as whispers and general noise. There was a banging on the door. At this point, bullets were flying about everywhere inside the house. The witness struggled over the door for about ten minutes to stop the soldiers outside from opening it, with the help of her husband. She screamed, saying, "There's only me and the children here! There's nobody else here! Stop shooting! Don't fire! Don't shoot my children!" Her son then said that he was wounded and her husband started shouting for the first time. A gun was pointed through the window and a blond soldier appeared, shouting "Out, out, out!" Her husband put his son on his shoulder and went out to the hallway and out the front door. There was a burst of gunfire, and the witness's husband and son fell down. Her son was dead, with bullets in his stomach while her husband was covered in blood, in great pain but alive. She tried to clean him up and lift him, but he died. The witness then went back into her house with her two daughters and stayed in the house. From there she saw Witness KL's and others' houses burning and the corpse of Munib Ahmi} and others. She realised that the soldiers were killing everyone and burning all the houses. She and her daughters eventually crawled out of the house to safety.

231. The witness estimated that the gunshots fired at her house came from the direction of the Croat houses in Lower Ahmi}i, the Kupre{ki} houses. She assumed they were attacked by their Croatian neighbours since the Muslims' properties were destroyed and Muslims were killed, whereas the Croatian houses were left untouched and their children were unharmed.

232. **Witness L** was wounded in the left arm during the attack as he ran from his home towards Upper Ahmi}i. Nevertheless he reached Vrhovine, where he was reunited with

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<sup>258</sup> Hendrikus Prudon, T. 2246-2254.

the rest of his family. His house was burned by the Croats that day. The witness was treated in Zenica.

233. **Witness N**, who was born in 1957 in Prijedor, was a former inmate of Keraterm camp and a refugee, expelled from Prijedor by the Serbs. He arrived in Ahmi}i on 20 August 1992, and settled in Upper Ahmi}i, living next door to the mosque. His family went to Austria and he stayed in Ahmi}i alone. Witness N participated in the village guard in Ahmi}i; his duty was to guard the people while they were praying in the mosque at dawn and evening. He possessed a short-barrelled weapon, which he carried on his person. The witness recalled that the assault of 16 April 1993 began with a direct hit on the minaret at 6.15 a.m. It was dawn, daylight had broken, but at the same time it was misty. There was then shooting from all quarters. Next came an infantry attack from the direction of the Catholic cemetery. As the attack went on, the witness helped to evacuate the wounded. He noticed shooting from Vlatko Kupre{ki}'s store. The witness himself came under fire from a bunker consisting of sandbags piled up one on top of the other, from the direction of Vlatko Kupre{ki}'s store,<sup>259</sup> at around 10 a.m. He thought it was a small anti-aircraft weapon firing at him. The witness succeeded in leaving Ahmi}i around 2 p.m. He escaped to Zenica, with the assistance of UNPROFOR.

234. **Witness O** was a refugee who came to Ahmi}i in November 1992. His family comprised his wife, three sons and two daughters. On 16 April 1993, the witness rose at around 3.45 a.m.; at 4 a.m., he saw lights at Vlatko Kupre{ki}'s house. He rose again around 5 a.m. At 5.30 a.m., there was considerable shooting. He then saw six soldiers in "motley" uniforms and with weapons going from house to house, who he believed had killed the local Muslims called Kurja, Sukrija, Naser and Huso, because he had seen the six soldiers going to their houses.<sup>260</sup> The witness, as he fled with his family to Vrhovine, saw the village ablaze and the houses of Muslims burning.

235. **Witness P** was 19 years old in April 1993 and lived in Lower Ahmi}i, where she had lived since her birth. Her family comprised her mother, father (Witness Q), a

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<sup>259</sup> The location is circled on Exhibit P182.

<sup>260</sup> **Witness O**, T. 2617-2626, who saw the killing of Meho Hrustanovic, at T. 2629.

younger sister (Witness R), who was 16 years old, an elder sister and a brother (who was in Stari Vitez at the time of these events). Her brother lived with his family – his wife (Witness T) and three small children (aged 1½, 2½, and 4½ years) - on the ground floor of the same house. On 16 April 1993, a friend was also present in her house, and her family was also joined by her paternal uncle (Witness S) and his wife, and by two refugees, a man and woman, from Prijedor; thus making fourteen persons in total. Her closest Croatian neighbours were Vlatko Kupre{ki}, and Dragan, Gordana and Mirko Vidovic.

236. Witness P's account of what transpired on 16 April 1993 is corroborated by the accounts of the members of the family who also testified – Witnesses Q, R, S, T and their evidence will, therefore, be treated together.

237. According to **Witnesses P, Q, R, S and T**, there was a loud detonation or explosion and shooting broke out between 5 - 5.30 a.m. The father Witness Q and the mother of the family told the children to get out of their beds. The family went down to the basement of the house. In the basement, the family was joined by Witness S who lived next door and who had also been woken by the sound of loud shooting from heavy weaponry. Witness S had seen houses burning near Vlatko Kupre{ki}'s house and noticed shooting from Dragan Vidovic's house and had seen wounded people passing by. The family continued to wait in the basement and in the brother's garage. The shooting intensified and they saw houses on fire and a wounded man. Witness T also saw shooting from heavy weaponry from Ivica Kupre{ki}'s house; loud detonations could be heard from the lower part of Ahmi}i. Witness Q noticed soldiers manoeuvring in a forest below the school, and other HVO soldiers in camouflage uniform advancing towards his house. The group in the basement then saw that they had no option but to flee to the upper village, which they did at around 8 – 8.30 a.m. They left the house together and climbed an elevation where the group hid in a shelter for ten minutes, discussing the escape route they should take.<sup>261</sup> This shelter was too small, however, for everyone to

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<sup>261</sup> This location was marked by Witness R on Exhibit P203, an aerial photograph, on the side of the hill facing Vlatko Kupre{ki}'s house. Witness R also indicated with an arrow on Exhibit P205 the route taken

hide in, so they left for Nermin Kermo's house, as pre-arranged in the event of an air attack. They took a very narrow path with which Witness R was familiar from her childhood.

238. On their route, there was a plateau with a large clearing free of any growth. As the group of fleeing persons traversed this area and came to the edge of the hill, they heard people swearing at them. Witness Q then turned around and saw three soldiers and Vlatko Kupre{ki} in front of the latter's house, all holding automatic weapons. The soldiers cursed the group as "Balijas", asking why they had not been killed and where they had been hiding and telling them to give themselves up. According to Witness Q, the soldiers said "Fuck you balija mothers. Where were you? Where have you been so far?"<sup>262</sup> Witness R, who did not see the soldiers nor recognise the voices, testified that the voices she heard said, "Fuck you balija mothers, how come you're still alive?" Witness S heard the cursing of a group of soldiers, calling from the direction of Vlatko Kupre{ki}'s house, 50-70 metres away, and cast a momentary glance towards them. He saw a group of soldiers there, and one man who was not wearing a uniform, but Witness S was not sure that Vlatko Kupre{ki} was among them. According to Witness S, the soldiers shouted, "Balija mothers, where have you been hiding? How come you haven't been killed yet?"

239. The soldiers then began to shoot at the family and the other refugees. From the damage caused to surrounding trees, they appeared to be using fragmentation bullets. Witness T described how the bullets prevented her from helping her two and a half year old child, Maida, who had been shot and was apparently injured, with blood running down her face: "... from the shooting I couldn't help her, because bullets were falling all around her, and the bullets -- the earth would be -- shot up into the air when the bullet

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by the group of persons with whom she fled; the route is to the left of the ridge of the hill, i.e. the side of the hill facing Vlatko Kupre{ki}'s house.

<sup>262</sup> **Witness Q**, T. 2763.

touched it. There were bullets all around and bullets going into the tree trunks".<sup>263</sup> As the shooting started, everybody ran. Witness T fell to the ground to protect her child.

240. When the soldiers started shooting from Vlatko Kupre{ki}'s house, Witness R lay down, at which point a bullet hit her in the leg, by the knee. Witness Q, the father of witness R, heard his daughter cry out and saw blood coming from her leg. The other members of the fleeing group ran "every which way" in order to save their lives and to escape the shooting. As his daughter cried out, "Mother, dear, I've been wounded. I'll die. You will lose me", her mother returned to help her and as she came to within three to four metres of the place where her daughter was, she fell, herself hit by a bullet. At the time she was hit, according to Witness Q, she was turned with her chest facing towards the direction from Vlatko Kupre{ki}'s house whence the shooting was coming. Witness Q then had to save his child by pulling her to the other side of the hill where she could not be hit by any more bullets coming from Vlatko Kupre{ki}'s house. After he had pulled Witness R out, crawling on the plain, he came to the place where his wife was and pulled her by the legs to one side. He lifted her head and watched to see whether she gave any signs of life, but she did not. Her mouth was full of dirt and she was dead. Then a neighbour approached them from the other side of the hill, and Witness R cried out to him to help them. They took Witness R and carried her away to Nermin Kermo's house. All this time, there was shooting coming from Vlatko Kupre{ki}'s house.

241. There was a basement in the lower section of Nermin Kermo's house where many other people from the lower section of the village had already gathered and were crying.<sup>264</sup> There Witness R received first aid; shirts were used to dress her wounds. After an hour's time, UNPROFOR came, and also administered first aid to Witness R and then removed her, and the other seriously wounded, in an Armoured Personnel Carrier.<sup>265</sup> Witness T noticed that when UNPROFOR arrived, the shooting stopped, but that once UNPROFOR left, there was intensive shelling of Nermin Kermo's house.

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<sup>263</sup> Witness T, T. 2961.

<sup>264</sup> Witness T, T. 2963.

<sup>265</sup> See Exhibits P195 and P196. Witness Q produced the jacket he was wearing on 16 April 1993 which sustained a whole from a piece of shrapnel. This jacket can also be seen on photograph 196.

242. Witness P stayed at Nermin Kermo's house until midnight due to the constant shooting. Then she and others escaped in small groups to Vrhovine and Zenica via Dobrila. Witness S told the court how his father did not want to leave, thinking that he would not be hurt as he was an old man of 83 years, but that he was later killed, as was his mother, who was 70 years old.<sup>266</sup>

243. **Witness U** remembered hearing a strong blast at the time of the morning call to prayer on 16 April 1993. He heard shooting and saw four young uniformed soldiers bearing HVO insignia running past. People were fleeing – men, women and children – and those who did not flee were killed. The witness fled with his family, including his sister who was an invalid, in a group of 15-20 civilians, mostly women and children. They stopped between two hills, where they were blocked. Before his eyes, one woman, Nadira, was shot in the head and died from the wound.<sup>267</sup> The witness was himself wounded in the left arm, and remains disabled in that arm to this day. His sister, 37 years old at the time and bedridden, whom he was carrying in his arms, was also wounded. Another woman, Hajra, was at the same time shot in the chest and died instantly. Her sister, Zela, was also wounded. The shooting was coming from the direction of the Sutre store, owned by Vlatko Kupre{ki}. Witness U described how a female refugee, whose young son and husband had been killed, told them that they should hide "because they were killing all males, all males indiscriminately". She said, "Hide even in a mouse hole, but just hide".<sup>268</sup>

244. The witness hid in a pit for a while, until some HVO soldiers came along and ordered his family out. The witness's family was taken away, but the witness managed to remain concealed and, when soldiers started burning the garage where the pit was located, he and others managed to run out and returned to his house for four to five days, hiding under a concrete staircase, which had not burned. Then the witness and the others

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<sup>266</sup> See Exhibit P187, produced to Witness S, showing a burnt out house with dead bodies, which was Jamal Ahmi's house (house # 205), where his mother was killed. The bodies in the house were burnt and decayed beyond recognition, but Witness S was able to identify his mother by a piece of cloth that remained. Later, knee caps, which withstand fire best, and spines and ribs, were retrieved from the site and buried.

<sup>267</sup> See photographic Exhibits P214-216; see also **Witness U**, T. 3003-3012.

<sup>268</sup> T. 3008.



surrendered to four soldiers. One soldier bore the HVO insignia, while the others were in blue uniforms which had led him to believe they were UNPROFOR soldiers. The soldiers took the witness to a collection centre near a soccer stadium. On the way to the collection area, Witness U saw that most of the houses in the Muslim area of town were damaged or burnt down, while not a single house was damaged in the Croatian section.

245. **Witness V** lived in Upper Ahmi}i in April 1993 with his wife and two sons. He was on patrol on the evening of 15 April 1993. He went to bed at 4.30 a.m., but was woken by shooting.<sup>269</sup> He left the house with his gun to find out what was going on and went towards the main road. There was heavy shooting coming from the direction of Vlatko Kupreškic's house. The witness saw houses burning, notably from the direction of Sukrija or Witness KL's house. The witness, his brother and some others gathered by a stable. Then he retreated towards his house. He saw the wife of Sukrija "running with her children and crying, and she was so distraught. She cried out to us, 'Run for your life. They have killed Sukrija, they have set my house on fire'. She looked so terrible it defies description".<sup>270</sup> The witness said he had the impression that they "wanted to kill every living thing in sight".<sup>271</sup>

246. **Witness V's** cellar became crowded with civilians.<sup>272</sup> The witness and Mirhad Berbi} took up a position in order to defend the civilians in his cellar and because they had no means of retreat. The witness exchanged gunfire with HVO soldiers who were running towards his house, and one of whom was armed with a grenade launcher. Being outgunned, the witness then took up a position between his house and the upper mosque, behind some construction material, until UNPROFOR came. As soon as UNPROFOR arrived the shooting stopped. When UNPROFOR left, the shooting started again, and indeed intensified, particularly in a vengeful burst directed towards the witness's house, which had served as a haven for the wounded.<sup>273</sup> The witness stayed in his position – between the mosque and his house - until it became dark, and then he and the civilians in

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<sup>269</sup> T. 3052.

<sup>270</sup> T. 3052-3057.

<sup>271</sup> T. 3058.

<sup>272</sup> T. 3061-3062.

<sup>273</sup> T. 3067-3078.

his basement decided to withdraw towards Vrhovine and Zenica. Those who stayed behind were killed and burned.

247. **Witness W**'s mother, wife, sister and son were all murdered on 16 April 1993. That day, he was woken at 5.30 – 5.40 a.m. by an explosion. The witness saw soldiers running past and heard heavy shooting. The soldiers swore at Sefik Pezer, a Bosniac, cursing his "balija mother" and threatening to set his house on fire, which they eventually did. The witness and his whole family left the house due to the falling mortar shells and went towards Upper Ahmi}i. The witness caught up with his family by Vlatko Kupre{ki}'s house. His wife was severely wounded in the head. Other Bosniacs were also wounded, while the daughter of a friend of his, Esad, was killed.<sup>274</sup>

248. The witness waited with his wife, by Vlatko Kupre{ki}'s store, amidst heavy shooting for 3-4 hours. A group of five HVO soldiers, wearing camouflage uniforms with the Croatian checkerboard flag, then came from towards Vlatko Kupre{ki}'s house, and saw the witness and his wounded wife. The soldiers searched the witness and his family and started mistreating them. In the end, the witness said, "they came to some kind of compromise, that they wouldn't liquidate us".<sup>275</sup> From what the witness said, it is clear there was an order to exterminate the Muslims:

"Some of them were in favour of liquidating us and others were not in favour of that, and then a man who was probably the leader of this group said, 'The job has been finished. You're free. Run. But as soon as you can. The commander should be coming in. If he sees that I've let you go, I will be liquidated too because no Muslim foot should tread on this soil.'<sup>276</sup>

249. Another soldier who said that he was from Nesrovici said that the witness and his family "should all be slaughtered".<sup>277</sup> The witness managed to improvise a makeshift stretcher in which he took his wife to Ahmi}i. She was evacuated by UNPROFOR to Travnik, where she died.

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<sup>274</sup> T. 3149-3154.

<sup>275</sup> T. 3154-3158.

<sup>276</sup> T. 3158.

<sup>277</sup> T. 3167.

250. **Witness X** lost her husband and one daughter that day. The witness heard a loud detonation from the direction of the Kupre{ki} houses. Then shooting started from all sides. Her family went down into their cellar. She saw people shooting at the Pezer house from Jevco Vidovi}'s, Ivica Vidovi}'s, Niko Vidovi}'s and Slavko Papi}'s houses. The witness saw a total of eight Bosniac houses burning.<sup>278</sup> She was told by a neighbour, "Run away, because they're taking everybody prisoner and killing people". She sent her children off with the neighbours and then heard her children crying from the direction of Vlatko Kupre{ki}'s house and then a burst of gunfire.

251. Next, four HVO soldiers who had just set Cazim Ahmi}'s house on fire stopped her and her husband. One of these HVO soldiers killed her husband in front of her eyes with a bullet through his forehead. The witness saw his brain spurting out. Her husband was wearing civilian clothes and had no weapon. The soldier then said to Witness X, "I'm going to set your house and barn on fire, so escape".

252. The witness fled and reached a spot below Vlatko Kupre{ki}'s house where she found her children. One of her daughters had been killed by the shooting, another daughter had been wounded from shrapnel from a mortar shell and another woman had been killed. She was told "to get away from that open space because there was sniper fire coming from Vlatko's [Vlatko Kupre{ki}'s] house and that they would kill [her]".<sup>279</sup> Eventually, after some three and a half hours, the witness surrendered to HVO soldiers and, seeing Franjo Kupre{ki}, Vlatko Kupre{ki}'s father, asked for help.<sup>280</sup>

253. Franjo Kupre{ki} and two or three other soldiers stood over the witness and said, "We kill our own wounded, let alone yours", and "This is all for the village of Nezirovici. We'll kill you or we'll slaughter you, but we should rape you first, and you tell us that we

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<sup>278</sup> T. 3242.

<sup>279</sup> T. 3244.

<sup>280</sup> T. 3245. - "When they came up to us, it was the HVO army, in fact. They stopped there, they cursed 'our balija mother', and they said 'How come you're alive?' I called out to Franjo (sic), Vlatko's father, and I said, 'Franjo, what's this happening here? What have I done to you?' And I said that they had killed [...] my husband and that they had killed one of my daughters, that they had injured my other daughter. What have we done to deserve this?' I said. And he just laughed."

can do what we like with you".<sup>281</sup> The Muslims had to agree that they were at the soldiers' mercy.<sup>282</sup> The HVO soldiers told them to go to Upper Ahmi}i to the upper mosque.<sup>283</sup> The witness walked to Upper Ahmi}i and emerged at Vrhovine with her children. She spent the night at Vrhovine and was transferred to Zenica the next morning.

254. On re-examination, Witness X referred to the fact that she heard soldiers calling for brandy and celebrating the fact that "they were all killed down there" (in Lower Ahmi}i), and saying "we've done a good job".<sup>284</sup> The voices were coming from Vlatko Kupre{ki}'s yard and house. When the witness walked past Vlatko Kupre{ki}'s house, it "was full of HVO soldiers in the yard". She also added that she saw that day the bodies of Sukrija and Meho and Meho's wife – all killed, all in civilian clothes.

255. **Witness Y** rose at 5 a.m., to go to work at the Princip factory. He was having coffee when he heard two bursts of gunfire from the direction of the Kupre{ki} houses. He told his wife to hide beneath the staircase. He saw Sukrija Ahmi}'s house on fire and five to ten uniformed soldiers in front of the house, armed with rocket-propelled grenades and with helmets on their heads. He ran back into his house, put on his uniform and took his rifle. He ran to Upper Ahmi}i to report to the command in Preocica. He telephoned the command and told them that the village had been attacked and was on fire and asked for assistance. The communication lines went dead, while they were talking. When the witness returned from Upper Ahmi}i, he saw that almost all the houses were burning, apart from his house and those of Nasid Ahmi} and Nermin Kermo.

256. The witness then joined Nermin Kermo and his brother and took cover in a thicket, near the upper mosque, and started to return fire. Witness Y said that 5-7 Bosnian Muslims – he, Nermin Kermo and a few others - defended the Bosniacs from the Croat attack in the upper village, and approximately the same number defended the lower

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<sup>281</sup> T. 3246.

<sup>282</sup> T. 3246. On re-examination, T. 3263, **Witness X** repeated that the soldiers said, "if we want to rape you, we can rape you, if we want to slaughter you, we can slaughter you. You can choose. "We said: You can do whatever you want with us".

<sup>283</sup> T. 3266-3268.

<sup>284</sup> T. 3263-3264.

village. They did not receive any assistance. The weapons the Bosniacs had were mostly burnt out rifles from Slimenje, of very poor quality and not very accurate.<sup>285</sup> They shot at the soldiers to stop them from burning his house and thus killing Witness Y's wife, and to protect the civilians who were in Nermin Kermo's basement. The witness shot about three magazines with his automatic rifle, i.e. 90 bullets, that day. UNPROFOR came at around noon with 3-4 vehicles. The witness went over to speak to them. He saw Nadira Ahmi} lying dead. UNPROFOR put some wounded people into the vehicles. At that point, the witness's wife broke cover and ran for Kermo's basement. The shooting died down when UNPROFOR came. Once UNPROFOR left, however: "there was a cannonade. There was shooting from all kinds of weapons, mortars, RPGs, PAMs, PATs, anti-aircraft guns, all kinds of weapons, artillery pieces. Whatever they had, they used to shoot all over Ahmi}i".<sup>286</sup>

257. Witness Y and Nermin Kermo stayed in their position until dusk. There was shooting all day. As dusk fell, more survivors from the lower part of the village appeared and they were transferred to Vrhovine. Some old people stayed and were all killed.<sup>287</sup>

258. **Witness Z** woke to the sound of shooting. His mother was in the hallway, "beside herself". Witness Z ran out with his rifle. He saw the Ahmi} houses on fire, bullets flying from anti-aircraft guns and shooting directed towards the lower mosque and surrounding houses. The witness said he did not use his gun that day, because he was afraid for the safety for his wife and mother. Moreover he took off his uniform, in which he had slept, and hid his weapon. His house was hit with bullets, so he ran with wife and mother to Galib Imsirevi}'s house, which was also already completely "drilled" with bullets. Galib was lying dead outside. Next the witness ran with a group of people to the house of Vlado [anti} (a neighbour, not the accused, who lived in Vitez). There was shooting all around and bullets flying all around them. Eight of them hid in a shed by Vlado [anti}'s house from 8.30 a.m. until approximately 4.30 p.m. When UNPROFOR came by, he flagged them down, and disguised himself as a woman in order to get on

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<sup>285</sup> T. 3316-3317.

<sup>286</sup> T. 3314-3315.

<sup>287</sup> T. 3315-3316.

board. As they drove off, he saw Drago Josipovi} in camouflage uniform, with an automatic rifle but without face paint, in the company of four other soldiers with rifles.

259. **Witness BB** woke up at 5-5.30 a.m., when she heard a detonation. She and her family hid in the pantry. Then a female neighbour came by and said, "Let's run. We're being attacked. They are torching everything. They are killing everyone". The witness went with the neighbour and the neighbour's daughter to Ahmi}i, leaving her husband and son behind. They reached the Kupre{ki} houses, where they had to stop because the Grabovi houses were all burned. She saw the HVO running everywhere and she hid under a hill. There was shooting from all sides, from the Kupre{ki} houses as well as from Piri}i. After some time, a neighbour, Nadira Ahmi}, was hit in the back of the head and killed, then a 18-year old girl, Zirafeta Ahmi}, Hajra and Kemo were all hit by gunfire. They went with Kemo into a house and hid there, nine women and children. The shot which killed Nadira Ahmi} came from either Vlatko Kupre{ki}'s house or Franjo Kupre{ki}'s house; according to the witness, it could not have come from anywhere else.<sup>288</sup>

260. In the same group as the witness were a dozen or so persons, including three men and a very young boy. None were in uniform and none had guns. HVO soldiers burst into the house in which they were hiding and harassed them.<sup>289</sup> They took them to a swamp called Dolina and kept them there for 2-3 hours. They then led the witness to the main road. They asked her where her husband and son were. When she said that she did not know, the soldiers said: "Well, we know where they are. We killed them and we sent them to God's garden to pick tangerines".<sup>290</sup> But in fact her son lived and she found him in Travnik hospital.

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<sup>288</sup> T. 3818-3831.

<sup>289</sup> T. 3821-3822.

<sup>290</sup> T. 3821-3822.

261. The witness was evacuated in an UNPROFOR vehicle. While waiting for UNPROFOR, she met a large number of refugees in a shed who had had members of their families killed before their very eyes.<sup>291</sup>

262. **Witness CC** was woken at approximately 6 a.m., by the sound of shooting and explosives. She saw houses on fire and decided to stay indoors with her family. Then soldiers arrived and started kicking and breaking the window with rifle butts. At that point, the witness and her family left the house. Outside, there were two soldiers - in black uniforms, with rifles and rucksacks, standing in front of the house of Husein Ahmi}. They told them to put their hands up, to bend their heads and not to look around, which they did. The witness saw two soldiers by Husein Ahmi}'s house brutally evicting a woman and her children from their house.<sup>292</sup> She saw another two soldiers on the other side of the house. One soldier had his face painted with black lines and the other had some sort of mask on his face so that only his eyes could be seen. As she left the house, she saw dead bodies lying on the ground two metres from their front door. At the front of the house, she left her father, as she was told to run wherever she could. So she ran by the mosque towards central and Upper Ahmi}i.<sup>293</sup>

263. **Witness DD** lost both her husband and son on 16 April 1993. She awoke to the sound of heavy shooting. She saw flashes outside the window and Muslim houses on fire. Looking out of the window, she saw three or more soldiers, including Drago Josipovi} with a rifle, shooting in the direction of her house. Soldiers started banging on the door, shouting "Nazif, come out, Nazif you balija motherfucker". Children were screaming. Bullets were flying everywhere, and there was a lot of smoke. The witness tried to find some clothes to dress the children, and her husband went downstairs and then

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<sup>291</sup> T. 3823–3824: "Somebody had called out my name, and I was looking all around, and I noticed in Vlado's shed, some of our people. I went across the field between Vlado's house and Drago's house. There's a field there. I went to the shed and I saw a neighbour of mine, her daughter-in-law, her son, two refugees, also, that was a mother-in-law and a daughter-in-law with two young children, they had killed her husband and son too. They killed them before their very own eyes. I said that UNPROFOR would come and that we could all get out of there. At that time, we heard the UNPROFOR coming".

<sup>292</sup> T. 3873: "Q. The two soldiers in the vicinity of Husein's house, what were they doing? A. One of them stood in front of the house and talked to his sister-in-law, and she was crying and screaming and begging him to allow her to get clothes for her children so that she could change them. He hollered at her and said, "No way. Leave everything behind and run".

<sup>293</sup> T. 3869, Exhibits P259 and 260 show the destruction of Witness CC's house.

came back and said, "Amir, Elma, you should go out too. They are calling you too". At this time, the soldiers, some of whom were masked, broke into the house. They took the family downstairs. The witness's son was then taken aside. The witness jumped at a person who was not wearing any mask - a very thin man with some black paint on his face - and yelled, "Do not take my Amir away, please, my Amir". She started struggling with the soldier. At that point, Drago Josipovi} came from around the house. He had taken off his mask to wipe off some sweat but then he put it on again. The soldier with whom the witness was struggling became very angry and pointed his rifle at the witness. He was about to shoot the witness, when Drago Josipovi} shouted, "Leave her alone".<sup>294</sup>

264. Next, Witness DD's husband, Nazif, was led away. The witness herself was told to "get lost". She was led away to a barn, where her daughter and some other women were. They were locked in the barn. The soldiers then set fire to her house. The group was told to leave the barn and to go to the house of Slavko Vrebac. Witness DD asked a Croat if she could go to her son, Amir, who may have been killed or wounded, and she did not want him to suffer. But he would not let her. They reached the house of Slavko Vrebac. The wife of Vrebac was "very merry".<sup>295</sup> They stayed there when night fell. They were not allowed even to go to the toilet. They were given wooden frames of couches and sofas, without cushions or other comforts, to sleep on. It was damp. Later they were taken to Sivrin Selo, and then on towards Zenica.

265. **Witness EE** lived in Lower Ahmi}i until 16 April 1993. Her family comprised her husband, daughter (12 years old) and son (9 years old).<sup>296</sup> The first thing the witness remembered was a loud detonation, followed by shooting. She grabbed her children and with her husband tried to go to the bathroom, but the moment she opened the bathroom door, bullets flew through. She returned to the hallway. Then there were "terrible voices" calling on them to open up. They repeated several times "Open the door, this is the police", but the witness and her family kept quiet because they were terribly afraid by now. Then a burst of gunfire shattered the glass and the door. The witness's husband

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<sup>294</sup> T. 3897-3900.

<sup>295</sup> T. 3901-3904.

<sup>296</sup> Exhibit P274 shows the house's destruction after 16 April 1993.



unlocked the other door. She saw soldiers in full military uniform. She recognised the soldiers as the accused Vladimir [anti}, Drago Josipovi}, as well as Zeljo Livanci}, Marinko Katava and Karlo Cerkez. Vladimir [anti} and Zeljo Livanci} were in camouflage uniform, with the HVO patch and helmets. They took her husband away, whereupon she heard a burst of gunfire. She never saw or heard from her husband again. As her husband was led away he said, "Don't kill my wife and children". The husband was in the clothes he slept in, namely an under-vest, underwear, vest and short pants.

266. One HVO soldier, Stipo Alilovi}, was left to guard her and her children as they went and stood in the corner. Then the other soldiers came back and stared at her and the children. Stipo Alilovi}, holding a grenade, said "What do I do with this grenade?" Zeljo Livanci} told her and her children to "get lost". The witness's mother had also been evicted from her house and was crouching outside, suffering from burns. The witness then went with her mother and two children to hide in a shed. She saw various soldiers around, some of whom were jumping from her verandah. Her house was on fire. She and her mother ran back into the house and managed to put out the fire with a hose. She then ran back and joined her children in the shed. But then her house was again set on fire with incendiary bullets and began to cave in. At this point, the witness saw soldiers outside Ramiz Ahmi}'s house saying, "Come out you balijas so that we can cut your throats. Come out you balijas, we're going to slaughter you".<sup>297</sup> She heard Ramiz Ahmi} telling his wife to come out and saw his house on fire.

267. The witness and her children stayed in the shed until dusk. There was shooting the whole day. Some soldiers came up to the shed, including Drago Josipovi} and Anto Papi}, both in full military gear. They called her out of the shed. Drago Josipovi} said, "Your shed is going to be set on fire now". Drago Josipovi} then told them to go to Anto Papi}'s house, where there were other Muslims, ostensibly for their own safety. She said she did not dare go and asked them to escort her there, which they did. At Anto Papi}'s house, the witness saw men, women and children who were crying, describing how their

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<sup>297</sup> T. 4077-4106.

loved ones had been killed. Drago Josipovi} said, "Ah, Musafer has been killed too". Muslim men were sent out to go pick up their dead.<sup>298</sup>

268. Subsequently **Witness EE** was told to leave Anto Papi}'s house and to go in the direction of Zume. She ended up in a house in [anti}i which was a sort of camp. There were Muslims there, full of fear, who had learned of their relatives who had been killed. At one point, two HVO soldiers came in and selected the men from the group, took them out and – as it later emerged – pursuant to orders, killed them.<sup>299</sup> Fatima Ahmi} asked Nika Plavci} what had happened to her husband, Hasim. He told her, "Orders were issued and they were all killed". Then the witness had to go by foot to the Dubravica school where she stayed until 1 May 1993. At the Dubravica school, Usta{a propaganda was prominently displayed on the walls, including the sign of the black legion of the Usta{a.<sup>300</sup>

269. **Witness FF** was awoken at around 5.20 a.m., by two loud detonations. Her husband got up and woke the children. The witness looked out of a window and saw Muslim houses on fire. A bullet came through the window. Then her father-in-law and mother-in-law were at the entrance to their house. A voice told them, "If there are any men in there, they should come out". They left the house. She saw her brother-in-law standing in front of his house. A group gathered. She heard five shots from the shed. It all went quiet after that. A soldier said, "This is Alija Izetbegovi}'s fault for the war breaking out". The witness went to the cellar of Zdravko Vrebac. Women were there

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<sup>298</sup> T. 4109-4120.

<sup>299</sup> T. 4126–4128: "Two HVO soldiers entered the room. They had the black socks over their heads with just slits for the eyes. All you could see were their eyes. One of them was fairly tall, the other one was a little shorter in build, and as we knew him personally, we concluded that it was Nika Plavci}. We called him Nika ^, that being a picture, and he was a photographer, in fact. ... As Fatima was in the corner with her husband, Ahmi} Hasim, he said, "You, you, you, you, you, let's go". Fatima jumped up and hugged Hasim, and she said, "Please don't take him away. He has a bad kidney and he has to have dialysis. Please don't take him away". "Don't worry about that," they said, "He'll be cured very quickly". Ramic Zenur, his brother Amir, and Mr. Engineer Helug Munir went out. A little boy from Loncari, he was fairly tall and thin, he managed, as the door was here, and the women had lined up against this door, when he left, he hid behind the women and crouched down. And that's how he stayed. He stayed alive by crouching and hiding behind the line of women. ... Q. Did Hasim and the other Muslim men who were taken, did they return at any time? A. No, never".

<sup>300</sup> Shown in Exhibits P277 and 277A., T. 4129-4138.

crying, saying that their husbands and sons had been killed. She stayed the night there. Later she fled, eventually reaching Zenica.

270. **Witness GG** was 28 years old and living with her father (who was away on 16 April 1993), mother and sister on the upper storey of a 2-storey house in Ahmi}i (Zume). She was awoken by shooting. An incendiary bullet entered their living-room and set the sofa on fire, which she tried to put out with water. She tried to telephone for help but the telephone was not working. The witness moved with her family down to the lower storey, via the outside staircase. There they were seen by five armed soldiers, who harassed them by pushing them into the lower storey apartment and cursing their "balija mothers". One of the soldiers was Anto Furund`ija, wearing camouflage uniform with a Jokers emblem on his sleeve, and one black line painted on both of his cheeks. The witness was told to go out to call her neighbours and to see if there were any menfolk. She protested, as there was shooting outside but the soldiers told her and her mother to get out. As she left, she heard one soldier saying into a walkie-talkie, "Everything is going to plan". The witness's mother turned around at one point, whereupon a soldier fired a burst of gunfire at her feet to make it clear to her that she had to keep going.

271. Witness GG walked in the direction of [anti}i. She saw Muslim houses burning. She also saw a soldier pouring something from a canister and flames rising in another part of the house. The witness then stayed at Mira's house. That evening, a Croat neighbour came by and said that it was not safe to stay there and that she should go to her daughter's house. That neighbour and her husband stayed the whole evening with them for their protection. The next day, the witness's mother went back to see her house, and after she had come back she told them that she had seen terrible things.<sup>301</sup>

272. The witness then had to move on to another house, where there were a lot of women and children, and a few men.<sup>302</sup> Anto Papi}, a Croat, was there as a guard, in uniform and with a rifle. While they were there, soldiers came in and took men out to kill

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<sup>301</sup> T. 4360. - "... , she came back all in tears, lost, she was trembling. Then we asked her what she had seen and what had happened. She said that the house had burned down, that she saw corpses in the yard, in our yard. She saw Muhamed Neslanovic's corpse there. Behind our house she saw Ibrahim Pezer's corpse, and in front of house, since she went in front of the house of Sefik Pezer, she saw his corpse too".

them.<sup>303</sup> Then Nikica Plavci}, with a uniform and a gun, came and took them all to Dubravica school, where the witness was held from 18 April 1993 – 1 May 1993.

273. **Witness CA**, who was 58 at the time, heard a detonation at around 5.20 a.m., and immediately thought it had to be connected to what Dario Kordi} had said on the television the day before about waiting for orders. The witness called to her husband to get up. She saw four soldiers coming into her yard, in camouflage uniforms and carrying weapons. They stopped her and asked where her son and husband were. A soldier then threw a bomb into the larder. The witness noticed fire around her son's home. Then a soldier kicked down her door and said "I'll fuck your mother". Two other soldiers entered the house. One soldier took a lighter and set fire to the curtains. When she came back later, her house had burnt down.

274. The soldiers then told her husband to come out and got ready to kill him. The witness pleaded for mercy, and the soldiers let both of them go. They went to their son's house, being pushed along by a soldier with a rifle. There she found her son's children in tears. Her daughter-in-law said, "they're going to kill my children". The witness assured her that they would not. The youngest child was afraid, and said "they killed Dad". The witness went outside and saw her son, Fahrhan, lying there dead. A soldier said, "I didn't kill him. Alija killed him". The soldiers then said, "Go fuck yourselves". The witness and her husband went towards the La{va River.

275. The witness then saw Drago Josipovi} and Anto Papi}, both in camouflage uniforms and armed. Drago Josipovi} was crying, saying that the witness's deceased son had been like a brother to him. She asked him who did this, and Drago Josipovi} replied that it "must be some higher force" or somebody higher up. Drago Josipovi} arranged for the witness, her husband and grandchildren to be taken to Anto Papi}'s house.<sup>304</sup>

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<sup>302</sup> T. 4362.

<sup>303</sup> T. 4362-4364.

<sup>304</sup> T. 4557-4577 and T. 4592

276. Later Witness CA went back to her son's house to collect her son's things and chickens. There was a pool of blood where her son had lain. She asked Drago Josipovi} if she could live in the summer kitchen. Josipovi} replied "... As far as I am concerned don't go anywhere. But people will come and kill you. I can't do anything, I can't save you. Go and follow your people". She then saw some soldiers, one of whom spoke into his radio saying, "Yes, the operation was successful, they're lying in front of every house like pigs". The soldiers then took away her husband. She tried to stop them but he was taken away with other Muslims. She insisted that a person she knew named Nikica Slikica, who was passing by, tell her what happened to her husband, and Nikica replied that "the order came and they were all killed. Don't even ask, they were all killed".<sup>305</sup>

(c) Burial of the Victims of the Attack on Ahmi}i of 16 April 1993

277. Scores of victims were buried in a mass grave in Vitez on 28 April 1993. **Stephen Hughes**, an UNPROFOR officer, was involved in this mass burial. Three Croat bodies and approximately 96 Muslim bodies were buried. He assumed they had died violent deaths, either from gunshot wounds or from mortar blasts. Of the 96 bodies, he could see only two with camouflage jackets. The rest were civilian males and females of a variety of ages. He also saw some small packages which contained either heads of decapitated bodies or children; he could not see inside the sacks so he did not know which. The burial in the mass grave went on all day and into the evening.<sup>306</sup> The details of the mass grave burial were fully corroborated by **Nihad Rehibi}**, a former member of the JNA, who organised the burial in Stari Vitez on 28 April 1993. Rehibi} testified that the bodies buried were received from the HVO, via UNPROFOR, who acted as an intermediary. The corpses were from the Vitez area, mainly from Ahmi}i. Ninety-four bodies arrived that day, although there were more bodies on the list compiled by the HVO.<sup>307</sup> Initially, the bodies would be examined before burial and an attempt made to verify their identities from documents, for example identity cards, found on the bodies.

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<sup>305</sup> T. 4565-4568.

<sup>306</sup> Exhibits P299, P300, P301, P302 and P303 show bodies being laid out for identification. Exhibit P299 is a general view of the burial site. Exhibits P295, P296, P297 and P298 show bodies being put into the mass grave. Exhibit P294 shows the mass grave after it had been filled.

<sup>307</sup> Exhibits P307 and P307A are lists of persons buried.

However, as the day went on and darkness began to fall, they had to speed up the burials and the identities of the corpses could not always be verified and it was necessary to rely upon the HVO list alone. Some bodies were in a shocking state, with crushed skulls or knife marks on the necks. There were also a number of burnt or carbonised bodies. According to this witness:

"Among the bodies, there were very many women. They were aged from all -- I mean, from the youngest to the eldest, there were children of three months, a child of seven years of age, a 12-year-old child, there were old men of 70 and more".<sup>308</sup>

278. In May 1993, UNPROFOR brought additional bodies, which appear on the list of corpses, including the carbonised corpses of Naser Ahmi} (#95 on the list), 7 years old, Elvis Ahmi} (#97 on the list), Edina Ahmi} (#96 on the list) and 3 month old Sejo (#98 on the list).<sup>309</sup> Not all the bodies buried that day were from Ahmi}i, but at least 70 bodies were. Nor were all the people who died in Ahmi}i buried in that mass grave.<sup>310</sup>

(d) Detention of Bosnian Muslims Following the Conflict of 16 April 1993

(i) Vitez Cinema

279. In Vitez, Muslims were detained in the local cinema following the attack of 16 April 1993. Defence witness **Zvonimir Cili}** testified that the conditions of detention of Muslim able-bodied men in Vitez cinema were worse than the accommodation usually provided, but not excessively poor and there was no mistreatment. For example, relatives were allowed to bring food to detainees. Other defence witnesses were equally reluctant to admit that Muslims were unlawfully detained and mistreated by the Croats after the

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<sup>308</sup> T. 4737.

<sup>309</sup> Exhibit P309 is a video showing the burial. Exhibit P312 shows the names of some of the victims on the memorial: Sukrija Ahmi}, Meho Hrustanovic, Aziz Pezer, Sabahudin Zec, Rasim Ahmi}, Nazif Ramiza Ahmi}, Ramiz Seho Ahmi}, Musafir Pušcul, Fahrudin Ahmi}, Naser Ahmi}, Elvis Ahmi}; Edina Ahmi}, Sejo Ahmi}, Abdulah Mehmed Brko.

<sup>310</sup> T. 4792: "Q. I just want to clarify one last thing. This list does not contain, as far as you know, does it, the entire list of people who were killed in Ahmi}i on April 16, 1993, does it? A. Yes, that is correct. It doesn't contain all the names".

events of April 1993.<sup>311</sup> They also pointed out that able-bodied Croats were detained by Bosnian Muslim forces, in Zenica and Mahala (Stari Vitez).<sup>312</sup>

(ii) Dubravica School

280. Those persons who survived the attack on Ahmi}i were moved to a prison camp which had been set up in Dubravica school, where they were mistreated and used, *inter alia*, to dig trenches in contravention of the laws of war.<sup>313</sup> **Witnesses F,**<sup>314</sup> **J**<sup>315</sup> and **Abdulah Ahmi}**<sup>316</sup> spoke of rapes occurring at the Dubravica school. According to **Witness U**, the HVO was in charge of Dubravica school. 150-200 men, women and children, all Bosnian Muslims, were detained in a hall there. They were not free to leave. Witness U stayed in Dubravica school for six days, before he was evacuated by UNHCR because of his wounds.<sup>317</sup>

281. **Witness CA** spent ten days at Dubravica school, where horrible pictures were displayed showing the killing and raping of women.<sup>318</sup> The living conditions were terrible. Someone threatened to carve a cross into her forehead. Although she was not beaten, she said "there was lots of fear and we barely survived".<sup>319</sup>

## 2. The Case for the Defence

282. The Defence have argued that the Muslim forces planned and prepared for attacks on the Croats – both in October 1992 and April 1993 – creating fear on the part of the

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<sup>311</sup> See, for example, **Vlado Alilovi}**, under cross-examination by the Prosecutor, T. 5586-5587: "Q. But you would concede, therefore, sir, that these numbers of Muslim persons were held in those locations and were not allowed to leave of their own will? A. Yes, I will agree. Q. Did you hear subsequently about such things as detainees being taken to the lines to dig trenches? A. No, I didn't hear that. Q. You didn't hear that? A. No. Q. Did you hear of the transfer of Muslim detainees to the Kaonik camp where they were further detained? A. No, I didn't hear about that. Q. Did you hear about searches and seizures in civilian apartments in Vitez during that period? A. No, I didn't hear about that at an official meeting, but this is possible".

<sup>312</sup> **Vlado Alilovi}**, T. 5608-5609.

<sup>313</sup> **Lt.-Col. Watters**, T. 205-206.

<sup>314</sup> T. 1401.

<sup>315</sup> T. 1872.

<sup>316</sup> T. 307.

<sup>317</sup> T. 3029-3031.

<sup>318</sup> T. 4569-"So when we came up to that classroom it was horrible to see what was written on the pictures. There was a head drawn with the knife through the neck saying we will kill the balijas like this".

Croats. By contrast, the Defence maintain that Croat forces – the HVO at least – did not plan, and were not prepared for, any offensive on 16 April 1993.

(a) Croat Unpreparedness for an Offensive on 16 April 1993

283. **Dragan Stojak** testified that the HVO was unaware of imminent armed conflict in Vitez on 16 April 1993. On 15 April 1993, he was at the Information Centre, while his family – his wife, two children and mother - was in Mahala, in Stari Vitez, which was under the control of the BiH army. There were only five Croatian houses in Mahala. Therefore if he, who worked in the information centre, had known there would be hostilities in Mahala, he would have taken his family out and evacuated them to the Croatian part of Vitez. However, **Ivan Taraba** recalled seeing a bunker built, presumably by Muslims, in Mahala, on the outskirts of town, a few days before the conflict of 16 April 1993,<sup>320</sup> which would have warned Croats in Vitez of the possibility of an impending conflict. **Dragan Grebenar**, who worked under Mario Cerkez, the commander of the Vitez brigade, testified that, when he spoke to Mario Cerkez on 15 April 1993, there was no mention of a possible conflict. He said that the Bosnian army launched an assault on 16 April 1993 from the direction of Kuber and Zenica, but that the Croats were unaware that such an assault would be launched.<sup>321</sup> **Witness DA/5** worked for the staff of the Muslim-dominated Territorial Defence of Vitez from May-June 1992. She noted, however, that the other Croats were, little by little, leaving the Territorial Defence. She felt that she was being by-passed and that information which she ought to receive as part of her job was being withheld from her, simply because she was a Croat. On one occasion, she was told to leave a meeting of the command of the Territorial Defence because she was the only Croat there.<sup>322</sup> She stated that the HVO Vitez brigade had not even begun to be organised on 16 April 1993. When the conflict did break out on

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<sup>319</sup> T. 4570.

<sup>320</sup> T. 8745.

<sup>321</sup> T. 6052: "Q. And you had no knowledge of a specific attack or intended attack coming from the Bosnian army prior to being shelled on the morning of the 16th, had you? A. No, no, we hadn't noticed a thing and we hadn't received any kind of information from anyone that there would be an attack that morning. Q. You were completely surprised when the shelling occurred? A. Exactly that way".

<sup>322</sup> T. 5633-5636.



that day, she was sent home, despite her important organisational role in deploying officers to the front line.<sup>323</sup>

284. The Prosecution suggested that this picture of HVO unpreparedness did not fit with HVO directives from Dario Kordi} and Tihomir Bla{ki}, which had been produced in evidence as exhibits and which placed Croat units on a "higher state of readiness".<sup>324</sup> An order entitled "Combat command" dated 16 April 1993 (Exhibit D38/2), 0130 hours, had been presented to Zvonimir Cili}. This order, which warned of the threat of incursion and attack on Vitez itself from "enemy (extremist Muslim forces)", was signed by Tihomir Bla{ki} and was addressed to the commander of the HVO brigade in Vitez, Mario Cerkez. The order stated that the task of Cerkez's HVO forces was "to occupy the defence region to block the villages and prevent all entrances to and exits from the villages". The order went on to state: "In the event of an open attack by the Muslims, neutralise them and prevent their movement with precise fire from P/N (small arms). Time of readiness at 0530 hours on 16 April 1993". Exhibit P336, a report prepared by Zvonimir Cili} on the night of 16-17 April 1993, refers to the "... regrouping of Muslim forces, whereby we could conclude that they will make an attempt at a breakthrough from the direction of Vrhovine in the [anti}i-Ahmi}i direction ... We are doing our best to thwart these intentions". However, **Zvonimir Cili}** stated categorically that the crimes committed in Ahmi}i were not committed by members of the Vitez brigade. No Croatian official ever said which individuals or unit were responsible. There were different theories as to who did it. In his report, though, he referred to what happened in Ahmi}i as "combat".

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<sup>323</sup> T. 5472-5743: "Q. In that case, Madam, how can we understand that, on the 16th of April, you were at home at a crucial moment for the HVO, when it was apparently in an armed conflict, exposed to a very violent offensive, and you, you were at home? A. Yes, that is exactly right. I was at home. Regardless of the fact that I held a very responsible post, I basically had not started to carry out these duties fully. I simply -- I assume that the people in the brigade command were also taken by surprise by the situation, and I simply at that moment, in order to do something, somebody had to help me to do that. In order to structure the brigade, in order to mobilise. I assume, when the conflict broke out, everybody thought that this was something of a small scale and it would stop in a few days and we would continue to work, so I don't know".

<sup>324</sup> Exhibit P343. See also **Witness Rudo Kurevija**, T. 5890–5891.

(b) Bosnian Army Offensive on Kuber on or around 16 April 1993

285. The Defence has also submitted<sup>325</sup> that Muslim forces initiated offensives around Kuber – an elevation in the vicinity of Vitez - on 15 April 1993. Several witnesses testified to this effect: **Zvonimir Cili}**, **Dragan Grebenar**,<sup>326</sup> **Rudo Kurevija**,<sup>327</sup> **Ljuban Grubesi}**,<sup>328</sup> **Dragan Stojak**<sup>329</sup> and **Anto Plavci}**<sup>330</sup>.

286. **Anto Plavci}** testified<sup>331</sup> as to a Muslim attack on Jelinak on 15 April 1993. Jelinak, Loncari and Putis are all on the slopes of Mount Kuber. Jelinak consisted of approximately 100 households – 50 Muslim, 50 Croat. Putis has about 80 households, 20-30% Croat. Loncari has about 70-80 households, comprised of Muslim as well as several Serb or orthodox households. Bakija was inhabited exclusively by Croats and there were about 20 households. These villages are directly adjacent to Ahmi}i.

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<sup>325</sup> T. 5034

<sup>326</sup> T. 6080–6081.

<sup>327</sup> T. 5890-5891: "A. On the 15th of April I was at home. Yes, I was at home. In the evening -- this was already in the early morning hours of the 16th of April, the commander called me to the command office by telephone, called me to come to Stara Bila. I think this happened between 2.30 or 3.00 a.m., and all the other members of the command arrived there too. We received information that an attack by the Muslims was expected, and then on that day in the evening of that day, the attack on Kuber took place against HVO positions. The Muslims carried out this attack. So that an attack was expected, and I was instructed, together with the commander of the platoon in my village Mali Mosunj to establish a line of defence in between the houses facing the Muslims. So that's where I went, together with the commander. I engaged some men. We established points among our houses as the border of our houses and Muslim houses. [...] A. Upon my arrival at the command, I think Slavko was there and two more members of the command staff. I think Marinko came later. The commander verbally told us all the information, that he had received orders from the command of the brigade for lines of defence to be set up, and also, he informed us that an attack by Muslims was expected, as well as information that already in the evening hours an attack was carried out by Muslims in the region of Kuber. We were also told at that time that the commander of the Zenica HVO, Zivko Toti} had been arrested, together with his escort, that four members of the escort were killed, and I think there was an eyewitness, a Muslim, that Zivko was still being detained".

<sup>328</sup> T. 6243–6244.

<sup>329</sup> T. 6307–6308: "The elevation of Kuber is on the crossroads between Busovaca, Vitez and Zenica, and it is very important because it dominates the entire valley, and from it it is easy to exercise control over the entire town of Vitez and along the communications line between Vitez and Busovaca, and it's also easy to reach Zenica from there. Q. Are you aware of the fighting on Kuber in April of 1993? A. Yes. I mostly heard about it and I also read reports of the civilian structures. There was sporadic fighting on the 15th of April in Kuber, and later, of course, it intensified during the 16th and the 17th, and according to Civil Defence reports, there were four persons killed in that area. Q. Did you know any of the persons who were killed? A. Yes, I did. I knew Mr. Livancic".

<sup>330</sup> T. 6915.

<sup>331</sup> T. 6918–6919.

287. Plavci} testified that the HVO had control of Kuber in 1993, but that there were BiH forces nearby and members of the Territorial Defence. On 15 April 1993, there was shooting from the Kuber area, which resulted in the wounding of some HVO members from Jelinak, who were evacuated. The witness heard that the BiH army had attacked the HVO from Zenica.

288. On 16 April, the fighting in Kuber intensified. The village of Jelinak came under fire from mortar shells. The village was surrounded and the only escape was toward Kaonik. People started fleeing Jelinak on 16-17 April 1993 – there had been fighting all night. On 17 April, the shooting was from all directions, and very close. All the Croats fled towards Kaonik, apart from two old men, one of whom was killed, whilst the other lost part of his leg from an explosion.

289. The BiH army took control of Jelinak on 18 April 1993, and it has been under Muslim control ever since. The same is true of Putis and Loncari. While Muslims who fled the conflict have returned, the Croats have not.

290. When the witness went back to his house in Jelenak on All Saint's Day, he saw that all the Croat houses had been burnt, and that they were abandoned and destroyed. The witness further pointed out that in Jelinak, it was the Croats who kept pigs, not the Muslims, who traditionally do not keep pigs. Thus if pigs were killed in Jelinak,<sup>332</sup> a plausible inference is that they were killed by Muslim forces. The witness also heard that Muslims had set houses in Putis and Bakija on fire around 18 April 1993. He, the witness, has not returned to his house to this day. The Prosecution submitted that his testimony was consistent with the whole Kuber area being one big battle-zone between Croats and Muslims, rather than one-sided "ethnic cleansing".<sup>333</sup>

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<sup>332</sup> See for Poculica, for example, **Dragan Grebenar**, T. 6066.

<sup>333</sup> T. 6934–6935: "Q. In fact, would it -- to the best of your knowledge, Mr. Plavcic, wasn't there, in fact, just the area becoming a large battle zone with damage to both Croatian and Muslim properties? A. That is correct, that on the 18th all houses in the village of Jelinak and Putis, in Putis the Croatian houses and in the village of Jelinak all the houses were burning on the 18th, that's what I heard in Busovaca that all the houses were on fire".

(c) Bosnian Army Attacks on Croatian Villages in the Vicinity of Ahmi}i on 16 April 1993

291. The Defence further argues that the Bosniacs attacked the villages of Pocolica, Krušcica, Brdo, Sivri Selo and Bukina Kuca (Kuca) on 16 April 1993. The following witnesses testified concerning this: **Zvonimir Cili}**,<sup>334</sup> **Vlado Alilovi}**,<sup>335</sup> **Rudo Kurevija}**<sup>336</sup> and **Zeljko Papi}**.<sup>337</sup>

292. **Dragan Grebenar** testified<sup>338</sup> that Pocolica was shelled by the Muslims on 16 April 1993. Pocolica was a village bordering on Ahmi}i with a majority Croat population, surrounded by Muslim villages. Prnjavor and Vrhovine were exclusively Muslim, whereas the upper part of the village of Pocolica was mixed and the lower part of the village was populated exclusively by Croats. On 16 April 1993, around 5 a.m., a Croat woman called villagers to warn them that Pocolica would be attacked by the Muslims from Vrhovine, Prnjavor and Veternica.<sup>339</sup> Subsequently, the witness testified, Pocolica was shelled. The witness then heard the Hodža from the Mosque declaring, "Croats, you have five minutes to surrender or there'll be a slaughter".<sup>340</sup> The Muslims entered the village and the Croats tried to flee. The witness evacuated his house, under very heavy fire and was hit by shrapnel. He then reached Krizancevo Selo. One Croat was killed "in action", whilst other Croats were taken prisoner by the Mujahedin and killed by them.<sup>341</sup> All forty-two Croat houses, in the lower, Croat part of Pocolica were burned down. Some houses were also burned down in the upper part of the village and towards the border with Visnjica.<sup>342</sup>

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<sup>334</sup> T. 5380.

<sup>335</sup> T. 5608–5609.

<sup>336</sup> T. 5930–5931.

<sup>337</sup> T. 6601–6602.

<sup>338</sup> T. 6017–6020.

<sup>339</sup> T. 5948–5961.

<sup>340</sup> T. 5979.

<sup>341</sup> Anto Kristo was killed in action, apparently by a sniper within the village; the witness's neighbours Pero Papi}, Ivo Vidovi} and Jozo Vidovi} were killed while prisoners, T. 5994–5995. A Muslim from the village was also killed on 16 April 1993.

<sup>342</sup> The burnt houses are shown in videotape D60/2. The English translation is D60A/2, and the Bosnian-Croatian-Serbian ("B/C/S") translation is D60B/2.

293. **Grebenar** testified that no Croat houses have since been rebuilt in Poculica nor have any of the 400 Croats who lived in Poculica returned after having been evacuated on 16 April 1993.<sup>343</sup> However, he did not himself see any Muslim soldiers on 16 April 1993 in the lower part of the village nor did he see where the shelling of his village came from; he relied on what people told him to form his opinion that the shelling came from certain Muslim positions; from trenches which had been dug around Tolovici.

294. The witness also admitted that his house had been burned down about a week after the attack of 16 April 1993, and therefore that the Croat houses might have been burned down later in reprisal for the massacres and destruction of property committed against the Muslims in Ahmi}i.

295. The witness testified that the Mujahedin forced Croat captives to dig trenches. He also admitted that he heard that the Croats made Muslim captives do the same.<sup>344</sup>

296. **Zeljko Papi}** also testified concerning the "ethnic cleansing" of Croats by Muslims in Poculica. On 16 April 1993, around 5.30 a.m., the witness was awoken by large explosions coming from the direction of Vitez. He went and hid in his basement with his family.<sup>345</sup> He could not identify who was shelling whom.<sup>346</sup> During the attack, the witness saw armed soldiers going around "clearing" the Croat houses. He believed from the insignia that they were Muslim armed forces.<sup>347</sup>

297. The Croats were ordered out of their basement with their hands up. Some old people were left in the basement, where conditions were terrible. The witness's grandmother, who was over 80, died there. The others were marched in a column to Prnjavor. There the witness was imprisoned in the Community Centre. The army and

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<sup>343</sup> T. 6017.

<sup>344</sup> T. 6066.

<sup>345</sup> T. 6572-6573.

<sup>346</sup> T. 6601-6602: "Q. ... throughout that particular period when you heard these detonations, for the most part you could not identify who was firing at who or from where, would that be correct? A. I was not able to identify them, no. I just heard detonations from the direction of Vitez, but I did not know what was happening".

<sup>347</sup> T. 6574. "At that moment uniformed soldiers of the Muslim nationality, in groups of about five to six men, there were quite a few groups made up of five to six men, and they took control and surrounded the

police took him from there to dig trenches in Sivrono Selo. The Croats were occasionally used as human shields against shooting from the Croatian side.

298. The food and conditions at the community centre were terrible – the detainees had to lie on a concrete floor and there were insufficient blankets for the thirty people incarcerated there. They had to lie down in their clothes. They were often provoked by the soldiers. One soldier beat them up and made them shout Muslim prayers.

299. On 23 or 24 April 1993, in the community centre the witness was shot and was eventually taken to hospital, where he stayed until 13 May 1993 when he was exchanged.

300. The witness never returned to Pocolica because Muslim refugees were now living in the Croat houses there. The Catholic church and graveyard in Zvisda were desecrated – the chapel was burnt, the gravestones broken.

301. The witness declared that he had seen foreign Mujahedin on 16 April 1993.<sup>348</sup>

(d) The Attack on Ahmi}i

(i) The Eve of the Attack – 15 April 1993

a. The Kidnapping of Zivko Toti} and the Killing of his Escorts

302. In addition to the attacks on the villages, the kidnapping of Zivko Toti} and the killing of his bodyguards on 15 April 1993 is said to have had a disruptive effect on relations between Muslims and Croats. Toti} was the head of the HVO Military Police in

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Croatian houses, and their tactics were first to throw devices which led to strong detonation. From these explosions you could hear glass being shattered and things being destroyed in the houses”.

<sup>348</sup> T. 6592-6593: “Q. And how did you know they were Mujahedins? A. Well, they didn't hide the fact. They had the scarfs that they wore. They did not understand Serbo Croatian and they were dark skinned compared to us that is. But, as I was born there, I knew, at least by sight, all the locals, including Pocolica and Prnjavor from Vrhovine and Vjetrenica and further afield as well. Q. Did they instil fear in the Croats? A. Yes. Q. In what way did they do this? A. Well, they made us afraid of them because when they would pass by our houses, they would very frequently express their type of greeting, and other forms of religious exclamations. So that part I understood”.

Zenica.<sup>349</sup> Four or five of his bodyguards were killed during his kidnapping, allegedly by Muslim forces.<sup>350</sup> Toti} himself was, however, eventually released.<sup>351</sup>

b. 15 April 1993 in Ahmi}i

303. According to the Defence, and contrary to the assertions of Prosecution witnesses, there were no harbingers of the attack on Ahmi}i on 15 April 1993. Defence witnesses stated that everything was as normal that day. One witness (**DC/1,2**) described how her children went to school as usual, and that she went to Ankica Kupre{ki}'s house to greet her upon her return to the village after being in Germany where, again, everything was normal.<sup>352</sup> Most defence witnesses testified that they were not aware of the impending conflict.<sup>353</sup>

304. **Ankica Kupre{ki}** returned from Germany to Ahmi}i on 15 April 1993, following reports from her husband that the situation in Bosnia had returned to normality. She said there were no real fears of a Muslim offensive in Vitez at the time, even though she had heard about the Toti} kidnapping incident, and had seen a lot of Muslim roadblocks *en route* to Ahmi}i. That night people came to visit her and the party went on until midnight. No Muslim neighbors visited her but the witness did not know why this was so. During the conversations of that night, nobody mentioned any possible danger.<sup>354</sup> **Gordana Cui}**, who visited Ivica and Ankica Kupre{ki} that night, also testified that there was no discussion of an imminent attack.<sup>355</sup> **Mirko Saki}** testified that the men at the party did speak about the problems in central Bosnia, including the kidnapping of Commander Toti}.

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<sup>349</sup> **Lt.-Col. Watters**, T. 147.

<sup>350</sup> The videotape showing this episode is D34/2 the Croatian translation, D34A/2, and the English translation D34B/2.

<sup>351</sup> **Jadranka Toli}**, T. 6156-6158.

<sup>352</sup> **Witness DC/1,2**, T. 8523.

<sup>353</sup> **Ljubica Milicevi}**, T. 7305; **Zdenko Raji}**, T. 7402; **Dragan Vidovi}**, T. 8403; **Zdravko Vrebac**, T. 7817-7818.

<sup>354</sup> T. 7860-7862.

<sup>355</sup> T. 8154: "Q. So when you were in that room where everyone was, what was the discussion about? Were they talking about that there's going to be a war tomorrow, they need to cleanse Muslims from Ahmi}i, or were they discussing some other topics? A. Well, these were just casual topics. We remained in Ivica's house for a short while".

305. **Ivica Kupre{ki}**,<sup>356</sup> the husband of Ankica Kupre{ki}, picked up his wife at the airport on 15 April 1993. He was warned of the tensions caused by the Toti} kidnapping on 15 April 1993 when he passed through HVO and BiH army roadblocks. He arrived home around 6:30 p.m., and subsequently the above-mentioned gathering took place at his home until around midnight.

306. **Niko Saki}** testified that he had no idea that there would be an attack on 16 April 1993, otherwise he would have warned his Muslim neighbours.<sup>357</sup>

(ii) That the Attack on Ahmi}i was not Planned by the HVO in Advance

307. The Defence have called witnesses to prove that the HVO had no foreknowledge of the attack which was launched on 16 April 1993.

308. **Witness DA/5**, who at the relevant time was working to organise the HVO's Vitez brigade testified that on 15 April 1993, she had heard no mention of an imminent attack by the HVO.<sup>358</sup>

(iii) The Attack as a Military Operation

309. In contradiction to the depiction of the Ahmi}i massacre as the product of a Muslim assault for which Croat forces were unprepared, the Defence has at the same time argued that Ahmi}i was of strategic value, and therefore a legitimate military target. **Vlado Divkovi}** said that Vitez was of strategic value to the BiH army, in particular because of the Vitezit factory, of which he was the manager, which supplied both the HVO and the BiH army in 1992-1993 with *materiel* such as casings.<sup>359</sup> Similarly, it would have been very dangerous had the Vitez factory been shelled or fallen into enemy hands.<sup>360</sup>

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<sup>356</sup> T. 7961-7967.

<sup>357</sup> T. 8312-8313.

<sup>358</sup> T. 5715.

<sup>359</sup> T. 5795: "Q. Do you consider Vitez to be of particular significance for the BiH army because of this strategically important factory? A. That is quite evident. There can be no question that it was an extremely important locality strategically". See also Exhibit D55/2 (invoices).

<sup>360</sup> T. 5812-5813 and T. 5836-5837.



310. The Defence denied that Ahmi}i was targeted because of its religious significance. **Zvonimir Cili}** stated that Ahmi}i was not special in terms of Islam. If anything, the town was known merely as being more urban than other villages in the area.<sup>361</sup>

(iv) Bosnian Croat Eye-witnesses to the Events in Ahmi}i of 16 April 1993

311. A large number of defence witnesses have been called to testify as to what happened in Ahmi}i on 16 April 1993. While the Muslim inhabitants of Ahmi}i uniformly relate a story of violent eviction from their houses and the murder of their loved ones, the Croat inhabitants have a different, but equally uniform, account of the conflict. The Croat inhabitants of Ahmi}i were generally warned of an impending attack in the very early hours of 16 April 1993, if not earlier. **Dragan Vidovi}** explained that around 2-2:30 a.m., on 16 April 1993, he had a telephone call from Nenad [anti} saying that there was a problem and he should go to the house of Jozo Livanci}. When he arrived there, various people were already gathered. Ivica Vidovi}, who was in charge of civil defence in Ahmi}i-[anti}i-Pirici, said that there was some information that the Muslims were about to attack and that the Croats should take themselves and their families to a safe place.<sup>362</sup> Dragan Vidovi} then went and woke up various Croats and told them to go to the shelters. He took his family to the shelter in Niko Saki}'s house.

312. **Ivica Kupre{ki}** was awoken by Dragan Vidovi} at 4 a.m., and warned of a possible attack by the Muslims; he was told that he should take his family to a shelter. He woke his wife, Ankica Kupre{ki}. She packed some clothes and food and left for the shelter at about 4:55 a.m. She went to the house of Dragan and Jelena Trajanovski (the so-called Vrebac shelter). She was one of the first to arrive there. Mirjan Kupre{ki} arrived five to ten minutes later, pushing his sick mother in a wheelbarrow, accompanied by his wife and their two children. Zoran Kupre{ki} also came to the shelter. **Ankica**

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<sup>361</sup> T. 5252.

<sup>362</sup> T. 8424-8425: "Q. Can you tell us what Ivica Vidovic, Jevco, told you what (sic) to do? A. He explained that there was some problems, that it was possible that we would be attacked by the Muslims, and that I should go and tell my family and my other neighbours and that I should take them to shelters. He told me, since it was on my way, to drop in to Niko Sakic's house and tell him that he should do the same in his area, to do what I was to do in my area".

**Kupre{ki}** stayed there until 17 April 1993 when she was evacuated to Donja Rovna.<sup>363</sup> She was told the conflict was the result of an attack by the Muslims on Mahala. According to the witness, the shooting continued on 17 April 1993 as well<sup>364</sup>; in other words, it went on for two days.

313. **Ivica Kupre{ki}** returned to his house after having taken his family to the shelter, and he could see smoke and flames everywhere. He saw soldiers going in the direction of Vlatko Kupre{ki}'s house. He also saw Zoran Kupre{ki} and Mirjan Kupre{ki} evacuating their families. He hid in a boiler room near the Kupre{ki} houses. Two soldiers ran in, one in black, one in a camouflage uniform.<sup>365</sup> The soldiers told him to run to his house to get brandy for them. They said they were Jokers.

314. **Milutin Vidovi}** was awoken at 4.30 a.m., on 16 April 1993 by his father. He thought it was a false alarm as there had been many before. All his Croat neighbours were gathering in front of his house. Zoran and Mirjan Kupre{ki} passed with their families, moving in the direction of Zume, and then returned. After the shooting started, the witness, Zoran Kupre{ki} and others went in the direction of a depression below the Kupre{ki} houses referred to as Dolina.<sup>366</sup> Several local Croats are alleged to have spent most of the day there, including Milutin Vidovi}, Zoran Kupre{ki}, and Mirjan Kupre{ki}.<sup>367</sup>

315. After about fifteen minutes in the depression, the group of men saw smoke rising from the direction of the Kupre{ki} houses. Between 9 a.m. and 10 a.m., Zoran Kupre{ki} and the witness went to see their families. They stopped by Milutin Vidovi}'s house first and went to the cellar. Milutin Vidovi} saw his and other families there. Zoran Kupre{ki}, Mirjan Kupre{ki} and Milutin Vidovi} then went in the direction of

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<sup>363</sup> T. 7871: "Q. Then when did you leave this shelter and where did you go to? A. Then they told us that the Muslims, the Mujahedin had barged into Krtina Mahala, and many women and children down there were running. They were crying and screaming, and they were barefoot and hardly -- they hardly had any clothes on. [...All] these people who ran out of Krtina Mahala were evacuated to Donja Rovna".

<sup>364</sup> T. 7875-7876.

<sup>365</sup> T. 7979-7980: "They had automatic rifles with them, and they had rounds of ammunition and several hand grenades. They had black bands over their foreheads, and they had paint on their faces. One of them had an M-48 rifle slung over his shoulder".

<sup>366</sup> T. 7493. **Witness BB**, T. 3821.

Zume to see the Kupre{ki} families. They met Anto Vidovi} on the way, who told them that one of their friends, Fahrhan Ahmi}, had been killed and "Mirjan Kupre{ki} literally started to cry, because they played in the band together and they were practically inseparable".<sup>368</sup>

316. On 18 April 1993, the group in the depression was taken by military policemen to some sort of front line in Pirici to dig trenches. It was the first time that they saw that the Muslim houses had been burnt down and that there were dead Muslims. Enver Sahi} was one of them. Zoran Kupre{ki} cried because they had been friends.<sup>369</sup>

317. Croat inhabitants of Ahmi}i who had not been warned earlier of the impending conflict stated that they had been woken around 5:30 a.m., on 16 April 1993 by heavy gunfire. According to Croat witnesses, the gunfire apparently came from the direction of Busovaca and Ahmi}i.<sup>370</sup> Ivo Vidovi} went out to the street where he could see people fleeing and he asked them what was going on. They replied that Muslim units had attacked Ahmi}i and that they were fleeing to a shelter. He fetched his family and also went towards a shelter.<sup>371</sup> Ljubica Milicevi} also took her children and left her house, first towards the woods, and then to a shelter. Goran Males was woken up by his mother, who had heard the shooting. Realising the seriousness of the situation, Males went to

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<sup>367</sup> See video produced in evidence by **Dragan Vidovi}** showing the depression (Exhibit D105/2, D106/2).

<sup>368</sup> **Mirko Saki}**, T. 7628.

<sup>369</sup> **Dragan Vidovi}**, T. 8446: "Q. Did you talk with the Military Police who brought you up there? A. Yes. About 20 metres before we reached the place where we stopped, one of those two said to us to guard that line well, and I quote him: "Because if the Muslims break through that line they will do to you the same that we did to them". Q. When you say "we", who do you mean? A. Those two military police members". - The witness dug in there and stayed there until the end of the war. The group of armed soldiers that went by had white belts, so he assumed they were military police. All had their faces painted, apart from Mirjan [anti}, a local whom he recognised. On 18 April 1993, they received instructions from the Military Police to dig trenches in Piri}i.

<sup>370</sup> **Ivo Vidovic}**, T. 6949.

<sup>371</sup> T. 6950: "Q. Where did you go with your wife and children, to which shelter? A. I started toward the house of Jozo where all the others had been going because this had been our shelter before. When the Serbian planes flew over, we always took shelter there. ... I stayed for about ten minutes, then I went out to see what was going on and I met other people coming to the shelter. I talked to them about what was going on, because we didn't know what was happening. Q. Did you meet anyone who told you to go somewhere? A. I met Nenad Šantic, the commander of my village guard. Q. What did Nenad Šantic say to you? A. Nenad told me that I had to go and defend the bridge, Radakov Most, immediately'.

Rijeka to protect his farm. He went to the area called Cerveno Brdce, a defence line on a hill, where he stayed throughout the war.

318. **Zdenko Raji}** received a telephone call from Karlo Grabovac informing him that a conflict had broken out in Ahmi}i. He was ordered to go to Cerveno Brdce, on high ground some 200-300 metres from his house. He was tasked with seeing that the Muslims did not advance from the Vraniska area. The line of defence was established at Cerveno Brdce and covered about four kilometres. There were approximately 130 men at the defence line, including Goran Males. **Zdenko Raji}** pointed out the importance to the Croats of holding Radak bridge near Rijeka, since the Muslims blocked the road between Busovaca and Vitez at Buhine Kuce.<sup>372</sup> Traffic had therefore to go through Rijeka and pass over Radak bridge, as the only way to get to Busovaca via Nadioci. The witness stated that the Croats in the area would have been completely cut off if the bridge was inoperable, so units were sent to protect it from sabotage by the BiH army.

(e) Casualties on Both Sides in Vitez and Ahmi}i on 16 April 1993

319. **Dragan Stojak** testified that 1,300 – 1,400 Croats were killed during the conflict in Vitez and that almost 5,000 were wounded.<sup>373</sup> This figure, however, was for the whole war period, so it included those killed in the war with the Serbs. Under cross-examination by the Prosecution, it appeared that very few Croats died on 16 April 1993,<sup>374</sup> despite the witness's contention that the fighting on that day in Mahala was very intense and that Croats were killed there, including one who had had his throat slit.

320. **Rudo Vidovi}** and other defence witnesses consistently emphasised that there were casualties on both sides in Ahmi}i on 16 April 1993. However, while no defence witness contested that more than one hundred Muslims died in Ahmi}i on that day, only one Croat death is consistently mentioned, namely that of Mirjan [anti].<sup>375</sup> **Vlado**

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<sup>372</sup> T. 7407.

<sup>373</sup> T. 6319.

<sup>374</sup> Exhibit P337 shows that only 2 HVO soldiers died in Vitez on 16 April 1993.

<sup>375</sup> See #435 on Exhibit P337.

**Alilovi}** testified that five Croats were killed in Ahmi}i on 16 April 1993; however, he could name only Mirjan [anti}, whom he knew. Moreover, whereas the vast majority of Muslim victims were civilians, Mirjan [anti} was a soldier.

(f) The Jokers and/or a Special Unit Committed the Attack on Ahmi}i

321. Many defence witnesses from Ahmi}i testified to having seen a large group of 30-40 armed soldiers in Ahmi}i on the morning of 16 April 1993, moving about at around 5 a.m., from Zume in the direction of the Kupre{ki} houses.

322. **Milutin Vidovi}** described seeing thirty well-armed individuals as he went to Niko Saki}'s shelter at 5 a.m., on 16 April 1993. The soldiers were in camouflage uniforms, with blackened faces and automatic rifles. The witness said they "looked like something out of a ninja film".<sup>376</sup> The soldiers also had white belts and Military Police insignia.

323. **Dragan Vidovi}** testified that he saw a group of soldiers that morning which appeared to be Military Police.<sup>377</sup>

324. **Witness DC/1,2** saw a smaller group of soldiers: "They were all wearing camouflage uniforms. They were all in black, their faces were painted, all smeared. And I was so frightened [...]"<sup>378</sup>

325. Other defence witnesses who testified to seeing this group of soldiers in the early hours of 16 April 1993 moving from Zume towards the Kupre{ki} houses include **Mirko Saki}**<sup>379</sup> and **Niko Saki}**.<sup>380</sup>

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<sup>376</sup> T. 7513.

<sup>377</sup> Note that **Witness E** recognised a soldier who worked in Vlatko Kupre{ki}'s Sutre store. T. 1270: "[...] Q. Can you please tell this Court where you felt you had seen that person before? In what circumstances? A. Well, this person that I have just described, I went to the Sutre shop cellar twice, three times, and there I met a similar person. [...]. **Dragan Vidovi}** said that Mirjan [anti}, whom he saw in the group of armed soldiers, used to work at Vlatko Kupre{ki}'s store, T. 8428 - 8429: "He was in the warehouse often. He would come to Vlatko Kupre{ki}'s warehouse often, and he knew the place. He moved around a lot. [...]" Q. Could you tell us whether that shop, [which] was in Vlatko Kupre{ki}'s warehouse was the only shop

326. **Ivica Kupre{ki}** saw two soldiers possibly belonging to this group as he hid in the boiler room near the Kupre{ki} houses.<sup>381</sup> "They had automatic rifles with them, and they had rounds of ammunition and several hand grenades. They had black bands over their foreheads, and they had paint on their faces. One of them had an M-48 rifle slung over his shoulder".

327. The accused **Zoran Kupre{ki}** gave evidence before the Trial Chamber. He stated that by April 1993 the situation was not good: there had been talk about crimes against Croats in Dusina and La{va and he had heard rumours that there were Muhajedin in the vicinity of Piri}i. There were numerous refugees in Ahmici. Soldiers fired weapons in the air. There was apprehension but Zoran Kupre{ki} was not afraid of his neighbours.<sup>382</sup>

328. He said that he was at work until 2 p.m. on 15 April 1993 and then went into Vitez for a coffee with Senad Topoljak and Dragan Grebenar. Just before dusk his uncle

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that operated in those three villages of [anti}i, Pirici, and Ahmi}i? A. Yes, at that time, it was the only one that was working, so almost all the neighbours would come to the shop and buy the food that they needed".  
<sup>378</sup> T. 8529.

<sup>379</sup> **Mirko Saki}**, T. 7614–7615, said that on the morning of 16 April 1993, shortly after he saw Zoran and Mirjan Kupre{ki} pass with their families moving in the direction of Zume, maybe five or ten minutes after that a group of about 25 or 30 armed men appeared. Some were camouflaged, some were in black uniforms. They were fully armed, with RPGs, some with their faces painted in dark paint. The witness recognised one man, Mirjan Šantic. Some had white belts, which suggested a Military Police unit. They came from the direction of Zume, and went towards the Kupre{ki} houses.

<sup>380</sup> **Niko Saki}**, T. 8263–8265, saw 30-35 well-armed, uniformed soldiers pass by his house around 5.30 a.m., on 16 April 1993. Their faces were painted; each had two weapons. They went in the direction of the warehouse of Vlatko Kupre{ki}. They had white belts and pistol casings, holsters and some kind of coloured bands tied to their shoulders. Saki} also mentioned that there were Muslim as well as Croat families in the shelter of Niko Vidovic on 16 April 1993 (the witness moved from the Vrebac shelter to the Vidovi} shelter at around 5 p.m., on 16 April 1993 because they were told it was safer) and thus the Muslims were not discriminated against: "Q. Who did you see in the shelter? Did you see both Croats and Muslims, and who were they? A. There were both Muslims and Croats in the basement. From the Muslims, there were three families. ... Q. Were the Muslims who were in the shelter with you also afraid, in the shelter of Niko Vidovic, the Bilici and the Strmonja families? A. They were not afraid of us, the neighbours, but they were afraid just because of the gunfire, but I don't think that they would have been there if they had been afraid of us. Q. Did they know that the family -- the Ramic and the Strmonja families were in that shelter? A. Yes, they did, and from my house, from Mirko's apartment on the first floor, Mirko came and Zoran came, and they called some woman called Ranka who used to work in UNPROFOR with ^, to make the Bilic and Strmonja families, to get them out of there. I don't know if they succeeded in that. Q. Who told them to call UNPROFOR? A. Because they could see them there -- I don't know who told them. I talked to them and I said it would be good to get those families out of there".

<sup>381</sup> T. 7979–7980.

Ivica brought his wife from Split. The accused and his wife went to Ivica's house that evening after 8 p.m., and stayed for half an hour. Zoran Kupre{ki} then went home, and to bed about midnight.<sup>383</sup>

329. When cross-examined about the evidence of Witness V, Zoran Kupre{ki} said he saw nothing of what Witness V claimed to have seen outside Zoran Kupre{ki}'s house; nor did anyone else mention it. None of the Kupre{ki}s left that night.<sup>384</sup>

330. **Mirjan Kupre{ki}** also gave evidence. He testified that on 15 April 1993 he was at work in the Sutre shop in Vitez. Friends came to the shop, such as Zdravko Vrebac and Veljko Cato. Mirjan Kupre{ki} finished work at 5 p.m. and went to the café where the musicians usually met. He noticed nothing unusual. About an hour and a half later he was taken home by Zdravko's cousin. There was only the regular checkpoint on the road and nothing out of the ordinary. When he arrived at home he found his son was ill. He went to Ivica's house and returned at 11 p.m.<sup>385</sup>

331. The accused **Vlatko Kupre{ki}** testified that he left with Ivica on 14 April 1993 for Split in the latter's car.<sup>386</sup> They arrived at Split at about 12 noon and bought salt, jeans and sneakers, all of which they put in the boot of the car. At about 9 p.m., they met Ivica's wife Ancika at the airport and spent the night in Baska Voda.<sup>387</sup>

332. On 15 April 1993, Vlatko Kupre{ki} arrived in Ahmici at about 6.30 p.m. He unloaded and prepared the goods which were to be delivered to Travnik the next morning. There were no soldiers at Vlatko Kupre{ki}'s house or the shop that evening.<sup>388</sup> He had nothing to do with the attack and in no way helped with the preparations.<sup>389</sup> He denied having been outside the Hotel Vitez on 15 April or having been,<sup>390</sup> on 15 April, in

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<sup>382</sup> T. 11273-11275 and T. 11458-11459.

<sup>383</sup> T. 11264-11271.

<sup>384</sup> T. 11470 and T. 11472.

<sup>385</sup> T. 11599-11603.

<sup>386</sup> T. 11867.

<sup>387</sup> T. 11764-11766.

<sup>388</sup> T. 11767-11769.

<sup>389</sup> T. 11797-11798.

<sup>390</sup> T. 11810.

the company of a group of soldiers, in front of his shop with soldiers, or on the balcony of his house.<sup>391</sup>

### 3. Findings of the Trial Chamber

333. The Trial Chamber considers that the Prosecution has adduced convincing evidence to show that the attack on Ahmici on 16 April 1993 was planned by HVO forces and the special unit of the Croatian Military Police called the Jokers. The Croatian inhabitants of Ahmici, or at least those of them who belonged to the HVO or were in contact with Croatian armed forces, knew that in the early morning of the 16 April 1993, Croatian forces would initiate a massive military attack. It is plausible to maintain that they acquired the conviction that an attack would be carried out at least on the occasion of the meeting that was held around 2.30 a.m., on 16 April, in Jozo Livancic's house. The Trial Chamber regards as credible the evidence led by the Prosecution to the effect that by 15 April many signs already indicated that a military operation was in the offing, and that many Croats were aware of this.

334. The Trial Chamber finds that the attack was carried out by military units of the HVO and members of the Jokers. The able-bodied Croatian inhabitants of Ahmici provided assistance and support in various forms. Some of them took part in the military operations against the Muslims. It is also true, however, that a few Croatian inhabitants of Ahmici endeavoured to save Muslim friends or neighbours by prompting them to escape and helping them in such attempts, or at any rate by providing them with suggestions as to how to avoid being killed.

335. The attackers targeted Muslim civilians and their houses. The Trial Chamber considers it to have been proved that there were no Muslim military forces in Ahmici nor any military establishment belonging to the BiH army. In addition to the men not of military age, the elderly, women and children, there were also able-bodied Muslims who were members on leave from the BiH army, or reservists who participated in the village guards. When the Croatian forces initiated the attack, not more than 10-15 Muslims in

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<sup>391</sup> T. 11802 and T. 11817.



the upper part of Ahmici and not more than 10-15 Muslims in the lower part of the village responded by the use of arms. Given the patent disparity in number and in military equipment between the combatants, the Muslim response was clearly directed only toward the protection of a few houses where some survivors of the initial attack had taken shelter. Possibly the Muslim combatants also hoped to limit as much as possible the massacre of civilians.

336. The purpose of the attack was to destroy as many Muslim houses as possible, to kill all the men of military age, and thereby prompt all the others to leave the village and move elsewhere. The burning of the Muslim houses and the killing of the livestock were clearly intended to deprive the people living there of their most precious assets. It should be noted that, as convincingly proved by the testimony of a court expert witness, the Norwegian anthropologist **Dr. Bringa**,<sup>392</sup> the house and livestock had for their owners not only economic value, but also and probably even more importantly, emotional, psychological and cultural significance. The house represented the moral unity of the household and the moral character of its members. For the man as a father, the house he managed to build symbolised his social value, his commitment to his family and to their future well-being. For the women in particular, due to the communist tradition of repression of public religious life, the house was also the place where religious and ritual life could unfold. In addition, the house was a very important place for socialising; the seat of social links with other people. In short, to attack one's house meant to attack one's whole being.<sup>393</sup> Also the livestock, in addition to their economic value, took on a symbolic significance (for instance because Croats had pigs and Muslims did not).<sup>394</sup>

337. The Trial Chamber also finds that the attacks carried out on the Muslim inhabitants of Ahmici constituted a form of "personalised violence", as defined by

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<sup>392</sup> T. 10928-10933.

<sup>393</sup> As **Court Witness Bringa** put it, "the house you managed to build throughout your lifetime, when that's destroyed it's not only a physical thing that's destroyed, but it feels -- it's an attack on your whole being because you put so much into it" (T.10932).

<sup>394</sup> T. 10933-10934.

Dr. Bringa; that is, violence directed at specific persons because of their ethnic identity.<sup>395</sup>

338. In short, the Trial Chamber finds that the Croatian attack of 16 April 1993 in Ahmici was aimed at civilians for the purpose of "ethnic cleansing". Whether the forced expulsion of Muslims from Ahmici was motivated by the strategic purpose of removing a Muslim pocket as the route between Busovaca and Vitez, or was instead conceived of as a retaliation against the attacks by Muslim armed forces on Kuber and a few predominantly or exclusively Croatian villages of the area is a question that the Trial Chamber may leave unresolved for the purposes of this case.

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<sup>395</sup> **Court Witness Bringa** illustrated this type of violence by citing a Muslim woman of another village who had told the witness that she was not scared of shells or grenades, "because there is just death and it is immediate. What I am terrified of are the *pjesadija*, the foot soldiers who come into my house, force themselves into my house. Maybe they rape, they kill your children in front of your eyes. ...g Shells don't ask me my name" (T. 10985-10986). "That's the point" -- observed the witness -- "because from your name you can usually tell which ethnic identity you have" (*ibid.*). According to this witness, the foot soldiers mentioned by the Muslim woman "attack their ...g very being ...g the sense of their identity, by going in and attacking them personally" (T. 11016).

#### IV. THE ROLE OF THE ACCUSED

339. In determining the role of the accused, the Trial Chamber has kept at the forefront of its consideration the following:

(a) The presumption of innocence embodied in Article 21 of the Statute which provides that the accused should be presumed innocent until proved guilty. This means that the burden of proof is on the Prosecution and before the defendant may be convicted of any offence the Prosecution must convince the Trial Chamber (beyond any reasonable doubt) of the defendant's guilt.

(b) The principle that the case against each accused must be considered separately. The fact that the accused have been tried together does not mean that their cases should not receive separate consideration. Accordingly the Trial Chamber has given separate consideration to the case of each accused.

(c) In cases where the Prosecution relies upon identification evidence, the Trial Chamber bears in mind the need to proceed with caution in connection with such evidence, particularly in cases where a witness obtained no more than a fleeting glance of a suspect. For instance, in the leading English case, the Court of Appeal pointed out the danger inherent in such evidence: i.e. that a witness can easily be mistaken about identification and that an honest but mistaken witness can be a convincing one.<sup>396</sup>

(d) All the accused are of good character and have called evidence to this effect. Due weight has been given in each case to this factor.

(e) The accused, Drago Josipovic, Vladimir Šantic and Dragan Papic, did not give evidence. It is their right not to do so. As already noted the Statute encapsulates the presumption of innocence in Article 21(3). The Statute also provides that an accused

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<sup>396</sup> *R v. Turnbull* [1977] QB 224.

shall not be compelled to testify against himself: Article 21(4)(g). Accordingly, no inference is to be drawn from the fact that these accused did not give evidence.

340. The Trial Chamber will now consider the case involving each accused.

## A. Dragan Papic

### 1. Introduction

341. Although named fifth in the indictment, it will be convenient to deal with the case involving this accused first since he is charged only in Count 1. The Prosecution case against Dragan Papi} is that he played an active role in the armed conflict in October 1992, and that thereafter he was an active participant on the Croatian side, that he made preparations for the conflict on 16 April 1993 and that he took part in that conflict. The Defence case is that the accused was non-partisan, and that he played no active part in either conflict.

### 2. Background

342. Dragan Papi} is aged 32, having been born on 15 July 1967. A forester before the war, he lived with his family (including Ivo, his father) on the main road in Ahmi}i, not far from the junction of the road leading to Lower Ahmi}i. He is listed in the Register of the HVO Vitez Brigade as being a reservist between 8 April 1992 and 15 January 1996.<sup>397</sup> He was described by **Witness D** as a "good neighbour" before the war,<sup>398</sup> but another neighbour, **Abdulah Ahmi}**, testified that during the war he "changed completely".<sup>399</sup>

343. **Abdulah Ahmi}** testified that during a conversation in 1991, Dragan Papi} told him that he was studying German fascist literature, and that he supported the fascist method of destroying Jews and other nations; that he admired Hitler as a military leader

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<sup>397</sup> Exhibit P353.

<sup>398</sup> T. 1026.

<sup>399</sup> T. 261.

who had organised the army and people well. Dragan Papi} said that it was necessary to apply this among the Croats.<sup>400</sup>

344. Prior to 16 April 1993, Dragan Papi} invited one of the refugees in Ahmi}i, **Witness A**, to his house for a chat and told him that he had been at the front as a sniper in the Blackshirts Unit. Dragan Papi} reproached Witness A and his family for being in Ahmi}i as refugees.<sup>401</sup>

345. On the other hand, his younger brother, **Goran**, said that Dragan Papi} was not a member of the HVO, and was not interested in politics. He was friendly with Muslims.<sup>402</sup> This evidence was supported by that of Dragan Papi}'s cousin, **Pero Papi}**<sup>403</sup> and **Goran Males**.<sup>404</sup> Another witness said that he had not heard Dragan Papi} express any negative attitude towards Muslims, who were willing to have their cars repaired by him, and that he went to Muslim funerals.<sup>405</sup> Statements were also produced from a family friend and a Franciscan friar, a parish priest in Vitez. They speak of Dragan Papi} as a friendly man with an easy-going nature, on good terms with his neighbours.<sup>406</sup> Another witness who knew him said that he was a hard worker who joked a lot and was not violent.<sup>407</sup>

### 3. His Conduct During the Armed Conflict on 20 October 1992

#### (a) Prosecution Evidence

346. Several witnesses gave evidence concerning the participation of Dragan Papi} in the armed conflict in October 1992. **Mehmed Ahmi}** gave evidence that Dragan Papi} fired at him and his house with an automatic weapon. The witness owned a shop on the main road opposite the Papi} house where he lived with his family above the shop: he

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<sup>400</sup> T. 261-262.

<sup>401</sup> T. 539-545.

<sup>402</sup> T. 7040-7045.

<sup>403</sup> T. 7208-7210.

<sup>404</sup> T. 7268.

<sup>405</sup> Testimony of **Ivo Vidovic**, T. 6974-6977, supported by **Pero Papic**, T. 7208 and T. 7241.

<sup>406</sup> Exhibits D29-30/5.

<sup>407</sup> Evidence of **Rudo Vidovic**, T. 6683.

and Ivo Papi} had been close as the latter was his neighbour and plumber. On 20 October 1992 at 5.30 a.m., the witness awoke to an explosion. At 7.30 a.m., he and his wife opened the shutters of their house to be met with a burst of gunfire from the Papi} house. The witness saw Dragan Papi} open fire from the front right upper floor window of his house. Dragan Papi} was wearing a black uniform and was using an automatic rifle.<sup>408</sup> Firing then started from all sides and the roof was set on fire with tracer bullets. At about 4 p.m., there was a lull in the shooting and the witness escaped to his father's house. To do so he crawled with a four-year-old child under his arm, following female relatives. Soldiers opened fire on him from the wood near the Papi} house (about 150 metres from the witness's house). Among the soldiers who were shooting at him he saw Dragan Papi}, who was using an anti-aircraft machine gun.<sup>409</sup> In cross-examination, it was pointed out that in his statement, the witness had said that it was the HVO who were firing the anti-aircraft guns at him, and not Dragan Papi}. However, the witness stated that he could observe and crawl with his child at the same time.<sup>410</sup>

347. The same day, after the shooting, when another prosecution witness, **Fahrudin Ahmi}**, a neighbour of the Papi}'s, was on his way to his house, he was stopped by Dragan Papi} and another man and told that he had to ask Slavko Skoro for permission to return home. They were dressed in camouflage uniform and were standing near a bunker and a machine gun.<sup>411</sup> The next day Dragan Papi} and the other man came to the witness's house and asked "Why don't you monkeys surrender?"<sup>412</sup> Dragan Papi} had a bomb fuse with him. He said to the witness that unless weapons were handed over they would be shelled.<sup>413</sup>

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<sup>408</sup> T. 646, T. 650-652 and T. 670.

<sup>409</sup> T. 654-655, T. 674-677 and T. 692-693.

<sup>410</sup> T. 695-696, T. 692-693.

<sup>411</sup> T. 1787.

<sup>412</sup> T. 1113.

<sup>413</sup> T. 1110-1114 and T. 1125-1126.

(b) Defence Evidence

348. The Defence case is that Dragan Papi} was not involved in the fighting that day. When the firing started, he fled with his family into the wood behind their house. From there he went to Rovna where he spent the day.

349. Four witnesses gave evidence about the events of that day concerning Dragan Papi}:

(a) His brother, **Goran**, said that the family were awoken by gunfire and heard a voice from the mosque calling on the Croats to give themselves up, together with their weapons. He and his family fled from their house and hid in the wood behind the house and then went to Rovna. There was no anti-aircraft gun in the wood.<sup>414</sup>

(b) Dragan Papi}'s cousin, **Pero Papi}**, said that he saw Dragan Papi} in the wood at about 5.30 a.m. with his wife and that Dragan Papi} went to Rovna. When cross-examined about Mehmed Ahmi}'s evidence about seeing Dragan Papi} and others armed in the wood, the witness said that this was incorrect and that Dragan Papi} only passed through the wood early on. Dragan Papi} spent the whole day in Rovna. The witness spent most of the day in the woods and testified that nobody opened fire from the woods or shot at Mehmed Ahmi}'s house.<sup>415</sup>

(c) **Zdenko Raji}**, a policeman from Vitez, was sent to Ahmici in command of a detachment of soldiers to guard the approaches to the barricade while other troops were attacking it. They went via an old railway line from the road to Rovna to the wood behind the Papi} houses where they remained all day until 4 p.m. On their way to the wood from the railway line between 5 - 5.30 a.m., they met a group of women, children and elderly people together with Dragan Papi}. They said that they were going to Donja Rovna. Dragan Papi} said that he was to take over an M60 mortar to

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<sup>414</sup> T. 7050-51.

<sup>415</sup> T. 7198-7200, T. 7214 and T. 7230.

send signals if the BiH Army started to move. The witness also said that nobody shot from the wood and that no PAT anti-aircraft gun was located there.<sup>416</sup>

(d) **Zvonimir Šanti}**, a resident of Donja Rovna and commander of the village guard said that in Rovna at about 8 a.m., he saw Dragan Papi} wearing a camouflage jacket and carrying an M60 mortar and bag. Dragan Papi} said that he did not know what was happening but there appeared to be a conflict between the Muslims and Croats and Nenad Šanti} had given him orders to go to Niva (about 100 metres from the witness's house).<sup>417</sup> Dragan Papi} remained at Niva until 4 p.m., when he called at the witness's house and asked if he could leave the mortar and bag until Nenad Šanti} sent someone to pick them up.<sup>418</sup>

#### 4. His Conduct in the Period Between the Armed Conflicts

350. Several prosecution witnesses gave evidence of Dragan Papi}'s conduct in the period between the armed conflicts. In particular, they testified as to his role as a supporter of the Croat side and that he was a member of Croat forces in charge of a checkpoint:

(a) During this period Dragan Papi} was seen in the village armed and in uniform and going to the Bungalow.<sup>419</sup> He was seen in uniform carrying a sniper rifle with target sights and a strangulation device.<sup>420</sup> **Witness V** saw him wearing a black uniform many times.<sup>421</sup> **Witness Z** also saw him in a black uniform and on one occasion carrying a sniper rifle.<sup>422</sup> **Abdulah Ahmi}** saw him climbing into a truck carrying an anti-aircraft gun and firing the gun in the air.<sup>423</sup>

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<sup>416</sup> T. 7387-94 and T. 7398-99.

<sup>417</sup> T. 7144.

<sup>418</sup> T. 7146.

<sup>419</sup> **Witness D**, T. 1022, T. 1025; **Witness G**, T. 1444.

<sup>420</sup> **Abdulah Ahmi}**, T. 273-274; **Esad Rizvanovi}**, T. 456-459; **Witness T**, T. 2949.

<sup>421</sup> T. 3043.

<sup>422</sup> T. 3601.

<sup>423</sup> T. 274-275.



(b) Another witness saw a vehicle with an anti-aircraft machine gun in the driveway outside Dragan Papi}’s house.<sup>424</sup>

(c) Shortly after the October conflict, **Witness B** was stopped at a checkpoint outside the village. Dragan Papi} (who was armed with an M48 rifle) told him that he could not enter the village. Some days later Witness B went to Ahmi}i with Mario Cerkez (an HVO Commander): they came upon a checkpoint on the main road near the Papi} house with a dug-out and machine gun. After a conversation with Mario Cerkez, Dragan Papi} ordered the soldiers to remove all the obstacles.<sup>425</sup> In the witness’s opinion, the checkpoint was under the command of Dragan Papi}.

(d) A checkerboard flag was flown outside the Papi} house.<sup>426</sup>

(e) Dragan Papi} was seen with others carrying military crates from Mario Papi}’s house.<sup>427</sup>

(f) **Witness N** testified that a man whom he was told was Dragan Papi}, wearing a black uniform, threatened him at the Bajram Festival.<sup>428</sup>

351. Others saw Dragan Papi} make specific preparations on 15 April 1993:

(a) **Witness A** saw Dragan Papi} leaving in a red Lada car with his wife and mother from his house and returning alone about 40 minutes later without them.<sup>429</sup> On 15 April 1993 **Witness G** overheard his parents saying that Dragan Papi}’s family were leaving and that vehicles were constantly coming and going from his house.<sup>430</sup>

(b) **Abdulah Ahmi}** was on his way home at 10 p.m. when he heard Ivo Papi} calling for Dragan. The witness noticed a large number of people at the Papi} house but did not pay much attention because people would gather quite frequently at

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<sup>424</sup> **Witness B** T. 799-801 and T. 820.

<sup>425</sup> T. 759-767.

<sup>426</sup> **Esad Rizvanovi}**, *ibid.*; **Witness G**, *ibid.*

<sup>427</sup> **Fahrudin Ahmi}**, T. 1128-1129.

<sup>428</sup> T. 2539.

<sup>429</sup> T. 547-550.

<sup>430</sup> T. 1447.

Dragan Papi}'s house and sometimes there would be as many as 30 cars in the yard: friends of his would come to visit and he repaired their cars.<sup>431</sup>

352. On the other hand **Goran Papi}** gave evidence that Dragan Papi}'s work included the preservation of game; for this work he wore a green uniform and sometimes a camouflage jacket and carried an M48 rifle.<sup>432</sup> Dragan Papi}'s employment book was produced, showing him to have been in employment until 15 April 1993.<sup>433</sup> **Ivo Vidovi}** said that he saw Dragan Papi} often in forestry uniform and a camouflage jacket, or a camouflage jacket and jeans.<sup>434</sup> Goran Papi} also said that Dragan Papi} had a black uniform (given to him as a present) which he wore so that he would not be stopped at checkpoints: he wore camouflage because everyone was doing it as it was the fashion.<sup>435</sup> Dragan Papi} had neither a rifle with a telescopic sight nor a sniper rifle.<sup>436</sup> There was never a machine gun nor an AA-gun anywhere near the family home.<sup>437</sup> A checkerboard flag was flown on the house on religious holidays – as on other houses.<sup>438</sup>

## 5. His Conduct During the Attack of 16 April 1993

### (a) Prosecution Evidence

353. The Prosecution case is that Dragan Papi} was present in Ahmi}i on 16 April 1993 and was involved in the attack. When the shooting started **Fahrudin Ahmi}** and his family fled towards Upper Ahmi}i. Their route took them across the main road near Dragan Papi}'s house. The witness noticed two soldiers bending down next to Ivo Papi}'s house and saw a "glimmer (sic) of the fire from a firearm coming from

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<sup>431</sup> T. 275 and T. 386-387.

<sup>432</sup> Evidence of **Goran Papi}**, T. 7038-7039.

<sup>433</sup> Exhibit D12/5.

<sup>434</sup> T. 6976.

<sup>435</sup> T. 7056.

<sup>436</sup> Evidence of **Pero Papi}**, T. 7242-7243; **Goran Papi}**, T. 7067.

<sup>437</sup> **Goran Papi}**, T. 7067.

<sup>438</sup> **Ivo Vidovi}**, T. 6974-6977; **Pero Papi}**, T. 7241.

Dragan Papi}'s window".<sup>439</sup> Shortly after, the witness was shot and wounded in the arm; he saw that the gunfire was coming from Mehmed Ahmi} and Dragan Papi}'s houses.<sup>440</sup>

354. **Witness A** saw a machine gun in front of Dragan Papi}'s house at one corner facing the road.<sup>441</sup> **Witness Z** heard gunfire coming from an anti-aircraft gun in a thicket owned by Dragan Papi} and his father.<sup>442</sup>

355. **Witness G** testified as to Dragan Papi}'s presence, armed and in uniform, in the vicinity of soldiers carrying out executions on 16 April 1993 in Ahmi}i, near the lower mosque. He knew Dragan Papi} because they were neighbours; their parents were close and he saw Dragan Papi} frequently. On the morning of 16 April the family fled their house and Witness G ran ahead of the rest. He came across three soldiers firing towards the village: he saw Dragan Papi} in the doorway of the house of Husein Ahmi} near the soldiers. Dragan Papi} was leaning against the door frame and carrying a rifle and the witness (who knew him) was 100 per cent certain it was him. The witness tried to run, but was cut down by a burst of gunfire. His parents and sisters were running towards him His father asked a soldier to let them pass, but the soldier ordered another soldier to kill them: the order was repeated twice, two bursts of gunfire followed and his parents and one sister (aged 11) were killed. His younger sister (aged 5) miraculously survived.<sup>443</sup> During the day Witness G remained motionless where he lay, but was able to look around. He saw Dragan Papi} once or twice passing by wearing a camouflage uniform and a hat and in the company of soldiers.<sup>444</sup>

356. **Captain Charles Stevens**, then Regimental Sergeant-Major of the Cheshire Regiment, was in Ahmi}i some days after the massacre, and met a man who called himself "Dragan" and carried an AK47 rifle. The man indicated that he had killed 32 Muslims by drawing his hand across his throat. Captain Stevens subsequently

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<sup>439</sup> T. 1134.

<sup>440</sup> T. 1134 and T. 1138-1139.

<sup>441</sup> T. 568 and T. 570.

<sup>442</sup> T. 3607-3608.

<sup>443</sup> T. 1464-1470 and 1475

<sup>444</sup> T. 1475-1477.

identified Dragan Papi} in court, stating that "When someone tells you they have killed 32 people, you don't forget their face in a hurry".<sup>445</sup>

(b) Defence Evidence

357. The Defence case is that Dragan Papi} was not involved in any fighting that day. Having taken the women of the family to Rovna early in the morning, he stayed to guard the bridge over the Lašva River where he remained for the next ten days. Accordingly, he was not in Ahmici during the day of 16 April. The following evidence was given in support of this case.

358. **Goran Papi}** testified that the family again fled to the woods on being awoken by gunfire. Their father told Dragan to take his wife (who was pregnant at the time), mother and the other women to Rovna.<sup>446</sup> Dragan Papi} was seen in the woods by a neighbour who also saw him leaving and going in the direction of Rovna.<sup>447</sup>

359. **Zvonimir Šanti}** was on Radak bridge over the Lašva River between Ahmici and Rovna. He saw Dragan Papi} with his wife, mother and sister. Dragan Papi} asked the witness if he could put the family up. The witness already had two families in his house and so he put them with his brother, Anto Šanti}.<sup>448</sup> Dragan Papi} took them there and returned twenty minutes later and joined Dragan and Ivo Vidovi} guarding the bridge on the left (i.e., Ahmici) bank. The witness, meanwhile, was on the other side guarding the bridge with three other men. Dragan Papi} was dressed in a camouflage jacket and jeans and had an M48 rifle.<sup>449</sup> Dragan Papi} remained guarding the bridge for 7-10 days and then left.<sup>450</sup>

360. This evidence was supported by that of **Ivo Vidovi}** who said that he was told by Nenad Šanti} to guard the bridge. He went to the bridge and ten minutes later, at 6.30–

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<sup>445</sup> T. 2152-2154 and T. 2181-2190.

<sup>446</sup> T. 7059.

<sup>447</sup> Evidence of **Ljubica Milicevi}**, T. 7307.

<sup>448</sup> T. 7148-7149.

<sup>449</sup> T. 7154-7155.

<sup>450</sup> T. 7149.

7 a.m., Dragan Papi} arrived, coming from Donja Rovna and saying that he had taken his wife, mother and sister to a shelter there.<sup>451</sup> The witness said that he and Dragan Papi} kept guard all day: they had strict orders not to move away. Dragan Papi} did not leave for ten days or so, when Nenad Šanti} allowed him to go home because his wife had had a baby.<sup>452</sup> The witness said that he was one hundred per cent certain that Dragan Papi} did not leave his position for the first eight days of the conflict.<sup>453</sup>

#### 6. Dragan Papi}'s Military Service: Records

361. A Mobilisation Report, an HVO Defence Department Report on Mobilisation in Vitez for the Period 16-28 April 1993, shows that 498 conscripts were mobilised.<sup>454</sup> The list includes all the accused except Vladimir Šanti}: none were on special duty for the elderly or disabled. However, there are no entries showing the date of mobilisation for the accused.

362. According to one witness, the document was produced for the purpose of distributing shares for wartime remuneration and service in the HVO.<sup>455</sup> This was supported by the evidence of a policeman from Vitez, **Zdenko Raji}**, who said that the purpose was to boost the number of shares received by Croats compared with Muslims; thus it contained a number of women and elderly persons although some women did work in the non-combatant department of the HVO.<sup>456</sup>

363. In the Register of Members of 1992 Viteska Home Guard Regiment<sup>457</sup>, Dragan Papi}'s time of service is shown as being from 8 April 1992 – 15 January 1996. His brother Goran disputed the correctness of this entry.<sup>458</sup>

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<sup>451</sup> T. 6951-6953.

<sup>452</sup> Birth certificate, Exhibit D18/5; T. 7017.

<sup>453</sup> T. 6972-6973 and T. 7027.

<sup>454</sup> Exhibit P335.

<sup>455</sup> **Goran Males**, T. 7279.

<sup>456</sup> T. 7424, T. 7430 and T. 7433.

<sup>457</sup> Exhibits P351/353.

<sup>458</sup> T. 7091; see also evidence of **Zdenko Raji}**, T. 7438-39.

364. In the List of Members of the 2<sup>nd</sup> Battalion of the Vitez Brigade of the HVO,<sup>459</sup> Dragan Papi} is described as a courier, having enrolled on 23 June 1992.

#### 7. Findings of the Trial Chamber

365. In the light of the records relating to the accused's military service, it is difficult not to conclude that he was mobilised in the HVO during some of the time relevant to this indictment, although his precise role is not clear. Also, it is not disputed that he wore a uniform and carried a rifle in the village, although the Defence contends that the reason for doing so was connected with his work. The prosecution evidence indicates that he was active on the Croatian side; that he was seen firing an anti-aircraft gun and was active at a checkpoint. However, this evidence is an insufficient basis upon which to convict the accused on Count 1. What must be established is that he took an active part in either (or both) of the armed conflicts in October 1992 and April 1993.

366. In relation to the armed conflict on 20 October 1992, the Prosecution relies on one crucial witness, **Mehmed Ahmi}**, who identified the accused as shooting from his house early that morning and firing an anti-aircraft machine gun in the afternoon. It has already been noted that there were flaws in this witness's evidence, i.e. his claim to have been able to identify the accused, although he was crawling with his child at the time, and the fact that he did not mention this identification in his statement. In these circumstances the Trial Chamber is unable to accept Mr. Ahmi}'s evidence. There being no other evidence that the accused participated in the armed conflict that day this part of the Prosecution case is not made out.<sup>460</sup>

367. In relation to the attack on 16 April 1993, one witness, **Witness G**, gave direct evidence for the Prosecution concerning the accused's involvement in the attack. If the Trial Chamber accepts this witness's evidence, it would establish the accused's presence among the attacking forces in the village. However, the Trial Chamber does not find that

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<sup>459</sup> Exhibit D18/2.

<sup>460</sup> The evidence of Fahrudin Ahmi} in this connection does not, by itself, establish that the accused was an active participant. Even if it did, it would not be safe to rely on it in the light of the evidence of the four witnesses, called by the Defence, to the effect that the accused was not involved in the armed conflict.

it can rely on this evidence. This is because the witness made no mention of the presence of Dragan Papi} in any statement to the Office of the Prosecutor until his third witness statement, made only six months before the trial, although he did mention the accused, Dragan Papi}, in his first statement to the authorities of Bosnia-Herzegovina.<sup>461</sup> In cross-examination the witness testified that he had been afraid to do so.<sup>462</sup> He was also very hesitant in his description of the accused's uniform.<sup>463</sup> Witness G was an honest witness who had been through a dreadful ordeal on 16 April 1993. However, he was under the most stressful conditions imaginable and there must be some doubt about the accuracy of his identification of Dragan Papi}.

368. None of the remaining Prosecution evidence is sufficient to establish that Dragan Papi} was an active participant in the conflict, i.e. the evidence to the effect that he was seen driving his wife and mother from his house on 15 April or that people and vehicles were gathered there that evening, or that gunfire was seen coming from his room on 16 April. As for the evidence of **Captain Stevens**, the Trial Chamber cannot be sure that the witness identified the correct man in court five years after the event. Therefore, the Trial Chamber finds that there is a reasonable doubt as to whether Dragan Papi} participated in the conflict that day.

## B. Zoran Kupre{ki} and Mirjan Kupre{ki}

### 1. Introduction

369. It is convenient to summarise the evidence concerning Zoran Kupre{ki} and Mirjan Kupre{ki} together since their cases are closely connected. These two accused are brothers. At all material times they lived with their families in adjoining houses in a cluster of houses referred to as Grabovi in the centre of the village between Upper and Lower Ahmi}i. The cluster also included the houses of their relatives Vlatko and Ivica Kupre{ki} and their families. The Prosecution case against them may be briefly set out

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<sup>461</sup> T. 1530-1531, T. 1548-1549 and T. 1587.

<sup>462</sup> T. 1589.

<sup>463</sup> T. 1552-1553; on a previous occasion the witness had said the accused always wore a black uniform. In his testimony, however, the witness said he was wearing a camouflage uniform on 16 April.

here: (a) Zoran Kupre{ki} was an HVO Commander; (b) on 16 April 1993 they both took an active part in the assault on the Bosniac population of Ahmi}i. In particular, they took part in the murders of their neighbours, the family of Witness KL, of Suhret Ahmi} and Meho Hrstanovi}. They were also seen that same day in Ahmi}i, armed and dressed in camouflage uniforms.

370. Zoran Kupre{ki} is aged 41, having been born on 23 September 1958 in Vitez. He is married with three children. He is a former member of the League of Communists of the SFRY. He was an employee of the Slobodan Princip Seljo factory in Vitez, where he was in charge of maintenance of one of the units.<sup>464</sup>

371. Mirjan Kupre{ki} is 36, having been born on 21 October 1963; he is married with two children. He was employed as a mechanical technician until February 1992 in the Slobodan Princip Seljo factory and from August 1992 until 15 April 1993 he worked for his cousin Ivica, first in the Sutre store in Ahmi}i and then, ten days before the conflict, at the store in Vitez. In April 1994 when he was demobilised he returned to work for Sutre.<sup>465</sup>

## 2. Background

### (a) Introduction

372. There is no dispute that these accused are of good character. Evidence to this effect was given by prosecution witnesses. They and their cousin Vlatko were described as growing up as fine, decent, well-behaved young men.<sup>466</sup> A neighbour, **Witness D**, knew both brothers: she said that they were good neighbours and did nothing bad to the Muslims nor showed them hatred. However, she also said that when they started talking of "Herceg-Bosna" the old intimacy was gone.<sup>467</sup> **Witness S** said that he had very good relations with Zoran with whom he socialised, and that Mirjan showed no signs of

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<sup>464</sup> Zoran Kupre{ki}, T. 11170-11171, T. 11180 and T. 11183.

<sup>465</sup> Mirjan Kupre{ki}, T. 11556-11559.

<sup>466</sup> Witness KL, T. 1893.

<sup>467</sup> T. 1080.



extremism.<sup>468</sup> At the Muslim feast of Bajram, held in March of 1993, Zoran and Mirjan Kupre{ki} and their families celebrated at Fahrudin ("Fahrnan") Ahmi}'s house.<sup>469</sup>

373. The Defence called evidence to similar effect. Zoran Kupre{ki} was a member of the SPS Cultural Association, a multi-ethnic folklore society which performed dances of all ethnicities and to all groups. Zoran Kupre{ki} resisted pressure to join a purely Croatian association. At the end of March 1993 the folklore group performed at the Muslim festival of Bajram; several days before the conflict in April, the group performed in Mosunj to celebrate the Catholic holiday of Easter.<sup>470</sup>

374. Mirjan Kupre{ki} said he was brought up with Muslims and was on good terms with them. Muslims were close friends to his parents, including some close neighbours: Witness KL was one, but there were misunderstandings about the boundary. Mirjan Kupre{ki} was also a member of the folklore society and was close friends with some members including Fahrnan Ahmi} and other Muslims and Serbs.<sup>471</sup>

375. Much evidence was given of the activities of Zoran Kupre{ki} and Mirjan Kupre{ki} within this folklore or Cultural and Arts Society, in which they were described as leading figures.<sup>472</sup> For instance, **Zdravko Vrebac** said that in 1993 the Society was half Muslim and half Croat with some Serbs. Zoran Kupre{ki} was the main choreographer; Mirjan Kupre{ki} saw to the music together with the witness and Fahrudin Ahmic. These four were the principals.<sup>473</sup> The Society held frequent rehearsals and performed at weddings and other events in Vitez. In 1993 they performed for UNPROFOR.<sup>474</sup> **Rudo Vidovi}**, Director of the Telecom Centre for Central Bosnia, whose family home is in Ahmici and who grew up with Zoran Kupre{ki}, described him as having similar characteristics to the witness himself; a competitive spirit, upright, hardworking. The witness said that Mirjan Kupre{ki} was younger and had the same

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<sup>468</sup> T. 2884.

<sup>469</sup> **Witness CA**, T. 4613. The Trial Chamber notes that this is a different Fahrudin Ahmic than the witness in this case: it was common in Ahmici for several people to share the same name.

<sup>470</sup> Photo, Exhibits D16-19/1; **Zoran Kupre{ki}**, T. 11186-11193.

<sup>471</sup> **Mirjan Kupre{ki}**, T. 11560-11565.

<sup>472</sup> **Rudo Kurevija**, T. 5895-5897.

<sup>473</sup> **Zdravko Vrebac**, T. 7786.

characteristics as Zoran Kupre{ki}.<sup>475</sup> Zoran Kupre{ki} was a member of the League of Communists but was not active after the elections. They did not express extremist views.<sup>476</sup> Zoran Kupre{ki}'s superior at work in the Princip factory, **Ivan Tabara**, said that Zoran Kupre{ki} as Head of Maintenance for machinery used for military production had 28 machine operators of mixed ethnicity under him: he had a correct attitude towards them and was responsible and regular in his attendance at work.<sup>477</sup> **Adil Fafulovi**}, a Muslim folk-dancer, a fellow member of the Society, gave evidence that Zoran Kupre{ki} and Mirjan Kupre{ki} did not differentiate on grounds of ethnicity and invited Muslims to join the Society.<sup>478</sup> **Veljko Cato**, a Serb, and another member of the Society described Zoran and Mirjan Kupre{ki} as honest family men, interested in folklore, dancing and socialising.<sup>479</sup>

376. According to another witness, Zoran Kupre{ki} was apolitical and did not express extremist views: he gave priority to family and the cultural society with its Muslims, Croats and Serbs, all singing and dancing together. He was popular among Muslims and Serbs. Mirjan Kupre{ki} held similar views.<sup>480</sup>

### 3. Involvement of the Accused in the HVO Prior to 16 April 1993

#### (a) Prosecution Evidence

377. Both Zoran and Mirjan Kupre{ki} have military experience, both having completed their military service in the JNA, in which Zoran became a reserve officer<sup>481</sup> and in which Mirjan was trained as an infantry man.<sup>482</sup> Both are listed in the Register of the HVO Vitez Brigade as being reservists between 8 April 1992 and 22 and

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<sup>474</sup> **Zdravko Vrebac**, T. 7787-7788, **Dragan Vidovi**}, T. 8419.

<sup>475</sup> T. 6654-6655.

<sup>476</sup> T. 6660-6661.

<sup>477</sup> T. 8737.

<sup>478</sup> T. 8796.

<sup>479</sup> T. 8816-8817.

<sup>480</sup> Evidence of **Dragan Grebenar**, T. 6023-25 and T. 6028.

<sup>481</sup> T. 11237 and T. 11388-11390.

<sup>482</sup> T. 11659.

23 January 1996.<sup>483</sup> It was disputed that the signature against Mirjan Kupre{ki}'s name was his.<sup>484</sup> However, he does not dispute that prior to and after the war he was a reservist.<sup>485</sup>

378. According to **Witness JJ**, a friend and work colleague of Zoran Kupre{ki}, the latter was a member of the HVO prior to 16 April 1993. He was absent from work at times and went to the front line. The witness saw him in uniform and he did not try to conceal the fact. He was present at an HVO oath-taking ceremony at Vitez stadium. She witnessed the oath-taking ceremony briefly: Zoran Kupre{ki} was a participant and took the oath, wearing a military uniform. He went to the front line for some time in the period between January to March 1993. About a month before 16 April 1993, Zoran Kupre{ki} told her that he was an HVO Commander.<sup>486</sup>

379. Evidence was given by two other witnesses that Zoran Kupre{ki} was an HVO Commander in the Grabovi area:

(a) **Witness B** was a Bosniac and former JNA Captain who became Security Officer for the Territorial Defence in Vitez. After the first conflict in October 1992 he visited Ahmi}i in connection with the return to the village of the Bosniac population who had fled. On this visit the witness spoke to Nenad Šanti} (whom he described as in command of the HVO in the area from Vitez to Ahmi}i). Nenad Šanti} told the witness that Zoran Kupre{ki} was the Commander of one area. The witness and Šanti} went to Zoran Kupre{ki}'s house and spoke to him. Šanti} said that Zoran Kupre{ki} should provide security and should guarantee that there would be no problems concerning the return of the Bosniac population. Zoran Kupre{ki} promised that there would be no problems and said that he would personally take action to ensure that there would be none.<sup>487</sup>

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<sup>483</sup> Exhibit P353 at pp. 75 and 30 respectively.

<sup>484</sup> **Ivica Kupreškic**, T. 7997.

<sup>485</sup> T. 11667.

<sup>486</sup> T. 12288-12292, T. 12357-12358 and T. 12367.

<sup>487</sup> T. 769-773.

(b) **Abdulah Ahmi}**, a resident of Ahmi}i at the material time, said that he had learned that Zoran Kupre{ki} was the HVO Commander: he learned this because people went to Zoran Kupre{ki}'s house for negotiations concerning the return of the Muslims. He saw Zoran Kupre{ki} often, armed and in full gear: Zoran Kupre{ki} went to the front at Busovaca and was in charge of village watches. The witness said that there were 5 or 6 Croatian families in Grabovi consisting of 20-30 people.<sup>488</sup>

380. According to **Witness Y**, who was the organiser of Muslim night patrols in Ahmi}i, Zoran Kupre{ki} called a meeting in the school and asked Witness Y to stop the Muslim watches. When the witness suggested joint patrols, Zoran Kupre{ki} said that he had no orders from his command to accept. Zoran Kupre{ki} also said that he was taking up a new post and would not be responsible for the area.<sup>489</sup>

381. According to **Witness S**, in 1992 and 1993 he saw both Zoran and Mirjan Kupre{ki} in uniform, but Zoran wore his more often than Mirjan.<sup>490</sup>

(b) Defence Evidence

382. **Zoran Kupre{ki}** denied that he was a Commander or was ever addressed as such: his role for a time was to assign the village guards.<sup>491</sup> He had not participated in the HVO oath-taking parade in the stadium but had witnessed it as a member of the audience.<sup>492</sup>

383. According to Zoran Kupre{ki}, the Kupre{ki}'s started a watch in February 1992. Dragan Vidovi} had contacted him to see whether he would be in favour of a village guard. Zoran Kupre{ki} then went out every night on a two-hour shift. At first he wore civilian clothes: he was later given a uniform top which he then wore and he carried Ivica Kupre{ki}'s hunting carbine.<sup>493</sup> After the conflict on 20 October it was decided to

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<sup>488</sup> T. 366-370.

<sup>489</sup> T. 3299-3301.

<sup>490</sup> T. 2948-2955; **Witness T** also saw Zoran Kupre{ki} in uniform; T. 2949; as did **Witness V**, T. 3072.

<sup>491</sup> T. 11533.

<sup>492</sup> T. 11201-11209.

<sup>493</sup> **Zoran Kupre{ki}**, T. 11216-11224.

place the guards on a more formal footing and it was agreed on 20 or 21 October that Zoran Kupre{ki} should be in charge of this. Zoran Kupre{ki} compiled these lists until late January 1993 when Dragan Vidovi} took over.

384. **Mirjan Kupre{ki}** said that in February or March 1992 Zoran asked him to join the village guard, which he did: he was one of about ten men. This guard duty continued until the first conflict. Mirjan Kupre{ki} did not have a rifle; he was given an old M48 rifle and two boxes of ammunition. He did not have a uniform, but sometimes used Zoran's camouflage jacket.

385. According to Zoran Kupre{ki}, Witness Y's evidence concerning a meeting was wrong as to the date. The meeting was in late January or early February 1993. He asked Witness Y not to maintain a checkpoint at the entrance to the village and not to patrol the main road. He said that Dragan Vidovi} would be in charge from now on. Zoran Kupre{ki} had no written or oral order from anyone telling him not to accept a Muslim proposal since he was not subordinate to anyone.<sup>494</sup>

386. According to their evidence, Zoran and Mirjan Kupre{ki} took no active part in the armed conflict on 20 October 1992. Summarising their evidence, they said that shortly after the shooting started, they took their families to a shelter in Šantici and then returned to the neighbourhood of their own houses to a feature which was referred to as "the Depression" where they felt safer and where they remained until the afternoon.<sup>495, 496</sup> Others in the Depression at the time gave evidence of the presence of the accused there.<sup>497</sup> The Depression was a sizeable hollow in the ground, not far from the Kupre{ki} houses and next to the house of Niko and Mirko Saki}: it had always been a kind of

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<sup>494</sup> **Zoran Kupre{ki}**, T. 11460-11463 and T. 11465.

<sup>495</sup> This evidence was supported by **Milutin Vidovi}**, T. 7493; **Zdravko Vrebac**, T. 7754-7759, and **Mirko Saki}**, T. 7602.

<sup>496</sup> T. 11247-11251 and T. 11585-11590.

<sup>497</sup> Evidence of **Niko Saki}**, T. 8231; **Mirko Saki}**, T. 7602; **Zdravko Vrebac**, T. 7809; **Dragan Vidovi}**, T. 8405; **Mirko Vidovi}**, T. 8583.

shelter and was used as a gathering point for citizens in cases of emergency in the former Yugoslavia as well as a shelter from Serb air attacks.<sup>498</sup> They were not armed.<sup>499</sup>

387. According to Zoran Kupre{ki}, he took part in negotiations to ease tensions after the conflict of 20 October 1992. He took notes on one occasion<sup>500</sup> and signed an agreement<sup>501</sup> on another because he was told to do so. He took part in a discussion about people returning to their houses but had no say in anything else.<sup>502</sup>

#### 4. Their Role in the Events of 16 April 1993

##### (a) Prosecution Evidence

388. The prosecution evidence against either accused concerning events on 16 April 1993 begins with the evidence of **Witness V** who testified that on 15 April at about 5 p.m., he saw a group of 10 soldiers and two civilians in front of Zoran Kupre{ki}'s house. The soldiers were in camouflage uniforms and carried weapons.<sup>503</sup>

389. The Prosecution case against these two accused arising from their roles in the events of 16 April relates to three separate allegations:

- (a) their alleged participation in murder and arson at the house of Witness KL;
- (b) their alleged participation in murder and arson at the house of Suhret Ahmic; and
- (c) their presence in Ahmi}i that day.

These matters will be considered separately.

##### (i) Their Alleged Participation in Murder and Arson at the House of Witness KL

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<sup>498</sup> Evidence of **Zdravko Vrebac**, T. 7752; **Mirko Saki**}, T. 7692

<sup>499</sup> **Ivica Kupre{ki}**, T. 7938.

<sup>500</sup> Exhibit D26/1.

<sup>501</sup> Exhibit D27/1.

<sup>502</sup> T. 11256-11258 and T. 11443-11445.

<sup>503</sup> T. 3041-3042.

390. **Witness KL** was an immediate neighbour of the Kupre{ki}'s in Grabovi (his house being nearest to that of Vlatko Kupre{ki}, but no distance from those of Mirjan and Zoran Kupre{ki}: he had known all three since their births). His evidence was that following the morning call to prayer there was an explosion. Zoran Kupre{ki} then appeared in Witness KL's house at the door of the living room (with a rifle, his face blackened and in a black uniform). Zoran Kupre{ki} shot and killed Witness KL's son (Naser). He then shot Witness KL's daughter-in-law (Zehrudina) and her son (Elvis, aged six or seven). The witness testified that he had been standing in the doorway to the living room, but "lost control" and fell behind the couch on which Elvis had been sleeping. According to the witness, shots were then fired at him but he was not hit. The witness's grandson (Sejad or 'Sejo', aged 3 months) was also shot and killed. Mirjan Kupre{ki} came into the room immediately after his brother, poured liquid from a bottle and set a couch on fire.<sup>504</sup> The men then left and Witness KL went into his bedroom. By this time, the house was on fire, the ceiling came down and eventually the witness made good his escape, running through the fire and sustaining burns to his hands and face as he did so.

391. Initially Witness KL hid in a hay-stack and woodpile near his house; finally he fled to Vrhovine, stopping on the way at his mother's house. On 17 April 1993 he was admitted to a hospital in Zenica where he was treated for severe burns to his face and hands. He remained in the hospital until 1 May 1994.

392. In cross-examination, Witness KL stated that both he and his six children had good relations with the Kupre{ki} brothers. Medical, divorce, and employment records were put to him but he denied that he had problems with his eyesight or alcoholism.<sup>505</sup> When asked why he did not tell his mother who the perpetrators were, the witness stated that he had not dared tell her, because she was an old woman (born in 1909) and could let it "slip out unintentionally, and then later on this could have cost me a lot".<sup>506</sup> He saw his

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<sup>504</sup> T. 1905-1906, T. 1913-1914 and T. 1917-1922.

<sup>505</sup> Exhibits D 3/1-8/1.

<sup>506</sup> T. 2006-2007.

granddaughter and his daughter-in-law in the hospital but did not discuss the events of 16 April 1993 with them. He said that he did tell another daughter, Witness EE.<sup>507</sup>

393. In some of his previous statements such as that made to Witness HH (a United Nations investigator), Witness KL said he was in the other room during the attack.<sup>508</sup> When confronted with such discrepancies he maintained that these were due to mistakes. In re-examination, Witness KL said that he was 100 per cent sure that Zoran and Mirjan Kupre{ki} were responsible for the killings.

394. It may be noted that at first the witness did not identify Zoran and Mirjan Kupre{ki} as the killers and did not do so until February 1994. However, according to the evidence of **Witness EE**, when she saw him in hospital in Zenica he told her that Zoran and Mirjan Kupre{ki} did the killing.<sup>509</sup>

395. It has not been disputed that these killings took place. On 6 May 1993 **Payam Akhavan** of the United Nations Centre for Human Rights and EEC Ambassadors visited the house and found the four bodies; two adults, an infant and a child.<sup>510</sup> Forensic examination of the house in July 1998 by a Dutch Crime Scene Investigator and subsequent forensic analysis showed that 20 cartridge cases and an anti-aircraft projectile were recovered, together with the bones of a child under some bed springs at the place where Witness KL described Elvis's bed.<sup>511</sup> No traces of inflammable liquids or other propellants were found but the fact that they were not found does not mean that they were not used.

396. On 7 May 1993 Witness KL spoke to **Witness HH**, an Officer of the United Nations Centre for Human Rights and told him that he knew those responsible: he said

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<sup>507</sup> T. 2009-2010.

<sup>508</sup> Exhibit P82, para. 17.

<sup>509</sup> T. 4245-4249; Statement dated 14 May 1993, Exhibit D10/1.

<sup>510</sup> T. 1235-1237 and T. 1244-1248; Video Exhibit P83; Photo Exhibits P84-96.

<sup>511</sup> Exhibit P169.



that they were his neighbours from the first house down the road. He also said that he was in the room and his family were killed in an adjacent room.<sup>512</sup>

397. The difficulty concerning the credibility of this witness's evidence is that it was not until ten months after the incident that he firmly identified Zoran and Mirjan Kupre{ki} as the perpetrators of the massacre of his family. Despite the horror of what had happened and his supposed knowledge of those responsible, he did not divulge the fact when interviewed on 18 and 19 April for a local television station or (more significantly) when interviewed by investigators on 22 April 1993, when he said that he did not recognise the perpetrators. On 1 October 1998, when interviewed by an investigating judge, the witness said only that the figures resembled Zoran and Mirjan Kupre{ki}. His explanation for these omissions is that he dared not identify the killers because of the wartime situation. However, the investigators and the investigating judge were Bosniacs and it is difficult to see why he should feel that identifying the perpetrators to them would have put him at risk.

398. It must also be noted that there is a further major discrepancy between his earlier accounts and those he gave subsequently. Initially he said he was in his bedroom when the killings took place whereas later he said that he was in the living room.

399. A possible explanation for the omissions and discrepancies may be that after conversations with others (notably his granddaughter), he had convinced himself that this is what he saw. He did not appear to the Trial Chamber to be an untruthful witness or one who had set out to lie deliberately; however he may have been mistaken.

(ii) Their Alleged Participation in Murder and Arson at the House of Suhret Ahmi}.

400. It is alleged that Zoran and Mirjan Kupre{ki} participated in the murders of Suhret Ahmi} and Meho Hrstanovi} and the arson of Suhret Ahmi}'s house. Evidence concerning this was given by **Witness H**, who lived with her father Suhret and her family

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<sup>512</sup> T. 4489-4491, T. 4521-4524, T. 4641-4648 and T. 4662. Witness HH's notes of interview, Exhibit P292.

in a house adjacent to that of Witness KL who is her grandfather. Her evidence was as follows. She knew Zoran Kupre{ki}, Mirjan Kupre{ki} and Vlatko Kupre{ki} (the former two she saw practically every day and she played with Vlatko Kupre{ki}'s daughter). On 16 April 1993, she was awoken by gunfire which shattered the glass in her bedroom. The family took refuge in a shelter constructed next to the garage. A grenade was thrown into the house and her father was told to open the door. When he went outside he was shot and killed. Their neighbour, Meho Hrstanovi}, was killed in a burst of gunfire at their front door.<sup>513</sup> Witness H left the shelter when the trapdoor was lifted. She was confronted by Zoran Kupre{ki} whom she recognised immediately (he was one metre away and she also recognised his voice): he told her that he had orders to kill everyone. Mirjan Kupre{ki} was in the hallway and the witness saw him climbing the stairs to the top floor. Zoran Kupre{ki} asked "What are we going to do with them, shall we kill them?" Mirjan Kupre{ki} said that he did not know. Soldiers then set fire to the house and the family left.<sup>514</sup> Zoran Kupre{ki} had black polish in lines on his face, he was in uniform, carrying a rifle and had a rocket launcher on his back. Mirjan Kupre{ki} was wearing a uniform with a line on each cheek and forehead. He was one metre from her and she had no difficulty identifying him. He too had a rifle and a rocket launcher. She looked at Mirjan Kupre{ki} and he looked at her and she could see his face clearly. She was positive that it was him.

401. In cross-examination, Witness H said that she was one thousand per cent sure that she had seen Zoran Kupre{ki}. She saw him for a couple of seconds and although the lights were not on, visibility was good since it was morning.<sup>515</sup>

402. She was cross-examined about a statement made to an investigating Judge on 17 December 1993.<sup>516</sup> Discrepancies between this statement and her evidence were pointed out. The statement said that her father had a rifle, that she saw him killed with a burst of gunfire, and that Zoran and Mirjan Kupre{ki} were setting fire to the upper

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<sup>513</sup> T. 1631-1640 and T. 1653-1654.

<sup>514</sup> T. 1641-1652.

<sup>515</sup> T. 1723-1724 and T. 1729.

<sup>516</sup> Exhibit D1/2.

floor.<sup>517</sup> The witness, however, denied meeting the investigating Judge and denied that the signature on the statement was hers.<sup>518</sup>

403. This witness appeared confident and forceful. She was in no doubt at all about her identification of the three accused whom she knew well as they had been her neighbours all her life.<sup>519</sup> Although the circumstances could not have been more stressful, she had a good opportunity to identify all three accused since they were in close proximity to her.

404. Another witness, referred to as **Witness SA**, was in Suhret Ahmi}i's house at the time of the attack. She did not give evidence at the trial, but her statements were admitted as Court Exhibits.<sup>520</sup> In two statements in April 1993 (made in Zenica) she did not identify the perpetrators. In a third statement (in May 1993) she said that she did not recognise any of the soldiers. However, in December 1993, in a statement made to an Investigating Judge of the High Court in Zenica she said that she recognised Zoran, Mirjan, Ivica and Vlatko Kupre{ki} in full combat gear in her house. She repeated this in a statement to the Office of the Prosecutor in October 1994. In the view of the Trial Chamber, little or no weight can be placed upon the statements purporting to identify the accused. It was not until her fourth statement that the witness made any identifications. She did not give evidence and was, therefore, not subject to cross-examination about those discrepancies.

(iii) Other Evidence Relating to Their Presence in Ahmi}i on 16 April 1993

405. **Witness C**, a 13 year-old boy, fled barefoot from his house when it was attacked by soldiers and his brother was killed. He was rescued by Croatian soldiers and taken to the house of Jozo Alilovi} (a Croatian friend and neighbour). The house is to the east of the village between the Catholic cemetery and the Bungalow. According to Witness C, at

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<sup>517</sup> T. 1706-1708.

<sup>518</sup> T. 1705. In order to contradict the evidence of Witness H, the Defence called the Investigating Judge, **Mrs. Dijana Ajanovic**, who took the statement from the witness and confirmed that the signature was that of the witness; T. 8988-92.

<sup>519</sup> She also saw the accused Vlatko Kupre{ki} that day: see below.

<sup>520</sup> Exhibits C1-6.

11 a.m. or 12 noon Zoran and Mirjan Kupre{ki} called at the house with others. They were dressed in camouflage uniforms with green straps on their shoulders and weapons (they did not have paint on their faces). They stayed for about an hour.<sup>521</sup>

406. Both Zoran and Mirjan Kupre{ki} are listed in the HVO Mobilisation Report,<sup>522</sup> as being mobilised between 16 and 28 April 1993, although there is no indication of the precise date.

407. **Witness JJ** gave evidence that she had a number of meetings in Vitez with Zoran Kupre{ki} and that during the course of one of the meetings, Zoran Kupre{ki} said that the Jokers had been firing at fleeing civilians in Ahmi{i} on 16 April, that one of them had raised his gun and threatened Zoran Kupre{ki} that unless he also shot at the civilians he himself would be shot. As a result, Zoran Kupre{ki} testified that in order to save himself he had shot into the air.<sup>523</sup>

(b) Defence Evidence

408. The accused deny that they participated in the crimes alleged, were in the places alleged or took any active part in the conflict at all.

409. On 15 April 1993 they were at work. **Zoran Kupre{ki}** testified that he was at work until 2 p.m., and then went into Vitez for a coffee with Senad Topoljak and Dragan Grebenar. On his way home things were normal. Just before dusk his uncle, Ivica, brought his wife from Split. Zoran Kupre{ki} and his wife went to Ivica's house that evening after 8 p.m., and stayed for half an hour. Ivica spoke about the barricades which he had come across and the incident in Zenica involving Toti} (an HVO officer who was killed). Zoran Kupre{ki} then went home and to bed about midnight.<sup>524</sup> When cross-examined about the evidence of Witness V, Zoran Kupre{ki} said he saw nothing of what

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<sup>521</sup> T. 942-948, T. 971-974 and T. 980.

<sup>522</sup> Exhibit P335.

<sup>523</sup> T. 12307-12310, T. 12314-12315, in particular T. 12333-12336 and T. 12376-12378.

<sup>524</sup> T. 11264-71.

Witness V claimed to have seen outside Zoran Kupre{ki}'s house; nor did anyone else mention it. None of the Kupre{ki}s left the village that night.<sup>525</sup>

410. **Mirjan Kupre{ki}** said that he left work in the Sutre shop in Vitez at 5 p.m., and went to a coffee shop before returning home where he found that his son was ill with a temperature. He, too, then went to Ivica's house, returning home at 11 p.m.<sup>526</sup> His evidence about his whereabouts in Vitez was supported by the evidence of a number of witnesses.<sup>527</sup>

411. Witnesses also gave evidence concerning the gathering at Ivica Kupre{ki}'s house, where friends and relatives of Mrs. Ankica Kupre{ki} had called to welcome her home.<sup>528</sup> The guests included Zoran and Mirjan Kupre{ki} and their wives, Vlatko Kupre{ki}'s wife and Mirko Saki.<sup>529</sup> According to **Gordana Cui}** and **Witness DC/1,2}** they talked of "normal things".<sup>530</sup> According to **Ivica Kupre{ki}**, they talked about the journey from Split and the Toti} case.<sup>531</sup> The guests left at about midnight.<sup>532</sup> Gordana Cui} said that she and Zoran Kupre{ki} had left earlier and gone to his house where her mother was: she stayed late, watching a music video-tape and talking of lots of things, not of war or of conflict.<sup>533</sup> She said that if Zoran Kupre{ki} had known that the conflict would break out the next day, he would have told her.<sup>534</sup>

412. Zoran Kupre{ki}'s account of the events of 16 April was as follows:

- (a) He was awoken by a ring at the doorbell while it was still dark. He opened the front door to find Dragan Vidovi} who told him that there was a possibility of an attack by Mujahedin and that they should flee with their families.

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<sup>525</sup> **Zoran Kupre{ki}**, T. 11470 and T. 11472.

<sup>526</sup> T. 11599-603.

<sup>527</sup> **Ivan Grabovac**, T. 8640-8642; **Veljko Cato**, T. 8811-8812; **Marko Martinovic**, T. 8831-8832; **Zdravko Vrebac**, T. 7766-7768.

<sup>528</sup> T. 7861.

<sup>529</sup> **Mirko Sakic**, T. 7609-7611.

<sup>530</sup> T. 8154; **Witness DC/1,2}**, T. 8526.

<sup>531</sup> T. 7966-7967; **Ankica Kupre{ki}**, T. 7862.

<sup>532</sup> Evidence of **Ankica Kupre{ki}**, T. 7863; **Ivica Kupre{ki}**, T.7967.

<sup>533</sup> T. 8155-8156 and T. 8198.

<sup>534</sup> T. 8156-8157.

(b) Zoran Kupre{ki} told his wife to get the children ready; he then went to rouse his brother and parents (he had put on a pair of jeans and a military top). He then returned to his house. He collected his family and with his parents and brother (with his mother in law in a wheelbarrow) went off towards Šanti}i and the shelter at the Vrebac house. He had Ivica's hunting carbine. There was no shooting at the time.<sup>535</sup> Some locals (Croats) were at Niko Saki}'s house, including Milutin Vidovi} who said that Zoran Kupre{ki}'s children would be safe at his house. Zoran Kupre{ki} took his family to Milutin Vidovi}'s house.<sup>536</sup>

(c) When he and his family and parents were going to Milutin Vidovi}'s house, he saw five or six well-armed soldiers in black and camouflage uniforms around Anto Pudja's house moving towards Niko Saki}'s house. They had painted faces and rifles and mortars, triangular insignia and some wore white belts. He concluded they were Croats who were coming to repel a possible attack; it was still dark and there was no shooting at the time.<sup>537</sup>

(d) Zoran Kupre{ki} and his brother (having put their families in shelters) returned to Niko Saki}'s' house. On the way they met the Didaks. Zoran Kupre{ki} then took the Didaks to Milutin Vidovi}'s house. He then returned towards Niko Saki}'s house. As he did so shooting started. It was now daybreak, between 5 and 6 a.m., and cloudy with drizzle. The shooting came from the direction of the Kupre{ki} houses and from the road by the cemetery.<sup>538</sup>

(e) Zoran Kupre{ki} ran back to Niko Sakic's house. Niko said that the others were in the Depression so Zoran Kupre{ki} went there where he saw Dragan Vidovi}, Mirko Saki}, his brother Mirjan, Dragan Samir and Drago Grgi}. After about 15-20 minutes smoke could be seen rising which appeared to come from his brother's house and then more smoke which seemed to come from Zoran Kupre{ki}'s house. (They later discovered that it was not coming from their houses). A short time later a shell

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<sup>535</sup> Zoran Kupre{ki}, T. 11278-11280.

<sup>536</sup> Zoran Kupre{ki}, T. 11281-11282.

<sup>537</sup> Zoran Kupre{ki}, T. 11283-11287.

<sup>538</sup> Zoran Kupre{ki}, T. 11287-11290.

fell nearby. The shooting was at its most intense for the first hour or two and then subsided. Mirko Saki} and Mirjan and Zoran Kupre{ki} went to see what had happened to their families. On the way, Anto Vidovi} told them that Fahrhan Ahmi}, their friend from the folklore group, had been killed. At 9 or 10 a.m., they reached the shelters.<sup>539</sup>

(f) When they went back towards the Depression, Zoran Kupre{ki} said that he heard screams and shooting in the area behind the Kupre{ki} houses or somewhere around the Sutre warehouse. The brothers met Nikola Omazi} near Mirko Saki}'s house. Nikola Omazi} said that Mirjan Šanti} had been killed. The brothers went into the Depression. The shooting had subsided. Mirjan Šanti}'s body was brought down on a ladder and the brothers helped to take the body to a shed at Niko Saki}'s house. Mirjan Šanti} was wearing a camouflage uniform with a white belt, the insignia of the Military Police and a light blue ribbon. This all happened sometime before 11 a.m.<sup>540</sup>

(g) They then returned to the Depression. As they were coming back they could see smoke rising from Muslim parts of the village: "you could gain the impression that the Muslims had been driven out of there".<sup>541</sup> There was shooting and the sound of UNPROFOR tanks. Later Ivica Raji} told the brothers that it was not their houses but those of Muslim neighbours which were burning. Ivica said that he had seen 10 soldiers at the Kupre{ki} brother's house who identified themselves as Jokers. In the afternoon the brothers went to Zume again. Sporadic fire continued until nightfall. There was then intense fire and a loud explosion: the minaret was destroyed. This was about 7.30 or 8 p.m. They spent the night in their uncle's stables.<sup>542</sup>

(h) Zoran and Mirjan Kupre{ki} never went to Jozo Alilovi}'s house. They remained in the Depression all day in order to protect the shelter. Zoran Kupre{ki} carried

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<sup>539</sup> Zoran Kupre{ki}, T. 11295-11299.

<sup>540</sup> Zoran Kupre{ki}, T. 11306-11307.

<sup>541</sup> T. 11303.

<sup>542</sup> Zoran Kupre{ki}, T. 11304 and T. 11307-11310.

Ivica's rifle the whole time. They did not know who was attacking whom or who would win.<sup>543</sup>

(i) When cross-examined by the Prosecution, Zoran Kupre{ki} denied that he had anything to do with the crimes on 16 April or that anybody with him had taken part in them.<sup>544</sup> He did not have time to call on Muslim neighbours. He did not pass Witness KL's or any other Muslim house. He did not take the car. The car was a small Fiat which was in the garage of Branko Livanci}.<sup>545</sup> They stayed in the Depression because they were 50-100 metres from the shelter in which their women and children were, so they could defend it.<sup>546</sup>

(j) When asked about the evidence of Witness KL and Witness H, Zoran Kupre{ki} said that Witness H could not have seen him or his brother because they were not there,<sup>547</sup> nor were they at Witness KL's house. He had normal relations with Witness KL and would greet him each day. He knew Nazir Ahmic. He never went to Witness KL's house as an adult, although he had been there as a child.<sup>548</sup> When examined by the Trial Chamber, Zoran Kupre{ki} said that he did not know Witness H: she was a child at the time and it was not customary to say hello to children when passing them.<sup>549</sup>

(k) When cross-examined about the statement of Witness JJ, Zoran Kupre{ki} said that she was wrong when she said that he had been threatened by Jokers and pretended to shoot at civilians.

413. Mirjan Kupre{ki}'s account of the events of 16 April was as follows:

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<sup>543</sup> Zoran Kupre{ki}, T. 11311-11314.

<sup>544</sup> T. 11468-11469.

<sup>545</sup> Zoran Kupre{ki}, T. 11473-11479.

<sup>546</sup> Zoran Kupre{ki}, T. 11487-11488.

<sup>547</sup> T. 11506.

<sup>548</sup> Zoran Kupre{ki}, T. 11511-11513.

<sup>549</sup> Zoran Kupre{ki}, T. 11554-11555.



(a) He was awoken before 5 a.m. by his brother Zoran, who told him that an attack from Barin Gaj was expected.<sup>550</sup> He roused his family. His mother-in-law suffered back-pain and his son Marko was ill. As a result, Mirjan Kupre{ki} informed nobody else of the news. The family set off for Zume, Mirjan Kupre{ki} taking his mother-in-law in a wheelbarrow. They met Zoran and their parents and all went together through the Depression.<sup>551</sup> On the road near Anto Pudja's house they passed some soldiers, commandos with white belts and holsters, some with painted faces and with several cases of ammunition. Mirjan Kupre{ki} concluded that they were Military Police: they had some type of insignia.<sup>552</sup>

(b) Mirjan Kupre{ki} left his family at the Vrebac shelter and returned to Niko Saki's house. When the shooting started, he was with others in front of the shelter at the back of the house and they ran into the Depression, at first to take shelter and later to observe what was going on:<sup>553</sup> Zoran Kupre{ki} was not with them, but joined them later. Mirjan Kupre{ki} had his rifle; Dragan Vidovi} and Zoran Kupre{ki} also had rifles. Zoran Kupre{ki} wore a camouflage jacket. Mirjan Kupre{ki} wore blue jeans and a long brown jacket and a green sweater. It was cold and there was drizzle or mist.<sup>554</sup> There were six men in the Depression in all.<sup>555</sup>

(c) The shooting lasted 2-3 hours and it was very intense. They tried to get out along the path but a shell fell nearby. When they tried again bullets were being fired through the forest. There was smoke coming from their houses and a high pillar of smoke rising from the road towards the mosque. There were detonations and small arms fire.<sup>556</sup> During the first lull Milutin Vidovi} came to the Depression to see whether they had any information. Mirjan Kupre{ki} then went to see his family with others.

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<sup>550</sup> T. 11673-11679.

<sup>551</sup> **Mirjan Kupre{ki}**, T. 11604-11608.

<sup>552</sup> **Mirjan Kupre{ki}**, T. 11608-11610.

<sup>553</sup> T. 11610-11616.

<sup>554</sup> **Mirjan Kupre{ki}**, T. 11617-11619.

<sup>555</sup> **Mirjan Kupre{ki}**, T. 11735.

<sup>556</sup> **Mirjan Kupre{ki}**, T. 11619-11621.

On the way, Anto Vidovi} told them that Fahrudin (Fahrhan) Ahmi} had been killed. (Mirjan Kupre{ki}, Fahrudin and Zdravko Vrebac had been inseparable friends).<sup>557</sup>

(d) On the way back from the shelter, Zoran said that he had been told that other persons had been killed. They heard that there were other casualties by the road near Fahrhan's house. Mirjan Kupre{ki} went with Mirko to the Saki} house briefly and then returned to the Depression. Nikola Omazi} told them that Mirjan Šanti} had been killed. Ivica Kupre{ki} and Nikola Omazi} put Mirjan Šanti}'s body on a ladder and carried the body to Nikola Saki}'s garage: Mirjan Šanti} wore a camouflage uniform, with an HVO Military Police insignia on his shoulder and a light blue ribbon.<sup>558</sup>

(e) UNPROFOR armoured personnel carriers (APCs) went towards Gornji Ahmi}i and the gunfire stopped. After the APCs left, gunfire started again immediately. About 4-5 p.m., there was another lull and then firing resumed again and stopped only after nightfall. Towards the evening the most intensive fire was from around the mosque. That night some slept in the stable and others in the gully.<sup>559</sup>

(f) Over the course of 16 April, they heard that houses were on fire, including all those around the Kupre{ki} houses. During their visits to their families in Zume they saw houses burning and realised that Muslims had perished.<sup>560</sup>

(g) When cross-examined by the Prosecution, Mirjan Kupre{ki} said that the Vrebac shelter was closest: it was 10-15 minutes away. He did not use the car. Asked why they remained in the Depression the witness said that they were hiding in the Depression; they were close to the shelters where their families were and could keep an eye on the path.<sup>561</sup> Mirjan Kupre{ki} said that he did not doubt that what Witness H said had happened did happen but that it had nothing to do with him; he was not

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<sup>557</sup> Mirjan Kupre{ki}, T. 11621-11625.

<sup>558</sup> Mirjan Kupre{ki}, T. 11625-11628.

<sup>559</sup> Mirjan Kupre{ki}, T. 11628-11631.

<sup>560</sup> T. 11632-11633.

<sup>561</sup> T. 11678-11683, T. 11691-11692 and T. 11706.

there, nor was his brother with him in that house. He had not been in Witness KL's house.<sup>562</sup>

414. The accused called witnesses to support their accounts of their journey to the shelter and arrival there.<sup>563</sup> They also called witnesses to support their account of spending the day in the Depression.<sup>564</sup> In this connection **Dragan Vidovi}** said that the men stayed in the Depression until it was dark when they went to Ivo Kupre{ki}'s stable.<sup>565</sup> When daylight came they went back to the Depression to keep an eye on the path; he agreed (in response to a question put by the Prosecution) that they were guarding the line of approach in case of a Muslim attack.<sup>566</sup> In re-examination Dragan Vidovi} said that the men in the Depression thought that they could offer some protection to the nearby shelters where the families were.<sup>567</sup> When examined by the Court, he said that there were patches of snow in the Depression: they did sit down but stood for most of the time when they were there.<sup>568</sup>

415. Zoran and Mirjan Kupre{ki} denied that they had been in the house of Jozo Alilovi} on 16 April. Other evidence was given concerning this. **Goran Papi}** denied that he was in Jozo's house with Zoran and Mirjan Kupre{ki} in the late morning, as the prosecution witness Witness C, had alleged.<sup>569</sup> Likewise, **Jozo Alilovi}** himself denied that Zoran and Mirjan Kupre{ki} had ever come to his house that day.<sup>570</sup>

416. **Anto Raji}**, brother-in-law of Mirjan and Zoran Kupre{ki}, said that he had seen the broadcast of the interview on Sarajevo TV on 18 April 1993 with Witness KL from Zenica Hospital and that the end of the interview is missing from the recording produced

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<sup>562</sup> **Mirjan Kupre{ki}**, T. 11711-14, 11717.

<sup>563</sup> **Dragan Vidovi}**, T. 8425; **Witness DC/1,2**, T. 8527-8528; **Ivica Kupre{ki}**, T. 8058, T. 8074; **Gordana Cui}**, T. 8159; **Niko Saki}**, T. 8247; **Mirko Saki}**, T. 7613; **Jozo Vebrac}**, T. 9495; **Ankica Kupre{ki}**, T. 7868-7869; **Ljuba Vidovi}**, T. 8091.

<sup>564</sup> Evidence of **Milutin Vidovi}**, T. 7520, T. 7565-7566 and T. 7587; **Dragan Vidovi}**, T. 8434;

**Mirko Saki}**, T. 7618, T. 7627-7628; **Ivica Kupre{ki}**, T. 7983; **Niko Saki}**, T. 8254.

<sup>565</sup> T. 8502.

<sup>566</sup> T. 8498-8504.

<sup>567</sup> T. 8510.

<sup>568</sup> T. 8515.

<sup>569</sup> T. 7119.

<sup>570</sup> T. 8361 and T. 8383.

by the Prosecution.<sup>571</sup> The interviewer asked Witness KL twice if he recognised the killers. He said that he did not because their faces were painted.<sup>572</sup> This evidence was supported by **Mirko Safradin**, a fellow member of the same anti-aircraft Defence Unit who said that he had witnessed the broadcast with Anto Raji}.<sup>573</sup>

417. Evidence of what happened to the accused after 16 April was given by **Zoran Kupre{ki}**. On 17 April, at 8 or 9 p.m., people fled from the shelters to Rovna. Zoran Kupre{ki} saw no bodies that day.<sup>574</sup> On 18 April there was still shooting in Gornji Ahmi}i and Gornji Pirici. At about 9 a.m., the accused and his brother went to their houses. Nothing was wrong with Zoran Kupre{ki}'s house apart from two broken windows.<sup>575</sup> Around 4–5 p.m., some military policemen appeared near the stable with some civilians: these men said that the accused had to go to the line at Gornji Pirici. Zoran Kupre{ki}, Mirjan Kupre{ki}, Dragan Vidovi}, Mirko Saki}, Ivica Kupre{ki} and Dragan Samija all then left together.<sup>576</sup> They passed Enver Sehi}'s house and saw the body of Enver and a burnt child's body in the house. There was a body on the balcony of another house and a further two bodies in between two houses. From the elevated ground they could see the entire village: "it was terrible ... everything was burned down".<sup>577</sup> Witness KL's house had burned down. At the line they were ordered to dig a trench. There was sporadic fire coming from Barin Gaj. They remained in the location for 2–3 days. They were then moved 500–600 metres to the right above Upper Ahmi}i.<sup>578</sup>

418. **Mirjan Kupre{ki}** said that on the evening of 17 April, he heard that his family had gone to Rovna: the next day he went to Rovna and saw his family at daybreak. He then went to his house to get his accordion. The house was in chaos: everything was pulled from drawers, doors were broken, window panes in the nursery were missing, bullet marks were on the walls, a fire was beginning to burn but died down, some things

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<sup>571</sup> Exhibit P157. **Anto Rajic**, T. 8706; **Mirko Safradin**, T. 8760.

<sup>572</sup> T. 8700-8702 and T. 8704.

<sup>573</sup> T. 8756.

<sup>574</sup> T. 11320-11321.

<sup>575</sup> **Zoran Kupre{ki}**, T. 11322-11324.

<sup>576</sup> **Zoran Kupre{ki}**, T. 11325-11327.

<sup>577</sup> T. 11328.

<sup>578</sup> **Zoran Kupre{ki}**, T. 11328-11331.

were missing and many empty cartridge cases were in front of the house.<sup>579</sup> In cross-examination it emerged that there are no documents concerning this damage; Mirjan Kupre{ki} had not obtained any.<sup>580</sup> It is the evidence of Mirjan Kupre{ki} that on 18 April 1993 the Military Police told them that they had to go to the defence lines in Pirici where they were ordered to dig trenches. Mirjan Kupre{ki} was then transferred to Upper Ahmi}i where he remained until demobilised at the end of the war in April 1994.<sup>581</sup> (The Trial Chamber notes that Exhibit P353, page 30 shows an entry for Mirjan Kupre{ki} as being mobilised from 8 April 1992 to 22 January 1996. Mirjan Kupre{ki} said he did not sign this entry and does not know who did: this list was compiled for the allocation of shares).<sup>582</sup>

419. **Zoran Kupre{ki}** testified that he remained on the frontline for three or four months and was then asked to become the Commander of that sector of the line. He refused but agreed to become Deputy Commander. He carried out administrative duties in the command post in Zume. He wrote daily reports for the battalion. In January or February 1994 he was transferred to the battalion command where he did administrative work.<sup>583</sup> Zoran Kupre{ki} said he became a soldier on 18 April 1993 when taken away by the Military Police. He returned to work in May 1994.<sup>584</sup> He went to live in Vitez. He did not return to Ahmi}i because he had been affected by events there. A terrible crime had been committed there, by Croat people. He, Zoran Kupre{ki} did not participate in it.<sup>585</sup> When cross-examined by the Prosecution about the Vitez Brigade List,<sup>586</sup> Zoran Kupre{ki} said that the signature on page 30 is not that of his brother, whereas the signature on page 75 is his. He signed it in 1996 in the municipal office. The dates of service were being stretched so that the value of shares each individual received would be as large as possible. Zoran Kupre{ki} did not know who put the date of 8 April 1992 in the entry but guessed it indicates participation in the village guards

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<sup>579</sup> T. 11632-11637.

<sup>580</sup> **Mirjan Kupre{ki}**, T. 11707.

<sup>581</sup> **Mirjan Kupre{ki}**, T. 11638-11642: Demobilisation Certificate dated 1.6.94; Exhibit D112/2 shows 31.5.94 as the date which is not correct.

<sup>582</sup> T. 11643-11644.

<sup>583</sup> Aerial photo Exhibit D23/1; **Zoran Kupre{ki}**, T. 11332-11334.

<sup>584</sup> Demobilisation certificate Exhibit D24/1.

<sup>585</sup> T. 11336-11339.

(although the guards had not started then). The entry “P” for “reserve” may reflect the fact that he was a reservist in 1992.<sup>587</sup>

420. The Defence called **Liljana Sapina**, a friend and colleague of Witness JJ and Zoran Kupreški, to contradict the evidence given by Witness JJ. Liljana Sapina said that in the summer of 1997 Zoran Kupreški asked her to try and locate Witness JJ to see if the latter would be willing to make a statement in his favour. Ms. Sapina did so and the parties met in her flat. Zoran Kupreški asked Witness JJ to make a statement about his helping her during the war: she said she would, but was afraid to testify because of her children and her family. Subsequently, it was apparent that Witness JJ was reluctant to make a statement: she said that her phone was bugged and from what she said Liljana Sapina concluded that she was under pressure from the Muslim side to make a statement against Zoran Kupreški.<sup>588</sup>

#### 5. Findings of the Trial Chamber

421. The Trial Chamber bears in mind the undisputed evidence as to the character of these accused, their activities in the folklore society and their good relations with their Muslim neighbours and colleagues prior to the conflict. Nonetheless, the Trial Chamber is satisfied that both accused were active members of the HVO. In the case of Mirjan Kupreški, this finding is based on the HVO Register and is also to be inferred from his activities on 16 April 1993 (dealt with below).

422. In the case of Zoran Kupreški, the Trial Chamber finds that he was a local HVO Commander and that his activities were not limited to assigning village guard duties (as he alleged). The Trial Chamber accepts the evidence of Witness JJ on this topic and also finds that Zoran Kupreški took part in the oath-taking ceremony and was present on duty on the front line as she alleged in her evidence. The Trial Chamber accepts the evidence of Witness B and Abdulah Ahmi in relation to the negotiations for the return of the

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<sup>586</sup> Exhibit P353.

<sup>587</sup> **Zoran Kupreški**, T. 11405-11407.

<sup>588</sup> T. 12555-12557, T. 12559-12562, T. 12564 and T. 12576-12577.

Muslims after the conflict of 20 October and finds that Zoran Kupreški's role in these negotiations was more active than he himself admitted in evidence.<sup>589</sup> Finally, the Trial Chamber notes that Zoran Kupreški, as a reserve officer and in charge of a maintenance unit at work, was used to the exercise of authority.

423. In relation to the events of 15 April 1993, the Trial Chamber accepts that the accused may have been at work that day and may have gone to a gathering at Ivica Kupreški's house that evening. However, the Trial Chamber does not accept their evidence, and that of their witnesses, that they did not know of the planned attack on the village the next morning. Preparations were already under way for the attack: in the light of what happened the next day, the Trial Chamber is satisfied that these accused must have known that an attack was planned and were ready to play a part in it. In this connection the Trial Chamber accepts the evidence of Witness V that he saw a group of soldiers, armed and in camouflage uniform, in front of Zoran Kupreški's house in the early evening of 15 April 1993.

424. With regard to the allegations of participation in the conflict of 16 April 1993, upon which the prosecution case is based, the Trial Chamber deals, first, with the alleged participation of the accused in murder and arson at the house of Witness KL. This allegation depends on the evidence of Witness KL. The Trial Chamber has already analysed that witness's evidence and found it wanting in credibility. The Trial Chamber found that the witness may have been mistaken in his identification of the accused as perpetrators of these crimes. Thus, there is no reliable evidence that the accused participated in the crimes at the house of Witness KL.

425. The Trial Chamber deals next with the allegation that the accused participated in the murders and arson at the house of Suhret Ahmic. This allegation depends principally upon the evidence of Witness H. The Trial Chamber has already analysed her evidence. The Trial Chamber takes into consideration the criticism of her credibility arising from:

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<sup>589</sup> It should be noted that the only evidence about the activities of the accused during the conflict on 20 Oct. 1992 was given by defence witnesses. Evidence about that day plays no specific part in the Prosecution case against these two accused. The Trial Chamber makes no findings except to comment that the evidence that the accused spent the day in the Depression appears unlikely to be true.

(a) the discrepancies between her statement and her evidence; and (b) her denial that the signature on the statement is hers. However, these criticisms are outweighed by the impression made by the witness upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken. The Trial Chamber is in no doubt that she was a truthful and accurate witness of events on 16 April. Her evidence might have been confirmed by the statements of Witness SA; however, the Trial Chamber places no reliance on this evidence.

426. Accordingly, the Trial Chamber finds that Zoran and Mirjan Kupreški}, armed, in uniform and with polish on their faces, were in the house of Suhret Ahmic immediately after he and Meho Hrstanovic were shot and immediately before the house was set on fire. The Trial Chamber concludes from this evidence that the two accused were participants in the attack on the house as part of the group of soldiers who carried it out.

427. Turning to the evidence of Witness C that the accused were in the house of Jozo Alilovic at about midday and that they were armed and in uniform, the Trial Chamber, having heard the evidence of Jozo Alilovic, is not satisfied as to the accuracy of Witness C's identification of the accused, given the stressful conditions under which it was made and the appalling ordeal to which the young Witness C had been subjected.

428. Finally, the Trial Chamber accepts the evidence of Witness JJ that Zoran Kupreški} admitted to her that the Jokers had been firing on fleeing civilians and that under threats, he himself had fired into the air. Although Zoran Kupreški} denied making this admission and an attempt was made to undermine Witness JJ's credibility by calling Liljana Sapina, the Trial Chamber is satisfied that she told the truth. She came to give evidence despite pressure being exerted to prevent her coming and went to great lengths in her evidence to acknowledge the considerable part which Zoran Kupreški} had played in assisting her and her family during the conflict. There was no reason for her to have lied about Zoran Kupreški} in her evidence and every reason for thinking that she told the truth. This is not to say that Zoran Kupreški}, himself, told the truth in his admission to Witness JJ. It was no more than a partial admission by someone who was troubled by the horror of what had transpired that day. However, it is an admission of some participation



on the part of Zoran Kupreški} and, as such, serves to undermine his contention that he did not participate in the conflict.

429. It will be apparent from the foregoing that the Trial Chamber rejects the evidence of the accused and their witnesses to the effect that the accused took no part in the crimes alleged and were elsewhere when they took place. While it is true that they may have taken their families to the shelter, the evidence about their doing so and their whereabouts during the morning are rejected as untrue. In particular, the evidence that they spent almost the entire day standing around with others in the Depression is inherently not credible given the circumstances of the conflict taking place that day in Ahmi}i.

430. In summary, the Trial Chamber concludes that both accused participated in the attack on Ahmi}i on 16 April 1993 as soldiers in the HVO. It is reasonable to conclude that their part involved their providing local knowledge and their houses as bases for the attacking troops. In addition, they participated in the attack on at least one house. Of the two accused, Zoran Kupreški}, as the local HVO Commander, must be taken to have played a more leading role.

### **C. Vlatko Kupre{ki}**

#### **1. Introduction**

431. The Prosecution case against this accused is that he was involved in the preparations for the attack on Ahmi}i. His house was used as a gathering point for the attackers and he participated in the attack on the 16 April 1993, in particular, in the shooting of members of the Pezer family. The Defence case is that he did not participate at all in the attack or shooting. On 16 April he was concerned only with the protection of his family.

#### **2. Background**

432. Vlatko Kupre{ki} is 41 years old, having been born on 1 January 1958. He is married with two children. He is the cousin of Zoran and Mirjan Kupre{ki} and co-

owner of the Sutre shop on the road to Upper Ahmi}i in Grabovo. He lives on the road near the shop, and near the houses of Zoran and Mirjan Kupre{ki}.

### 3. Events Prior to April 1993

#### (a) Prosecution Evidence

433. The Prosecution evidence concerning these events was as follows:

(a) One day in October 1992 **Witness T** saw Vlatko Kupre{ki} and his wife and a third person unloading weapons from a Yugo car on the road in front of Vlatko Kupre{ki}'s house.<sup>590</sup>

(b) Vlatko Kupre{ki} was seen by **Witness B** at the Hotel Vitez (the headquarters of the HVO) three to five times between October 1992 and April 1993.

(c) Reports of the Travnik police administration of December 1992 and February 1993 describe Vlatko Kupre{ki} as "Operations Officer for the Prevention of Crimes of Particular State Interest": his rank is shown as Inspector 1<sup>st</sup> Class.<sup>591</sup>

(d) When a neighbour made a plea for peace after the first conflict in Ahmi}i in October of 1992, Vlatko Kupre{ki} said that they (the Croats) had waited 45 years for their own State and now they had it.<sup>592</sup>

#### (b) Defence Evidence

434. **Vlatko Kupre{ki}**, in his own defence, said:

(a) He has a congenital heart condition (for which he was operated on in 1966) and must not undergo stress. He was relieved of military service as one hundred per cent

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<sup>590</sup> T. 2946.

<sup>591</sup> Exhibits P377 and P378.

<sup>592</sup> **Witness Q**, T. 2751.

disabled.<sup>593</sup> He produced his military identification card and certificates showing him to be unfit for military service<sup>594</sup> and called evidence to this effect.<sup>595</sup>

(b) He was against ethnically-based parties, including the HDZ. He was not, in any way, politically active and was never a member of the HVO. He was on very good terms with his Muslim neighbours (including the Pezer family). He was never an HVO soldier. He produced a statement from the local HDZ to this effect<sup>596</sup> and called witnesses to say that he was on good terms with Muslims and did not engage in political activity, wear a uniform or carry a gun.<sup>597</sup> The Defence also produced the statements of 14 character witnesses (all Muslims or Serbs) who spoke of the absence of nationalist or ethnic prejudice on the part of Vlatko Kupre{ki}.<sup>598</sup>

(c) Vlatko Kupre{ki} said that he was not a police operations officer but was carrying out an inventory for the police, and the police chief had to assign him to a vacant post in order to be able to pay him. He was assigned to the Office of the Crime Prevention Service and assigned a desk where he would work with the commission in making inventories of basic supplies.<sup>599</sup>

#### 4. His Role on 15 April 1993

##### (a) Prosecution Evidence

435. According to **Witness KL**, Vlatko Kupre{ki} was among HVO soldiers, carrying rifles, on the main road between 11 a.m. and 12 noon on 15 April 1993.<sup>600</sup>

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<sup>593</sup> **Vlatko Kupre{ki}**, T. 11747-11751 and T. 11757.

<sup>594</sup> Exhibits D13-17/3.

<sup>595</sup> **Ivica Kupre{ki}**, T. 8037; **Fikreta Vidovic**, T. 9556; **Ljubica Kupre{ki}**, T. 9372-9373; **Rudo Vidovic**, T. 6663-6664.

<sup>596</sup> Exhibit D18/3.

<sup>597</sup> **Vlatko Kupre{ki}**, T. 11752-11758 and T. 11801; **Rudo Vidovi}**, T. 6663-6664; **Ivica Kupre{ki}**, T. 8003; **Ljuba Vidovi}**, T. 8108-8109; **Niko Saki}**, T. 8273-8274; **Witness DF**, T. 9213-9214.

<sup>598</sup> Exhibit D61/3.

<sup>599</sup> T. 11862-11865

<sup>600</sup> T. 1896-1897.

436. **Witness B** saw him at the Hotel Vitez on 15 April at around 2 or 3 p.m., with two or three men in uniform, standing in front of the entrance to the hotel. He was in civilian clothes.<sup>601</sup>

437. On 15 April between 5 and 6 p.m., a neighbour saw 20-30 soldiers on Vlatko Kupre{ki}'s balcony; Vlatko Kupre{ki} himself was sitting outside the shop.<sup>602</sup> Another witness saw a truck arrive with soldiers at dusk. Five or six soldiers got out in the vicinity of the house.<sup>603</sup> Another witness also saw several soldiers in front of Vlatko Kupre{ki}'s house at dusk.<sup>604</sup> Witness V's diary records that on 15 April 1993 before dark he learned that the Croats were concentrating around the Kupre{ki} houses.<sup>605</sup>

(b) Defence Evidence

438. The Defence case was that on 15 April Vlatko Kupre{ki} was not in Vitez or Ahmi}i until the evening: he was accompanying his cousin, Ivica Kupre{ki}, on a trip to Split to collect the latter's wife from the airport on her return from Germany.

439. According to the evidence of **Ivica** and **Vlatko Kupre{ki}**, they left Ahmi}i on 14 April and were stopped at numerous roadblocks on the way.<sup>606</sup> Permits for the journey were produced.<sup>607</sup> They arrived at Split at about 12 noon. While in Split they went to the market and bought jeans (for re-sale) in cash and filled the boot of the car with them: they then held a business meeting at a company called Kotex about buying salt, but concluded no contracts. At about 9 p.m., they met Mrs. Ankica Kupre{ki} at the airport. They spent the night at Baska Voda, one hour from Split with Radoslav Simovi}. The next day (15 April) they set off for Ahmi}i. They got home at about 6.30 p.m. and unloaded the jeans at Vlatko Kupre{ki}'s house.<sup>608</sup> Further supporting evidence about

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<sup>601</sup> T. 778-781, T. 860-861 and T. 916-917.

<sup>602</sup> **Witness L**, T. 2349.

<sup>603</sup> **Witness M**, T. 2439.

<sup>604</sup> **Witness O**, T. 2623.

<sup>605</sup> Exhibit D8/2 p. 19; T. 3224.

<sup>606</sup> T. 7955-60.

<sup>607</sup> Exhibits D24-26/3.

<sup>608</sup> **Vlatko Kupre{ki}**, T. 11764-11766; **Ivica Kupre{ki}**, T. 7955-7960 and T. 8040-8041; **Mrs. Ankica Kupre{ki}** (her passport was produced, Exhibit D12/1), T. 7851 and T. 7855.

the journey was given by **Witness DE,<sup>609</sup> Radoslav Simovi<sup>610</sup>** and **Mrs. Ljubica Kupre{ki}.<sup>611</sup>**

440. **Vlatko Kupre{ki}** gave evidence about events that evening. He said that he unloaded the goods from the boot of the car and spent the evening preparing the goods for a buyer from Travnik to whom the goods were to be delivered on 16 April. There were no soldiers at his house or in front of it, or at the shop that evening. Everything was normal. He had nothing to do with the army: he did not prepare weapons or ammunition at his house as a staging post.<sup>612</sup>

441. Vlatko Kupre{ki} denied that he was outside the Hotel Vitez earlier that day, and denied going into the HVO Headquarters.<sup>613</sup> He was not, on 15 April, with a group of soldiers in front of his shop nor with soldiers on the balcony of his house.<sup>614</sup> There were lights on in his house (as alleged by Witnesses M and O) during the night: there were lights on the balconies and parking space for safety reasons.<sup>615</sup>

## 5. His Role on 16 April 1993

### (a) Prosecution Evidence

442. Two documents point to Vlatko Kupre{ki}'s having been mobilised on 16 April 1993:

- (a) His name appears on the HVO Mobilisation Report,<sup>616</sup> dated 30 April 1993, as being mobilised on a date between 16 and 28 April 1993. (His name does not appear on the reserve list. Additionally, he is listed neither for special duties nor as a medical corps driver);

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<sup>609</sup> T. 9157-9158 and T. 9160.

<sup>610</sup> T. 9357-9359.

<sup>611</sup> T. 9375-9376.

<sup>612</sup> T. 11797-11798.

<sup>613</sup> T. 11810.

<sup>614</sup> T. 11802 and T. 11817.

<sup>615</sup> T. 11819.

<sup>616</sup> Exhibit P335.

(b) An HVO Certificate of 4 June 1996 was recovered from his briefcase on his arrest confirming that Vlatko Kupre{ki} was a member of the 92<sup>nd</sup> Viteska Home Guard Regiment between 16 April 1993 and January 1996. He is described as performing duties as "Assistant Commander for Health Matters".<sup>617</sup>

443. Gunfire came from the vicinity of Vlatko Kupre{ki}'s house during the early part of the day. According to **Esad Rizvanovi}** (a refugee in Ahmi}i, who was staying in a house close to the lower mosque) the first shots were in the direction of the mosque and the lower part of the village, coming from the Kupre{ki} houses including that of Vlatko Kupre{ki}.<sup>618</sup>

444. **Witness E** was another refugee whose family were staying in a house near the lower mosque. Shortly after 6.20 a.m., he was fleeing with his mother and sister along a path towards Upper Ahmi}i. They were forced to stop because of gunfire, some of which, according to Witness E, came from the direction of the houses, one being the house of Vlatko Kupre{ki}.<sup>619</sup>

445. Evidence was given that Vlatko Kupre{ki} was in the vicinity of Suhret Ahmi}'s house shortly after Suhret was murdered. When **Witness H** ran with her family from the house, they were forced to turn back because they came to a clearing where they were in danger of being shot. When they returned to their house, the witness saw Vlatko Kupre{ki} (wearing a blue overcoat with something under it) in front of the garage of her house. This was at about 5.45 a.m.<sup>620</sup> Her evidence was supported by the evidence of **Witness KL** who said that upon looking out of the window of his house after the murder of his family, he saw Vlatko Kupre{ki} leave the yard of Suhret's house, cross his (Witness KL's) garden and go towards Vlatko Kupre{ki}'s own house.<sup>621</sup>

446. **Witness KL** also testified that while he was hiding in a stack of hay in his barn later in the day, he saw five young men killed: the shots appeared to come from Vlatko

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<sup>617</sup> Exhibit P329.

<sup>618</sup> T. 470-478, in particular T. 475.

<sup>619</sup> T. 1277-1279.

<sup>620</sup> T. 1656-1658.

<sup>621</sup> T. 1906-1907 and T. 1927.

Kupre{ki}'s house. Three Croat soldiers came out of Vlatko Kupre{ki}'s house, patted the bodies and returned towards the same house.<sup>622</sup>

447. There was evidence of the following activity during the day of the attack from Vlatko Kupre{ki}'s house:

(a) **Witness N** came under fire from in front of the store.<sup>623</sup>

(b) **Witness V** heard shooting coming from the direction of Vlatko Kupre{ki}'s house.<sup>624</sup> **Witness W** was in the vicinity of the house, hiding during the morning with his grievously wounded wife, when they were accosted by a group of soldiers who came from bushes to the right of Vlatko Kupre{ki}'s house.<sup>625</sup> **Witness BB** saw her neighbour Nadira fatally wounded by a shot which came from the house of Vlatko or Franjo Kupre{ki}.<sup>626</sup>

(c) **Witness X** was also hiding there: one of her daughters (aged 19) was killed and another wounded. She testified that about midday Vlatko Kupre{ki}'s yard was full of soldiers. She heard voices calling for brandy and lunch: somebody said that everybody had been killed down there and that they had done a good job.<sup>627</sup>

448. A defence witness, **Witness DE**, was cross-examined about a statement made to a representative of the BiH army on 25 June 1993,<sup>628</sup> where he stated that "it was said that the destruction of the Ahmi}i mosque was ordered by Nenad Šanti} with the support of Vlatko Kupre{ki}". The witness said in evidence that that is what he heard, what people were saying, but nobody proved it.<sup>629</sup> In re-examination, the witness said people from Ahmi}i were detained at Dubravica school and he took food to them. He asked them who destroyed the mosque and one replied masked soldiers. He then asked what Vlatko did: one said Vlatko took shelter; another said that he had not seen Vlatko but that all

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<sup>622</sup> T. 1936 and T. 1939.

<sup>623</sup> T. 2544.

<sup>624</sup> T. 3060.

<sup>625</sup> T. 3156.

<sup>626</sup> T. 3830-3831.

<sup>627</sup> T. 3247 and T. 3261-3264.

<sup>628</sup> Exhibit P356.

Croats are the same. After the war Vlatko denied destroying the mosque saying "my friend you know I would never do anything like that",<sup>630</sup> and he said that he was ready to do his part in the reconstruction.<sup>631</sup>

449. Finally, evidence was given of Vlatko Kupre{ki}'s alleged participation in an attack on the Pezer family which culminated in the killing of Fata Pezer and the wounding of **Dženana Pezer**. Fata Pezer was the wife of Ismail Pezer and mother of Dženana. They lived in a house on the opposite side of a small hill (which then existed, but which has now been flattened) from the Kupre{ki} houses. On the morning of the attack, they were joined by Witness S and his wife and by a refugee, Witness CF and his family, who had been living nearby. At about 8 or 8.30 a.m., the whole group (consisting of about 15 people including four small children) set off for the house of Nermin Kermo which was not far away in the direction of Upper Ahmi}i. Five witnesses from the group gave evidence: they were referred to as **Witnesses P, Q, R, S and T**. The journey involved going down a gully and climbing a hill opposite Vlatko Kupre{ki}'s house.<sup>632</sup> The route was described by Witness Q. In cross-examination **Witness Q** was shown a video-recording made in April 1998 in which Witness CF is shown describing a different route.<sup>633</sup> Witness Q commented that the route described by Witness CF was marshy and was not passable at the time.<sup>634</sup> This evidence was corroborated by that of Witness S, who was also shown the video-recording and who stated that the route described by Witness CF was not the one taken. As the party climbed the hill, they heard shouting and swearing and came under fire from a group of soldiers standing in front of Vlatko Kupre{ki}'s house. As a result of the shooting Fata was killed and D'enana was wounded. The five witnesses all gave evidence concerning these incidents. The witnesses said that the soldiers were in front of Vlatko Kupre{ki}'s house. Two witnesses, **Q and S**, said that there was a civilian with the soldiers. Witness Q identified

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<sup>629</sup> T. 9184-9185 and T. 9197.

<sup>630</sup> T. 9242-9243.

<sup>631</sup> T. 9244.

<sup>632</sup> Exhibits P203, 205.

<sup>633</sup> Exhibit D4/3.

<sup>634</sup> T. 2809-2811.



the civilian as Vlatko Kupre{ki}. Vlatko Kupre{ki} was 50-60 metres away and the witness had him in his view for several moments; he had known Vlatko Kupre{ki} all his life and said that he was 100 per cent sure it was him.<sup>635</sup> This evidence as to distance was confirmed by the evidence of **Howard Tucker**, an Investigator with the Office of the Prosecutor, who measured the distance with range-finding binoculars and found it to be 53 metres.<sup>636</sup>

450. The Prosecution called **Witness II** in rebuttal on this topic. He said that he was crossing the meadow when he heard cries for help coming from the top of the hill where he found Fata, D'enana and Ismail Pezer. Fata and Dženana were lying on the ground. Fata showed no signs of life. The witness went to another part of the hill to observe. He said that there was shooting from the house of Vlatko Kupre{ki}. He saw five to six soldiers with painted faces and helmets running near Vlatko Kupre{ki}'s house: their rifles were pointed in the direction of the Pezer family and himself. He then picked up Dženana, put her over his shoulder and carried her, using the hill as shelter, towards Kermo's house. Two minutes elapsed between his hearing cries for help and his reaching Fata Pezer. When he reached her there were gunshots, coming primarily from Vlatko Kupre{ki}'s house. However, he noticed no civilians among the soldiers. It is his opinion that the Pezers were hit from Vlatko Kupre{ki}'s house.<sup>637</sup>

(b) Defence Evidence

451. The Defence case is that Vlatko Kupre{ki} was not involved in the conflict and did not participate in any of the killing or wounding of civilians or the looting and burning of property. The Defence case is also that between 5.30 and 6 a.m., Vlatko Kupre{ki} was taking his family to Jozo Vrebac's shelter in Šantici where he remained with them until 10 a.m., when he set off to try and contact his father in the family home, ending up in Niko Saki's house where he remained until after midday.

452. **Vlatko Kupre{ki}**'s account in evidence of the events that day was as follows:

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<sup>635</sup> T. 2763, T. 2771-2773 and T. 2832.

(a) At 5 a.m., the telephone rang; he answered and an unknown person said "Vlatko, what are you waiting for? Go to the shelter". He did not take this seriously, but Ivica Kupre{ki} then rang and told him to go to the shelter: everyone had left. His wife told him someone had already called at 3 a.m. that morning. He left quickly with his family (wife, two children and mother): his father refused to go to the shelter. They went to Ivica Kupre{ki}'s house, found nobody there and went to Niko Saki}'s house where they met Saki}. They then went on towards Zume: when they were near the sportsground they heard heavy fire and detonations. They went to Jozo Vrebac's shelter, arriving at about 6 a.m.<sup>638</sup>

(b) He stayed in the shelter until 10 a.m., when he left to go and see his father. He told his wife that he was going to help the wounded. When he got to Niko Saki}'s house the latter told him to come in. By this time there was continuous shooting and Niko Saki} said that he had seen HVO soldiers going towards Vlatko Kupre{ki}'s house. Vlatko Kupre{ki} remained in Saki}'s kitchen until the shooting died down at about 12.30 p.m., when he left for his own house.<sup>639</sup>

(c) As he approached his own house he saw a soldier, outside the house at the entrance, who challenged him. Vlatko Kupre{ki} said that he had come to get his father. The soldier took him into the house. There were approximately 7 or 8 soldiers in a room in the house. His father was sitting in a chair. The front door had been broken down, the house had been ransacked, merchandise thrown around and the flower pots spilled. The house had been looted. Vlatko Kupre{ki} was upset and angry but a soldier pointed to the house of Suhreta Ahmi} (which was on fire) and said: "Is that what you want? .... Scram, come and get your father later". Vlatko Kupre{ki} ran out and returned to Niko Saki}'s house. On the way he met Drago Grgi}, another soldier in camouflage uniform, and Anto Vidovi}. He then fled to the basement of Nikola Samija's house where he remained until the shooting subsided

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<sup>636</sup> T. 12066 and T. 12072; Exhibit P385.

<sup>637</sup> T. 11979-11984 and T. 11990.

<sup>638</sup> **Vlatko Kupre{ki}**, T. 11770-11773.

<sup>639</sup> T. 11773-11775.

again at 4 p.m., when he returned to Jozo Vrebac's shelter. The soldiers he had seen had painted faces, most had camouflage uniforms, two had black uniforms and some had helmets: all had ribbons on the left shoulder and were well-armed. They were all unknown to him.<sup>640</sup> In his evidence he commented that the soldiers had entered his house violently, perhaps because it was a good vantage point for viewing Ahmi}i. It was probably a very useful point for them strategically.<sup>641</sup>

(d) He stayed in Jozo Vrebac's shelter until 6 p.m., when he went to collect his father, returning to the shelter at 7 p.m. There were then no soldiers inside or around the house. His father told him that soldiers had burst into the house and shot from the house and from around it. (Vlatko Kupre{ki} himself, in the morning, had seen shell casings). The father said he had helped Cazim Ahmi} to assist his wife by providing a blanket and axe from which Cazim could make a stretcher. His father told him nothing about the Pezer's predicament.<sup>642</sup>

(e) Vlatko Kupre{ki} denied killing anyone or taking property or setting property on fire. He did not participate in the killing or wounding of the Pezer family: he did not come home until about 1 p.m., on 16 April.<sup>643</sup> He was not in Witness H's yard at 6 a.m.<sup>644</sup> He was not in Witness KL's yard: he did not have a blue coat. He was not with soldiers shooting in front of his house or involved in the killing of Fata Pezer as alleged by Witness Q: he was in the shelter.<sup>645</sup>

(f) When cross-examined, Vlatko Kupre{ki} said he was wearing civilian clothes; a chocolate-coloured winter jacket and corduroy trousers.<sup>646</sup> Prior to 16 April 1993 he did not have a rifle but had a pistol for self-defence and that no more than 10 bullets were ever fired from it.<sup>647</sup> On 16 April at approximately 1 p.m., when he met Dragan

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<sup>640</sup> Vlatko Kupre{ki}, T. 11777-11782.

<sup>641</sup> Vlatko Kupre{ki}, T. 11798-11799.

<sup>642</sup> Vlatko Kupre{ki}, T. 11783-11785.

<sup>643</sup> T. 11801-11803.

<sup>644</sup> Vlatko Kupre{ki}, T. 11813-11814.

<sup>645</sup> TT. 11814-16 and T. 11820.

<sup>646</sup> Vlatko Kupre{ki}, T. 11922.

<sup>647</sup> Vlatko Kupre{ki}, T. 11909-11910.

Grgi}, the latter gave him a small rifle (a hunting carbine) to give to Ivica Kupre{ki}: the weapon went off and Vlatko Kupre{ki} gave it back to Dragan Grgi}.<sup>648</sup>

453. The evidence of the accused as to his clothing, the circumstances of their being woken and their journey to the shelter was supported by the evidence of his wife, **Mrs. Ljubica Kupre{ki}**<sup>649</sup> and cousin **Ivica Kupre{ki}**.<sup>650</sup>

454. The evidence of the accused that he was present in the shelter from about 6 a.m. until 10 a.m. was supported by that of his wife **Ljubica**,<sup>651</sup> **Ivo Vidovi}**,<sup>652</sup> **Ljuba Vidovi}**<sup>653</sup> and **Gordana Cui}**.<sup>654</sup>

455. **Niko Saki}** gave evidence in support of the accused's account of events at his house. This witness was cross-examined about a statement which he made in January 1998 in which he said Vlatko Kupre{ki} appeared at his house at about 10 a.m., to help in the evacuation of the wounded, remained for three hours and then left. The witness said that he thought that Vlatko Kupre{ki} could provide medical assistance because, in the witness's personal opinion he was unfit.<sup>655</sup>

456. Further evidence was given concerning conditions in the house of the accused on 16 April:

(a) **Witness DE** said that between 6.30 and 9 a.m., he tried to phone Vlatko Kupre{ki} but could not get through or there was no answer: at 9 a.m., somebody picked up the phone and, when the witness asked for Vlatko Kupre{ki}, brusquely said that Vlatko Kupre{ki} was not there and put the phone down.<sup>656</sup>

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<sup>648</sup> T. 11912.

<sup>649</sup> T. 9378-9383 and T. 9440-45.

<sup>650</sup> T. 7971; see also **Niko Sakic**, T. 8275-8276.

<sup>651</sup> T. 9469-9470.

<sup>652</sup> T. 6984-6988.

<sup>653</sup> T. 8106.

<sup>654</sup> T. 8174-8175 and T. 8208-8212.

<sup>655</sup> T. 8299-8300.

<sup>656</sup> T. 9162.

(b) According to **Ljubica Kupre{ki}**, Franjo (Vlatko's father) had said that three camouflaged soldiers had come to the house, asking for money and stealing a synthesizer.<sup>657</sup>

(c) **Witness DF** said that he was waiting at his home for Vlatko Kupre{ki} to bring the jeans (as promised) but by 8 a.m., he had not done so and the witness phoned him. Vlatko Kupre{ki}'s father (Franjo) answered and said that Vlatko Kupre{ki} had escaped with his wife, mother and children to the shelter: there was a war going on. Shooting could be heard on the phone. Franjo Kupre{ki} died after the war but before he died he told the witness "that on 16 April masked members of the special police had entered the village and nobody could recognise them because they wore paint on their faces".<sup>658</sup>

457. The Defence called a great deal of evidence to contradict the Prosecution evidence concerning the murder of Fata Pezer. Summarising that evidence, it is convenient, first, to deal with the evidence of **Professor Wagenaar**, Professor of Experimental Psychology, University of Leiden, who gave his expert opinion on the identification of Vlatko Kupre{ki} by Witness Q. The Professor said that the important aspect of the recognition by Witness Q was the distance over which the observation was carried out. He said that, based on his studies, at the distance of 40 metres the accuracy rate is 50 per cent, i.e., it is as likely that a person would make a mistake as that they would be correct. Therefore, the likelihood of a witness making a mistake at 60 metres is higher than 50 per cent.<sup>659</sup> On the other hand, matters such as the length of the observation, the fact that the person identified was in a group, and the fact that Witness Q could not provide details of clothing are not relevant since this is a case of recognition.<sup>660</sup>

458. The Defence also called evidence to show that Fata Pezer was not shot on the slope opposite Vlatko Kupre{ki}'s house (as alleged by the Prosecution) but on the other

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<sup>657</sup> T. 9384-9385.

<sup>658</sup> T. 9210-9213 and T. 9215.

<sup>659</sup> T. 9848-9849, T. 9853, T. 9861-9862 and T. 9873.

<sup>660</sup> T. 9854-9857.

side of the hill at a place from which the house could not be seen. They called four factual witnesses on this topic:

(a) **Witness CF** and **Witness CE** (a husband and wife respectively) were Muslim refugees from Prijedor living in the school in Ahmi}i. According to their evidence, on the morning of 16 April they heard shooting and went to the Pezer house and then accompanied the family on the journey to Nermin Kermo's house. They said that they were in the wood when the shooting started and the people were hit.<sup>661</sup> A video recording was played,<sup>662</sup> showing Witness CF demonstrating the alleged route taken from the Pezer house across the meadow and giving a commentary which may be summarised as follows. They were fired upon from behind as they were in the wood. Witness CF was wounded in the neck and shoulder. Fata fell dead to his left and remained on the spot; the little girl (Dženana) was picked up and the rest went on.<sup>663</sup> Both witnesses were cross-examined. Witness CF was cross-examined about a statement he had made to defence counsel on 18 March 1998, the day that they were filming, in which he said that they started walking from the Pezer house across a meadow under a hill on the right side towards the forest (i.e. an account which supports the Prosecution case).<sup>664</sup> The witness said in evidence that in fact the slope was to the left of the hill.<sup>665</sup> He was also cross-examined about a statement made to an Office of the Prosecutor Investigator of 9 June 1998,<sup>666</sup> in which he said that he was shot from behind when running away from the main road and the Sutre store.<sup>667</sup> Witness CE was cross-examined about a statement she made to an Office of the Prosecutor Investigator in June 1998 in which she said that they hid for a while in a vegetable storage shelter.<sup>668</sup> She did not remember saying in the statement that the

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<sup>661</sup> **Witness CE**, T. 9613-9616; **Witness CF**, T. 9655-9657.

<sup>662</sup> Exhibit D4/3.

<sup>663</sup> T. 9623-9627 and T. 9665-9669.

<sup>664</sup> Exhibit P365.

<sup>665</sup> T. 9688-9690 and T. 9693.

<sup>666</sup> Exhibit P364.

<sup>667</sup> T. 9707-9710.

<sup>668</sup> Exhibit P363.

voice came from the Sutre shop or that somebody from the direction of the Sutre shop, or next to it, started shooting at them. She denied saying this.<sup>669</sup>

(b) In the light of these very serious discrepancies between their statements and their evidence, the Trial Chamber places no reliance on the evidence of these witnesses. In any event, the Trial Chamber prefers the evidence of the prosecution witnesses as to the route taken, in particular the evidence of Witness Q who knew the area well, as opposed to the two defence witnesses who had only been there for a few months.

(c) **Witness CG** lived near the lower mosque and said that on 16 April when the shooting began, he and his family left their house and went to an old house with a cellar 50 metres from their house. At about 8 a.m., the witness heard a scream and saw a line of people 150 metres away. He heard shouting and screaming. He saw people in the middle of the wood on a path on the side of the hill facing the witness. Gunfire was coming from all round and fragmentation bullets were hitting the trees. The shooting was coming from Hrasno. The weapons being used were not ordinary rifles, but weapons of a higher calibre. The witness left the house at about 1 p.m. and took the path to Nermin Kermo's house. Just below the wood he came across Fata's body next to the path: it was in the same place as he had seen the group of people.<sup>670</sup>

(d) **Stipan Vidovi}** said that 10-12 days after the conflict, he found the body of Fata Pezer in the woods about 100-150 meters behind her house. It is not possible from that place to see Vlatko Kupre{ki}'s house or yard because it is in a wood and there is a hill in between. The body had originally been found by two other men but they did not recognise Fata and told the witness. He could not tell if the body had been displaced before he discovered it. He ensured that the Red Cross were informed and they removed the body.<sup>671</sup>

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<sup>669</sup> T. 9640-9645.

<sup>670</sup> T. 9805-9807, T. 9810, T. 9814, and T. 9818. A further witness was called during rejoinder evidence, **Witness CH**, who said that she also had gone to the Kermo house that morning and had seen Fata Pezer's body on the edge of the forest at the foot of the hill (T. 12499, T. 12502-12506, T. 12517-12518).

<sup>671</sup> T. 9579-9583 and T. 9599.

459. The Defence called a Land Surveyor, **Mr. Kesi**, to show that the place where Stipan Vidovi} found the body of Fata Pezer is in the same area as the place where Witness F said that he saw Fata Pezer's body on 17 April. Vlatko Kupre{ki}'s house cannot be seen from either of these places as it lies on the other side of the hill.<sup>672</sup>

460. With regard to the evidence regarding the finding of the body of Fata Pezer, the Trial Chamber notes that the position where the body was found cannot establish where the shooting occurred because of the possibility of the body having been moved after the shooting.

461. The Defence next called two witnesses from Zagreb to give evidence concerning the injuries to Dženana Pezer and Witness CF and the way in which those injuries were inflicted, namely **Professor Skavi**, Professor of Forensic Medicine and **Mr. Catipovi**, a Ballistics Expert at the Ministry of the Interior.<sup>673</sup> Their evidence may be summarised as follows:

(a) the injuries to Dženana Pezer were wounds to the right leg above and below the knee and included a fracture of the shin and the intrusion of alien metal bodies. The injury to Dženana Pezer's shin was due to a bullet or shrapnel; the explosion was on the right side and the projectile came from the right.<sup>674</sup> Witness CF sustained injuries to the right side of his neck and back; in fact this was a single injury, starting with a groove to the right side of the neck, the projectile then entering the right shoulder and exiting above the right shoulder blade. This wound was caused by a small firearm or fragmentation bullet. The groove formed by the projectile in the neck suggests that it is more likely to have been caused by shrapnel since a firearm would cause a narrower groove. The injury was inflicted from upward and then backward and downward.<sup>675</sup>

(b) the injuries to Witness CF were caused by a bullet (or fragment) fired from a firearm of heavy calibre: an MK-84 machine gun or heavier rather than to an automatic rifle. The bullets must have been fragmentation bullets which hit the

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<sup>672</sup> T. 9728-9739.

<sup>673</sup> Joint Report, Exhibit D54/3.

<sup>674</sup> T. 9764-9768.



treetops and then hit Witness CF in the neck, because the channel is too irregular. The injury D'enana Pezer's leg could not have been caused by a small bullet but by a projectile from an MK-84 machine gun or anti-aircraft gun hitting the trees.<sup>676</sup>

## 6. Findings of the Trial Chamber

462. The Trial Chamber takes account of the undisputed evidence that, prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice. The Trial Chamber also takes account of the evidence (again undisputed) that he suffers from a congenital heart condition and, as a result, was excused from military service. However, this condition neither prevented him from leading an active life (as his evidence concerning his business shows), nor meant that he could not play a part in the events with which this trial is concerned.

463. In this connection, the Trial Chamber finds that in 1992-1993 Vlatko Kupreški} was an Operations Officer in the police with the rank of Inspector, as the Report of the Travnik Police Administration shows. The Trial Chamber rejects the evidence of the accused to the effect that he was concerned merely to make inventories of supplies for the police, and finds that he was an active operations officer. This occupation explains why he was seen unloading weapons from a car in front of his house in October 1992 and April 1993 and was again seen there on the afternoon of 15 April 1993. This is all evidence which the Trial Chamber accepts.

464. In addition to his police duties, the accused was engaged in business. It is his case that he did not return to Ahmi}i on 15 April until the evening when he got back from the trip to Split. On the other hand, the Prosecution evidence is that he was seen in Ahmi}i during the morning of 15 April at the Hotel Vitez (as noted) during the afternoon, and in the early evening in the vicinity of soldiers who were at his house. The Trial Chamber accepts the Prosecution evidence on this topic. While it has not been disputed by the Prosecution that the accused made the journey to Split, there is no evidence, apart from

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<sup>675</sup> T. 9764-9767.

that given by the accused and his witnesses, as to the time of his return. The Trial Chamber is prepared to accept that Witness KL may have been mistaken in his identification of the accused in the morning, but is not prepared to accept that Witness B and Witness L are mistaken in their identification of the accused later in the day. Witness B, himself a security officer in the Territorial Defence and Witness L, a neighbour, both knew the accused and there is no reason to think either that they were mistaken or that they were lying during their evidence. The explanation for the discrepancy in the evidence is that the accused returned earlier in the day than he or his witnesses admitted.

465. The Trial Chamber also accepts the evidence given by the Prosecution witnesses in relation to the troop activities in and around the accused's house on the evening of 15 April. This evidence is confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreški} houses.

466. The Trial Chamber concludes from the above evidence that Vlatko Kupreški} was involved in the preparations for the attack on Ahmi}i in his role as police operations officer and as a resident of the village. The Trial Chamber also concludes that the accused allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before.

467. With regard to events on 16 April, it was not disputed that shots may have been fired from Vlatko Kupreški}'s house (although the circumstances in which they were fired are in dispute). The Trial Chamber finds that the first shots came from the Kupreški} houses, including that of the accused, as alleged by Esad Rizvanovic, and that firing continued from that house or its vicinity during the day as alleged by Witness E, Witness V, Witness W, Witness KL and Witness BB and the witnesses to the firing upon the Pezer family (dealt with below).

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<sup>676</sup> T. 9779-9780, T. 9787-9789 and T. 9795.

468. In this connection the Trial Chamber rejects the evidence of the accused that the firing from his house had no connection with him and came about because soldiers broke into his house and used it. The Trial Chamber concludes that part of the accused's contribution to the attack was to authorise the use of his house for this purpose.

469. With regard to the evidence relating to the direct participation of the accused in the conflict of 16 April, the significant part is that relating to the shooting of the Pezer family, involving, as it did, the killing of Fata Pezer and the wounding of her daughter, D'enana. The Trial Chamber accepts that those responsible for these crimes were a group of soldiers standing in front of Vlatko Kupreški's house. Whatever the exact cause of D'enana's injuries was, the Trial Chamber is in no doubt that there was a group of soldiers firing, as alleged. However, the Trial Chamber is not satisfied that Vlatko Kupreški was among them. Only one witness, Witness Q, identified the accused. This witness did so at a distance of over 50 metres: a distance at which, as Professor Wagenaar pointed out, a witness is as likely to be mistaken as not. In the absence of confirmation of the correctness of this identification, the Trial Chamber is not able to be sure that it is correct. Accordingly, the allegation that Vlatko Kupreški was present when these crimes were committed is not made out.

470. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, who contends that the accused was in the vicinity of Suhret Ahmi's house at about 5.45 a.m. and shortly after the latter was murdered. This evidence was disputed by the accused. The evidence of Witness H has already been discussed in connection with the cases of the co-accused Zoran and Mirjan Kupreški. She knew Vlatko Kupreški and had no doubt of her identification of him. Her evidence was supported by the evidence of Witness KL. The Trial Chamber finds that this identification was correct and that Vlatko Kupreški was in the vicinity shortly after the attack on Suhret Ahmi's house. There is no further evidence as to what the accused was doing there,<sup>677</sup> but the Trial Chamber concludes that he was present and ready to lend assistance in whatever way he could to the attacking forces, for instance by providing

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<sup>677</sup> The suggestion in the evidence of **Witness DE** that Vlatko Kupreški may have had anything to do with the destruction of the mosque is unsubstantiated and is discounted by the Trial Chamber.

local knowledge. In this connection the Trial Chamber notes that he is recorded in two documents as being mobilised as a member of an HVO regiment on 16 April.

471. It follows that the evidence of the accused and his witnesses as to his non-participation in the conflict is rejected as untruthful. His role in the conflict was to assist in the preparation for it and to be present and ready to give assistance during it.

#### **D. Drago Josipovic and Vladimir Šantic**

##### 1. Introduction

472. The cases involving these two accused may conveniently be considered together because both are charged together with offences in count 1 and counts 16-17 (the attack on the Pušcul family and their house).

##### 2. Background

###### (a) Drago Josipovic

473. Drago Josipovic is aged 44, having been born on 14 February 1955. Prior to the conflict he worked in a factory. The following evidence was given regarding his conduct and associations:

(a) **Witness G**, who lived in Ahmi}i with his family was 13 years old in 1993. In the early 1990's he was a friend of Drago Josipovic's son, Goran. Witness G said in evidence that a rifle was kept in the porch of the Josipovi} house and Drago Josipovi} used to wear a uniform, a pistol and a belt.<sup>678</sup>

(b) Drago Josipovi}'s wife, Slavica, came from what **Witness Z** described as an "Ustaša family" (her brother was Nenad Šanti}). Drago Josipovi} was seen with a rifle, usually in civilian clothes, but, on occasion, in uniform.<sup>679</sup> **Witness GG** in the

<sup>678</sup> T. 1446-1447, T. 1559-1561.

<sup>679</sup> **Witness Z**, T. 3598-3600; **Witness FF**, T. 4312.

period before the attack on 16 April saw Drago Josipovi} in a camouflage uniform with HVO patches.<sup>680</sup> She also saw Slavica in uniform on television with Dario Kordi} when HVO soldiers were taking a solemn oath.<sup>681</sup> **Witness CB** said that the accused was a member of the HVO but was not on active duty: he was a member of the village guard taking part in patrols.<sup>682</sup>

(c) **Witness EE** knew Drago Josipovi} well as a neighbour: she had known him since childhood.<sup>683</sup> She also knew Vladimir Šanti} since she used to meet him during the course of her work for the Vitez Municipality and often used to see him in the street going towards the Hotel Vitez.<sup>684</sup> Passing her house before the conflict, Drago Josipovi} had said to Fahrudin Ahmi} (who was killed on 16 April) "pity for those two houses here". Fahrudin then told Witness EE what Drago Josipovi} had said.<sup>685</sup>

(d) The accused's name appears on the HVO Mobilisation Report<sup>686</sup> as having been mobilised between 16 and 28 April 1993.

474. Witnesses called by the Defence painted a different picture. Drago Josipovi} was portrayed as a quiet, hardworking craftsman, not politically active and on good terms with his neighbours.<sup>687</sup> He was a member of the village guard<sup>688</sup> and had a rifle which had belonged to Fahrudin Ahmi}, but which had been surrendered to Nenad Šanti} who had given it to Drago Josipovi}. The latter was not comfortable with this.<sup>689</sup>

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<sup>680</sup> T. 4341-4342.

<sup>681</sup> T. 4343.

<sup>682</sup> T. 8938-8940.

<sup>683</sup> T. 4068.

<sup>684</sup> T. 4092.

<sup>685</sup> T. 4093-4094.

<sup>686</sup> Exhibit P343.

<sup>687</sup> Evidence of **Vlado Alilovi}**, T. 5504; **Rudo Vidovic**, T. 6677; **Milica Vukadinovic**, T. 10458-10460, T. 10466; **Dragan Stojak**, T. 6320-6321; **Marinko Katava**, T. 10582; declarations as to the character of the accused, Exhibits D29/5 and D30/5.

<sup>688</sup> **Ivo Vidovi}**, T. 6993.

<sup>689</sup> **Witness CB**, T. 8893-8895, T. 8898; **Jozo Livancic**, T. 10035-10036.

(b) Vladimir Šanti}

475. The accused is by profession a policeman. He is aged 41, having been born on 1 April 1958. The Prosecution case is that by the time of the conflict he was a Commander in the Military Police and had an office in the Hotel Vitez.<sup>690</sup> In January 1993 he had been promoted from Criminal Inspector to Commander of the 1<sup>st</sup> Company of the 4<sup>th</sup> Battalion, which was under the command of Pasko Ljubici}.<sup>691</sup>

476. Evidence concerning his position was given by Prosecution witnesses:

(a) **Witness B**, a Muslim Territorial Defence Security Officer in Vitez took up complaints which he had received about the activities of the Military Police with Vladimir Šanti}, either on the telephone, or in person in Vladimir Šanti}'s office. On one occasion Anto Furundžija came into the office in uniform, his face masked by cream and carrying a gun. Anto Furundžija said to Vladimir Šanti}: "It's all right, we're back". Vladimir Šanti} asked "How did it go? Is everything all right?" In the witness's opinion, Vladimir Šanti} was the superior of the former.<sup>692</sup>

(b) Brigadier **Asim Dzambasovi}** of the BiH army, a professional soldier and former JNA officer, described six documents<sup>693</sup> signed by Vladimir Šanti} as documents all signed by a company commander and one<sup>694</sup> as a company commander's report to the Commander of the Military Police.<sup>695</sup>

477. Vladimir Šanti} was also Commander of the Jokers. This was according to the evidence of **Witness AA**, who was a Muslim member of the HVO Military Police and a member of the Jokers. Witness AA had known Vladimir Šanti} since childhood, their fathers having been friends, and Vladimir Šanti} was his superior when he joined the HVO Military Police.<sup>696</sup> According to Witness AA, Vladimir Šanti} told him of the

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<sup>690</sup> **Witness B**, T. 736-737, T. 741-742 and T. 845-846.

<sup>691</sup> **Witness AA**, T. 3707-3709.

<sup>692</sup> T. 745-746.

<sup>693</sup> Exhibits P390-1/2 (AD/1-6).

<sup>694</sup> Exhibit P390/2 (AD/1).

<sup>695</sup> T. 12178-12180 and T. 12182-12184.

<sup>696</sup> T. 3699.

establishment of a "special purpose or anti-terrorist" unit to be set up at the Bungalow in Nadioci. The witness's platoon reported there.<sup>697</sup> Vladimir Šanti} gave them orders, e.g. telling them to decide on a name for the unit, to take anything they needed for the Bungalow from Busovaca and to visit the lines at Rovna. Vladimir Santi} approved the election of Anto Furundžija as "Immediate Commander". In the witness's view the Jokers could do nothing without orders from Vladimir Šanti}.<sup>698</sup> In March 1993 Vladimir Šanti} signed three orders imposing various punishments on Witness AA.<sup>699</sup>

478. On the other hand, defence witnesses gave evidence of his good character. According to one witness, distantly related to him, Vladimir Šanti} was employed in the civilian police before the war and was an exemplary individual.<sup>700</sup> According to another witness (**Zeljko Kocaj**) he never drew attention to himself as a nationalist.<sup>701</sup> Declarations were admitted from his wife, sister, a colleague and a Muslim family friend, which speak of his professional approach to his work, sociability and friendliness, including a willingness to help to those in need, of whatever religion.<sup>702</sup>

### 3. Their Alleged Participation in the Killing of Musaf er Pu}ul and Burning of the Pu}ul House

#### (a) Prosecution Evidence

479. The Prosecution relied on the evidence of one witness, **Witness EE**, in the case against the accused in relation to these allegations. Witness EE's evidence was as follows: at dawn on 16 April there was a loud detonation and shooting. Voices could be heard calling out her husband, Musaf er's, name: "Open the door, this is the police". There was then a burst of gunfire and Musaf er opened the door. Soldiers in full uniform were on the verandah outside the door: the witness was at the door and recognised Drago Josipovi}, Vladimir Šanti}, Zjeliko Livanci}, Marinko Katava and Karlo ^erkez. Šanti}

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<sup>697</sup> Exhibit P119.

<sup>698</sup> T. 3719-3729.

<sup>699</sup> Exhibits P250-252; T. 3732-3733 and T. 3740.

<sup>700</sup> Evidence of **Rudo Kurevija**, T. 5932.

<sup>701</sup> T. 10862.

<sup>702</sup> Exhibits D16-20/6.

and Livanci} then took Musafér away and the witness never saw him again. Šanti} and Livanci} were wearing camouflage uniforms with an HVO patch and they were wearing helmets (the only ones to do so).<sup>703</sup> Drago Josipovi} told Witness EE and her children to go into the corner of the veranda and threatened to cut their throats. When the witness and the children went into the corner, a single soldier, Stipo Alilovi}, remained. Then the group of soldiers re-appeared, including Drago Josipovi}. Livanci} ordered the witness and children to get out. She and the children went outside near some sheds where her mother was. While there, the witness saw Vlado Šanti} passing by: she hailed him, but he moved away.<sup>704</sup> The witness, her children and mother spent the day in a shed. There was shooting throughout the day, and soldiers set fire to her house. Towards evening Drago Josipovi} (in full military gear), Anto Papi} and Jozo Livanci} came to the shed. They told her to come out and she, her mother and the children did so. Drago Josipovi} said that the shed would be set on fire. (She asked for the cows to be let out and he let the animals out). She was told to go to Anto Papi}'s house with her family, which is where they went.<sup>705</sup> While they were in front of the shed Drago Josipovi} told her that her husband Musafér had been killed.<sup>706</sup>

480. In cross-examination Witness EE said that she wore glasses outside and when driving a car, but not in the house or at work. She was not wearing her glasses on 16 April.<sup>707</sup> Her husband (Musafér) was killed beside the shed: she could hear shooting while Drago Josipovi} was ordering her to go into the corner. Her late mother was standing there and watching Vladimir Šanti} and Zeljo Livanci} as they were leading him behind the shed.<sup>708</sup> Drago Josipovi} wore a camouflage cap but she recognised him: “. . . it was Drago. I saw the moustache and everything and I saw him there. I recognised him by everything because we saw each other every day. We were neighbours”.<sup>709</sup> In re-examination she testified that Drago Josipovi} was “in full military gear, camouflage

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<sup>703</sup> T. 4077-4083.

<sup>704</sup> T. 4085-4091.

<sup>705</sup> T. 4109-4113.

<sup>706</sup> T. 4116.

<sup>707</sup> T. 4152-4153.

<sup>708</sup> T. 4216-4217.

<sup>709</sup> T. 4221.



uniform, camouflage cap, HVO insignia and weapons".<sup>710</sup> She had no doubt that Drago Josipovi} and Vladimir Šanti} were in her yard on the morning of 16 April 1993.<sup>711</sup>

481. The following is a summary of statements made by Witness EE:

(a) On 5 May 1993 at Zenica the witness made a tape-recorded statement for an Officer of the United Nations Centre for Human Rights (Witness HH). According to the latter's note of the recording<sup>712</sup> the witness said that on 16 April she heard shouting at the door, telling her husband to open the door. When Musafer opened the door she saw HVO soldiers, whom she knew. Zeljko Ivanci} took her husband and fired three bursts of gunfire into him; thereupon she saw Stipo Alilovi}, Drago Josipovi} and Vladimir Šanti}. Stipo Alilovi} told her to shut up and threatened to kill the witness and her children.

(b) On 14 May 1993 in a statement to Zenica Security Services she said that Stipo Alilovi} ordered Zjelko Livanci} to take her husband and he took him behind a shed and shortly after she heard a burst of gunfire.<sup>713</sup>

(c) On 20 December 1993, in a statement to the Zenica court she said that Zjelko Livanci} took her husband behind the shed and fired three bursts of gunfire into him.<sup>714</sup>

(d) On 1 February 1995, in a statement made to investigators of the Office of the Prosecutor, she said that Zjelko Livanci}, Vladimir Šanti}, Drago Josipovi} and Marinko Katava took Musafer behind the shed: she heard many bursts of gunfire from the shed where they took her husband.<sup>715</sup> She said in evidence that she had not said that the four men took her husband off.

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<sup>710</sup> T. 4258.

<sup>711</sup> T. 4259.

<sup>712</sup> Exhibit P292.

<sup>713</sup> Exhibit D10/1; T. 1300.

<sup>714</sup> Exhibit D3/6; T. 1305.

<sup>715</sup> Exhibit D4/6.

482. The Defence called evidence to cast doubt on the credibility of Witness EE. The purpose was to show that Marinko Katava, Stipo Alilovi} and Zeljko Livanci} were not in Ahmi}i on 16 April 1993 and, accordingly, that the witness was mistaken in her identification of them as parties to the killing of her husband.

(a) The Defence called evidence to show that Stipo Alilovi} was in the Netherlands on 16 April 1993, i.e. the evidence of **Mrs. Dragica Krizanac**, the widow of Stipo Alilovi},<sup>716</sup> supported by the evidence of **Ms. Johanna Hume**, a Dutch friend of the Alilovi}'s whose daughter went to the same school as the Alilovi}'s daughter.<sup>717</sup> Documents were exhibited to the same effect.<sup>718</sup>

(b) Evidence was called that Marinko Katava was in his apartment in a building on Marshall Tito Street, Vitez on the morning of 16 April; i.e., the evidence of **Witness CD**, who lived in the same apartment,<sup>719</sup> and **Marinko Katava** himself.<sup>720</sup>

(c) Evidence was called as to the presence of Zeljo Livanci} in Kuber on the morning of 16 April. According to this evidence Livanci} was Commander of a unit of guards who went to Kuber on 13 April and which were still there on 16 April and which remained there all day.<sup>721</sup> Livanci} was killed on 17 April.

483. The Prosecution sought (and were granted) leave to withdraw the indictment against Katava on the grounds that there was an insufficient evidentiary basis to justify proceeding with the prosecution. However, the decision to withdraw the indictment was one for the Prosecution and it does not follow that Witness EE is mistaken in her identification of the accused. Similarly, even if she was mistaken about her identification of Katava (and Alilovi} and Livanci}), it does not necessarily mean that she was mistaken in her identification of Drago Josipovic and Vladimir Šantic. Although she did

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<sup>716</sup> T. 9304, 9320, 9343.

<sup>717</sup> T. 10627-10632, T. 10635-36 and T. 10641-10643.

<sup>718</sup> Exhibit D2/6.

<sup>719</sup> T. 9249-50 and T. 9253-55.

<sup>720</sup> T. 10536-38, T. 10541-10542, T. 10574 and T. 10623.

<sup>721</sup> **Ivo Pranjkovi}**, T. 10212, T. 10217; **Andjelko Vidovi}**, T. 10670-10674.

not see the accused for long (a matter of seconds),<sup>722</sup> she recognised them as people known to her before the attack (Drago Josipovi} as a neighbour for more than 30 years and Vladimir Šanti} professionally).

#### 4. Their Alleged Participation in Other Incidents on 16 April 1993

##### (a) Drago Josipovi}

##### (i) Prosecution Evidence

484. Drago Josipovi} was identified as a participant in other attacks on the homes of his neighbours in which the male inhabitants of the houses were executed and the houses set on fire. This was part of what appears to have been a concerted attack on Muslim homes in the area.

485. First, it is alleged that Drago Josipovi} participated in the attack on the house of Nazif and Senija Ahmi}, during which Nazif and his 14 year old son, Amir, were killed. **Witness DD** gave evidence of this attack. She saw Drago Josipovi} among soldiers near Asim's house, shooting at Nazif's house: the soldiers came to the latter house. A soldier took Amir behind the house and a shot was heard. Drago Josipovi} then came from behind the house, taking off his mask or cap to wipe sweat from his forehead. Drago Josipovi} pointed a rifle and told a soldier with whom she had been struggling to leave the witness alone.<sup>723</sup> It seemed to the witness that Drago Josipovi} was in command.<sup>724</sup> She had known Drago Josipovi} as a neighbour for 21 years prior to the attack.

486. Secondly, it is alleged that Drago Josipovic participated in an attack in which Fahrudin ('Fahran') Ahmi} was killed. Fahrudin's mother, **Witness CA**, gave evidence regarding this attack. (She was a Court witness, called by the Trial Chamber). She lived in Zume near Fahrudin and Drago Josipovi}: only a fence separated her house from that of Drago Josipovi}. She said she had good relations with Drago Josipovi}'s mother who

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<sup>722</sup> T. 4081.

<sup>723</sup> T. 3899-3900; T. 3922-3926; T. 3933-3935; T. 3956 and T. 3962-3973.

<sup>724</sup> T. 3982.

was like a sister to her. Drago Josipovi} grew up with her children in her courtyard; her son, Fahrudin and Drago were like "blood brothers".<sup>725</sup> Her evidence was as follows:

(a) On the morning of the 16 April at about 5.20 a.m., after some detonations, Witness CA saw four soldiers in camouflage uniforms and with rifles coming from Drago Josipovi}'s yard to her house. They asked for her son, Fahrudin, and shortly afterwards threw a bomb into the upper part of her house. They then broke in and put her husband up against a pillar to be shot. She successfully pleaded for his life. The soldiers then told her to leave (which she did) and they set fire to the house. Witness CA then went to Fahrudin's house where his children told her that he had been killed.<sup>726</sup> She subsequently saw his body.

(b) Later she saw Drago Josipovi} nearby with a man called Anto Papi}; they had camouflage uniforms and weapons. She asked Drago Josipovi} where he was when Fahrudin was killed. He was crying and said he would have done something if he could, but he could not do anything. When asked who had ordered the killing, he said "somebody higher up, some higher force".<sup>727</sup> At Drago Josipovi}'s suggestion the witness and her family were taken to Anto Papi}'s house. While they were in the house Witness CA asked Drago Josipovi} to collect two other families from their houses which he did. Drago Josipovi} told the witness that Musaf'er Puš}ul had been killed and that Jozo Livanci} had told him.<sup>728</sup>

(c) The next day, on 17 April 1998, Drago Josipovi} and Anto Papi} told the witness and her husband to go to Ramiz's yard. When she met Drago Josipovi} later, she asked him to accompany her. He refused, saying that he could not save them since there was shooting and they would all be killed. He told her to follow her people.<sup>729</sup> They went to Ramiz's yard and her husband was subsequently taken away and executed.

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<sup>725</sup> T. 4571 and T. 4575-4577.

<sup>726</sup> T. 4557-4562 and T. 4581-4583.

<sup>727</sup> T. 4562-4563, T. 4577 and T. 4591-4592.

<sup>728</sup> T. 4563 and T. 4622.

<sup>729</sup> T. 4565 and T. 4596-4598.

487. It may be noted that there was evidence of a similar attack on another house nearby on 16 April (although Drago Josipovi} was not identified as a participant). This evidence, given by **Witness FF**, was to the effect that shots were fired at the house, her husband Razim was taken from the house and while she and her children were locked in a barn her husband was executed.<sup>730</sup>

488. The remaining evidence concerning Drago Josipovi}'s conduct on 16 April concerns events at or near the Ogrjev Plant:

(a) **Witness Z** said that he saw Drago Josipovi} on the main road near the Ogrjev Plant at about 4.30 p.m., leading a group of soldiers, wearing a camouflage uniform and multi-coloured cap and with an automatic rifle, but no paint on his face.<sup>731</sup>

(b) According to Witness Z, Aladin Karahodja, night watchman at the Ogrjev Plant, told Witness Z that on 16 April 1993 Drago Josipovi} took his gun from him and threatened him.<sup>732</sup>

(c) According to **Witness BB**, Aladin told her that Drago Josipovi} had locked him in his hut and told him that he would see everything and be the last to be killed.<sup>733</sup> (Aladin is now dead). However, the Trial Chamber notes that this allegation was not contained in Witness BB's statement made in 1995.

(b) Vladimir Šantic

(i) Prosecution Evidence

489. There is no other direct evidence of Vladimir Šanti}'s involvement in attacks on 16 April 1993. However there is evidence of the accused's involvement with the Jokers from which the Prosecution invited the Trial Chamber to conclude that he participated in such attacks, at least in his capacity as Commander of the Jokers. This evidence was as follows:

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<sup>730</sup> T. 4314-4317.

<sup>731</sup> T. 3617-3618.

(a) According to **Witness B**, on 16 or 17 April 1993 a young HVO soldier, Zoran Šanti}, was arrested in Stari Vitez and was questioned. Witness B overheard part of the questioning. **Zoran Šanti}** said that he had spent the last few months at the Bungalow as a messenger and that it was full of troops and Special Purpose Units: he had often seen Vladimir Šanti} there. On the evening of 15 April 1993 "there was intensified activity with arming, equipment and fresh forces coming in". Zoran Šanti} was at the Bungalow and Vladimir Šanti} came in a car with a crate of alcohol. There had been a meeting at which he overheard Vladimir Šanti} say that the order was that not a single male from 12-70 years must remain alive; everyone else was to be captured.<sup>734</sup> (The Trial Chamber bears in mind that this evidence is double hearsay).

(b) A video tape of a TV report (alleged to have been made by Bosnian Croat TV from Busovaca) relating to events on the evening of 16 April showed a scene at 2248 hours which **Witness AA** identified as showing the Jokers in the Bungalow with Pasko Ljubici} and Vladimir Šanti}.<sup>735</sup> The Defence did not dispute that Vladimir Šanti} is shown on the tape but disputed the circumstances in which it was filmed and said that the time shown therein was not accurate.

(c) According to **Sulejman Kavazovi}**, on 24 April 1993 he was taken to the Bungalow where he saw Vladimir Šanti}, wearing a black uniform normally worn by the Jokers, together with 50 or 60 people from various units. Vladimir Šanti} ordered some men to take the witness to Kratine.<sup>736</sup>

(d) **Zaim Kabler**, a Muslim prisoner and an acquaintance of Vladimir Šanti}'s, said that he saw Vladimir Šanti} at the Bungalow on 26 April 1993 in a camouflage shirt and patches.<sup>737</sup>

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<sup>732</sup> T. 3616.

<sup>733</sup> T. 3824 and T. 3834.

<sup>734</sup> T. 787-791.

<sup>735</sup> T. 3749; Exhibit P253.

<sup>736</sup> T. 4394-4396 and T. 4402.

<sup>737</sup> T. 4026-4030.

5. Defence Evidence concerning Events on 16 April 1993(a) Drago Josipovic

490. The case for this accused is that he was not involved in the murders as alleged by the Prosecution. He alleges that he was not at the location alleged at the material time but that he instead spent the day moving around the houses nearby, in particular, those of Anto Bralo and Anto Papic. He took no part in military activity but rather, was helping others find shelter (including Muslims).

491. In support of this case Drago Josipovic called evidence from five of his neighbours and another witness was called by the Trial Chamber. First, **Anto Papic** said that at 5.15 a.m., he saw Drago Josipovic going past his (the witness's) house. The witness was in his yard and invited Drago Josipovic in for a cup of coffee. Drago Josipovic said he was going to his father-in-law's in Rovna where he had some business. After ten minutes shots were fired. Drago Josipovic said he did not know what it was. The witness suggested that they go to see who was firing. They went out and met Witness CB (the wife of Fahran) and her children. She asked the witness for shelter. He agreed. There were a number of Muslims at his house. Drago Josipovic brought Mirsad Osmancevi} and Casim Rami} and family to the witness's house where they were protected.<sup>738</sup> Later he also brought back Witness EE.<sup>739</sup>

492. This evidence was supported by the evidence of **Mr. and Mrs Kova}**, **Mr. Anto Bralo** and **Mrs. Finka Bralo**, who described the accused moving around with Anto Papi} in the vicinity of Anto Papi}'s house between 5.30 and 5.45 a.m. that morning and taking Muslims to that house.<sup>740</sup> These witnesses, together with **Witness CB**, testified

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<sup>738</sup> T. 9927-9933.

<sup>739</sup> T. 9952-9953.

<sup>740</sup> **Franjo Kova}**, T. 10092-10199, T. 10102; **Katica Kova}**, T. 10157-10162, T. 10167 and T. 10190-10192; **Anto Bralo** and **Finka Bralo**, T. 10389-10392; **Finka Bralo**, T. 10340-10342, T. 10348 and T. 10357.

that Drago Josipovic remained in this vicinity all day and helped various Muslims to find shelter in the house.<sup>741</sup>

493. It may be noted that Mr. Kova} and Mr. Bralo said that Drago Josipovic was carrying a rifle.<sup>742</sup> Also, there was evidence that the accused was wearing an army vest which he lent to Mirsad Osancevi} (a member of the BiH Army).<sup>743</sup> The vest had an insignia which was similar to that on the Croat flag, a small chessboard.<sup>744</sup>

494. A suggestion appeared to be made that a man called Slavko Rajkovi} (a Croat soldier wearing a Jokers patch), who was himself killed on 16 April 1993, and who was seen together with other soldiers wearing black uniforms with painted faces in front of Ramiz Ahmi}'s house, may have been responsible for the killings. Evidence of this was given by **Josip Vidovi}** and **Josip Covi}**.<sup>745</sup>

495. **Witness CB** was the wife of Fahrhan Ahmi} and gave evidence which tended to contradict that of her mother-in-law, Witness CA. Witness CB said that she and her family were awoken by loud explosions. They went downstairs. A grenade was thrown into an adjacent room. A shot was fired into the door and a man came in.<sup>746</sup> She said that he was tall and blonde, wearing a camouflage uniform with the insignia of the Military Police on his arm.<sup>747</sup> The man told the family to get out. Her husband, Fahrhan, went out – the man shot him in a burst of gunfire. The rest of the family remained in the house. Her mother-in-law, Fatima, came to the house. A Croat soldier in camouflage uniform told them to leave.<sup>748</sup> They left the house and went across the fields. There was gunfire all around.<sup>749</sup> They met Drago Josipovi} and Anto Papi}. This was before 6 a.m.<sup>750</sup> The witness said that Fahrhan had been killed and they expressed their condolences. Drago Josipovic said that if he had been there he would have been killed. Anto Papi} and Drago

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<sup>741</sup> **Witness CB**, T. 8868-8948.

<sup>742</sup> T. 10102 and T.10429.

<sup>743</sup> T. 8873-8875 and T. 8876-8877; **Anto Papi}**, T. 9937-9940; **Katica Kova}**, T. 10166-10167.

<sup>744</sup> **Anto Papic**, T. 10007-10008.

<sup>745</sup> **Josip Vidovi}**, T. 10282-10285 and T. 10293-10297; **Josip Covic**, T. 10305-10315.

<sup>746</sup> T. 8856-8857.

<sup>747</sup> T. 8945.

<sup>748</sup> T. 8857-8858.

<sup>749</sup> T. 8880.



Josipovic told them to go to Anto Papi}'s house: his family would share their fate. The witness agreed with her statement to the Office of the Prosecutor that in her opinion Drago Josipovic could not have been near her house when her husband was killed. The distance between the witness's house and Anto Papi}'s house was 10 minutes walk.<sup>751</sup>

496. **Dragan Cali}**, who was foreman of the warehouse in the Ogrjev plant, was called to give evidence about events at the plant. He said in evidence that Aladin Karahodja was one of the guards (he was between 27-30 years old and healthy). He was on duty from 4 p.m. on 15 April 1993 to 8 a.m. on 16 April 1993. According to the rules, he could not leave until the foreman arrived. The witness did not go to work on 16 April. Aladin could have climbed out over the fence or gone through the small gate which was not locked. If the guard hut was locked a person inside could get out through the door or window. On 18 April the witness returned to work and everything was in order: the door was unlocked and a pistol was in the drawer with two rounds which had been issued to Aladin.<sup>752</sup>

(b) Vladimir Šanti}

497. The Defence case is one of alibi, i.e. that at the time that Witness EE alleged that he was one of the party who attacked her house and killed her husband, Vladimir Šanti} was in fact in the HVO Headquarters in the Hotel Vitez. He called two witnesses in support of his alibi.

498. The first witness was **Davor Bileti}**, a member of the 4<sup>th</sup> Battalion of the HVO Military Police, employed in security in the Hotel Vitez. He said that at midnight of 15 April, he was on duty at the reception desk at the Hotel. At 5.15 a.m. on 16 April Vladimir Šanti} arrived as usual: there was a clock on the desk and the witness was aware of the time as he had to wake up those who were going on guard duty. Vladimir Šanti} came to the hotel on foot: he was dressed in a camouflage uniform and was

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<sup>750</sup> T. 8861-8862, T. 8878, T. 8863-8864 and T. 8947.

<sup>751</sup> T. 8863-8865.

<sup>752</sup> T. 10249-10251 and T. 10256-10257.

carrying a pistol.<sup>753</sup> The witness exchanged greetings with Vladimir Šanti} who then went into the Military Police office behind the reception. At 5.30 a.m., there was a loud detonation, followed by smaller detonations which shattered some of the glass. There was also fire from rifles. Shells and bullets were falling around the hotel. The witness took up position outside the entrance: he heard Vladimir Šanti}'s voice.<sup>754</sup> The witness remained at his post at the entrance until 11 a.m., when he went to get a sandwich and saw Vladimir Šanti} going into the mess. At about 6 p.m., the witness went to get his dinner and again saw Vladimir Šanti} in the mess.<sup>755</sup> After 8 p.m., the witness and six others from hotel security were sent to the Bungalow by vehicle. He saw Vladimir Šanti} in front of the Bungalow. The group stayed for 20 minutes at the Bungalow and were then taken to the frontline at Kratine.<sup>756</sup>

499. The second witness, **Ivica Franji}**, was at the time Manager of the Hotel Vitez. According to his evidence, he was living in Kruscice, about 1 km. from the hotel.<sup>757</sup> On 16 April, having been woken by detonations, he left for the hotel, arriving there between 6.15 - 6.30 a.m. He saw Vladimir Šanti} in the lobby of the hotel and asked him what was going on, only to receive a dismissive reply, to the effect that "well, don't you see?" The witness left the hotel shortly afterwards because none of his staff were there. Šanti} stayed in the lobby, issuing instructions.<sup>758</sup> This witness was cross-examined about an interview with an Office of the Prosecutor Investigator in March 1999 (in the presence of both Prosecution and Defence Counsel) in which (contrary to his evidence) he said that he left the hotel by the exit to the coffee shop: the witness said in evidence that he went through the coffee shop to the main entrance.<sup>759</sup>

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<sup>753</sup> T. 10732-10738 and T. 10759.

<sup>754</sup> T. 10739-10743.

<sup>755</sup> T. 10745-10749.

<sup>756</sup> T. 10749, T. 10752 and T. 10759-10780.

<sup>757</sup> T. 10788-10789.

<sup>758</sup> T. 10794, T. 10798 and T. 10801-10806.

<sup>759</sup> T. 10828-10830.

## 6. Findings of the Trial Chamber

500. Dealing, first, with Vladimir Šanti}, the Trial Chamber finds that in April 1993 he held the following positions. It was not disputed that he was commander of the 1<sup>st</sup> Company of the 4<sup>th</sup> Battalion of the Military Police: the evidence of Witness B and the documents signed by the accused in this capacity make this clear.

501. The Trial Chamber also finds that Vladimir Šanti} was Commander of the Jokers. In this connection the Trial Chamber accepts the evidence of Witness AA who, as a member of the Jokers, gave evidence that the accused was their Commander.

502. The Trial Chamber finds that Drago Josipovi} was a member of the HVO prior to 16 April 1993; he was a member of the village guard and was seen in the village in uniform and with a rifle. The Trial Chamber accepts the Prosecution evidence on this point and notes that much is undisputed. However, the background, views and conduct of the accused's wife are irrelevant.

503. Turning to the alleged direct participation of both accused in the conflict on 16 April 1993, the prosecution relies on the evidence of Witness EE, who identified them both as participants in the attack on her house when her husband was murdered. Her evidence, together with the evidence called to cast doubt on it, have been analysed above. The thrust of the criticism is that she mis-identified three other participants. It is accepted by the Trial Chamber that the witness was mistaken in her identification of Katava and Alilovi}, since there is compelling evidence that neither was in Ahmi}i that morning. (It is not accepted that she was mistaken about Livanci} since the only evidence concerning his whereabouts that morning came from two of his colleagues). However, it does not follow from the fact that the witness was mistaken in the identification of two of the participants that she was mistaken in the identification of the accused. The witness struck the Trial Chamber as a trustworthy and careful witness who identified the two accused in a statement made within three weeks of these offences and has not, in any way, retracted it. The Trial Chamber accepts her evidence and finds that Vladimir Šanti} and Drago Josipovi} participated in the attack on the Pušcul house: they were part of the group of soldiers who attacked and burned the house and murdered Musafer Pušcul.

504. The Trial Chamber also finds that Drago Josipovi} participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14 year old son were killed. The Prosecution case, in relation to these crimes, rests upon the evidence of Witness DD. The Trial Chamber is satisfied that she accurately identified the accused. The witness had known the accused as a neighbour for a great many years and had a ample opportunity to identify him during the incident. The Trial Chamber is also satisfied that the witness accurately described the role played by the accused in the attack and that he was, in fact, in a commanding position with regard to the troops involved.

505. On the other hand, having heard the evidence of Witness CB, the Trial Chamber is not satisfied that Drago Josipovi} participated in the attack on the house of Fahrhan Ahmi}. At most, his comments to Witness CA amount to his saying that he knew of the incident and had not been able to do anything to prevent it.

506. The evidence concerning Drago Josipovi} and the nightwatchman of the Ogrjev Plant is hearsay and inconclusive. However, the Trial Chamber accepts the evidence of Witness Z regarding the presence of the accused leading soldiers near the plant on the afternoon of 16 April.

507. In relation to Vladimir Šanti}, the Trial Chamber is unable to accept the evidence of the conversation overheard by Witness B. As noted, this evidence is double hearsay and lacks any features which could confirm its reliability. On the other hand, the Trial Chamber notes the scene displayed on the video tape, referred to in the same paragraph, showing the accused at the Bungalow with the Jokers in the Bungalow on the evening of the conflict.

508. In finding that Vladimir Šanti} was present during the conflict, the Trial Chamber rejects his alibi. In relation to one of the two witnesses whom the accused called to support his alibi, **Davor Biletic**, an indication of this witness's lack of credibility was that although he was a member of the Military Police in Vitez, he denied knowing anything about the Jokers.<sup>760</sup> He also denied knowing Vladimir Šanti}'s rank.<sup>761</sup> In relation to the

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<sup>760</sup> T. 10761 and T. 10783.

second witness, **Ivica Franji**}, the Trial Chamber, having noted the discrepancy between his evidence and the interview he gave, does not accept his evidence.

509. The Trial Chamber, likewise, rejects the defence put forward by Drago Josipovi} and his witnesses. The picture which they paint of the accused spending the day moving around the locality to very little apparent purpose is simply not credible. The truth is that he was armed and active, playing his full part in the attacks on his neighbours, sometimes having command over a group of soldiers.

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<sup>761</sup> T. 10766 and T. 10784.

## V. THE APPLICABLE LAW

### A. Preliminary Issues

#### 1. General

510. Two particular arguments which have either been put forward by the Defence in their submissions or which are implicit in the testimony of witnesses called by the Defence need to be rebutted in the strongest possible terms.

511. The first is the suggestion that the attacks committed against the Muslim population of the Lašva Valley were somehow justifiable because, in the Defence's allegation, similar attacks were allegedly being perpetrated by the Muslims against the Croat population.<sup>762</sup> The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.

512. A second strand of argument resorted to by the Defence has been to challenge the civilian character of the Muslim population of Ahmici by alleging that the village of Ahmici was not an undefended village.<sup>763</sup> The Defence contends that the non-combatant status of the Muslim population of Ahmici should be determined in fact and not by formalities<sup>764</sup> and that it cannot encompass persons who had previously taken part in any

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<sup>762</sup> See, *inter alia*, the Defence's Submission of Witnesses (sic) Summaries pursuant to the Request of the Trial Chamber on 15 Oct. 1998, Nov. 10 1998 (filed 13 Nov. 1998), Doc. No. D2943-D2928: "the commander of the Army of Bosnia and Herzegovina (sic) in Ahmici [...] confessed crying before the major (sic) group of Croats that Nijaz Sivro was the one who was in charge and set targets [for...] the Army of Bosnia and [H]erzegovina with the final aim of persecution of Croats from Ahmici [...]" and T. 5999-6033.

<sup>763</sup> See for instance Defence's submission of the Answer whether on 16 April 1993 a massacre was carried out in Ahmici [...], Nov. 10, 1998, filed 13 Nov. 1998, Doc. No. D2958-D2947: "Ahmici was not [an] undefended village in which all Moslems were (sic) the civilian population [...]. Many people were killed ... because it is (sic) a sad consequence of the war and armed conflict".

<sup>764</sup> See for example the Defence's assertion that members of the BiH Army seldom wore uniforms or distinctive insignia and hence, the mere fact that none of the victims appeared to be wearing uniforms

fashion in hostilities, had previously taken up arms or who spontaneously took up arms to resist an attacker.<sup>765</sup> According to these submissions, the civilian deaths in Ahmici resulted from skirmishes between warring factions and hence, were militarily-justified actions.<sup>766</sup>

513. Whether or not this is correct – and this is a matter that will be addressed later – it is nevertheless beyond dispute that at a minimum, large numbers of civilian casualties would have been interspersed among the combatants. The point which needs to be emphasised is the sacrosanct character of the duty to protect civilians, which entails, amongst other things, the absolute character of the prohibition of reprisals against civilian populations. Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.

514. The Trial Chamber will also address an issue of general relevance and of a methodological nature, namely, the importance it should attach to case law in its findings on international humanitarian law and international criminal law.

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cannot be dispositive of this issue. (See Petition of the Counsels of the Accused Zoran and Mirjan Kupreškic, filed 12 Nov. 1998, Doc. No. D2904-D2891, at para. 7: "... in (sic) the incriminated time most of the members (sic) of the BiH had no uniforms, that they were (sic) in civilian clothes, with no special marks on them, and they were dressed that way when they left for the front line with Serbs, so, according to that, the fact that no dead persons in uniforms have been seen, does not mean that they were not army members". See also Defence's Closing Brief of 5 Nov. 1999, Doc. No. D5970-D5879, at p. 18: "In Ahmici [on April 16 1993 ...]the resistance was significant and organised" and the closing argument of defence counsel Radovic, T. 12733-12734.

<sup>765</sup> See for instance the Defence's Closing Brief of 5 Nov. 1999, at p. 84: "[P]rivate individuals [...] who had previously taken part in any fashion in the internal hostilities, who previously had taken arms, or who spontaneously take up arms to resist an attacker [...] directly take part in hostilities and, therefore, are [not] covered by this definition of "non-combatant" [or] protected by ICTY Art. 3".

<sup>766</sup> See for instance Defence's submission of the Answer whether on 16 April 1993 a massacre was carried out in Ahmici, *ibid.*

2. The *Tu Quoque* Principle is Fallacious and Inapplicable: The Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law

515. Defence counsel have indirectly or implicitly relied upon the *tu quoque* principle, i.e. the argument whereby the fact that the adversary has also committed similar crimes offers a valid defence to the individuals accused.<sup>767</sup> This is an argument resting on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimise similar breaches by a belligerent in response to, or in retaliation for, such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals, and is accordingly assessed below. Here the Trial Chamber will confine itself to briefly discussing the first meaning of the principle at issue.

516. It should first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected. The US Military Tribunal in the *High Command* trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused.<sup>768</sup> Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.

517. Secondly, the *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations.

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<sup>767</sup> See for instance the cross-examination of Witness Y, where defence counsel Ms. Glumac gave a list of Croatian villages from which Croats were allegedly expelled and their houses burnt, supporting the inference that the Croats justified the massacres in Ahmici in terms of revenge (T. 3344-46). See also paras. 23, 125 and 338, *ibid*.

<sup>768</sup> *US v. von Leeb et al* (the *High Command* trial) (1948), Law Reports of the Trials of War Criminals (hereafter *LWT*), vol. 12, p. 1, at p. 64 (US Military Tribunal, Nuremberg). See also 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),' UN Doc. S/1994/674 (27 May 1994), p. 18, para. 63.



Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that “The High Contracting Parties undertake to respect [...] the present Convention *in all circumstances*” (emphasis added). Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that “No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [i.e. grave breaches]”. Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.

518. The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called ‘humanisation’ of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy.<sup>769</sup> The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily

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<sup>769</sup> This is translated in para. 121 of the 1958 British Manual of Military Law into a clear rejection of a broad principle of reciprocity: A belligerent is thus not justified in declaring himself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary. (UK War Office, *Manual of Military Law*, Part III, *The Laws and Usages of War on Land* (H. Lauterpacht (ed.), London, HMSO, 1958), para. 121, n. 1(a)). This Manual does,

designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the “categorical imperative” formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.

519. As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather -- as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) -- they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.<sup>770</sup>

520. Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.<sup>771</sup> One illustration of the consequences which follow from this classification is that if the norms in question are contained in treaties, contrary to the general rule set out in Article 60 of the Vienna Convention on the Law of Treaties, a material breach of that

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however, leave open the possibility of reprisals against an earlier violation by the enemy (see paras. 642-9 of the Manual).

<sup>770</sup> *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 3 at p. 32. See also W. Riphagen, “*Second Report on the Content, Forms and Degrees of International Responsibility*”, *Yearbook of the International Law Commission*, 1981, UN Doc. A/CN.4/344. Vol. 2, part. 1, p. 79 at p. 86.

<sup>771</sup> Art. 53, Vienna Convention on the Law of Treaties, 23 May 1969. A peremptory norm or *jus cogens* principle is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules: *Prosecutor v. Furundžija*, (IT-95-17/1-T), Judgement, Trial Chamber, 10 December 1998, (hereafter *Furundžija*, Judgement, 10 Dec. 1998), at para. 153. With regard to the impermissibility of reservations to human rights conventions with respect to peremptory norms, see also General Comment 24 of the UN Human Rights Committee on “Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to declarations made under article 41 of the Covenant (fifty-second Session, 1994), 4 Nov. 1994.

treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle *inadimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties.

### 3. The Prohibition of Attacks on Civilian Populations

521. The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law. In 1938, the Assembly of the League of Nations, echoing an important statement made, with reference to Spain, in the House of Commons by the British Prime Minister Neville Chamberlain,<sup>772</sup> adopted a Resolution concerning the protection of civilian populations against bombing from the air, in which it stated that “the intentional bombing of [the] civilian population is illegal”.<sup>773</sup> Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice, that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.<sup>774</sup>

522. The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in three exceptional circumstances: (i) when civilians abuse their rights; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (iii) at least according to some authorities, when civilians may legitimately be the object of reprisals.

523. In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks

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<sup>772</sup> House of Commons *Debates*, 21 June 1938, vol. 337, col. 937.

<sup>773</sup> The Resolution was adopted on 30 Sept. 1938; see League of Nations, *Official Journal*, Special Supplement no. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15-17.

granted to civilian hospitals shall cease, subject to certain conditions, if the hospital "[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy", for example if an artillery post is set up on top of the hospital. Similarly, if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention of 1949.

524. In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War,<sup>775</sup> has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party. Nevertheless this is an area where the "elementary considerations of humanity" rightly emphasised by the International Court of Justice in

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<sup>774</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, p. 257 (para. 78).

<sup>775</sup> In his statement in the House of Commons on the Spanish civil war, the British Prime Minister stated that one of the rules applicable in any armed conflict was the rule whereby "[r]easonable care must be taken in attacking [...] military objectives so that by carelessness a civilian population in the neighbourhood is not bombed". (House of Commons, *Debates*, 21 June 1938, vol. 337, cols. 937-938).

the *Corfu Channel*,<sup>776</sup> *Nicaragua*<sup>777</sup> and *Legality of the Threat or Use of Nuclear Weapons*<sup>778</sup> cases should be fully used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law.

525. More specifically, recourse might be had to the celebrated Martens Clause which,<sup>779</sup> in the authoritative view of the International Court of Justice, has by now become part of customary international law.<sup>780</sup> True, this Clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

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<sup>776</sup> ICJ Reports, 1949, p. 22.

<sup>777</sup> ICJ Reports, 1986, p. 112, para. 215.

<sup>778</sup> ICJ Reports, 1996, p. 257, para. 79.

<sup>779</sup> The Martens Clause was first set forth in the preambular provisions of the 1899 Hague Convention concerning the Laws or customs of War on Land which reads as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.

The French text of this Article reads as follows:

En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties Contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.

A modern version of this clause is to be found in Art. 1(2) of Additional Protocol I of 1977, which refers, instead, to “the principles of humanity and [...] the dictates of public conscience” (“principes de l'humanité et des exigences de la conscience publique”).

<sup>780</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, at p. 259, para. 84.

526. As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

527. As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the

imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

528. The question of reprisals against civilians is a case in point. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.

529. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility. Article 50(d) of the Draft Articles on State Responsibility, adopted on first reading in 1996, prohibits as countermeasures any "conduct derogating from basic human rights".<sup>781</sup>

530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing

compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts. This means serves the purpose of bringing to justice those who are responsible for any such crime, as well as, albeit to a limited extent, the purpose of deterring at least the most blatant violations of international humanitarian law.

531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion. With regard to the formation of a customary rule, two points must be made to demonstrate that *opinio iuris* or *opinio necessitatis* can be said to exist.

532. First, even before the adoption of the First Additional Protocol of 1977, a number of States had declared or laid down in their military manuals that reprisals in modern warfare are only allowed to the extent that they consist of the use, against enemy armed forces, of otherwise prohibited weapons – thus *a contrario* admitting that reprisals against civilians are not allowed. In this respect one can mention the United States military manual for the Army (*The Law of Land Warfare*), of 1956,<sup>782</sup> as well as the Dutch “Soldiers Handbook” (*Handboek voor de Soldaat*) of 1974.<sup>783</sup> True, other military manuals of the same period took a different position, admitting reprisals against civilians

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<sup>781</sup>See Draft Articles on State Responsibility, in *Report of the International Law Commission on the Work of its forty-eighth Session*, 6 May-26 July 1996, UNGAOR, 51<sup>st</sup> Session, Supp. No. 10, (A/51/10) para. 237, p. 145.

<sup>782</sup>See Department of the Army Field Manual, FM 27-19, July 1956, pp. 177-178, para 497. After stating that reprisals against “protected persons” are prohibited pursuant to the Geneva Conventions of 1949, the Manual goes on to state that “[h]owever, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces undertaking the reprisals” (para. 497(c)). In sub-para (a) of the same paragraph it is stated that “[t]he employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy”.

<sup>783</sup>See *Handboek voor de Soldaat* (“Soldiers Handbook”), VS 2-1350, 1974, Chapter VII (“The Laws of warfare”), Art. 34 (“The civilian population, who takes no active part in the hostilities, must be spared. [...] Reprisals against civilians are prohibited [...]”). Art. 35: “[...] Collective punishments [of civilians], the taking of hostages, and reprisals [against civilians] are prohibited” (unofficial translation). These provisions have been restated in the edition of March 1995 of the Dutch Manual, at Art. 6 (pp. 7-43).



not in the hands of the enemy belligerent.<sup>784</sup> In addition, senior officials of the United States Government seem to have taken a less clear stand in 1978, by expressing doubts about the workability of the prohibition of reprisals against civilians.<sup>785</sup> The fact remains, however, that elements of a widespread *opinio necessitatis* are discernible in international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that “civilian populations, or individual members thereof, should not be the object of reprisals”.<sup>786</sup> A further confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilians must always be prohibited.<sup>787</sup> It is also notable that this view was substantially upheld by the ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva Conventions on the Iran-Iraq war<sup>788</sup> and by Trial Chamber I of the ICTY in *Martic*.<sup>789</sup>

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<sup>784</sup> See for example the British Manual (*The Law of War on Land*, The War Office, 1958, p. 184, para 644 and note 2). The Austrian Manual (*Truppenführung*), Bundesministerium für Landesverteidigung, Wien 1965, p. 255, para 48, lists the various categories of persons and objects against whom reprisals are prohibited by the Geneva Conventions, but specifies that these are the reprisals “expressly prohibited” (*ausdrücklich verboten*).

<sup>785</sup> In his report to the United States Secretary of State, the U.S. Deputy Legal Adviser and Head of the U.S. Delegation to the Geneva Diplomatic Conference of 1974-77 stated that in his view the Geneva Conference had “gone unreasonably far in its prohibition of [reprisals]” (text in 72(2) *American Journal of International Law*, 1978 at p. 406) and added: “It is unreasonable to think that massive and continuing attacks directed against a nation’s civilian population could be absorbed without a response in kind. By denying the possibility of response and not offering any workable substitute, Art. 51 [of the First Additional Protocol] is unrealistic and cannot be expected to withstand the test of future conflicts. On the other hand, it will not be easy for any country to reserve, explicitly, the right of reprisal against an enemy’s civilian population, and we shall have to consider carefully whether such a reservation is indispensable for us” (*ibid*). Furthermore, it has been reported that the United States JCS (Joint Chiefs of Staff), faced with the possibility that other States would not accept individual monitoring mechanisms, expressed misgivings about the acceptance of the prohibition of reprisals against civilians. (J.A. Roach, in *ICCR Review*, 1991, 67 at p. 183, note 7: “If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behaviour by US adversaries”).

<sup>786</sup> U.N. General Assembly Resolution 2675 (XXV) of 9 Dec. 1970.

<sup>787</sup> It should, however, be noted that in 1998 the United Kingdom, in ratifying the First Additional Protocol of 1977, made a reservation concerning the obligations of Articles 51 and 55 of the Protocol on the use of reprisals against civilians (see the letter sent on 28 January 1998 by the British Ambassador C. Hulse to the Swiss Government, and partially reproduced in M. Sassoli and A.A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva 1999, pp. 617-618).

<sup>788</sup> The ICRC pointed out the following: “The Iraqi forces have indiscriminately and systematically bombarded towns and villages, causing casualties among the civilian inhabitants and considerable destruction of civilian property. Such acts are inadmissible, the more so that some were declared to be reprisals before being perpetrated. [...] Such acts are in total disregard of the very essence of international humanitarian law applicable in armed conflicts, which is founded on the distinction between civilians and

533. Secondly, the States that have participated in the numerous international or internal armed conflicts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran-Iraq war of 1980-1988<sup>790</sup> as well as – but only *in abstracto* and hypothetically, by a few States, such as France in 1974<sup>791</sup> and the United Kingdom in 1998.<sup>792</sup> The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.

534. The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on sub-paragraph d of Article 14 (now Article 50) of the Draft Articles on State Responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that Article 3 common to the four 1949 Geneva Conventions “prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment”.<sup>793</sup> It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial

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military forces” (memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 Concerning the Conflict Between the Islamic Republic of Iran and the Republic of Iraq, Geneva, May 7, 1983, partially reproduced in M. Sassoli and A.A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, 1999 at 982).

<sup>789</sup> *Prosecutor v. Milan Martić*, Review of Indictment Pursuant to Rule 61, ICTY Trial Chamber, Case No. IT-95-11-R61, 8 March 1996, at paras. 10-18.

<sup>790</sup> See the Memorandum of the ICRC, *ibid.*

<sup>791</sup> See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974-77, *Official Records*, Vol. VI, 1977, at 162. France voted against the provision prohibiting reprisals, stating, *inter alia*, that it was “contrary to existing international law” (*idem*).

<sup>792</sup> See the British reservation to the First additional Protocol of 1977, *ibid.*

<sup>793</sup> See the Commission’s comments on the former Article 14 of the II<sup>nd</sup> Part of the Draft Articles in *Yearbook of the International Law Commission*, 1995, Volume II, Part Two, A/CN.4/SER.A/1995/Add.1 (Part 2) (State responsibility), para. 18, p. 72.

Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law.<sup>794</sup> Secondly, as the International Court of Justice rightly held in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts.<sup>795</sup> Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.

535. It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity' (as mentioned above).

536. Finally, it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949.<sup>796</sup> Hence, whether or not the armed conflict of which the attack on Ahmici formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

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<sup>794</sup> See in this regard *Military and Paramilitary Activities in and Against Nicaragua (Merits)*, Judgment of 27 June 1986, ICJ Reports 1986, p. 113, especially at para. 218.

<sup>795</sup> *Ibid.*, p. 114 at para. 219.

<sup>796</sup> Croatia succeeded to the four Geneva Conventions of 1949 and the two Additional Protocols on 11 May 1992 and Bosnia and Herzegovina on 31 Dec. 1992.

4. The Importance the International Tribunal can Attach to Case Law in its Findings of Law

537. This issue, albeit of general relevance and of a methodological nature, acquires special significance in the present judgement, as it is largely based on international and national judicial decisions. The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence. What judicial value should be assigned to this *corpus*?

538. The value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper. The Trial Chamber shall therefore first of all consider, if only briefly, this matter – a matter that so far the Tribunal has not had the opportunity to delve into.

539. Indisputably, the ICTY is an international court, (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal, as well as the status, privileges and immunities it enjoys under Article 30 of the Statute, and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary

international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world.<sup>797</sup> Furthermore, the Tribunal may have to apply national law *incidenter tantum*, i.e. in the exercise of its incidental jurisdiction. For instance, in determining whether Article 2 of the Statute (on grave breaches) is applicable, the Tribunal may have to establish whether one of the acts enumerated there has been perpetrated against a person regarded as “protected” under the Fourth Geneva Convention of 1949. To this end it may have to satisfy itself that the person possessed the nationality of a State other than the enemy belligerent or Occupying Power. Clearly, this enquiry may only be carried out on the basis of the relevant national law of the person concerned. The fact remains, however, that the principal body of law the Tribunal is called upon to apply in order to adjudicate the cases brought before it is international law.

540. Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a “subsidiary means for the determination of rules of law” (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). Hence, generally speaking, and subject to the binding force of decisions of the Tribunal’s Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating

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<sup>797</sup> A reference to such a method is made in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), 3 May 1993, at paragraph 58 (hereafter *Report of the Secretary-General*).

international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.

541. As noted above, judicial decisions may prove to be of invaluable importance for the determination of existing law. Here again attention should however be drawn to the need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law. In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Conventions or the 1977 Protocols or similar international treaties. In these instances the international framework on the basis of which the national court operates

and the fact that in essence the court applies international substantive law, may lend great weight to rulings of such courts. Conversely, depending upon the circumstances of each case, generally speaking decisions of national courts on war crimes or crimes against humanity delivered on the basis of national legislation would carry relatively less weight.

542. In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.

## B. Crimes Against Humanity

### 1. Objective and Subjective Elements of the Crimes Under Article 5

543. Article 5 of the Statute of the International Tribunal deals with crimes against humanity. The essence of these crimes is a systematic policy of a certain scale and gravity directed against a civilian population. In the *Nikolic* Rule 61 decision, the Trial Chamber set forth in broad terms three distinct components of crimes against humanity under the ICTY Statute:<sup>798</sup>

First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.

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<sup>798</sup> *Prosecutor v. Nikolic*, Rule 61 Decision, Trial Chamber, 20 Oct. 1995, (hereafter *Prosecutor v. Nikolic*, Rule 61 Decision), at para. 26.

544. The following elements can be identified as comprising the core elements of crimes against humanity: first, the existence of an armed conflict; second, that the acts were part of a widespread or systematic occurrence of crimes directed against a civilian population (the requirement that the occurrence of crimes be widespread or systematic being a disjunctive one<sup>799</sup>) and finally, that the perpetrator had knowledge of the wider context in which his act occurs.<sup>800</sup>

## 2. The Requirement of an Armed Conflict

545. By requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council, in establishing the International Tribunal, may have defined the crime in Article 5 more narrowly than is necessary under customary international law.<sup>801</sup> It is nevertheless sufficient for the purposes of Article 5 that the act occurred in the course or duration of any armed conflict. The type and nature of such conflict – whether international or internal – is therefore immaterial.<sup>802</sup> An armed conflict can be said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>803</sup>

546. The nature of the nexus required under Article 5 of the Statute is merely that the act be linked geographically as well as temporally with the armed conflict.<sup>804</sup>

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<sup>799</sup> As the Trial Chamber stated in its Judgement: “it is now well established that the requirement that the acts be directed against a civilian “population” can be fulfilled if the acts occur on either a widespread basis or in a systematic manner” (*Tadic*, Trial Chamber Judgement, 7 May 1997, para. 646).

<sup>800</sup> *Ibid.*, at paras. 626 and 657.

<sup>801</sup> See *Prosecutor v. Tadic*, (IT-94-1-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, (hereafter *Tadic*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995) at para. 141: ‘It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all’.

<sup>802</sup> *Ibid.*, at para. 142: “Art. 5 may be invoked as a basis for jurisdiction over crimes committed in either internal or international armed conflicts”.

<sup>803</sup> *Ibid.*, at para. 70.

<sup>804</sup> In this regard, the Appeals Chamber in *Tadic* noted that “[...] the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the [...] nature of the language [...] suggests a broad geographical scope as well” (*ibid.*, at para. 69).



### 3. 'Directed Against a Civilian Population'

547. It would seem that a wide definition of "civilian" and "population" is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes. However, faced with the explicit limitation laid down in Article 5, the Trial Chamber holds that a broad interpretation should nevertheless be placed on the word "civilians", the more so because the limitation in Article 5 constitutes a departure from customary international law.

548. The above proposition is borne out by the case law. Of particular relevance to the present case is the finding in *Barbie*<sup>805</sup> (admittedly based on general international law) that "inhumane acts and persecution committed in a systematic manner, in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community but also against the opponents of that policy, whatever the form of their "opposition" could be considered a crime against humanity.<sup>806</sup> In the *Vukovar* Rule 61 Decision of 3 April 1996, a Trial Chamber held that crimes against humanity may be committed even where the victims at one time bore arms.<sup>807</sup>

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<sup>805</sup> The *Barbie* case, French *Court of Cassation* (Criminal Chamber), 20 Dec. 1985, 78 ILR 125.

<sup>806</sup> *Ibid.*, at 137.

<sup>807</sup> On this point, the Trial Chamber held that "[a]lthough according to the terms of Article 5 of the Statute of this Tribunal [...] combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council Resolution 780, noted, "it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. ... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose". (*Prosecutor v. Mrksi} et al*, Review of Indictment Pursuant to Rule 61, 3 Apr. 1996, para. 29, citing *Report of the Commission of Experts established pursuant to Security Council Resolution 780*, Doc. S/1994/674, para. 78.)

549. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.

#### 4. Can Crimes Against Humanity Comprise Isolated Acts?

550. In general terms, the very nature of the criminal acts over which the International Tribunal has jurisdiction under Article 5, in view of the fact that they must be ‘directed against any civilian population,’ ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.<sup>808</sup> Nevertheless, in certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context.<sup>809</sup> For example, the act of denouncing a Jewish neighbour to the Nazi authorities - if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity.<sup>810</sup> An *isolated* act, however – i.e. an atrocity which did not occur within such a context – cannot.

#### 5. The Policy Element

551. With regard to the “form of governmental, organisational or group policy” which is to direct the acts in question, the Trial Chamber has noted that although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity. In any case, it

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<sup>808</sup> *Tadic*, Decision on Defence Motion on the Form of the Indictment, 14 Nov. 1995, at para. 11.

<sup>809</sup> On this point, the Trial Chamber in *Tadic* has held that “clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus “even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution” (*Tadic*, Trial Chamber Judgement, 7 May 1997, para. 649, footnotes omitted).

<sup>810</sup> See e.g. the judgements of the Supreme Court for the British zone in: *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. I, pp. 6 *et seq.*; 19 *et seq.*; 39 *et seq.*; 45 *et seq.*; 49 *et seq.*; 56 *et seq.*

appears that such a policy need not be explicitly formulated, nor need it be the policy of a *State*.<sup>811</sup>

552. The need for crimes against humanity to have been at least tolerated by a State, Government or entity is also stressed in national and international case-law. The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding *de facto* authority over a territory.<sup>812</sup>

553. National case-law tends, in particular, to emphasise that crimes against humanity are usually the manifestation of a criminal governmental policy. As observed by the Canadian Supreme Court in the case of *Finta*:<sup>813</sup>

The central concern in the case of crimes against humanity is with such things as state-sponsored or sanctioned persecution, not the private individual who has a particular hatred against a particular group or the public generally.

554. The aforementioned judgements and others on the same matter implicitly illustrate the nature and implications of the link between an offence and a large-scale or systematic practice of abuses necessary in order for the offence to be characterised as a crime against humanity. In particular, they enable us to answer the question of whether the offence must be perpetrated by organs or agents of a State or a governmental authority or on behalf of such bodies, or whether it may be committed by individuals not acting in an official capacity, and in the latter case, whether the offence must be approved

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<sup>811</sup> *Tadic*, Trial Chamber Judgement, 7 May 1997, at para. 653, where the Trial Chamber noted that “[t]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population.” It went on to explain that although traditionally this requirement was understood to mean that there must be some form of State policy to commit these acts occurred during this period, this was no longer the case (*ibid.*, at para. 654). See also *Prosecutor v. Nikolic*, Rule 61 decision, at para. 26: “Although they [the crimes in question] need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.”

<sup>812</sup> The Court held in both *Barbie*, (French Court of Cassation (Criminal Chamber), 3 June 1988, 100 ILR 331 at 336) and the *Touvier* (France, Court of Appeal of Paris, First Chamber of Accusation, 13 April 1992); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351), that crimes against humanity are acts performed in a systematic manner in the name of a State practising by those means a policy of ideological hegemony.

<sup>813</sup> *R v. Finta* [1994] 1 S.C.R. 701 at 733.

of or at least condoned or countenanced by a governmental body for it to amount to a crime against humanity.

555. While crimes against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy. In addition to many decisions concerning crimes against humanity perpetrated by individuals acting in a private capacity,<sup>814</sup> the *Weller* case may prove to be of some relevance to this issue. This case gave rise to six different judgements by German courts after World War II<sup>815</sup> and involved the ill-treatment of Jewish civilians by two persons under the command of Weller, a member of the SS, who was at the time not in uniform and was acting on his own initiative. After the injured parties reported to the Jewish community, which in turn complained to the local Gestapo, the head of the Gestapo informed the wronged Jews that Weller's actions were an isolated event which would in no way be approved. Thereafter Weller was summoned by the Gestapo and strongly taken to task by the district leader of the Nazi party. On appeal to the Supreme Court for the British zone, it was held that the offence did indeed constitute a crime against humanity, on the grounds that it was sufficient for the attack on human dignity to be connected to the national-socialist system of power and hegemony.<sup>816</sup>

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<sup>814</sup> See in this regard the German 'denunciation' cases, *ibid.*

<sup>815</sup> See the decision of the *Landgericht* of Mönchengladbach of 16 June 1948 (unpublished), the decision of the *Oberlandesgericht* of Düsseldorf of 21 Oct. 1948 (unpublished) and the decision of the German Supreme Court in the British occupied zone, of 21 Dec. 1948 (in *Entscheidungen, ibid.*, vol.1, pp. 203-208), the decision of the *Schwurgericht* of Mönchengladbach of 20 April 1949 (unpublished), that of the German Supreme Court in the British occupied zone, of 10 Oct. 1949 (unpublished) and the decision of the *Schwurgericht* of Mönchengladbach of 21 June 1950 (unpublished).

The aforementioned decisions are on the Tribunal's files (they have been kindly provided to the Tribunal by the *Nordrhein Westfälisches Hauptstaatsarchiv*).

<sup>816</sup> In this regard the Supreme Court noted that "[a]ctions which seemingly or actually originated from quite personal decisions were also often and readily put by the national-socialist leadership at the service of its criminal goals and plans. This held true even for actions which outwardly were even disapproved of [...]"

6. Knowledge of the Context Within Which the Perpetrator's Actions are Taken:  
the Mens Rea Requirement

556. The determination of the elements comprising the *mens rea* of crimes against humanity has proved particularly difficult and controversial. Nevertheless, the requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs.<sup>817</sup>

557. With regard to the latter requirement (knowledge), the ICTR in *Prosecutor v. Kayishema* noted as follows:<sup>818</sup>

The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. [Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge

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The link, in this sense, with the national-socialist system of power and tyranny does in the case at issue manifestly exist [as] the actions of the accused fitted into the numerous persecutory measures which were then imposed against the Jews in Germany or could at any time be imposed against them. [...] [The] link with the national-socialist system of power and tyranny does not exist only in the case of those actions which are ordered and approved by the holders of hegemony; that link exists also when those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was [thus] wrong when it attached decisive value to the fact that the accused after his action was "rebuked" and that even the Gestapo disapproved of the excess as an isolated infringement. That this action nevertheless fitted into the persecution of Jews effected by the State and the party, is shown by the fact that the accused ... was not held criminally responsible... in proportion to the gravity of his guilt...." (See *Entscheidungen*, *ibid.*, vol.1, pp. 206-207).

The Supreme Court for the British zone returned to this matter, although only fleetingly, in its decision of 10 October 1949 (unpublished), where it restated its position on the issue of crimes against humanity (see pp. 4-5 of the typescript).

<sup>817</sup> *Tadic*, Trial Chamber Judgement, 7 May 1997, at para. 656. See also *ibid.*, para. 659, where it was noted that "if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis ... that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population [and ...] know that his act fits in with the attack ....". Note the recent finding of the *Tadic* Appeals Chamber, which has declared erroneous the Trial Chamber's enunciation of a negative element; namely, that crimes against humanity must not be committed for the purely personal motives of the perpetrator: *Prosecutor v. Tadic*, (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, (hereafter *Tadic*, Appeals Chamber Judgement, 15 July 1999), at para. 248-52.

<sup>818</sup> *Prosecutor v. Kayishema and Ruzindana*, (ICTR-95-1-T), Judgement, Trial Chamber, 21 May 1999 (hereafter *Kayishema and Ruzindana*, Judgement, 21 May 1999), paras. 133-4.

of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.

558. Two aspects of the subjective requirement of crimes against humanity are now free from dispute. Subsequent to the Appeals Chamber's decision in *Prosecutor v. Tadic*, crimes against humanity need be committed with a discriminatory intent only with regard to the category of "persecutions" under Article 5(h); ie. the sole category in which discrimination comprises an integral element of the prohibited conduct. Otherwise, a discriminatory animus is not an essential ingredient of the *mens rea* of crimes against humanity.<sup>819</sup> Nor are the *motives* (as distinct from the *intent*) of the accused, as such, of special pertinence.<sup>820</sup>

## 7. The Constituent Offences

559. The instant case involves counts of murder under Article 5(a) (counts 2, 4, 6, 8, 12 and 16), persecutions under Article 5(h) (count 1) and inhumane acts under Article 5(i) (counts 10, 14 and 18). Murder and inhumane acts will here be considered; persecution forms part of a separate analysis.

### (a) Article 5(a): Murder

560. The constituent elements of murder under Article 5(a) of the Statute are well known.<sup>821</sup> They comprise the death of the victim as a result of the acts or omissions of the accused, where the conduct of the accused was a substantial cause of the death of the victim.<sup>822</sup> It can be said that the accused is guilty of murder if he or she engaging in

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<sup>819</sup> *Tadic*, Appeals Chamber Judgement, 15 July 1999, at para. 305.

<sup>820</sup> *Ibid.*, at para. 272.

<sup>821</sup> As was acknowledged by the International Law Commission: "Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation". (*Report of the International Law Commission on the work of its 48<sup>th</sup> Session*, 6 May-26 July 1996, p. 96, Commentary to Article 18 (Crimes against Humanity), 51<sup>st</sup> Session, Supp. No. 10, UNGAOR (A/51/10), para. 7).

<sup>822</sup> *Prosecutor v. Akayesu*, (ICTR-96-4-T), Judgement, Trial Chamber, 2 September 1998, (hereafter *Akayesu*, Judgement, 2 Sept. 1998), at para. 589.

conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.

561. The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.<sup>823</sup> In *Kayishema* it was noted that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.<sup>824</sup>

(b) Article 5(i): Other Inhumane Acts

562. The expression "other inhumane acts" was drawn from Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10.

563. There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category. The phrase "other inhumane acts" was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition. The importance of maintaining such a category was elucidated by the ICRC when commenting on what would constitute a violation of the obligation to provide "humane treatment" contained in common Article 3 of the Geneva Conventions:<sup>825</sup>

[I]t is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be,

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<sup>823</sup> *Idem*.

<sup>824</sup> *Kayishema and Ruzindana*, Judgement, 21 May 1999, at para. 139.

<sup>825</sup> *ICRC Commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in time of War* (1958, repr. 1994), p. 39.

the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.

564. In interpreting the expression at issue, resort to the *ejusdem generis* rule of interpretation does not prove to be of great assistance. Under this rule, that expression would cover *actions similar* to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. Thus, for instance, in the *Tarnek* case, the District Court of Tel-Aviv held in a decision of 14 December 1951 that the definition of “other inhumane acts” laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950, which reproduced the definition of Article 6(c), was to apply only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition.<sup>826</sup> This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.

565. The Statute of the International Criminal Court (ICC) (Article 7(k)) provides greater detail than the ICTY Statute as to the meaning of other inhumane acts: “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health”.<sup>827</sup> However, this provision also fails to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts.<sup>828</sup>

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<sup>826</sup> See 18 *ILR*, 1951, p. 540. See also the *Enigster* case (Decision of 4 Jan. 1952 by the same Court), *ibid.*, at p. 541-2.

<sup>827</sup> With regard to a similar concept, that of ‘inhuman treatment’ under Art. 2(b) (grave breaches), the ICTY Trial Chamber in *Delalić et al.* noted that “inhuman treatment” was constituted by “an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity” (*Prosecutor v. Delalić et al.*, (IT-96-21-T), Judgement, Trial Chamber, 16 Nov. 1998, (hereafter *Delalić et al.*, Judgement, 16 Nov. 1998), at para. 543). The Trial Chamber also suggested a negative definition, namely that inhuman treatment is treatment which causes severe mental or physical suffering but which falls short of torture, or lacks one of the elements of torture (e.g. a prohibited purpose or official sanction). (*Ibid.* at para. 542). Whether a given conduct constitutes inhuman treatment will be determined on a case-by-case basis and appears ultimately to be a question of fact (*ibid.*, at para. 544. See also *Kayishema and Ruzindana*, Judgement, 21 May 1999, at para. 151: “[T]he acts that rise to the level of inhuman acts should be determined on a case-by-case basis”).

<sup>828</sup> The International Law Commission, commenting on Art. 18 of its Draft Code of Crimes further states that “[t]he Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act



566. Less broad parameters for the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1).<sup>829</sup> Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional

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must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity” (*Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May-26 July 1996, UNGAOR 51<sup>st</sup> Sess. Supp. No. 10 (A/51/10) (Crimes Against the Peace and Security of Mankind), at para. 17, p. 103).

<sup>829</sup> As for the specification of what constitutes cruel, debasing, humiliating or degrading treatment, resort can of course be had to the important case-law of the relevant international bodies, chiefly to the United Nations Torture Committee and the European Commission and Court of Human Rights.

It is worth adding that resort to the standards laid down in the Universal Declaration of Human Rights has already been made in 1950 by a Belgian court. The *Conseil de guerre* of Brussels, in a judgment of 8 Feb. 1950, held that Art. 5 of the Universal Declaration, prohibiting torture and inhuman treatment can be utilised for the application of the so-called Marten's clause in the IVth Hague Convention of 1899. It noted, at p. 566, that “in searching for the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience, the Court-Martial is presently guided by the Universal Declaration of Human Rights ...” [*D]ans la recherche des principes du droit des gens tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique, le Conseil de guerre est aujourd'hui guidé par la déclaration universelle des droits de l'homme [...]*. After citing Art. 5 of the Declaration, the court went on to say that “[...] suspending a human being by his hands tied behind his back from a pulley specially rigged for the purposes is *torture*; [...] blows to the face, delivered so repeatedly and violently that they caused it to swell up and, in several cases, broke some teeth, constitute *cruel treatment*” (*ibid.*). “[L] a pendaison d'un être humain, par les mains liées derrière le dos, à une poulie spécialement aménagée à cet effet, est une *torture*; [...] des coups au visage, à ce point répétés et violents qu'ils l'ont tuméfié et dans plusieurs

Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of "inhumane acts" are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.

### C. Persecution as a Crime Against Humanity

567. Persecution under Article 5(h) has never been comprehensively defined in international treaties. Furthermore, neither national nor international case law provides an authoritative single definition of what constitutes 'persecution'. Accordingly, considerable emphasis will be given in this judgement to elucidating this important category of offences.

568. It is clear that persecution may take diverse forms, and does not necessarily require a physical element.<sup>830</sup> Additionally, under customary international law (from which Article 5 of the Statute derogates), in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel. An explicit finding to this effect was made by the French courts in the *Barbie* and *Touvier* cases.<sup>831</sup> Under Article 5 of the Statute, a key constituent of persecution

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*cas, ont brisé des dents, constituent un traitement cruel* (in 30 *Revue de droit pénal et de criminologie*, 1949-50, p. 566).

<sup>830</sup> In this regard, another Trial Chamber has held that "persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element". (*Tadic*, Trial Chamber Judgement, 7 May 1997, at para. 707).

<sup>831</sup> In both cases the crimes at issue were held to constitute persecution. In the *Barbie* decision, the French Court of Cassation held that crimes against humanity in the form of persecution had been perpetrated against members of the French resistance movements (*ibid.*). The same view was taken by the *Chambre*

appears to be the carrying out of any prohibited conduct, directed against a civilian population, and motivated by a discriminatory *animus* (political, racial or religious grounds).<sup>832</sup> Beyond these brief observations, however, much uncertainty exists.

569. The non-legal or “common understanding” of the term persecution also varies widely. For example, in its comment on the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind of 1991, the United States remarked that the dictionary definition of the verb “to persecute” is “to annoy with persistent or urgent approaches, to pester”.<sup>833</sup> Such a definition of persecution for the purposes of a criminal trial is clearly inapplicable before this Tribunal, due to the fact that crimes against humanity, far from being trivial crimes, are offences of extreme gravity.

570. Turning to the *text* of Article 5, the general elements of crimes against humanity, such as the requirements of a widespread or systematic nature of the attack directed against a civilian population, are applicable to Article 5(h) and have already been set out above. The text of Article 5, however, provides no further definition of persecution or how it relates to the other sub-headings of Article 5, except to state that persecution must be on political, racial, or religious grounds.<sup>834</sup> From the text of Article 5 as interpreted by the Appeals Chamber in *Tadic*, it is clear that this discriminatory purpose applies to persecution alone.<sup>835</sup>

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*d'accusation* of the Court of Appeal of Paris in a judgment of 9 July 1986 in the same case and confirmed by the *Chambre d'accusation* of the Court of Appeal of Paris in a Judgment of 13 April 1992 in the *Touvier* case (*ibid.*). The *Chambre d'accusation* stated that Jews and members of the Resistance *persecuted* in a systematic manner in the name of a State practising a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by reason of their opposition to that policy, can equally be the victims of crimes against humanity. (*ibid.*, p. 352; emphasis added).

<sup>832</sup> The question is thus raised as to whether a crime against humanity could also be committed on discriminatory grounds not enumerated in the list provided in Art. 5(h) (eg. discrimination on grounds of gender, political opinion or social class): see *Tadic*, Appeals Chamber Judgement, 15 July 1999, at para. 285.

<sup>833</sup> 13<sup>th</sup> Report on the Draft code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/455, 24 March 1995 at para. 75; Comments and Observations of Governments on the Draft Code, UN Doc. A/CN.4/448, 1 March 1993, at p. 97.

<sup>834</sup> Although the text of Article 5 reads “political, racial, *and* religious grounds”, these grounds should be read disjunctively: *Tadic*, Trial Chamber Judgement, 7 May 1997, at paras. 711-713.

<sup>835</sup> *Tadic*, Appeals Chamber Judgement, 15 July 1999, at para. 305.

571. With regard to a *logical construction* of Article 5, it could be assumed that the crime of persecution covers acts other than those listed in the other subheadings: each subheading appears to cover a separate crime. However, on closer examination, it appears that some of the crimes listed do by necessity overlap: for example, extermination necessarily involves murder, torture may involve rape, and enslavement may include imprisonment. Hence, the wording of Article 5, logically interpreted, does not rule out a construction of persecution so as to include crimes covered under the other subheadings. However, Article 5 does not provide any guidance on this point. The *Report of the Secretary-General* is also silent on persecution and does not further elucidate the matter.

572. From the submissions of the parties, it appears that there is agreement between the parties that (a) persecution consists of the occurrence of a persecutory act or omission, and (b) a discriminatory basis is required for that act or omission on one of the listed grounds. Two questions remain in dispute: (a) must the crime of persecution be linked to another crime in the Statute, or can it stand alone? (b) what is the *actus reus* of persecution and how can it be defined? Each of these issues will be addressed in turn.

1. The Alleged Need for a Link Between Persecution and Other International Crimes.

573. The Defence alleges that the *Tadić* definition of persecution contravenes a long-standing requirement that persecution be "in execution of or in connection with any crime within the jurisdiction of the Tribunal".<sup>836</sup> This wording is found in the Charter of the International Military Tribunal (IMT) which defines crimes against humanity as follows:

[...] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated (emphasis added).

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<sup>836</sup> Brief of the Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, filed on 19 Nov. 1998, at para. 58; Defence's Closing Brief, filed by counsel for Mirjan Kupre{ki}, 9 Nov. 1999, p. 91.

574. This wording is repeated in the Charter of the IMT for the Far East, and was upheld in the 1950 UN Declaration of Principles of the Nuremberg Charter and Judgement (Principle VI(c)). Although Control Council Law No. 10 eliminated this requirement, the ICC Statute upholds it in Article 7(1)(h). The Defence therefore asserts that there is a consensus that persecution is a “relatively narrow concept”, and argues that “persecution should thus be construed as including only acts enumerated elsewhere in the Statute, or, at most, those connected with a crime specifically within the jurisdiction of the ICTY”. The Prosecution Brief is silent on whether or not such a link is required.

575. It is evident that the phrase “in execution of or in connection with any crime within the jurisdiction of the Tribunal” contained in Article 6(c) refers not just to persecution but to the entire category of crimes against humanity. It should be noted that when this category of crimes was first laid down in Article 6(c), all crimes against humanity were subject to the jurisdictional requirement of a link to an armed conflict. Thus crimes against humanity could only be punished if committed in execution of or in connection with a war crime or a crime against the peace. Crimes against humanity constituted a new category of crimes and the framers of Article 6(c) limited its application to cases where there already existed jurisdiction under more “well-established” crimes such as war crimes.

576. Moreover, in its application of Article 6(c), the IMT exercised jurisdiction over individual defendants who had allegedly committed only crimes against humanity, even when there was only a tenuous link to war crimes or crimes against the peace. This is demonstrated by the Judgement rendered by the IMT in the case of defendant *von Schirach*. Von Schirach, as *Gauleiter* of Vienna, was charged with and convicted of crimes against humanity for the deportation of Jews from Austria. The IMT concluded that Von Schirach was probably not involved in the “development of Hitler’s plan for territorial expansion by means of aggressive war”, nor had he been charged with war crimes. However, the link to another crime under the Charter (that of aggression) was found in the fact that “Austria was occupied pursuant to a common plan of aggression.

Its occupation was, therefore, a “crime within the jurisdiction of the Tribunal”.<sup>837</sup> Another example is found in the case of *Streicher*, publisher of *Der Stürmer*, an anti-Semitic weekly newspaper. Streicher was convicted for “incitement of the German people to active persecution”. There was no evidence that he had ever committed war crimes or “that he was ever within Hitler’s inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war”.<sup>838</sup> Nevertheless he was convicted of persecution as a crime against humanity (in connection with war crimes).<sup>839</sup>

577. What is most important, and indeed dispositive of the matter, is that an examination of customary international law indicates that as customary rules on crimes against humanity gradually crystallised after 1945, the link between crimes against humanity and war crimes disappeared. This is evidenced by: (a) the relevant provision of Control Council Law No. 10,<sup>840</sup> which omitted this qualification; (b) national legislation (such as the Canadian<sup>841</sup> and the French<sup>842</sup> laws); (c) case-law<sup>843</sup>; (d) such

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<sup>837</sup> Judgement of the International Military Tribunal, Trial of Major War Criminals before the IMT, Nuremberg, (14 Nov. 1945 – Oct. 1946) (hereafter IMT Judgement), Vol. I, p. 318.

<sup>838</sup> *Ibid.*, p. 302.

<sup>839</sup> *Ibid.*, p. 304.

<sup>840</sup> Art. II(c) of Control Council Law No. 10 defines crimes against humanity as “[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated”. As was held in *US v. Josef Alstötter et al. (the Justice case)*, Trials of War Criminals (before the Nuremberg Military Tribunal, (hereafter NMT)) Vol. III at p. 974: “. . . it must be noted that Control Council Law No. 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, “in execution of, or in connection with, any crime within the jurisdiction of the tribunal”, whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition”.

<sup>841</sup> S. 7 (3.76) of the Canadian Criminal Code provides that: “[C]rimes against humanity” means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognised by the community of nations”.

<sup>842</sup> Art. 212-1, para. 1 of the French Criminal Code (enacted by the Law no. 92-1336 of 16 Dec. 1992, modified by the Law no. 93-913 of 19 July 1993, entered into force on 1 March 1994) provides that

“La déportation, la réduction en esclavage ou la pratique massive et systématique d’exécutions sommaires, d’enlèvements de personnes suivis de leur disparition, de la torture ou d’actes inhumains, inspirés par des motifs politiques, philosophiques, raciaux ou religieux et organisés en exécution d’un plan concerté à l’encontre d’un groupe de population civile sont punies de la réclusion criminelle à perpétuité”.

<sup>843</sup> See e.g. *US v. Otto Ohlendorf et al. (the Einsatzgruppen case)*, NMT Vol. IV, p. 49; *Justice case, ibid.* NMT Vol. III, p. 974. See, however, the *Flick case, ibid.* NMT Vol. VI, p. 1213.

international treaties as the Convention on Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and the Convention on Apartheid of 1973; and (e) the prior jurisprudence of the International Tribunal.<sup>844</sup> This evolution thus evidences the gradual abandonment of the nexus between crimes against humanity and war crimes.<sup>845</sup>

578. The Defence relies on Article 7(1)(h) and 2(g) of the ICC Statute to argue that persecution must be charged in connection with another crime under that Statute. Article 7(1)(h) states:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

579. Article 7(2)(g) provides:

“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

580. Article 7(2) thus provides a broad definition of persecution and, at the same time, restricts it to acts perpetrated “in connection” with any of the acts enumerated in the same provision as constituting crimes against humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression. To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking in the light of the fact that the ICC Statute reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict. Furthermore this restriction might easily be circumvented by charging persecution in connection with “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to

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<sup>844</sup> *Tadic*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, paras. 140-141.

mental or physical health" under Article 7(1)(k). In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law. In addition, it draws attention to an important provision of the ICC Statute dealing with this matter. The application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, is restricted by Article 10 of the same Statute which provides that "Nothing in the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute" (emphasis added). This provision clearly conveys the idea that the framers of the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide.

581. Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. It notes that in any case no such requirement is imposed on it by the Statute of the International Tribunal.

## 2. The Actus Reus of Persecution

### (a) Arguments of the Parties

582. The Prosecution argues that "persecutory act" should be defined broadly and that it should include both acts not covered by the Statute and acts enumerated elsewhere in the Statute, particularly other subheadings of Article 5, when they are committed with discriminatory intent.<sup>846</sup> According to the Prosecution:

(a) [T]he crime of persecution has prominence [under customary international law], providing a basis for additional criminal liability in relation to all inhumane acts.

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<sup>845</sup> At present, customary international law bans crimes against humanity whether they are committed in time of war or peace (see on this point the *dictum* by the Appeals Chamber in *Tadić*), Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 141).

<sup>846</sup> Prosecutor's Brief on the Permissibility of Charging Criminal Violations under the Same Articles of the Statute Based on Conduct Arising from a Single Incident, filed 15 Sept. 1998 (hereafter Prosecutor's Brief), paras. 31-32; see also Prosecutor's Closing Brief, para. 12.17.



[Were it not the case that crimes against humanity could comprise other crimes enumerated in the Statute], this would allow an accused to escape additional culpability for persecution merely by showing that the relevant act falls under another provision of the Statute or elsewhere in the indictment. Persecution is one of the most serious crimes against humanity and an interpretation of the Statute which does not recognise it as such is not tenable.

583. The Prosecution submits that persecution also includes acts not covered elsewhere in the Statute. Thus the persecution charge in the Indictment pertains to “an ethnic cleansing campaign” composed of the killing of Muslim civilians, destruction of their homes and property, and their organised detention and expulsion from Ahmici-Šantici and its environs.

584. According to the Defence a broad interpretation of persecution would be a violation of the principle of legality (*nullum crimen sine lege*).<sup>847</sup> Persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution. The Defence submits that on a statutory construction of Article 5, murder is not included in persecution.<sup>848</sup>

585. The Defence does not agree with the conclusion of the Trial Chamber in *Tadić* that persecutory acts could include, “*inter alia*, those of a physical, economic, or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”.<sup>849</sup> The Defence submits that persecution should not include acts which are legal under national laws, nor should it include acts not mentioned in the Statute “which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken”.<sup>850</sup> Such a definition, in the submission of the Defence, would be too broad and strains the principle of legality. They contend that the *Tadić* definition, which basically follows that of the International Law Commission (ILC) Draft Code, should be rejected in favour of the definition found in the ICC Statute, which “embodies the existing consensus within the international

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<sup>847</sup> Brief of the Defendants Zoran Kuprećki and Mirjan Kuprećki on Legal Trial Issues, filed on 19 Nov. 1998, paras. 55-56.

<sup>848</sup> Petition of the Counsels of the Accused Zoran and Mirjan Kuprećki, 12 Nov. 1998; Defence’s Closing Brief, filed by counsel for Dragan Papi}, 5 Nov. 1999.

<sup>849</sup> *Tadić*, Trial Chamber Judgement, 7 May 1997, at para. 710.

<sup>850</sup> *Ibid.*, at para. 715.

community", and which has taken a much narrower approach to the definition of persecutory acts in its Article 7(2)(g).<sup>851</sup>

(b) Discussion

586. The Trial Chamber will now discuss previous instances in which a definition of persecution has been suggested: firstly, in the *corpus* of refugee law and secondly, in the deliberations of the International Law Commission. The purpose of this discussion is to determine whether the definition propounded there may be held to reflect customary international law.

587. It has been argued that further elaboration of what is meant by the notion of persecution is provided by international refugee law. In its comments on the Draft Code presented in 1991, the government of the Netherlands stated: "It would be desirable to interpret the term 'persecution' in the same way as the term embodied in the Convention on refugees is interpreted".<sup>852</sup> The concept of persecution is central to the determination of who may claim refugee status under the Convention Relating to the Status of Refugees of 1951, as supplemented by the 1967 Protocol.<sup>853</sup>

588. However, the corpus of refugee law does not, as such, offer a definition of persecution.<sup>854</sup> Nor does human rights law provide such a definition. The European Commission and the Court have on several occasions held that exposing a person to a

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<sup>851</sup> Brief of Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, 19 Nov. 1998, paras. 55-63.

<sup>852</sup> Comments and Observations of Governments on the International Law Commission Draft Code, UN Doc. A/CN.4/448, 1 March 1993, p. 93.

<sup>853</sup> Art. 1A(2) of the Refugee Convention defines a refugee as someone who: "[. . .] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who [. . .] is unwilling to return to it". Art. 33 of the same Convention states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

<sup>854</sup> *The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, (hereafter *UNHCR Handbook*) states at para. 51: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Art. 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution".

risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights.<sup>855</sup> However, their decisions give no further guidance as to the definition of persecution.<sup>856</sup> In an attempt to define who may be eligible for refugee status, some national courts have delivered decisions on what acts may constitute persecution.<sup>857</sup> Other cases show that national courts in applying refugee law have given persecution a broad definition, and have held that it includes denial of access to employment or education<sup>858</sup> or more generally have drawn the conclusion that "there is an open ended category of forms of conduct capable of amounting to persecution, to be evaluated in the light of the Convention from case to case".<sup>859</sup>

589. The Trial Chamber finds, however, that these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may

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<sup>855</sup> Art. 3 of the European Convention on Human Rights provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

<sup>856</sup> *Ahmed v. Austria* (1997) 24 ECHR 278; *Altun v. Federal Republic of Germany* D & R 36 (1984) p. 209; *A v. Switzerland* D & R 46 (1986), p. 257 (271).

<sup>857</sup> For example, Judge McHugh of the Australian High Court in *Chan v. Minister for Immigration and Ethnic Affairs* held that "[a]s long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purpose of the Convention [ . . . ] Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty [ . . . ] Other forms of harm short of interference of life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution [ . . . ] ((1989) 169 CLR 379). The Judgement went on to hold that "[p]ersecution on account of race, religion and political opinion has historically taken many forms of social, political, and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason" (*idem*).

<sup>858</sup> *Prahastono v. Minister for Immigration and Multicultural Affairs* 1997 Austr. Fed. Ct. Lexis 514, the Federal Court of Australia, per Hill J.

occur. In addition, the intent of the persecutor is not relevant.<sup>860</sup> The result is that the net of “persecution” is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.

590. Little guidance in the interpretation of “persecution” is provided by the ILC Draft Code of Crimes Against the Peace and Security of Mankind. The International Law Commission, which originally based its definition of crimes against humanity on the Nuremberg Charter, has included persecution since its earliest draft.<sup>861</sup> The ILC proposed a definition of persecution in its commentary on the Draft Code dated 1996 which stated as follows:<sup>862</sup>

The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and

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<sup>859</sup> *R v. Secretary of State for the Home Department ex parte Sasitharan* Queens Bench Division (Crown Office List) Co/ 1655/98, 23 June 1998, per Sedley J.

<sup>860</sup> *Immigration and Naturalization Service, Petitioner v. Jairo Jonathan Elias-Zacarias*, Supreme Court of the United States, 1992 U.S. Lexis 550. The *UNHCR Handbook* states in paragraphs 52 and 53: “Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds’”.

<sup>861</sup> The Nuremberg Principles stated that Art. 6(c) of the Charter “distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds” (Nuremberg Principles, *Report of the International Law Commission to the General Assembly*, 2<sup>nd</sup> Session (5 June –29 July 1950) UN Doc. A/1316, para. 120).

<sup>862</sup> *Report of the International Law Commission on the Work of its forty-eighth session*, 6 May-26 July 1996, at 98. It is not clear whether the International Law Commission interprets persecution to include other subheadings of the Article on crimes against humanity. In its Commentary on its 1991 Draft (UN Doc. A/46/10), the International Law Commission states the following: “Persecution on social, political, racial, religious, or cultural grounds, already a crime under the 1954 draft Code, relates to human rights violations other than those covered in the previous paragraphs, committed in a systematic manner or on a mass scale by government officials or by groups that exercise *de facto* power over a particular territory and seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied. Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts could come within the scope of this Article when committed in a systematic manner or on a mass scale”.

fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (Articles 1 and 55) and the ICCPR (Art. 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide.

591. As neither refugee law nor the ILC draft is dispositive of the issue, in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.

592. In its discussion, the Trial Chamber will focus upon two distinct issues: (a) can the acts covered by the other subheadings of Article 5 fall within the notion of persecution? and (b) can persecution cover acts not envisaged in one of the other subheadings of Article 5?

(c) Can the Acts Covered by the Other Subheadings of Article 5 Fall Within the Notion of Persecution?

593. As noted above, the Prosecution argues that whereas the meaning of “persecutory act” should be given a broad definition, including a wide variety of acts not enumerated in the Statute, it should also include those enumerated in the Statute and particularly other subheadings of Article 5 when they are committed with discriminatory intent.<sup>863</sup> By contrast, the Defence argues that it would be a violation of the principle of legality (*nullum crimen sine lege*) for this Tribunal to apply Article 5(h) to any conduct of the

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<sup>863</sup> Prosecutor’s Brief, paras. 31-32.

accused.<sup>864</sup> On this view, persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution.<sup>865</sup>

594. With regard to the question of whether persecution can include acts laid out in the other subheadings of Article 5, and particularly the crimes of murder and deportation, the Trial Chamber notes that there are numerous examples of convictions for the crime of persecution arising from the Second World War. The IMT in its findings on persecution included several of the crimes that now would fall under other subheadings of Article 5. These acts included mass murder of the Jews by the *Einsatzgruppen* and the *SD*, and the extermination, beatings, torture and killings which were widespread in the concentration camps. Similarly, the judgements delivered pursuant to Control Council Law No. 10 included crimes such as murder, extermination, enslavement, deportation, imprisonment and torture in their findings on the persecution of Jews and other groups during the Nazi era. Thus the Military Tribunals sitting at Nuremberg found that persecution could include those crimes that now would be covered by the other subheadings of Article 5 of the Statute.

595. The International Military Tribunal in its Judgement referred to persecution, stating that: "the persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale".<sup>866</sup> The IMT commenced with a description of the early policy of the Nazi government towards the Jewish people: discriminatory laws were passed which limited offices and professions permitted to Jews; restrictions were placed on their family life and rights of citizenship; Jews were completely excluded from German life; pogroms were organized which included the burning and demolishing

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<sup>864</sup> Brief of the Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, filed on 19 Nov. 1998

<sup>865</sup> The Closing briefs of two of the accused, Vladimir [anti} and Dragan Papi}, both filed 5 Nov. 1999, indicate acceptance of a broader definition of persecution. The Defence Final Brief for the accused Vladimir [anti} states: "The Defence admits that such inhuman acts can occur in very many forms which have one mutual characteristic and that is denial of fundamental rights and freedoms which an individual is entitled to without distinction" (p. 8). The Defence's Closing Brief for the accused Dragan Papi} states: "The concept of persecution covers a wide sphere . . ."

<sup>866</sup> IMT Judgement, p. 247.

of synagogues; Jewish businesses were looted; prominent Jewish businessmen were arrested; a collective fine of 1 billion marks was imposed on Jews; Jewish assets were seized; the movement of Jews was restricted; ghettos were created; and Jews were compelled to wear a yellow star.<sup>867</sup> According to the IMT, “[t]hese atrocities were all part and parcel of the policy inaugurated in 1941 [. . .] But the methods employed never conformed to a single pattern”.<sup>868</sup>

596. At Nuremberg, organisations<sup>869</sup> as well as individual defendants<sup>870</sup> were convicted of persecution for acts such as deportation, slave labour, and extermination of the Jewish people pursuant to the “Final Solution”. Moreover, several individual defendants were convicted of persecution in the form of discriminatory economic acts.<sup>871</sup> An example is the defendant Frick who had “drafted, signed, and administered many laws designed to eliminate Jews from German life and [the] economy”, and thus “paved the way for the Final Solution [. . .]”.<sup>872</sup>

597. It is clear from its description of persecution that the IMT accorded this crime a position of great prominence and understood it to include a wide spectrum of acts perpetrated against the Jewish people, ranging from discriminatory acts targeting their general political, social and economic rights, to attacks on their person.

598. This broad interpretation of persecution was upheld in subsequent cases. None of the courts endeavoured to define persecution but the term was generally used to describe the treatment suffered by the Jews and other groups specifically targeted by the Nazis. Persecution was a central allegation in several of the cases brought before Military Tribunals under Control Council Law No. 10. The Tribunals held that in persecuting

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<sup>867</sup> *Ibid.*, p. 248-249.

<sup>868</sup> *Ibid.*, p. 251.

<sup>869</sup> For example, for the role played by the SD and the Gestapo in the persecution of the Jews, see *ibid.*, pp. 265-267; for the role of the SS see *ibid.*, pp. 271-273.

<sup>870</sup> For example see IMT Judgement on defendants Frank (*ibid.*, pp. 297-298); von Schirach (*ibid.*, p. 319); Seyss-Inquart (*ibid.*, pp. 328-29), Borman (*ibid.*, pp. 339-340).

<sup>871</sup> See IMT Judgement on Göring, *ibid.*, p. 282, Frank, *ibid.*, pp. 297-298 and Funk, *ibid.*, p. 305.

<sup>872</sup> *Ibid.*, p. 300.

Jews and other groups, the accused had infringed a wide variety of rights.<sup>873</sup> For example, in *US v. Ernst von Weizsäcker* (the *Ministries Case*), the United States Military Tribunal stated:

Hitler made the Jewish persecution one of the primary subjects of his policy to gain and retain power [...]. The persecution of the Jews went on steadily from step to step and finally to death in foul form.<sup>874</sup>

599. The Tribunal described the progression of infringement of rights, which started with the deprivation of rights of citizenship; rights to work and education; economic and property rights; and then led to arrest and confinement in concentration camps; beatings, mutilation and torture; deportations; slave labour and “finally over six million were murdered”.<sup>875</sup> The US Military Tribunal did not purport to find a common definitive element in the wide variety of acts it illustrated.<sup>876</sup>

600. It is clear that the courts understood persecution to include severe attacks on the person such as murder, extermination and torture; acts which potentially constitute crimes against humanity under the other subheadings of Article 5. This conclusion is supported by the findings of national courts in cases arising out of the Second World War. For

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<sup>873</sup> The *German High Command Trial*, NMT, Vol II at pp. 647-648. The US Military Tribunal, in a summary of the evidence against the accused von Roques, stated that “many of the documents heretofore show ill-treatment and persecution of the civilians within the accused von Roques’ area of command. Other documents show the establishment of ghettos for the Jews; requirements that they wear the Star of David; prohibition of Jewish rites; confiscation of Jewish ritual articles; requirements that Jews surrender all foreign exchange securities, precious metals, and precious stones; terror killings of suspect partisan and partisan sympathisers; so-called mopping-up exercises and turning over of Jews and Communists to the SD [...]”.

<sup>874</sup> *Ministries Case*, NMT, Vol. XIV at p. 471: “The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they worked to exhaustion and death; they became slave labourers; and finally over six million were murdered”. See also the United States Military Court in the Trial of *Ulrich Greifelt et al. (RuSHA case)* NMT Vol. V. Ulrich Greifelt and his co-accused from the RuSHA (Reichs Security Head Office) were convicted *inter alia* of participation in a program of genocide aimed at the destruction of foreign nations and ethnic groups, “in part by murderous extermination, and in part by elimination and suppression of national characteristics” (p. 88). The Notes on the Case (*Law Reports of Trials of War Criminals*, UN War Crimes Commission, (hereafter UNWCC), 1948 Vol XIII) state at p. 1-2 “The trial dealt with the main body of racial persecutions which distinguished so conspicuously the Nazi regime inside the Third Reich”.

<sup>875</sup> *Ministries case, ibid.*

<sup>876</sup> *Ibid.*, at p. 470.



example, *Gauleiter Artur Greiser* was charged with and convicted by the Supreme National Tribunal of Poland of participating in crimes against the Polish and Jewish people, including acts of persecution and extermination, by, *inter alia*, “murdering them on the spot, concentrating them in ghettos . . . whence they were being gradually deported and murdered, mainly in the gas-chambers of the extermination camp at Chelmno [. . .], submitting the Jewish population from the very beginning of the occupation to every possible kind of vexation and torment, from verbal and physical effronteries to the infliction of the most grievous bodily harm, in a way calculated to inflict the maximum of physical suffering and human degradation”.<sup>877</sup>

601. In the case of *Willy Zühlke*, a former German prison warden was convicted by the Netherlands Special Court in Amsterdam of co-operating in the German policy of humiliation and persecution of Jews by holding them in illegal detention, beating and kicking them, and mistreating and humiliating them in other ways. It was noted by the Netherlands Special Court that “Jewish prisoners were ill-treated by him in a far more brutal manner than the other prisoners”.<sup>878</sup>

602. *Adolf Eichmann* was convicted, *inter alia*, of causing the murder, extermination, enslavement, starvation, and deportation of civilian Jewish people by the Israeli Supreme Court. The Court found that “in carrying out the above-mentioned activities [Eichmann] persecuted Jews on national, racial, religious and political grounds”.<sup>879</sup> Furthermore, in 1985 the French *Cour de Cassation* convicted *Klaus Barbie* of “persecution against innocent Jews, [. . .] carried out for racial and religious motives with a view to their extermination, in furtherance of the “Final Solution”.<sup>880</sup> In 1986 the Zagreb District Court passed judgement in the case of *Andrija Artukovi*}, a prominent member of the “Ustaša” movement in the self-proclaimed “Independent State of Croatia” during the Second World War. In this capacity he had ordered mass killings and deportations to a

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<sup>877</sup> *Ibid.*, Trial of *Gauleiter Artur Greiser*, Supreme National Tribunal of Poland, 21 June – 7 July 1946. Law Reports of Major War Criminals, UNWCC, Vol. XIII at p. 105.

<sup>878</sup> Judgement of *Bijzonder Gerechtshof Amsterdam*, 3 Aug. 1948 (referred to in Judgement of *Bijzondere Raad van Cassatie*, 6 Dec. 1948, *Nederlandse Jurisprudentie*, 1949 No. 85): English translation found in UNWCC, Vol. XIV, p. 139.

<sup>879</sup> *Attorney General of Israël v. Adolf Eichmann*, ILR 5, pp. 277-78 (1968).

<sup>880</sup> *Barbie*, *ibid.*, at 139.

concentration camp. The Court held that his intent stemmed from his "Ustaša orientation, by which persecutions, concentration camps and mass killings of Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology, were a part of the implementation of a program of creating a "pure" Croatia".<sup>881</sup> The Court sentenced Artuković to death, describing him as one of the "ruthless murderers, who under the cover of 'protecting purity of race and faith' and with the aim of realising their Nazi-Fascist ideology, [...] killed, slaughtered, tortured, crippled, exposed to great suffering, and persecuted thousands and thousands of people, among whom women and children".<sup>882</sup>

603. More recently, in the case of *Prosecutor v. Tadić* before this Tribunal, Tadić was convicted under Article 5(h) for his role in "the attack on Kozarac and the surrounding areas, as well as the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings".<sup>883</sup> It is noted that these acts potentially fall under other sub-headings of Article 5, although no objection based upon this fact was put forward by the Trial Chamber.

604. These findings emphasise the conclusion of international tribunals and national courts that the crime of persecution both during and since the Second World War did not consist only of those acts not covered by the other types of crimes against humanity. On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.

605. The Trial Chamber finds that the case-law referred to above reflects, and is indicative of, the notion of persecution as laid down in customary international criminal law. The Trial Chamber therefore concludes that acts enumerated in other sub-clauses of Article 5 can thus constitute persecution. Persecution has been used to describe some of the most serious crimes perpetrated during Nazi rule. A narrow interpretation of persecution, excluding other sub-headings of Article 5, is therefore not an accurate

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<sup>881</sup> *Artuković*, Zagreb District Court Doc. No. K-1/84-61, 14 May 1986, Translation (on file with the ICTY), at p. 23.

<sup>882</sup> *Ibid.*, at p. 26.

<sup>883</sup> *Tadić*, Trial Chamber Judgement, 7 May 1997, at para. 717.

reflection of the notion of persecution which has emerged from customary international law.

606. It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a *lacuna* would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group". An example of such a crime against humanity would be the so-called "ethnic cleansing", a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.

607. Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds. The Trial Chamber therefore accepts the submission of the Prosecution that "[p]ersecution, which can be used to charge the conduct of ethnic cleansing on discriminatory grounds is a serious crime in and of itself and describes conduct worthy of censure above and apart from non-discriminatory killings envisioned by Article 5".<sup>884</sup>

(d) Can Persecution Cover Acts not Envisaged in one of the Other Subheadings of Article 5?

608. The Prosecution argues that persecution can also involve acts other than those listed under Article 5. It is their submission that the meaning of "persecutory act" should be given a broad definition and includes a wide variety of acts not enumerated elsewhere in the Statute.<sup>885</sup> By contrast, the Defence submits that the two basic elements of persecution are (a) the occurrence of a persecutory act or omission, and (b) a discriminatory basis for that act or omission on one of the listed grounds. As mentioned above, the Defence argues that persecution should be narrowly construed.

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<sup>884</sup> Prosecutor's Brief, at para. 15.

<sup>885</sup> *Ibid.*, para. 22.

609. The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.

610. The Judgement of the IMT included in the notion of persecution a variety of acts which, at present, may not fall under the Statute of the International Tribunal, such as the passing of discriminatory laws, the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the requirement that they mark themselves out by wearing a yellow star.<sup>886</sup> Moreover, and as mentioned above, several individual defendants were convicted of persecution in the form of discriminatory economic acts.<sup>887</sup>

611. It is also clear that other courts have used the term persecution to describe acts other than those enumerated in Article 5. A prominent example is the trial of *Josef Altstötter et al.* (the *Justice Trial*).<sup>888</sup> Altstötter and the other accused were former German Judges, Prosecutors or officials of the Reich Ministry of Justice. They were charged with a common design, conspiracy, plan and enterprise which "embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of races".<sup>889</sup>

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<sup>886</sup> IMT *Judgement*, pp. 248-249.

<sup>887</sup> *Frank, ibid.*, pp. 297-298; *Funk, ibid.*, p. 305; *Frick*, p. 300.

<sup>888</sup> NMT Vol. III.

<sup>889</sup> Indictment, *Justice trial*, NMT Vol. III, p. 18.

612. The U.S. Military Tribunal in the *Justice* case held that the national pattern or plan for racial persecution was one of actual extermination of Jewish and Polish people, but that "lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich".<sup>890</sup> These lesser forms of persecution included the passing of a decree by which Jews were excluded from the legal profession; the prohibition of intermarriage between Jews and persons of German blood and the severe punishment of sexual intercourse between these groups; and decrees expelling Jews from public services, educational institutions, and from many business enterprises. Furthermore, upon the death of a Jew his property was confiscated, and under an amendment to the German Citizenship Law, the Security Police and the *SD* could also confiscate property of Jews who were alive. Jews were subject to more severe punishments than Germans; the rights of defendants in court were severely circumscribed; courts were empowered to impose death sentences on Poles and Jews even if not prescribed by law; and the police were given *carte blanche* in the punishment of Jews without resort to the judicial process.<sup>891</sup> In summary, what was considered to be persecution in the *Justice* case was the use of a legal system to implement a discriminatory policy.

613. The jurisprudence of the national courts provides further examples such as the trial of *Hans Albin Rauter*, before the Netherlands Special Court in The Hague. Rauter, a Nazi *SS Obergruppenführer* and a General of the *Waffen-SS* and the Police, was convicted and sentenced to death for his intentional participation in the framework of the German policy of persecution of the Jews, which manifested itself in multifarious measures.<sup>892</sup> Also, *Artukovi}* was found guilty of acts such as the passing and

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<sup>890</sup> *Ibid.*, pp. 1063-64.

<sup>891</sup> *Ibid.*

<sup>892</sup> For instance, "[h]e issued orders under which Jews were subjected to discriminatory treatment and gradually segregated from the rest of the population, which facilitated their being detected and apprehended at a later date for slave labour and eventual extermination. Jews were ordered to wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes and restaurants, to use dining and sleeping cars, to visit theatres, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms, and museums. A special curfew was introduced for all Jews between the hours of 8 p.m., and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport. These measures were followed by the erection of concentration camps in various places. They culminated in systematic round-ups of Jews, who were sent to the concentration

implementation of discriminatory decrees ranging from Decrees on racial identity and the protection of Aryan blood or the honour of the Croatian people to the Decree on deporting unsuitable and dangerous individuals to internment and labour camps.<sup>893</sup>

614. The Trial Chamber is thus bolstered in its conclusion that persecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute. Similarly, whether or not such acts are legal under national laws is irrelevant. It is well-known that the Nazis passed many discriminatory laws through the available constitutional and legislative channels which were subsequently enforced by their judiciary. This does not detract from the fact that these laws were contrary to international legal standards. The Trial Chamber therefore rejects the Defence submission that persecution should not include acts which are legal under national laws.

615. In short, the Trial Chamber is able to conclude the following on the *actus reus* of persecution from the case-law above:

- (a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.
- (b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.
- (c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. The scope of these acts will be defined more precisely by the Trial Chamber below.

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camps in order to be deported to Germany or Poland, where they were to be used for slave labour or exterminated". (Trial of *Hans Albin Rauter*, Bijzondere Gerechtshof te 's-Gravenhage, 4 May 1948, (referred to in the Judgement of the Bijzondere Raad van Cassatie, 12 Jan. 1949, *Nederlandse Jurisprudentie*, 1949, No. 89); English Translation in UNWCC, Vol. XIV 1949, p. 93).

<sup>893</sup> *Artukovic, ibid.*, p. 16.

(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice, as was found by the Zagreb District Court in *Artukovi}*.<sup>894</sup>

(e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.<sup>895</sup>

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<sup>894</sup> *Ibid.*, p. 24: "The defendant has committed a war crime by his actions against humanity and international law. He implemented racist law, which amounted to an imitation of the law of the Third Reich against non-Aryans, Jews, and Gypsies. He also savagely and ruthlessly treated Serbs in Croatia, hundreds of thousands of whom perished in internment, concentration and labour camps, and other places. He did not choose means to eliminate and kill Serb, Croats who had not accepted the Ustaša ideology and system, Jews, communists, Gypsies, anti-fascists, and members of other ethnic groups. The apparatus through which all was done . . . was a horrific machine of violence and generally a mechanic organisation which planned, prepared, executed and systematically implemented such crimes, as the crimes against humanity, which are most characterised by the mass destruction of human beings".

<sup>895</sup> The Tribunal in the *Justice* trial NMT Vol. III, p.1063) found that: "The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency [...]".

The Notes on the case, UNWCC, 1948, Vol. VI state at pp. 82-3 that "it is probably true to say that the Tribunal regarded as constituting crimes against humanity not merely a series of changes made in the legal system of Germany but a series of such alterations as involved or were pursuant to persecutions on political, racial or religious grounds, or (perhaps) such as led to the commission of "atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts against any civilian population". In similar terms, the Zagreb District Court in the case of *Artukovi}* found that "[t]he obligation of wearing a sign to signify Jewish origin [...] was not only inhuman behaviour [with regard] to the whole people, but also a revealing foreboding of death". It is not each individual act, but rather their cumulative effect that matters. (*Ibid.*, UNWCC, p. 15).

### 3. The Definition of Persecution

616. In the Judgement of *Prosecutor v. Tadić*, Trial Chamber II held that persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights. It is not necessary to have a separate act of an inhumane nature to constitute persecution, but rather, the discrimination itself makes the act inhumane. The Trial Chamber held that the crime of persecution encompasses a wide variety of acts, including, *inter alia*, those of a physical, economic, or judicial nature that violate an individual's basic or fundamental rights. The discrimination must be on one of the listed grounds to constitute persecution.<sup>896</sup>

617. As mentioned above, this is a broad definition which could include acts prohibited under other subheadings of Article 5, acts prohibited under other Articles of the Statute, and acts not covered by the Statute. The same approach has been taken in Article 7(2)(g) of the ICC Statute, which states that "[p]ersecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" (emphasis added).

618. However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.

619. Accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. This legal criterion has already been resorted to, for instance, in the *Flick* case.<sup>897</sup>

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<sup>896</sup> *Tadić*, Trial Chamber Judgement, 7 May 1997, at paras. 697, 710.

<sup>897</sup> In this case, the U S Military Tribunal sitting at Nuremberg held that "[n]ot even under a proper construction of the section of Control Council Law No. 10 relating to crimes against humanity, do the facts



620. It ought to be emphasised, however, that if the analysis based on this criterion relates only to the level of seriousness of the act, it does not provide guidance on what types of acts can constitute persecution. The *ejusdem generis* criterion can be used as a supplementary tool, to establish whether certain acts which generally speaking fall under the proscriptions of Article 5(h), reach the level of gravity required by this provision. The only conclusion to be drawn from its application is that only gross or blatant denials of fundamental human rights can constitute crimes against humanity.

621. The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts", holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.

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[compulsory taking of Jewish industrial property] warrant conviction. The "atrocities and offences" listed therein, "murder, extermination," etc., are all offences against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category". (*Flick et al.*, in NMT Vol. VI, p. 1215). This statement was taken up and used by the U.S. Military Tribunal in *US v. Krauch et al.*, (*Farben* case) (NMT Vol. VIII pp. 1129-1130). See also Notes on the Case, UNWCC, Vol. IX, which states at p. 50, that the judgement in the *Flick* case declared that "A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people" and thus left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity".

622. In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.<sup>898</sup>

623. The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.

624. In its earlier conclusions the Trial Chamber noted that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution.

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<sup>898</sup> In this regard the Trial Chamber notes that the US Military Tribunal in the *Einsatzgruppen* case (NMT Vol IV) stated at p. 49: "Can it be said that international conventions and the law of nations gave no warning to these accused that their attacks against ethnic, national, religious, and political groups infringed the rights of mankind? We do not refer to localised outbursts of hatred nor petty discriminations which unfortunately occur in the most civilised of states. When persecutions reach the scale of nationwide campaigns designed to make life intolerable for, or to exterminate large groups of people, law dare not remain silent (. . .) The Control Council simply reasserts existing law when naming persecutions as an international offence."

625. Although acts of persecution are often part of a discriminatory policy, the Trial Chamber finds that it is not necessary to demonstrate that an accused has taken part in the formulation of a discriminatory policy or practice by a governmental authority. An example is that of the defendant *Streicher*: "In his speeches and articles [...] he infected the German mind with the virus of anti-Semitism, and incited the German People to active persecution".<sup>899</sup> He did so not in any official capacity but as the publisher of an anti-Semitic journal, *Der Stürmer*. The Tribunal concluded that his "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution" and sentenced him to death.<sup>900</sup>

626. The Trial Chamber observes that in the light of its broad definition of persecution, the Prosecution cannot merely rely on a general charge of "persecution" in bringing its case. This would be inconsistent with the concept of legality. To observe the principle of legality, the Prosecution must charge particular acts (and this seems to have been done in this case). These acts should be charged in sufficient detail for the accused to be able to fully prepare their defence.

627. In sum, a charge of persecution must contain the following elements:

- (a) those elements required for all crimes against humanity under the Statute;
- (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5;

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<sup>899</sup> IMT Judgement, p. 302.

<sup>900</sup> *Ibid.*, pp. 302-4. This is also demonstrated in cases brought before German courts acting under Control Council Law no. 10. The *Oberster Gerichtshof für die Britische Zone in Köln*, 9 Nov, 1948, StS 78/48 held that denunciation "is [...] intimately linked to the National Socialists' regime of violence and arbitrariness because, from the very outset, it clearly fitted into the organised campaign of persecution against all Jews and everything Jewish in Germany which all humanity not under the sway of National Socialism perceived as an assault and, although directed against this one victim only, became part and parcel of all the mass crimes committed during the persecution of Jews (translation on file with the ICTY)".

More generally, the Düsseldorf *Oberlandesgericht* stated in a Judgement of 20 May 1948 (Criminal Chamber 3/48) that National Socialism has built up a power mechanism in the party and State which could be set in motion against anyone from anywhere. Not only the holder of the power himself who used his own personal position of power against someone weaker can be a perpetrator of a crime against humanity but also anyone who on his own initiative also participated in any way or even only encouraged the commission of such acts. (Judgement of Düsseldorf Regional Appellate Court, 20 May 1948, translation on file with ICTY, p. 4).

(c) discriminatory grounds.

4. The Application of the Definition set out above to the Instant Case

628. The Trial Chamber will now examine the specific allegations in this case, which are the “deliberate and systematic killing of Bosnian Muslim civilians”, the “organised detention and expulsion of the Bosnian Muslims from Ahmici-Šantici and its environs”, and the “comprehensive destruction of Bosnian homes and property”. Can these acts constitute persecution?

629. In light of the conclusions above, the Trial Chamber finds that the “deliberate and systematic killing of Bosnian Muslim civilians” as well as their “organised detention and expulsion from Ahmici” can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.

630. The Trial Chamber next turns its attention to the alleged comprehensive destruction of Bosnian Muslim homes and property. The question here is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution. The Trial Chamber notes that in the Judgement of the IMT, several defendants were convicted of economic discrimination. For example, Göring “persecuted the Jews . . . and not only in Germany where he raised the billion mark fine . . . this interest was primarily economic - how to get their property and how to force them out of economic life in Europe”.<sup>901</sup> Defendants Funk and Seyss-Inquart were also charged with acts of economic discrimination.<sup>902</sup>

631. The Trial Chamber finds that attacks on property can constitute persecution. To some extent this may depend on the type of property involved: in the passage from *Flick* cited above the Tribunal held that the compulsory taking of industrial property could not be said to affect the life and liberty of oppressed peoples and therefore did not constitute persecution. There may be certain types of property whose destruction may not have a

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<sup>901</sup> IMT Judgement, p. 282.

<sup>902</sup> *Ibid.*, pp. 305, 328-329.

severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone's car (unless the car constitutes an indispensable and vital asset to the owner). However, the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population.<sup>903</sup> This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.

#### 5. The Mens Rea of Persecution

632. The Trial Chamber will now discuss the *mens rea* requirement of persecution as reflected in international case-law.

633. Both parties agree that the mental element of persecution consists of discriminatory intent on the grounds provided in the Statute. Nevertheless, the Trial Chamber will elaborate further on the discriminatory intent required.

634. When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society. The deprivation of these rights can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.

635. The grounds on which the perpetrator of persecution may discriminate are listed in Article 5(h) of the Statute as political, racial or religious grounds.<sup>904</sup>

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<sup>903</sup> See evidence of witness Dr. Bringa summarized above, para. 336.

<sup>904</sup> The *RuSHA* trial (*ibid.*) dealt with persecution of Jewish and Polish people, *Greiser* was charged with the persecution of Polish as well as Jewish people, *Rauter* was charged with persecution of relatives of

636. As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.

#### D. The Question of Cumulation of Offences (*Concursus Delictorum*)

##### 1. The Issue in Dispute

###### (a) Prosecutor's Submissions

###### (i) General

637. It is the Prosecutor's contention that a person may be charged with, and convicted of, various crimes even when that person has only engaged in one criminal action against the same victim or victims. In other words, according to the Prosecutor the same act or transaction against one or more victims may simultaneously infringe several criminal

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members of the Netherlands police forces who refused to carry out German orders or who had joined the resistance movement.

rules and can consequently be classified as a multiple crime. For instance, one act (say, murder) may be both a war crime and a crime against humanity.

638. To support this view the Prosecutor relies on previous decisions of the ICTY and the ICTR authorising cumulative charging.<sup>905</sup> In particular, reliance is placed on the *Akayesu* Judgement of the ICTR and the *Tadic* Judgement of the ICTY Trial Chamber. The Prosecutor also refers to an interlocutory decision rendered in this case on the subject of cumulation of offences. The Prosecutor places principal reliance on the test enunciated by a Trial Chamber of the ICTR in its *Akayesu* judgement of 2 September 1998. According to this test, “when more than one offence contained in the Articles of the Statute applies to a single set of facts, each offence may be separately charged: (1) where the offences have different elements; *or* (2) where the provisions creating the offences protect different interests; *or* (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did”.<sup>906</sup>

639. The Prosecutor endorses this test over that set out by this Trial Chamber in this case in its *Decision on Defence Challenges to the Form of the Indictment* of 15 May 1998, according to which:<sup>907</sup>

The Prosecutor may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values *and* when each Article requires proof of a legal element not required by the others.

The Prosecutor submits that this test, inasmuch as it requires the conjunction of these two conditions, and does not allow for the third condition postulated in the *Akayesu* Judgement, mentioned above, is “overly restrictive”.<sup>908</sup> Nevertheless, the Prosecutor submits that even this restrictive test is met in this case.<sup>909</sup>

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<sup>905</sup> Prosecutor’s Brief.

<sup>906</sup> *Akayesu*, Judgement, 2 Sept. 1998, p. 194, para. 468 (emphasis added).

<sup>907</sup> *Prosecutor v. Kupreškic et al.*, Decision on Defence Challenges to the form of the Indictment, 15 May 1998, at p. 3 (emphasis added).

<sup>908</sup> Prosecutor’s Brief, para. 7.

<sup>909</sup> This conclusion is implicit in para. 40 of the Prosecutor’s Brief.

640. The third approach referred to by the Prosecutor may be referred to as the *Tadic* approach. In an oft-quoted *dictum* from the *Tadic Decision on Defence Motion on Form of the Indictment*, the Trial Chamber stated:<sup>910</sup>

In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend on whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.

641. In the *Tadic Sentencing Judgement*,<sup>911</sup> concurrent sentences were imposed for offences which had been cumulatively charged in the indictment in relation to one set of facts. The same approach was taken in the *Delalic et al.*<sup>912</sup> and *Furundžija*<sup>913</sup> final Judgements, as well as in a number of interlocutory decisions on preliminary motions objecting to the form of the indictment,<sup>914</sup> on the basis of the *Tadic* dictum quoted above. The Prosecutor therefore also relies on the *Tadic* approach to justify cumulative charging.

642. Applying the tests enunciated above to the present case, the Prosecutor argues that it is justified in cumulatively charging (i) murder as a crime against humanity (Article 5(a) of the Statute) and persecution as a crime against humanity (Article 5(h) of the Statute), and (ii) murder as a crime against humanity (Article 5(a) of the Statute) and murder as a war crime (Article 3 of the Statute, incorporating the prohibition on murder laid down in Common Article 3 of the 1949 Geneva Conventions), as these crimes have different elements and protect different societal values. It can also be assumed that the Prosecutor would use the same reasoning to justify the cumulative charging of (iii)

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<sup>910</sup> *Tadić*, Decision, 14 Nov. 1995, at p. 6, para. 17.

<sup>911</sup> *Prosecutor v. Tadić*, (IT-94-1-T), Sentencing Judgement, Trial Chamber, 14 July 1997 (hereafter *Tadić*), Sentencing Judgement, 14 July 1997).

<sup>912</sup> *Delalić et al.*, Judgement, 16 Nov. 1998, para. 1286.

<sup>913</sup> *Furundžija*, Judgement, 10 Dec. 1998, paras. 292-296.

<sup>914</sup> *Delalić et al.*, Decision on motion by the accused Zejnil Delalić based on defects in the form of the indictment, 4 Oct. 1996, para. 24; Decision on Motion by the Accused Esad Landžo based on defects in the form of the Indictment, 15 Nov. 1996, para. 7, and Decision on Motion by accused Hazim Delić based on defects in the form of the Indictment, 15 Nov. 1996, para. 22 (upheld by a bench of the Appeals Chamber in Decision on Application for Leave to Appeal by Hazim Delić (Defects in the form of the Indictment), 6 Dec. 1996 paras. 35-36).



inhumane acts as a crime against humanity (Article 5 of the Statute) and cruel treatment as a war crime (Article 3 of the Statute).

- (ii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Persecution as a Crime Against Humanity (Article 5(h) of the Statute)

643. The Prosecution argues that murder and persecution, as crimes against humanity, are not co-extensive but rather have different elements, and may thus be cumulatively charged applying the test set forth in the *Akayesu* case.<sup>915</sup> There may be acts of persecution apart from murder, and there may be murders which do not constitute acts of persecution. To support this latter contention, the Prosecution maintains that murder as a crime against humanity may be committed without a discriminatory intent, whereas persecution requires just such a discriminatory element. Thus the Prosecution disagrees with the holding in the *Tadic* Trial Chamber Judgement that *all* crimes against humanity must be committed with a discriminatory intent. This finding was itself overruled by the Appeals Chamber in the same case.<sup>916</sup> Accordingly the Prosecution argues that these two crimes can be cumulatively charged, under the first limb of the *Akayesu* test, *viz.* that they both have different elements.

644. Second, the Prosecution argues that different values are protected by these different provisions, and hence that the second, disjunctive limb of the *Akayesu* test is also satisfied.<sup>917</sup>

645. Third, with regard to the third, disjunctive limb – the “description” test – referred to in the *Akayesu* case, the Prosecution argues that “charging such unlawful conduct under these separate provisions serves to fully describe the magnitude of the offence ...”,<sup>918</sup> and for this reason too there can be cumulative charging.

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<sup>915</sup> Prosecutor’s Brief, paras 13-34.

<sup>916</sup> *Tadic*, Appeals Chamber Judgement, 15 July 1999, at para. 305.

<sup>917</sup> Prosecutor’s Brief, para. 15: “The prohibition of persecution and that of murder as crimes against humanity protect different societal interests since murder concerns the taking of individual life and although persecution may also involve the taking of individual life it must be that of members of a targeted group on the grounds of their political, racial and religious membership of the group”.

<sup>918</sup> *Ibid.*, para. 4.

646. Since the *Kupreškic* test involves the same first two limbs as those in *Akayesu*, but construed as *conjunctive* rather than *disjunctive* requirements – and since the *Tadic* test does not lay down a test but merely permits cumulative charging – the Prosecution concludes that “[t]he guidelines for multiple charging established by the decisions in *Tadic* and *Akayesu* and *Kupreškic*, among others, thus are fully satisfied by the charging decision in this case”.<sup>919</sup>

- (iii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Murder as a War Crime (Article 3 of the Statute, Incorporating the Prohibition on Murder Contained in Common Article 3)

647. The Prosecution addresses this same issue of cumulative charging in the context of murder as a crime against humanity (Article 5(a) of the Statute) and murder as a war crime (Article 3 of the Statute, incorporating Common Article 3’s prohibition on murder). The Prosecution argues that murder as a crime against humanity has different elements from murder as a war crime:<sup>920</sup>

The elements for the crime of murder as a crime against humanity and as a violation of the laws or customs of war are not identical. The *chapeaux* of the two crimes are very different. Crimes against humanity must ‘be directed against any civilian population as part of a widespread or systematic practice or policy’. This prerequisite is not one required to establish a violation of the laws or customs of war.

648. Second, the Prosecution argues that crimes against humanity and war crimes protect different societal interests. The Prosecution cites the ICTR Trial Chamber in *Akayesu* to support both of these views.<sup>921</sup> Accordingly, the Prosecution argues that it is permissible to charge murder as a crime against humanity and murder as a war crime in relation to the same set of facts.<sup>922</sup> The Prosecution also alludes to the negative test applied in *Akayesu*, according to which it is not justifiable to convict an accused of two offences in relation to the same set of facts where “one offence is a lesser included

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<sup>919</sup> *Ibid.*, para. 15.

<sup>920</sup> *Ibid.*, para. 35.

<sup>921</sup> *Ibid.*, para. 38.

<sup>922</sup> *Ibid.*, Conclusion, para. 40.

offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault”.

649. On this issue, the Prosecution states that “[g]iven that neither the ICTY nor the ICTR has established jurisprudence indicating that crimes can be charged as lesser included offences of other crimes, the Prosecutor thus charges lesser included offences separately”.<sup>923</sup> It is not clear whether, by the phrase “lesser included offences”, the Prosecutor is referring to, for example, murder (crimes against humanity) / murder (war crimes) or, instead, murder (war crimes) / inflicting serious bodily injury (war crimes). This issue will be dealt with below, when the concept of “lesser included offences” is explored.

(iv) Inhumane acts as a Crime Against Humanity (Article 5(i) of the Statute) and Cruel Treatment as a War Crime (Article 3 of the Statute)

650. Although the matter of cumulatively charging inhumane acts as a crime against humanity (Article 5(i) of the Statute) and cruel treatment as a war crime (Article 3 of the Statute) is not specifically addressed in the Prosecution brief, it may be assumed that the arguments in (ii) apply, *mutatis mutandis* to this scenario. Thus, to the extent that inhumane acts and cruel treatment have different elements and/or protect different interests, they may be cumulatively charged applying the *Akayesu* test (if either of these two conditions is met) and the *Kupreškic* test (if both of these conditions are met).<sup>924</sup>

(b) Submissions of the Defence

651. The Defence disagrees with the submissions of the Prosecution. Pursuant to a request of the Trial Chamber that the Parties submit briefs on this issue,<sup>925</sup> Counsel for four of the accused have submitted briefs, which shall be considered in turn.

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<sup>923</sup> *Ibid.*, para. 12.

<sup>924</sup> This issue arises for consideration since the amended indictment in this case cumulatively charges inhumane acts and cruel treatment in Counts 10 and 11, Counts 14 and 15 and Counts 18 and 19.

<sup>925</sup> Oral Ruling of 15 Oct. 1998.

652. Counsel for Zoran Kupreškic and Mirjan Kupreškic submitted a joint Brief ("*Kupreškic Brief*").<sup>926</sup> In the *Kupreškic Brief*, the Defence endorses the test articulated by this Trial Chamber in this case in its Decision of 15 May 1998 imposing a two-fold conjunctive requirement for cumulation of offences. Conversely, the Defence disapproves of the test propounded in *Akayesu*, both because it renders the two requirements articulated by this Trial Chamber in this case *disjunctive* rather than *conjunctive* requirements by use of the word "or" rather than "and", and because it adds a third, *disjunctive* requirement ("where it is necessary to record a conviction for both offences in order fully to describe what the accused did"), which, the Defence argues, is contrary to the *non bis in idem* rule and the civil law principle of "imperfect concurrence". The Defence requests the Court to reject the *Tadic* test for the same reasons. According to the Defence, the Trial Chamber, in order to decide this issue, should apply the laws, doctrine and jurisprudence on "imperfect concurrence" of the former Yugoslavia, at least to the extent that resort to international law and general principles of criminal law does not furnish a complete answer.<sup>927</sup>

653. The Defence further argues that the *Tadic* jurisdiction decision precludes double charging of murder under Articles 3 and 5. In this regard, it quotes the Appeals Chamber when it stated that "Article 3 may be taken to cover all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap)".<sup>928</sup> Thus Article 3 is a residual clause which applies only if the principal norm cannot apply. Therefore if murder is charged under Article 5(a) or (h), it cannot be charged under Article 3.<sup>929</sup>

654. Moreover, the Defence agrees with the *Tadic* Trial Chamber's holding that "acts that are found to be crimes against humanity under other heads of Article 5 will not be

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<sup>926</sup> Brief of Defendants Zoran Kupreškic and Mirjan Kupreškic on Legal Trial Issues, 19 Nov. 1999.

<sup>927</sup> *Kupreškic Brief*, para. 74. The Defence cites Bassiouni as arguing that, since the Tribunal's Statute does not include a "general part", aside from Art. 7 of the Statute, the Tribunal should apply the law of the former Yugoslavia in order to act in accordance with the principle of legality.

<sup>928</sup> *Tadic*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 87.

<sup>929</sup> *Kupreškic Brief*, para. 76.

included in the consideration of persecution as a separate offence under Article 5(h)",<sup>930</sup> based on the conclusion – with which the Prosecution and the *Tadic* Appeals Chamber disagrees - that discriminatory intent is required for all crimes against humanity.

655. The Defence asserts that even if no discriminatory intent was required for Article 5(a) (murder), cumulative charging under Article 5(a) and (h) is nonetheless impermissible as murder with intent to discriminate is an *aggravated form of murder*.<sup>931</sup> This distinction between the basic form of an offence and an aggravated form is a paradigm of a "lesser included offence in common law [...] systems or 'imperfect concurrence' [...] by reason of specialty [...] in civil law systems".<sup>932</sup> According to the principle of speciality, where one crime, e.g. murder, is composed of some but not all elements of the other crime, e.g. discriminatory murder, and the former crime does not have any elements which are not included in the latter crime, then the latter crime is the only one to apply when all the elements are present.

656. The Defence submits that the Prosecution conceded that Articles 3 and 5(a) murder constitute lesser included offences to murder under Article 5(h), but asserted that neither the ICTY nor the ICTR has established jurisprudence indicating that crimes can be charged as lesser included offences of other crimes. The Defence asserts that the *Akayesu* Judgement established such jurisprudence.

657. The Defence applies the same reasoning to deny the permissibility of cumulative charging under Article 3 and Article 5(a).

658. Counsel for Zoran and Mirjan Kupre{ki} also filed a Petition,<sup>933</sup> which similarly argues that "ideal concurrence" is impermissible in this case, evoking the principle of speciality.

659. Defence Counsel for Dragan Papic submitted a brief on this issue,<sup>934</sup> dated 10 November 1998 and filed on 13 November 1998, in which Counsel joins in the brief

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<sup>930</sup> *Tadi*}, Trial Chamber Judgement, 7 May 1997, para. 702.

<sup>931</sup> Kupre{ki} Brief, para. 80.

<sup>932</sup> *Idem*.

<sup>933</sup> Petition of the counsel of the Accused Zoran and Mirjan Kupre{ki}, 12 Nov. 1998.

filed by Counsel for Zoran Kupreškic and Mirjan Kupreškic on behalf of all Defence Counsel, and adds various additional points.

660. Defence Counsel for Vladimir Šantic submitted a brief<sup>935</sup> in which the Defence uses the civil law concepts of real concurrence, ideal concurrence and apparent concurrence to argue that cumulative charging is not permissible under the present indictment.

661. "Real concurrence" occurs when the perpetrator commits several crimes, albeit in a single transaction, either by violating the same criminal provision against more than one person or by violating a number of distinct criminal provisions through disparate acts. The Defence does not give an example of real concurrence. Since this is a well-known concept in civil law countries and examples proliferate in the case-law, the Trial Chamber will mention, as an instance of the former sub-class, the commission of more than one murder by killing several people in a spray of gunfire; an example of the latter would be reckless driving and failure to assist a person injured as a result of the reckless driving, where there are disparate acts of driving recklessly and of not stopping after knowingly colliding with someone. The Defence states that cumulative charging is permissible only under real concurrence.

662. Neither "apparent concurrence" (*unechte Konkurrenz, concours apparent d'infractions*) nor "ideal concurrence" (*Idealkonkurrenz, concours idéal d'infractions*) are defined by the Defence. However, the notions are well-known in civil law countries, although there is no unanimity about their exact definition. It is usually held that "apparent concurrence" occurs when the perpetrator performs an act that may appear to simultaneously breach several criminal provisions, whilst in reality it only violates one.

662. In many legal systems "ideal concurrence" occurs when a person through one act breaches more than one criminal provision. For an instance drawn from German law: if a father uses violence to have sexual intercourse with his minor daughter, he has at one

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<sup>934</sup> Pre-Defence Brief, 13 Nov. 1998.

<sup>935</sup> Defence's response on Prosecutor's brief on the permissibility of charging criminal violations under the Same Articles of the Statute based on conduct arising from a single incident, 13 Nov. 1998, para. 26.

and the same time committed unlawful coercion, incest, sexual abuse of a person under his legal protection and, possibly, bodily harm. In French law, the production of a forged document may amount to both "*usage de faux*", namely making use of a forged document with intent to defraud, and attempted deceit ("*tentative d'escroquerie*").

663. In contrast to "real concurrence", the Defence states that cumulative charging is *not* permissible in the case of ideal concurrence or apparent concurrence. In its discussion, ideal concurrence and apparent concurrence are not distinguished; rather they are conflated. The Defence mentions three principles designed to deal with and solve problems of apparent/ideal concurrence: specialty, subsidiarity, consumption, and a possible fourth principle, alternativity.<sup>936</sup>

664. Under "specialty", one crime, e.g. murder, may be qualified by the addition of further elements, e.g. the intent to destroy a racial group in whole or in part, as a specialised crime, i.e. genocide. In this case, if the additional element is present, then the special crime, i.e. genocide, should be charged and not both the special crime and the general crime, i.e. murder, and the accused can only be convicted of one crime.

665. It is widely held that the "subsidiarity" principle applies when one crime is a preparatory form of a second crime, so that if the second crime is completed, only that second crime should be charged. For example, a person might detain another person in order to kill him; murder should then be charged, not illegal detention and murder. In many legal systems "consumption" applies where one crime is "consumed" by another, a notion which parallels the common law idea of "lesser included offences", e.g. robbery consumes theft, rape consumes sexual assault, etc. The fourth notion, "alternativity", refers to the situation where one or more legal descriptions might apply to an act; then the "predominant" description should be chosen, e.g., in *Akayesu*, the crime of genocide rather than complicity in genocide.

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<sup>936</sup> *Ibid.*, paras. 11-14.

666. In its brief the Defence also discusses the common law notion of double jeopardy which often leads to the same result as the civil law concepts just explained.<sup>937</sup>

667. The Defence concludes that:

(a) Bringing cumulative charges in the case of apparent concurrence is not permissible. It is possible [only] in the case of genuine concurrence. However, bringing alternative charges could be permissible, and the Prosecutor has already resorted to this solution several times.

(b) The crime of murder and the crime of persecution as crimes against humanity, especially in the Kupreškic case are typical cases of apparent concurrence, and in this case bringing cumulative charges, delivering a decision on two crimes and delivering two sentences is not possible. By the application of the criteria of subsidiarity and alternativity the accused (if found guilty at all) can be convicted for only one of these crimes.

(c) In the same way as (b), a violation of the laws or the customs of war should be assessed in relation to murder charged as a crime against humanity.

(d) Persecution and murder as crimes against humanity and murder as a violation of the laws or customs of war protect certain different, but also certain identical interests and values and entirely meet the criteria according to which they can be characterised as apparent concurrence. This requires the exclusion of bringing cumulative charges, of delivering cumulative decisions and of delivering cumulative sanctions from the point of view of substantive criminal law. At the same time, from the point of view of criminal procedure, it requires application of the double jeopardy rule as well as of the rule *non bis in idem*.<sup>938</sup>

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<sup>937</sup> *Ibid.*, paras. 18-22.

<sup>938</sup> *Ibid.*, para. 26.



## 2. Discussion

### (a) General

668. The Trial Chamber considers that this issue has a broad import and great relevance, all the more so because it has not been dealt with in depth by an international criminal court.<sup>939</sup> The Trial Chamber shall therefore consider it in its general dimension, so as to set out what it considers to be the correct legal standards on the basis of which the question must be decided *in casu*.

669. In delving into this new area of international criminal law, the Trial Chamber will rely on general principles of international criminal law and, if no such principle is found, on the principles common to the various legal systems of the world, in particular those shared by most civil law and common law criminal systems. In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of *ius praetorium*. However, its powers in finding the law are of course far more limited than those belonging to the Roman *praetor*: under the International Tribunal's Statute, the Trial Chamber must apply *lex lata* i.e. existing law, although it has broad powers in determining such law.<sup>940</sup>

670. It is appropriate to emphasise at the outset that the question of cumulation of charges is material in two distinct but closely intertwined respects. First of all, it is relevant from the viewpoint of *substantive* international criminal law. On this score the questions that arise are: (i) whether and on what conditions the same act or transaction

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<sup>939</sup> None of the *Tadić*, *Prosecutor v. Kambanda*, ((ICTR 97-23-S), Judgement and Sentence, 4 Sept. 1998), *Delalić et al.* or *Furundžija*, final Judgements treated of the issue in depth. The *Akayesu* Judgement contains a brief discussion on the subject of "Cumulative Charges" (Judgement, 2 Sept. 1998, paras 461-470); so does the Judgement in *Kayishema and Ruzindana*, 25 May 1999 at paras. 625-650.

<sup>940</sup> See the *Report of the Secretary-General*, at para. 34: "... the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise". See also Decision on Application for Leave to Appeal by Hazim Deli (Defects in the form of the Indictment), *Delalić et al.*, 6 Dec. 1996, Bench of the Appeals Chamber: "the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law" (para. 26); see also the final Judgement in *Delalić et al.*, Judgement, 16 Nov. 1998: "The Statute does not create substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law" (para. 417, and discussion at paras. 414-417).

may infringe two or more rules of international criminal law and (ii) in case of a double conviction for a single action, how this should be reflected in sentencing. Secondly, the question of cumulation is relevant from the viewpoint of *procedural* international criminal law. In this respect the question presents itself as follows: (i) when and on what conditions can the Prosecutor opt for cumulative charges for the same act or transaction? (ii) when should she instead put forward alternative charges? (iii) with what powers is a Trial Chamber vested when faced with a charge that has been wrongly formulated by the Prosecutor? In the opinion of the Trial Chamber the correct solution to both problems can only be found by first resolving the issue from the viewpoint of substantive law.

671. The Trial Chamber shall therefore examine the general legal criteria by which it is possible to distinguish cases where the same act or transaction infringes two or more provisions of the Statute from those cases where although the same seemingly holds true, in reality only one provision is breached. The Trial Chamber shall then establish which criteria should be applied to determine sentence when a single act is an offence under two or more Articles of the Statute.

672. In the light of the conclusions reached as a result of this analysis, the Trial Chamber shall dwell on the procedural aspects of this issue.

(b) Issues of Substantive Criminal Law

(i) Principles on Multiple Offences in International Criminal Law

673. Under traditional international criminal law it was exceedingly difficult to apply general principles concerning multiple offences so as to identify cases where the same act or transaction breached various rules of international criminal law and cases where instead only one rule was violated.

674. Under Article 6 of the London Agreement of 8 August 1945 some acts could qualify both as war crimes and crimes against humanity: e.g., mass murder or deportation of foreign civilians in occupied countries. True, that provision made it clear that some actions could only be characterised as crimes against humanity: for example, persecution on religious or political grounds of enemy civilians or persecution, on those

same grounds, of civilians having the same nationality as the persecutor. By the same token, other actions could only qualify as war crimes: for example, wanton destruction of enemy property not justified by military necessity, pillage, use of prohibited weapons or execution of hostages. Nevertheless, as stated above, there was an area where the two categories overlapped. In addition, those instruments which provided for the various penalties consequent upon the various crimes did not distinguish between war crimes and crimes against humanity: they envisaged the same penalties (death sentence, imprisonment etc.) for both categories in the same terms. This holds true, for example, for Control Council Law No.10.<sup>941</sup>

675. It is therefore not surprising that the International Military Tribunal at Nuremberg (IMT) convicted many defendants both of war crimes and crimes against humanity for the same act.<sup>942</sup> Similarly, the various military courts sitting at Nuremberg after World War II found many defendants guilty of both categories of crimes and sentenced them for both.

676. This pattern can be explained by three factors. First, at that time the class of "crimes against humanity" had just emerged and there were concerns about whether by convicting defendants of such crimes the courts would be applying *ex post facto* law. Secondly, and as a consequence, the relevant criminal provisions at the time did not draw a clear-cut distinction between the two classes of crimes. Thirdly, the general concepts of international criminal law were still in a state of flux.

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<sup>941</sup> Art. II paragraph 3 of which provides that:

"Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

- a) Death.
- b) Imprisonment for life or for a term of years, with or without hard labour.
- c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- d) Forfeiture of property.
- e) Restitution of property wrongfully acquired.
- f) Deprivation of some or all civil rights".

<sup>942</sup> However, two defendants (Streicher and von Schirach) were only found guilty of crimes against humanity (IMT Judgement, pp. 304, 320), while another two defendants, Raeder and Doenitz, the two highest commanders of the naval forces, were convicted only of war crimes (IMT Judgement, pp. 317, 315) (Raeder was also convicted of crimes against peace and conspiracy to commit crimes against peace).

677. The Trial Chamber holds the view that a satisfactory legal solution to the questions at issue can now be reached. The legal notion of “crimes against humanity” is now firmly embedded in positive international law, its legal contours are neatly drawn and it no longer gives rise to doubts as to its legitimacy; in particular, its application does not raise the issue of retroactive criminal law. General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied by the International Tribunal.

678. It is possible to set out the following notions and principles.

(a) Generally speaking, two different legal situations may arise. First of all, it is possible for various elements of a general criminal transaction to infringe different provisions. For instance, the Inter-American Court of Human Rights has repeatedly held that the “forced disappearance of human beings is a multiple and continuous violation of many rights under the [American] Convention [on Human Rights] that the States Parties are obligated to respect and guarantee”.<sup>943</sup> The Court rightly noted that the kidnapping of a person is contrary to Article 7 of the Convention, prolonged isolation and deprivation of communication is contrary to Article 5, while secret execution without trial followed by the concealment of the body is contrary to Article 4.<sup>944</sup> In another case dealing with the illegal detention and subsequent killing of two persons by Colombian armed forces, the Court held that the respondent State

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<sup>943</sup> See the Court’s judgement in the *Velásquez Rodríguez Case* (I/A Court H. R., Judgment of July 29 1988, Series C No. 4, para. 155).

<sup>944</sup> See *ibid.*, paras. 155-157 and 186 *et seq.*, as well as the *Godínez Cruz Case* (I/A Court H. R., Judgment of Jan. 20, 1989, Series C No. 5, paras. 163-166) and *Fairen Garbi and Solís Corrales Case* (I/A Court H. R., Judgment of 15 May, 1989, Series C No. 6, paras. 147-150).

had breached Article 7, laying down the right to personal liberty, and Article 4, providing for the right to life.<sup>945</sup>

(b) Similarly, when applying Article 3 of the European Convention on Human Rights referred to below, the European Commission and Court have not ruled out the possibility of a differentiated characterisation of various actions. Thus in the *Greek* case the European Commission held that some actions of the respondent State constituted torture, while other actions amounted to inhuman treatment.<sup>946</sup>

(c) Clearly, in these instances there exist distinct offences; that is, an accumulation of separate acts, each violative of a different provision. In civil law systems this situation is referred to as *concoirs réel d'infractions*, *Realkonkurrenz*, *concorso reale di reati*, etc. These offences may be grouped together into one general transaction on the condition that it is clear that the transaction consists of a cluster of offences.

679. The situation is different with regard to the case of one and the same act or transaction simultaneously breaching two or more provisions. The European Court has repeatedly held that "one and the same fact may fall foul of more than one provision of the Convention and Protocols".<sup>947</sup> It is appropriate, however, to distinguish between two categories of such acts or transactions.

(a) First, there may be an act or transaction that breaches one provision in some respects and another provision in other respects. Consider for example the shelling of a religious group of enemy civilians by means of prohibited weapons (e.g. chemical weapons) in an international armed conflict, with the intent to destroy in whole or in part the group to which those civilians belong. This single act contains an element particular to Article 4 of the Statute (on genocide) to the extent that it intends to

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<sup>945</sup> See *Caballero Delgado and Santana* Case (I/A Court H. R., Judgment of Dec. 8, 1995, Series C No. 22, para. 72).

<sup>946</sup> See European Commission of Human Rights, Final Decision of the Commission as to the Admissibility of the Application, 16 July 1970, Denmark, Norway and Sweden v. Greece (the *Greek* case), Application No. 4448/70, annexed to the Report of the Commission (adopted 4 Oct. 1976) in the same case, at pp. 19-20.

<sup>947</sup> See Eur. Court H.R., case of *Erkner and Hofauer*, decision of 23 April 1987, Series A, no. 117, para. 76; Eur. Court H.R., *Poiss*, judgement of 23 April 1987, Series A, no. 117, para. 66; Eur. Court H.R., *Venditelli v. Italy*, judgement of 18 July 1994, Series A, no. 293-A, para. 34.

destroy a religious group, while the element particular to Article 3 (on war crimes) lies in the use of unlawful weapons.

(b) Second, there may be acts or transactions that are fully covered by both provisions. Consider for example the systematic rape, by combatants, of enemy civilians in an occupied territory. This conduct is envisaged by, and runs contrary to, for example, both Article 3 (on war crimes) and Article 5(g) (on crimes against humanity). This also applies to the case of lesser included offences, e.g. torture and cruel treatment (cruel treatment being the lesser included offence), both envisaged as offences under Article 3 common to the Geneva Conventions, taken in conjunction with Article 3 of the Statute.

680. Certain criteria for deciding whether there has been a violation of one or more provisions consistently emerge from national legislation and the case-law of national courts and international human rights bodies. In other words, it is possible to deduce from a survey of national law and jurisprudence some principles of criminal law common to the major legal systems of the world. These principles have to some extent been restated by a number of international courts. One test has been enunciated and spelled out by certain national courts, such as those in the United States. The Supreme Court of Massachusetts in *Morey v The Commonwealth* (1871) for instance held that:<sup>948</sup>

A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

681. This has been followed in subsequent United States jurisprudence, notably the case of *Blockburger v United States of America* (1932) which approved the above criteria, since known as the "*Blockburger test*":<sup>949</sup>

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

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<sup>948</sup> *Morey v. The Commonwealth*, (1871) 108 Mass. 433 and 434. See Prosecutor's Brief, pp. 23-24.

<sup>949</sup> *Blockburger v US* (1932) 284 U.S. 299, 304, 52 S.Ct. 180, and see the cases referred to in the Prosecutor's Brief, pp. 23-24.

determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.

682. The test then lies in determining whether each offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision.

683. If the *Blockburger* test is not met, then it follows that one of the offences falls entirely within the ambit of the other offence (since it does not possess any element which the other lacks). Then the relationship between the two provisions can be described as that between concentric circles, in that one has a broader scope and completely encompasses the other. In these cases the choice between the two provisions is dictated by the maxim *in toto iure generi per speciem derogatur* (or *lex specialis derogat generali*), whereby the more specific or less sweeping provision should be chosen. This maxim reflects a principle laid down both in general international law and in many national criminal systems (see e.g. Article 55 paragraph 2 of the Dutch Criminal Code<sup>950</sup> and Article 15 of the Italian Criminal Code).<sup>951</sup>

684. The rationale behind the principle of speciality is that if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action. Particularly in case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail.

685. When each of the two provisions requires proof of a fact which the other one does not require, civil law courts tend to speak of "reciprocal speciality" and find that both provisions apply. In sum, the reciprocal speciality doctrine leads to the same result as the *Blockburger* test.

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<sup>950</sup> "Where an act is punishable under one general penal provision and a special penal provision applies, only the special penal provision shall be applicable".

686. In other cases, although the provisions cannot be said to be in a *lex specialis* - *lex generalis* relationship, it would nonetheless appear unsound to apply both provisions. This was illustrated by Judge Nieto-Navia, then President of the Inter-American Court of Human Rights, in his dissenting opinion in the *Caballero Delgado and Santana* case.<sup>952</sup>

In criminal law if a person is killed by a dagger it is obvious that he was also the victim of wounding. However, the crime that was committed is murder, and no judge will interpret the norms in such a way that the dead person was the victim of "murder and wounding".

687. This notion corresponds to the common law doctrine of the "lesser included offence".<sup>953</sup>

688. In civil law jurisdictions, a double conviction is ruled out in such cases by the so-called principle of consumption.<sup>954</sup> Its *ratio* is that when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct.

689. In international law, albeit not in a criminal context, a similar principle may be found in the case-law of the European Commission and Court of Human Rights concerning the application of Article 3 of the European Convention on Human Rights. Article 3 of the Convention prohibits various actions, which may be grouped together into the following three classes: (i) torture, (ii) inhuman treatment or punishment, and (iii) degrading treatment or punishment.

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<sup>951</sup> "When a matter is governed by more than one penal law or more than one provision of the same penal law, the specific law or provision of law shall prevail over the general law or provision of law, except as otherwise prescribed".

<sup>952</sup> Inter-American Court of Human Rights, *Caballero Delgado and Santana* case, Judgment of 8 Dec. 1955, p. 99.

<sup>953</sup> See Archbold, *Criminal Pleading, Evidence and Practice* (1997), paras. 4-453 – 4-464 at 4-453): "At common law conviction of a lesser offence than that charged was permissible provided that the definition of the greater offence necessarily included the definition of the lesser offence [...]".

<sup>954</sup> See e.g. its application by the Austrian Supreme Court: Decision of the Oberster Gerichtshof of 3.4.1962, reported in the *Evidenzblatt* of the *Österreichische Juristenzeitung* ("EvBl") 1962/427, p. 527, Decision of the Oberster Gerichtshof of 7.10.1969, reported in *EvBl* 1970/143, Decision of the Oberster Gerichtshof of 16.2.1977, reported in the *EvBl* 1977/165, p. 360 and LSK 1983/162, in *EvBl* 1984/57, p. 220. See also the judgement delivered by the German Bundesgerichtshof on (26 June 1957) in *Entscheidungen des Bundesgerichtshofs in Strafsachen*, vol. 10, p. 313 ff.



690. Interestingly, the European Commission and Court have never applied the three provisions cumulatively. In substance, it may be inferred from their decisions that torture is any inhuman and degrading treatment which is deliberately inflicted for one of a number of specified purposes, e.g. to obtain information, and which causes extreme suffering; inhuman treatment or punishment is any action causing severe suffering and lacking in any justification; degrading treatment or punishment is any action which grossly humiliates an individual before himself or others, or drives him to act against his conscience or will. It follows that torture always constitutes inhuman and degrading treatment as well. By contrast, inhuman treatment or punishment may not amount to torture or to degrading treatment or punishment. Similarly, degrading treatment or punishment may result from an action which does not constitute torture or inhuman treatment or punishment.

691. The *Aksoy* case illustrates how Article 3 has been applied by the two international bodies. In this case, the European Court, after finding that the facts complained of amounted to torture, held that “[i]n view of the gravity of this conclusion, it [was] not necessary for the Court to examine the applicant’s complaints of other forms of ill-treatment”.<sup>955</sup>

692. In sum, the European Commission and Court have held that the more serious breach (torture) prevails over the other two less serious ones (inhuman treatment or degrading treatment). The two bodies have refrained from a multiple characterisation of the same action falling foul of Article 3: whenever an action proved to be contrary to both the proscription of inhuman treatment (or of degrading treatment) and to that of torture, the Commission and Court opted for the more serious breach. Presumably, the

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<sup>955</sup> Eur. Court HR, *Aksoy v. Turkey* judgment of 18 Dec. 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2279. The Bundesgerichtshof held in a decision of 30 April 1999 on the appeal of *Jorgic*, (BGH, Urt. V. 30 April 1999 – 3 STR 251/98, OCG, Düsseldorf) that the offence of genocide did not in the first place protect the life and health of the individual, but the integrity and living conditions of the racial, ethnic, religious or national group subjected to such attacks (NStZ 1999, p. 396 and 401). Thus the Federal Court concluded that the offence of genocide may be committed over a longer period of time and the individual acts of murder etc. occurring therein are not of and by themselves counts of genocide, but rather of murder, committed in *Tateinheit* with genocide (*ibid.*, at p. 397). The Court of First Instance had convicted *Jorgic* of 11 counts of genocide. The conviction was therefore modified by the Federal Court to only one count, but the sentence remained unchanged and the appeal was finally dismissed (*ibid.*, at p. 399).

rationale behind this approach is twofold: (1) the European Commission and Court have applied a principle analogous to that of consumption; and (2) they have considered that the various norms of Article 3 all pursue the same goal and safeguard the same basic values.

693. The latter rationale leads us to a further test, which consists in ascertaining whether the various provisions at stake protect different values. Again, traces of this can be found in both the common law and civil law systems.<sup>956</sup>

694. Under this test, if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions. Take the example of resort to prohibited weapons with genocidal intent. This would be contrary to both Article 3 and Article 4 of the Statute. Article 3 intends to impose upon belligerents the obligation to behave in a fair manner in the choice of arms and targets, thereby (i) sparing the enemy combatants unnecessary suffering and (ii) protecting the population from the use of inhumane weapons. By contrast, Article 4 primarily intends to protect groups from extermination. A breach of both provisions with a single act would then entail a double conviction.

695. However, the Trial Chamber's review of national case law indicates that the test is hardly ever used other than in conjunction with, and in support of, the other tests mentioned above (*Blockburger* and reciprocal speciality, as well as the principles of

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<sup>956</sup> This test, advanced by the Prosecution in its *Brief*, is one applied in the dissenting judgement of Ritchie, J in the Canadian case of *Kienapple v The Queen* [1975] 1 S C R. 729, at 731, in which Kienapple appealed against his conviction both for rape and for unlawful carnal knowledge of a female under fourteen years of age. This judgement, contained the following passage:

“The purpose and effect of s.146(1) is in my view to protect female children under the age of fourteen years from sexual advances leading to intercourse by male persons over that age ... and I cannot subscribe to a result which relieves an assailant from the consequences of violating a child on the ground that his act also constitutes the crime of rape” (*ibid.*, at p. 734).

See also the decision of the French Cour de Cassation of 3 March 1960 in the *Goulam and Ben Haddadi* case (Crim., 3 mars 1960, *Bull. crim.*, no. 138):

“Attendu que si la loi punit de la peine de mort la destruction par l'effet d'un explosif d'un édifice habité ou servant à l'habitation, parce que ce fait met en péril des vies humaines, ce crime n'en est pas moins essentiellement établi en vue d'assurer la protection des propriétés”.

speciality and consumption).<sup>957</sup> This test is therefore unlikely to alter the conclusions reached through the application of these principles.

(ii) Relationship Between the Various Offences Charged in the Indictment

696. Having set out the general principles of criminal law governing multiple offences in international law, the Trial Chamber will now apply these principles to the relations between the various substantive provisions of the Statute relied upon by the parties in the instant case.

697. Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain *general* legal ingredients. It follows that, for instance, a crime against humanity may consist of such diverse acts as the systematic extermination of civilians with poison gas or the widespread persecution of a group on racial grounds. Similarly, a war crime may for instance consist in the summary execution of a prisoner of war or the carpet bombing of a town.

698. In addition, under the Statute of the International Tribunal, some provisions have such a broad scope that they may overlap. True, some acts may only be characterised as war crimes (Article 3), e.g., the use of prohibited weapons against enemy combatants, attacking undefended towns, etc. Other acts or transactions may only be defined as crimes against humanity (Article 5): e.g., persecution of civilians, whatever their

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<sup>957</sup> See the dissenting judgement of Ritchie, J in the Canadian case of *Kienapple v The Queen* [1975] 1 S C R 729 at p. 731.

See also the decision of the French Cour de Cassation of 3 March 1960 in the *Goulam and Ben Haddadi* *ibid.*, and the following Austrian Supreme Court cases: LSK 1983/162, in *EvBI* 1984/57, p. 221 (different values protected in conjunction with reciprocal speciality) and Decision of the *Oberster Gerichtshof* of 3 April 1962, in *EvBI* 1962/427, p. 527 (different values protected in conjunction with no consumption of the lesser offence).

The only cases in which a multiple conviction was entered for a single action by virtue of the "different protected values test", although under the speciality test a single conviction would have been appropriate, the Trial Chamber is aware of, were decided by the Italian *Corte di Cassazione* (Decision of 6 Oct. 1964, reported *in summary* in *Giustizia penale*, 1965, II, p. 205 and decision of 21 Jan. 1982, reported in *Cassazione penale*, 1983, p. 621). However, as the *Corte di Cassazione* admitted in the decision of 21 Jan. 1982, its own jurisprudence on the issue is far from homogeneous (*ibid.*, p. 623).

nationality, on racial, religious or political grounds. However, other acts, depending upon certain circumstances, may either be characterised as war crimes or both as war crimes and crimes against humanity. For instance, murder, torture or rape of enemy civilians normally constitute war crimes; however, if these acts are part of a widespread or systematic practice, they may also be defined as crimes against humanity. Plainly, Articles 3 and 5 have a different scope, which, however, may sometimes coincide or overlap.

699. In order to apply the principles on cumulation of offences set out above specific offences rather than diverse sets of crimes must be considered. The Trial Chamber will therefore analyse the relationship between the single offences with which the accused are charged, such as murder as a war crime, murder as a crime against humanity, etc.

a. Relationship Between “Murder” under Article 3 (War Crimes) and “Murder” under Article 5(a) (Crimes Against Humanity)

700. Following the principles set out above, the relevant question here is whether murder as a war crime requires proof of facts which murder as a crime against humanity does not require, and *vice versa* (the *Blockburger* test). Another relevant question is whether the prohibition of murder as a war crime protects different values from those safeguarded by the prohibition of murder as a crime against humanity.

701. With regard to the former question, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the *Blockburger* test is not fulfilled, or in other words the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime.<sup>958</sup>

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<sup>958</sup> This result is borne out by the Appeals Chamber in its Decision on Jurisdiction:

“Article 3 thus confers on the International Tribunal jurisdiction over [any] serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any “serious violation of international humanitarian law” must be prosecuted by

702. In addressing the latter question, it can generally be said that the substantive provisions of the Statute pursue the same general objective (deterring serious breaches of humanitarian law and, if these breaches are committed, punishing those responsible for them). In addition, they protect the same general values in that they are designed to ensure respect for human dignity. Admittedly, within this common general framework, Articles 3 and 5 may pursue some specific aims and protect certain specific values. Thus, for instance, the prohibition of war crimes aims at ensuring a minimum of humanitarian concern between belligerents as well as maintaining a distinction between combatants' behaviour toward enemy combatants and persons not participating in hostilities. The prohibition of crimes against humanity, on the other hand, is more focused on discouraging attacks on the civilian population and the persecution of identifiable groups of civilians.

703. However, as under Article 5 of the Statute crimes against humanity fall within the Tribunal's jurisdiction only when committed in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential.

704. As explained above, the validity of the criterion based on the difference in values protected is disputable if it is not also supported by reciprocal speciality between the two offences. It follows that, given also the marginal difference in values protected, the Trial Chamber may convict the Accused of violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 and under Article 5 are proved.

b. Relationship Between "Persecution" under Article 5(h) (Crimes Against Humanity) and "Murder" under Article 5(a) (Crimes Against Humanity)

705. On the grounds set out above, the Trial Chamber agrees with the Prosecutor that "persecution" may comprise not only murder carried out with a discriminatory intent but

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the International Tribunal. In other words, Art. 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the

also crimes other than murder. Count 1 of the indictment, which charges persecution, refers not only to killing, but also to “the comprehensive destruction of Bosnian Muslim homes and property” (para. 21(b)) and “the organised detention and expulsion of the Bosnian Muslims from Ahmici-Šantici and its environs” (para. 21(c)); in short, what in non-legal terms is commonly referred to as “ethnic cleansing”. There are clearly additional elements here beyond murder.

706. As for the relations between murder as a crime against humanity and persecution as a crime against humanity, it should be noted that persecution requires a discriminatory element which murder, albeit as a crime against humanity, does not. The Trial Chamber is of the view therefore that there is reciprocal speciality between these crimes; indeed, both may have unique elements. An accused may be guilty of persecution for destroying the homes of persons belonging to another ethnic group and expelling the occupants, without however being found guilty of any acts of killing. The destruction of homes and the expulsion of persons, if carried out with a discriminatory intent, may in and of themselves be sufficient to constitute persecution. Equally, an accused may commit a non-discriminatory murder as part of a widespread attack on a civilian population which, because it is non-discriminatory, fails to satisfy the definition of persecution. These, then, are two separate offences, which may be equally charged.

707. If an accused is found guilty of persecution, *inter alia* because of the commission of murders, it seems that he should be found guilty of persecution only, and not of murder *and* persecution, because in that case the *Blockburger* test is not met: murder is in that case already encompassed within persecution as a form of aggravated murder, and it does not possess any elements which the persecutory murders do not. Hence, in that case, murder may be seen as either falling under *lex generalis* or as a lesser included offence, and a conviction should not ensue when there is already a conviction under *lex specialis* or for the more serious offence, i.e. persecutory murder.

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International Tribunal (emphasis added)”. See *Tadic*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 91.

708. Things however are different when a person is charged both with murder as a crime against humanity and with persecution (including murder) as a crime against humanity. In this case the same acts of murder may be material to both crimes. This is so if it is proved that (i) murder as a form of persecution meets both the requirement of discriminatory intent and that of the widespread or systematic practice of persecution, and (ii) murder as a crime against humanity fulfils the requirement for the wilful taking of life of innocent civilians and that of a widespread or systematic practice of murder of civilians. If these requirements are met, we are clearly faced with a case of reciprocal speciality or in other words the requirements of the *Blockburger* test are fulfilled. Consequently, murder will constitute an offence under both provisions of the Statute (Article 5(h) and (a)).

709. Let us now consider whether the prohibition of persecution as a crime against humanity protects different values from those safeguarded by the prohibition of murder as a crime against humanity. It is clear that the criminalisation of murder and persecution may serve different values. The prohibition of murder aims at protecting innocent civilians from being obliterated on a large scale. More generally, it intends to safeguard human life in times of armed conflicts. On the other hand, the ban on persecution intends to safeguard civilians from severe forms of discrimination. This ban is designed to reaffirm and impose respect for the principle of equality between groups and human beings.

710. This test then bears out and corroborates the result achieved by using the other test. Under the conditions described above, the test based on protection of values leads to the conclusion that the same act or transaction (murder) may infringe two different provisions of Article 5 of the Statute.

c. Relationship Between "Inhumane Acts" under Article 5(i) (Crimes Against Humanity) and "Cruel Treatment" under Article 3 (War Crimes)

711. These two crimes are clearly presented as alternatives in the Indictment and should be considered as such. Except for the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of

elements not required by the other. In other words, it is clear that every time an inhumane act under Article 5(i) is committed, *ipso facto* cruel treatment under Article 3 is inflicted. The reverse is however not true: cruel treatment under Article 3 may not be covered by Article 5(i) if the element of widespread or systematic practice is missing. Thus if the evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhumane acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime. Given this, it is not strictly necessary to consider the "different values test", since the *Blockburger* test is ultimately dispositive of the issue.

d. Relationship Between the Charges for Inhumane Acts (or Cruel Treatment) and the Charges for Murder

712. A brief word here should be said about the relationship between charges for inhumane acts/cruel treatment and murder. In Counts 2-9, for example, the accused are charged with the murder of the Ahmic family, and in Counts 10-11 for inhumane acts/cruel treatment of Witness KL by murdering his family before his eyes. These are clearly separate offences. Not only are the elements different, but the victims are even different. Witness KL's family are the victims of the murder counts, while Witness KL himself is the victim of the inhumane acts/cruel treatment counts.

(iii) The Sentence to be Imposed in the Event of More Than One Conviction for A Single Action

713. The question remains as to how a double conviction for a single action shall be reflected in sentencing. Both parties seem to agree that a defendant should not suffer two distinct penalties, to be served consecutively, for the same act or transaction. However, the Trial Chamber is under a duty to apply the provisions of the Statute and customary international law. Article 24(1) of the Statute provides that:

The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the term of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.



714. Pursuant to Article 48 of the former SFRY Criminal Code, which is still applied in the successor States of the SFRY, if the accused has committed several criminal offences by one action, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments.<sup>959</sup>

715. The 1997 Criminal Code of the Republic of Croatia contains similar rules on sentencing in the case of multiple offences committed by one action.<sup>960</sup> Outside the former Yugoslavia, the Italian Criminal Code includes a similar rule.<sup>961</sup>

716. As was held by the Trial Chamber in the *Tadic* case, “[t]he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person”.<sup>962</sup> In numerous legal systems, the penalty imposed in case of multiple conviction for offences committed by one action is limited to the punishment provided for the most

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<sup>959</sup> The text of Art. 48 reads as follows:

(1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.

(2). The single sentence shall be imposed according to the following rules:

i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

iii) if sentences of imprisonment are determined for concurrent criminal offences, the single sentence shall be greater than each individual sentence determined, but it shall not be greater than the sum of the sentences determined, nor shall it be greater than a term of imprisonment of fifteen years;

iv) if sentences of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

<sup>960</sup> See Art. 60 of the Croatian Penal Code of 1997.

<sup>961</sup> Art. 81 of the *Codice Penale* reads:

“(1) Anyone who, by a single act or omission, violates different provisions of law or commits more than one violation of the same provision of law, shall be punished with the punishment which would be imposed for the most serious violation, increased *up to no more than three times that sentence*. [...]”

<sup>962</sup> *Tadić*, Sentencing Judgement, 14 July 1997, at para. 9.

serious offence. An instance of this approach is represented by Article 52(2) of the German Penal Code.<sup>963</sup>

717. Faced with this discrepancy in municipal legal systems, the Trial Chamber considers that a fair solution can be derived both from the object and purpose of the provisions of the Statute as well as the general concepts underlying the Statute, and from “the general principles of justice applied by jurists and practised by military courts” referred to by the International Military Tribunal at Nuremberg.<sup>964</sup>

718. The following proposition commends itself as sound. If under the principles set out above a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may aggravate the sentence for the more serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence, for instance because the less serious offence is characterised by distinct, highly reprehensible elements of its own (e.g. the use of poisonous weapons in conjunction with the more serious crime of genocide).

719. On the other hand, if a Trial Chamber finds under the principles set out above that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only. For example, if the more specialised offence, e.g. genocide in the form of murder, is made out on the evidence beyond a reasonable doubt, then a conviction should be recorded for that offence and not

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<sup>963</sup> Art. 52 reads:

(1) If the same act violates several criminal statutes or violates the same statute more than once, only one punishment may be imposed.

(2) If several criminal statutes have been violated, the punishment shall be determined by the statute which provides the most severe kind of punishment. It may not be any less severe than the other applicable statutes permit.

<sup>964</sup> See Trial of the Major War Criminals Before the International Military Tribunal, 1947, Vol. I, p. 221.

for the offence of murder as a war crime. In that case only one conviction will be recorded and only one sentence will be imposed.

(c) Issues of Procedural Criminal Law

(i) The Power of the Prosecutor to Opt for Cumulative or Alternative Charges

720. In the light of the foregoing discussion, the Trial Chamber shall answer the query raised above regarding when the Prosecutor may present cumulative charges for the same act or transaction.

721. The approach currently adopted by the Prosecution creates an onerous situation for the Defence, on the grounds that the same facts are often cumulatively classified under different headings, very often -- as in the case at issue -- under two different heads (war crimes, and crimes against humanity), and in other cases before the Tribunal under three (or even possibly four) different heads. Admittedly, the Defence is made cognisant of the various classifications of the facts propounded by the Prosecution and is thus enabled to make its case. The fact remains, however, that the charges are made cumulatively and therefore placed on the same footing, even though the facts which allegedly infringe various provisions of the Statute may, legally speaking, violate only one provision.

722. Neither the Statute nor the Rules establish how the charges must be brought by the Prosecutor. Generally speaking, if under the principles set out above, the facts allegedly committed by the accused are in breach of only one provision of the Statute, the Prosecutor should present only one charge. If, in the Prosecutor's view, the alleged facts simultaneously infringe more than one provision of the Statute, the Prosecutor should present cumulative charges under each relevant provision.

723. In practice, however, the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge. As we shall see, at

least for the time being it is questionable that the *iura novit curia* principle (whereby it is for a court of law to determine what relevant legal provisions are applicable and how facts should be legally classified) fully applies in international criminal proceedings. If this is so, the eventuality just described might indeed result in a dismissal of the charge.

724. The Trial Chamber holds that the issue must be settled in the light of two basic but seemingly conflicting requirements. There is first the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor be granted all the powers consistent with the Statute to enable her to fulfil her mission efficiently and in the interests of justice.

725. The former requirement demands among other things that the accused be “informed promptly and in detail [...] of the nature and cause of the charge against him” (Article 21 (4) (a) of the Statute). It follows that the accused is entitled to know the specifics of the charges against him, namely the facts of which he is accused and the legal classification of these facts. In particular, as far as this legal element is concerned, he must be put in a position to know the legal ingredients of the offence charged.

726. It follows from the latter requirement (that relating to the functions of the Prosecutor), that legal technicalities concerning classification of international offences should not be allowed to thwart the mission of the Prosecutor, which is to prosecute persons responsible for serious violations of international humanitarian law. The efficient fulfilment of the Prosecution’s mission favours a system that is not hidebound by formal requirements of pleading in the indictment.

727. These requirements may be harmonised in the following manner.

The Prosecution:

- (a) may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions of the Statute in accordance with the criteria discussed above;

(b) should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove. For instance, the Prosecution may characterise the same act as a crime against humanity and, in the alternative, as a war crime. Indeed, in case of doubt it is appropriate from a prosecutorial viewpoint to suggest that a certain act falls under a stricter and more serious provision of the Statute, adding however that if proof to this effect is not convincing, the act falls under a less serious provision. It may also prove appropriate to charge the indictee with a crime envisaged in a provision that is – at least in some respects - special *vis-à-vis* another (e.g. Article 4 of the Statute) and, in the alternative, with a violation of a broader provision (e.g. Article 2 or 3 of the Statute), so that if the evidence turns out to be insufficient with regard to the special provision (the *lex specialis*), it may still be found compelling with respect to a violation of the broader provision (the *lex generalis*). However the Prosecution should make clear that these are alternative formulations by use of the word “or” between the crimes against humanity and war crimes charges, for example, and refrain in these circumstances from using the word “and”, to make clear the disjunctive and alternative nature of the charges being brought.

(c) should refrain as much as possible from making charges based on the same facts but under excessive multiple heads, whenever it would not seem warranted to contend, in line with the principles set out above in the section on the applicable law, that the same facts are simultaneously in breach of various provisions of the Statute.

- (ii) The Obligations of the Prosecutor When She Decides to Change the Legal Classification of Facts in the Course of Trial and the Power of a Trial Chamber When it Disagrees with the Prosecutor’s Legal Classification of the Facts.

728. Neither the Statute nor the Rules establish how Trial Chambers should act in the case of an erroneous legal classification of facts by the Prosecutor. In particular, no guidance is offered on how a Trial Chamber should proceed when certain legal ingredients of a charge have not been proved but the evidence shows that, if the facts were differently characterised, an international crime under the jurisdiction of the

Tribunal would nevertheless have been perpetrated. Absent such guidance, and in view of the lack of any general principles of international criminal law on this matter, it may prove useful to establish how most national criminal systems regulate this matter. This examination serves the purpose of establishing whether principles of criminal law common to the major legal systems of the world exist on this matter.<sup>965</sup>

729. In two of the major common law jurisdictions - England and Wales, and the United States of America – there is a system of “lesser included offences” and “alternative verdicts” which establishes which offences need to be separately charged in the indictment and which offences are automatically considered as lesser alternatives (e.g. murder and manslaughter, robbery and theft).<sup>966</sup>

730. In England, the position is now largely governed by Statute. Section 6(3) of the Criminal Law Act 1967 reads:

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<sup>965</sup> See *Furundžija*, Judgement, 10 Dec. 1998, paras. 177-178.

<sup>966</sup> See also, in this regard, the Criminal Procedure Code of the Republic of Zambia of 1 April 1934. Art. 181 of the Zambian Procedural Code, which deals with lesser included offences, provides as follows:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it;

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

A specific example of this is contained in Section 186(1) of the Zambian Code, which states that if a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of, say, indecent assault, he may be convicted of that offence even though he was not charged with it. Additionally, Art. 213(1) provides that “[w]here, at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may ... make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case”. Where an alteration of a charge is made, Art. 213(3) obliges the court to allow for an adjournment if it is of the opinion that the accused may have been thereby “misled”.

For similar provisions, see also Section 169 of the Nigerian Criminal Procedure Act 1958 and Section 219 of the Criminal Procedure Code of 1963, whereby a court can convict an accused for an offence not charged if the evidence adduced supports a conviction on that charge and Sections 256-269 of the South African Criminal Procedure Act 51 of 1977. In particular, Section 270 of this Act reads as follows:

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

In practice, the effect of Section 270 is that a court can convict an accused only of lesser included offences, the essential elements of which must be included in the offence charged. (See *S v. Mbatha* 1982 (2) SA 145 (N); *S v. Mei* 1982 (1) SA 299 (O); *S v. Mavundla* 1980 (4) SA 187 (T); and *S v. Nkosi* 1990 (1) SACR 653 (T)).

6. – (3) Where, on a person’s trial on indictment for any offence except treason or murder, the jury finds him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

731. As for murder, manslaughter is always available as an alternative verdict, and need not be charged in the indictment; likewise, under the common law (as opposed to statutory law) theft is always available as an alternative verdict to robbery, and so on for all lesser included offences. Treason – always treated as a unique crime – seems to be the only offence for which there is no possible alternative verdict.

732. It is worth noting that the Criminal Law Act 1967 would apply not only to “lesser included offences” but also to offences where the elements are different. For example, a person charged with rape could also be convicted of robbery if it is alleged in the indictment that he had also forcibly taken money from the rape victim. However, in these circumstances it would be preferable to amend the indictment to add the new count rather than for the Judge to give an oral direction as to the jury’s powers under section 6(3) of the above act.<sup>967</sup> “Lesser included offences” are not the only alternative verdicts. Theft and handling of stolen goods are alternative verdicts, as it is not permissible for an accused to be convicted of both offences with respect to the same goods, but neither is a “lesser included” version of the other.<sup>968</sup> Likewise, indecent assault is an alternative to a charge of unlawful sexual intercourse with a girl under 16 – i.e. the prosecution does not need to charge indecent assault in the indictment – although neither offence is necessarily more serious than the other. In the United States of America, alternative verdicts for lesser included offences not charged in the indictment are possible under Rule 31(c) of

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<sup>967</sup> *R. v. Mandair* [1994] 2 WLR 700, (H.L.).

<sup>968</sup> Archbold, *Criminal Pleading, Evidence and Practice* (1997), para. 21-12 .

the Federal Rules of Criminal Procedure.<sup>969</sup> There is an “elements test” for what constitutes a “lesser included offence”.<sup>970</sup>

733. Broader powers are conferred on courts in most civil law countries, including the States of the former Yugoslavia.<sup>971</sup> Generally speaking, in these countries the principle *iura novit curia* (the court is expected and required to establish the law, while the facts must be proved by the parties) prevails. It follows that courts enjoy greater latitude in the determination of the applicable law than courts of common law countries. However, on close scrutiny it appears that in some civil law systems the powers of courts in the matter under discussion are more limited than in other systems. In short, in some countries the court may only reclassify, in the course of the trial, the facts of the case after duly warning the accused and enabling him to prepare his defence. Germany and Spain belong to this category. In other countries, such as France and Italy, courts may instead give a different legal characterisation of the facts from that propounded by the Prosecution, without necessarily advising the accused. This is permissible even in cases where the court eventually classifies the facts as a more serious offence than that charged by the Prosecution.

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<sup>969</sup> Rule 31(1) of the US Federal Rules of Criminal Procedure provides: “The defendant may be found guilty of an offense (sic) necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense”.

<sup>970</sup> *Schmuck v. United States*, 489 U.S. 705 (1989).

<sup>971</sup> Art. 272 of the 1985 SFRY Law on Criminal Procedure, dealing with pre-trial proceedings, provides that when making a ruling under Art. 269(3) and Arts. 270 and 271, the Chamber is not bound by the legal characterisation of the offence specified by the Prosecutor in the indictment. Arts. 269(3), 270 and 271 refer, respectively, to a finding that a criminal offence falls instead within the jurisdiction of another court (Art. 269(3)); a finding that the facts alleged does not comprise a criminal offence, that circumstances exist to preclude criminal culpability or that insufficient evidence exists to support the charge (Art. 270) and special cases, such as private prosecutions (Art. 271). Additionally, Art. 337(1) of the SFRY law permits a prosecutor to amend the indictment in the course of a hearing if the evidence presented “indicates that the factual situation outlined in the indictment has changed”. In such circumstances, the court may adjourn the main hearing to allow the Defence to prepare (Art. 337(2)). Furthermore, in issuing its judgment, the court “shall not be bound by the legal characterisation of the act proposed by the prosecutor” (Art. 346(2)). This, in practice, has been interpreted to mean that the court may decide that the offence proved is either a more or a less serious offence than that charged if the factual circumstances outlined in the indictment so dictate. (See the commentary by Petric (ed.), *The Law on Criminal Procedure as Explained by the Case Law* (Belgrade, 1983) at p. 198, concerning the equivalent and substantively identical provision in the earlier SFRY Code of 1976).

Art. 346(2) of the 1997 Law on Criminal Procedure of the Republic of Croatia is identical to its counterpart in the SFRY Law on Criminal Procedure. In addition, and with regard to Croatian pre-trial proceedings, Arts. 274(3), 275, 276, 277 and 341(1) and (2) of the Croatian Law on Criminal Procedure mirror Arts. 269(3), 270, 271, 272 and 337(1) and (2) of the SFRY Law on Criminal Procedure, considered above.



734. A brief survey of these legal systems may prove useful. In German law, changes in the legal characterisation of facts during the pre-trial or trial stage are dealt with under sections 206, 207 and 265 of the Code of Criminal Procedure.<sup>972</sup> If the court deciding on the confirmation of the indictment is of the opinion that a different legal characterisation is warranted, the order confirming the indictment will contain a notice to that effect. The court is not bound by this notice if at the trial stage the judges change their minds. If the characterisation changes yet again during the trial, the accused must be given a warning by the court, except for where lesser included offences are concerned. The accused may then request an adjournment to prepare his defence. In the case of a mere change in the legal assessment of the otherwise unchanged facts, this adjournment is discretionary. The accused only has a right to an adjournment if the evidence *at trial* suggests *new circumstances* that would make the application of a more severe offence or sanction possible.<sup>973</sup>

735. In Spanish law, Article 653 of the Code of Criminal Procedure allows the Prosecution to charge in the alternative and especially reserves the parties' right to re-evaluate the offences after the evidence has been heard.<sup>974</sup> The law permits the presiding judge, where necessary, to ask the Prosecution and the Defence after the evidence has been presented whether they wish to amend their evaluations,<sup>975</sup> and if the Prosecution intends to charge a more serious offence than originally charged, Article 793 No. 7 *LECrim* gives the court a discretion to grant an adjournment to the Defence.<sup>976</sup> The court must hand down its sentence regarding all the legal aspects of the facts proven and may thus in the ordinary trial proceedings find the accused guilty of any offence that he has

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<sup>972</sup> *Strafprozessordnung, (StPO)*.

<sup>973</sup> For a similar provision, see also Art. 262 of the Austrian Code of Criminal Procedure (*StPO*).

<sup>974</sup> Arts. 653 and 732 *Ley de Enjuiciamiento Criminal*. (Hereinafter *LECrim*).

<sup>975</sup> *Ibid.*, Art. 793.

<sup>976</sup> A similar procedure applies in the recently established jury trial (*tribunal del jurado*) under Arts. 29 No. 3, 42 and 48 of the *Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado*. Art. 733 *LECrim* empowers the court in extraordinary circumstances to give the parties a warning that the charges may qualify for different legal classification and to ask them to present their views on the matter. However, this is a rather exceptional procedure given the adversarial nature of the Spanish trial. It would appear, though, that under constitutional law the court is always required to give a warning under Art. 733 *LECrim* before sentencing the accused on a more serious charge if the Prosecution does not address the issue, or risk having its verdict quashed on appeal in terms of Art. 851 No. 4 *LECrim*.

been warned of under Article 733 *LECrim*, even though the Prosecution may not have amended its charges.<sup>977</sup>

736. A different approach is taken in France and Italy. In France, the case-law has established the principle whereby, as long as the facts alleged by the Prosecution remain the same, courts are empowered to legally characterise those same facts in a manner different from that suggested by the prosecution, and without giving any prior notice to the accused.<sup>978</sup> This would seem to entail, amongst other things, that the court is authorised to find that the crime of which the accused is guilty is more serious than that charged by the Prosecutor – again, on the condition that the facts charged remain the same.

737. In Italy, Article 521(1) of the Code of Criminal Procedure provides that “in its judgement the court may give a legal definition to the facts different from that set forth in the charge, as long as the crime is within the competence of that court”. The following two paragraphs of the same provision envisage instead the possibility that the facts are changed in the course of trial. If the court establishes that the facts are different from those set out in the indictment, or if the Prosecutor sets forth a new charge, the court must return the file to the Prosecutor and enable the accused to prepare his defence. The case law has clearly inferred from these provisions that, whenever the facts remain the same, courts are not bound by the legal classification of those facts propounded by the

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<sup>977</sup> This follows from a comparison of Art. 742 *LECrim*, which applies to ordinary and jury trials, and Art. 794 No. 3 *LECrim*, which deals with the expedited procedure (*procedimiento abreviado*) applicable to certain classes of relatively minor offences. In these kinds of proceedings the court may not find the defendant guilty of any offence other than the one charged if the new offence protects a different interest or the verdict would lead to a substantial change in the acts tried (*mutación sustancial del hecho enjuiciado*). Art. 742 *LECrim* does not contain that restriction.

<sup>978</sup> According to the French Court of Cassation “il appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés”, on condition, however, that facts are not changed (the new characterisation is admissible “à la condition qu’il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu’ils ont été retenus dans l’acte de saisine”). (See Cass. Crim., 22 April 1986, in *Bulletin Criminel*, no. 136; see also Cass. Crim., 21 June 1989, in *Bulletin Criminel*, no. 267).

prosecutor. Courts may even find that the crime perpetrated by the accused is more serious than the crime charged in the indictment.<sup>979</sup>

738. It is apparent from the above survey that no general principle of criminal law common to all major legal systems of the world may be found. It therefore falls to the Trial Chamber to endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice.

739. In this regard, two basic requirements – already referred to above – acquire paramount importance on account of the present status of international criminal law. One is the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice.

740. Turning to the former requirement, it must be emphasised again that at present, international criminal rules are still in a rudimentary state. They need to be elaborated and rendered more specific either by international law-making bodies or by international case law so as to gradually give rise to general rules. In this state of flux the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries. Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would become exceedingly onerous, given the aforementioned uncertainties which still exist in international criminal law. Hence, even though the *iura novit curia* principle is normally applied in international judicial proceedings,<sup>980</sup> under present circumstances it would be

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<sup>979</sup> See Court of Cassation, Section I, 8 July 1985, *Sconocchia* case, in *Giustizia penale*, 1986, pp. 562-564; Court of Cassation, Section VI, 16 April 1991, *Parente* case, in *Giurisprudenza italiana*, 1992, II, p.297.

<sup>980</sup> See e.g. Permanent Court of International Justice, *Lotus* case, Judgement No. 9, 7 Sept. 1927, Series A no. 10, p. 31; *Brazilian Loans* case, 12 July 1929, Series A, no. 14, p. 124; *Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, ICJ Reports 1986, pp. 24-25, para. 29.

inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake. It would also violate Article 21(4)(a) of the Statute, which provides that an accused shall be informed “promptly and in detail” of the “nature and cause of the charge against him”.

741. On the other hand, the other requirement relating to the efficient discharge of the Tribunal’s functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence.

742. A careful balancing of the two aforementioned requirements leads to the following conclusions:

- (a) It may happen that, in the course of the trial, the Prosecutor finds that she has not proved beyond reasonable doubt the commission of the crime charged, but that a different offence, not charged in the indictment, has been proved which has different objective or subjective elements. For instance the Prosecutor may come to the conclusion that there is evidence of torture as a crime against humanity rather than rape as a crime against humanity; or of plunder of private property as a war crime instead of the attack of undefended dwellings or buildings as a war crime. She may consider that there is evidence of the extermination of civilians as a crime against humanity rather than of killing members of an ethnic group as genocide; or of unlawful deportation or transfer of civilians as a grave breach of the Geneva Conventions instead of genocide taking the form of deliberately inflicting on an ethnic

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See also European Court of Human Rights, *Neumeister* case, 27 June 1968, Recueil, Series A, no. 8, para. 16; *Handyside* case, 7 Dec. 1976, Series A no. 24, para 41; Inter-American Court of Human Rights, *Velasquez Rodriguez* case, 29 July 1988, Series C, No. 4, p. 151, para. 163.

It would seem that the best definition of the principle is that given by the ICJ. in *Fisheries* (Jurisdiction):

“The Court [...], as an international judicial organ, is deemed to take judicial notice of international law and is therefore required [...] to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court”. (ICJ Reports 1974, p. 181, para. 18).

or religious group conditions of life calculated to bring about its physical destruction in whole or part. To such cases others can be assimilated. Consider for instance the case where the Prosecutor realises that the charge of committing crimes against humanity in the form of deportation or imprisonment cannot be proved, while the charge of aiding and abetting in the execution of this crime can be substantiated by sufficient evidence. In this case the modality of participation in the commission of the crime is different from (albeit perhaps less serious than) actual perpetration. In these cases the Prosecutor must request the Trial Chamber to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge.

(b) During the course of the trial, the Prosecutor may conclude that a more serious offence than that charged in the Indictment has been or may be proved. For instance, she considers that while the accused had been charged with a war crime consisting of killing civilians, in the course of trial evidence has been presented showing that he may be found guilty of genocide in the form of killing members of an ethnic or religious group with the intent to destroy that group, in whole or in part. Or she may consider that while the crime charged was a war crime consisting of causing inhuman treatment to civilians, evidence has been presented showing that the accused engaged in torture as a crime against humanity. Clearly, once again the Prosecutor must request leave to amend the Indictment, so as to avoid any jeopardy to the rights of the accused. Again, the accused must be put in a position to contest the charges and to this end he must be informed promptly and in detail of the "nature and cause of the charge against him" (Article 21(4)(a) of the Statute). The same concept applies to the Trial Chamber, should it consider that a more serious offence has been proved in court.

(c) The Prosecutor may conclude during the trial that a lesser included offence, not charged in the Indictment, may be or has been proved in court. For instance, she considers that the murder of civilians charged as a crime against humanity has not been made out for lack of proof of a widespread or systematic practice, while evidence is sufficient for proving that a war crime was committed, consisting of the murder of civilians. Or else she concludes that the charge of genocide consisting of the killing of

members of an ethnic group cannot be proved for lack of the requisite intent to destroy in whole or in part, the group; by contrast, evidence may be produced proving that the killing of civilians may be charged as a war crime. Clearly, these are cases where the *lex specialis* invoked by the Prosecutor is found not to be applicable, whereas the *lex generalis* is still applicable.

743. If in these and similar cases the Prosecutor is or believes she is able to prove all the elements of a crime except for that which make up an additional element elevating the crime to a more serious category, she need not request leave to amend the Indictment. For the accused has been given the opportunity to contest all the elements of the crime charged. If one of the elements is lacking, this does not entail that the crime has not been committed, provided all the elements of a lesser included offence are proven. However, it would seem advisable that prompt notice be given by the Prosecutor to the Defence and the Trial Chamber that she proposes to submit that the lesser but not the greater offence has been committed, so that the accused may know the particulars of the case against him or her.

744. Let us apply the same criteria for the power, if any, of Trial Chambers to depart from the classification of the offence suggested by the Prosecutor.

745. If it is the Trial Chamber that concludes that the more serious offence has not been proved, it is sufficient for it to make this finding in its judgement, without ordering the Prosecutor to amend the Indictment. To give a practical example, an accused may be charged in an indictment with one count of murder as a crime against humanity. During the trial, it is conclusively proved that the accused committed the murder in circumstances that would characterise it as a war crime, but it is *not* proved that the crime was committed in the context of a widespread or systematic attack on a civilian population. In those circumstances the Trial Chamber could convict the accused of murder as a war crime, despite the fact that that crime has not been charged in the indictment.

746. Similarly, the Trial Chamber may conclude that the facts proven by the Prosecutor do not show that the accused is guilty of having perpetrated a war crime; they

show instead that he aided and abetted the commission of the crime. In this case, the Trial Chamber may classify the offence in a manner different from that suggested by the Prosecutor, without previously notifying the Defence of the change in the *nomen iuris*. For the same reason the Trial Chamber may find that the accused, charged with perpetrating a murder as a crime against humanity, is instead guilty of participating in a common design to commit murder as a crime against humanity.

747. If instead the Trial Chamber finds in the course of trial that the evidence conclusively shows that the accused has committed a more serious crime than the one charged, it may call upon the Prosecutor to consider amending the indictment. Alternatively, it may decide to convict the accused of the lesser offence charged. The same course of action should be taken by the Trial Chamber in the event the Prosecutor should decide not to accede to the Trial Chamber's request that the indictment be amended.

748. Similarly, if the Trial Chamber finds in the course of trial that only a different offence can be held to have been proved, it should ask the Prosecutor to amend the indictment. If the Prosecutor does not comply with this request, the Trial Chamber shall have no choice but to dismiss the charge.

## **VI. LEGAL FINDINGS**

### **A. General**

749. In the course of this trial, the Trial Chamber has had to assess the involvement, if any, of the six accused and their potential culpability within a tragic episode of the armed conflict that raged in Bosnia and Herzegovina between 1992 and 1994. On 16 April 1993, in a matter of few hours, some 116 inhabitants, including women and children, of Ahmi}i, a small village in central Bosnia, were killed and about 24 were wounded; 169 houses and two mosques were destroyed. The victims were Muslim civilians. The Trial Chamber is satisfied, on the evidence before it in this case, that this was not a combat operation. Rather, it was a well-planned and well-organised killing of civilian members of an ethnic group, the Muslims, by the military of another ethnic group, the Croats. The primary purpose of the massacre was to expel the Muslims from the village, by killing many of them, by burning their houses and their livestock, and by illegally detaining and deporting the survivors to another area. The ultimate goal of these acts was to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes.

750. This tragedy carried out in a small village reflects in a microcosm the much wider tensions, conflicts and hatreds which have, since 1991, plagued the former Yugoslavia and caused so much suffering and bloodshed. In a matter of a few months, persons belonging to different ethnic groups, who used to enjoy good neighbourly relations, and who previously lived side by side in a peaceful manner and who once respected one another's different religious habits, customs and traditions, were transformed into enemies. Nationalist propaganda gradually fuelled a change in the perception and self-identification of members of the various ethnic groups. Gradually the "others", i.e. the members of other ethnic groups, originally perceived merely as "diverse", came instead to be perceived as "alien" and then as "enemy"; as potential threats to the identity and prosperity of one's group. What was earlier friendly neighbourly coexistence turned into persecution of those "others".



751. Persecution is one of the most vicious of all crimes against humanity. It nourishes its roots in the negation of the principle of the equality of human beings. Persecution is grounded in discrimination. It is based upon the notion that people who share ethnic, racial, or religious bonds different to those of a dominant group are to be treated as inferior to the latter. In the crime of persecution, this discriminatory intent is aggressively achieved by grossly and systematically trampling upon the fundamental human rights of the victim group. Persecution is only one step away from genocide – the most abhorrent crime against humanity - for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of members of the group. In the crime of genocide the criminal intent is to destroy the group or its members; in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental human rights. In the present case, according to the Prosecution - and this is a point on which the Trial Chamber agrees - the killing of Muslim civilians was primarily aimed at expelling the group from the village, not at destroying the Muslim group as such. This is therefore a case of persecution, not of genocide.

752. The fact that in this area of Bosnia and Herzegovina, the armed conflict frequently took the form of persecution is vividly depicted in the words of one Muslim woman mentioned by one of the witnesses in this trial. "I do not fear the shells and bombs that may fall on my house," she said. "They do not ask for my name. I fear the foot soldiers who break into my house and kill and wound in a very personal way and commit atrocities in front of the children". The main target of these attacks was the very identity – the very humanity – of the victim.

753. The "personal violence" most feared by this Muslim woman is that which is carried out against other human beings solely upon the basis of their ethnic, religious or political affiliation. It is persecutory violence.

754. The massacre carried out in the village of Ahmi}i on 16 April 1993 comprises an individual yet appalling episode of that widespread pattern of persecutory violence. The tragedy which unfolded that day carried all the hallmarks of an ancient tragedy. For one thing, it possessed unity of time, space and action. The killing, wounding and burning

took place in the same area, within a few hours and was carried out by a relatively small group of members of the Bosnian Croatian military forces: the HVO and the special units of the Croatian Military Police, the so-called Jokers. Over the course of the several months taken up by these trial proceedings, we have seen before us, through the narration of the victims and the survivors, the unfolding of a great tragedy. And just as in the ancient tragedies where the misdeeds are never shown but are only recounted by the actors, numerous witnesses have told the Trial Chamber of the human tragedies which befell so many of the ordinary inhabitants of that small village.

755. Indisputably, what happened on 16 April 1993 in Ahmi}i 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 us all shudder with horror and shame: Dachau, Oradour sur Glâne, Katijn, Marzabotto, Soweto, My Lai, Sabra and Shatila, and so many others.

756. To be sure, the primary task of this Trial Chamber was not to construct a historical record of modern human horrors in Bosnia and Herzegovina. The principal duty of the Trial Chamber was simply to decide whether the six defendants standing trial were guilty of partaking in this persecutory violence or whether they were instead extraneous to it and hence, not guilty.

757. At the end of the trial, we have come to the conclusion that, with the possible exception of one of the accused, this Trial Chamber has not tried the major culprits, those most responsible for the massacre of 16 April 1993, those who ordered and planned, and those who carried out the very worst of the atrocities against innocent civilians.

758. We thus had to confine ourselves to the six persons accused by the Prosecutor before our Trial Chamber, to determine whether and to what extent they participated in the crimes perpetrated in Ahmi}i. Our task has not been easy. More than six years after those events – events that occurred far away from The Hague – we have had to shoulder the heavy burden of establishing incredible facts by means of credible evidence.

759. We have now accomplished our arduous task and our findings, on the evidence before us, are as follows.

**B. Existence of an Armed Conflict**

760. The attack on Ahmi}i was undertaken as part of the beginning of the Croat-Muslim war and is thus sufficiently closely related to an armed conflict. The attack was not a single or unauthorised event brought about by rogue factions of the HVO or the Military Police. It was part of an overall campaign in the La{va River Valley, intended to bring about "ethnic cleansing" through a systematic and widespread attack as a pre-condition of unrestricted Croat dominance over the area, promoted or at least condoned by the HVO and Military Police, and more generally, by the leadership of Croatia.

The reason for this forced expulsion was the achievement of territorial homogeneity by the Croats. The Muslims were identified as the group that was to be expelled.

**C. The Persecutory Nature of the Croatian Attack on Ahmi}i on 16 April 1993 -  
Ahmi}i as an undefended village**

761. The entirety of the evidence brought before the Trial Chamber shows that the attack by the Croats was a planned and highly organised operation. The use of different classes of heavy weaponry such as rocket launchers and anti-aircraft guns proves that it was not only an operation by a special purpose unit like the Jokers, who did not dispose of such an arsenal, but that the HVO as a professional army was itself actively involved in the attack. The Trial Chamber is satisfied that there were no significant military units or installations of the BiH present in the area of the village at the time of the attack, but that the HVO and Military Police actually exploited the absence of the BiH for a surprise attack on the village.

762. The Trial Chamber also finds beyond reasonable doubt that the attack was not a military combat operation such as a pre-emptive defensive strike against a threat of Muslim armed aggression. On the contrary, the aim of the attack was the forced expulsion of the Muslim population from the area, as from the entire La{va River Valley. The attack was carried out in an indescribably cruel manner, sparing not even the lives of

women and small children. The many bodies of civilians found in the village after the attack, especially those of very young children, the wholesale destruction of Muslim - and only of Muslim – houses and even the destruction of the livestock of the Muslim families, do not match the picture the Defence tried to paint, which was that of a military battle between two armies. In such a case it would have been highly improbable that it was almost exclusively Muslim persons who were killed and Muslim houses destroyed. In a pitched battle between two armies the so-called collateral damage on both sides would have been divided more evenly. Nor does the concept of a military combat engagement accord with the fact that the houses of Muslim civilians were broken into and the male members of military age pulled out and executed. Above all the intentional killing of children, at least one of which was only three months old, cannot be reconciled with the view that this was an action demanded and guided by strategic or tactical necessities. In sum, the damage and harm inflicted by the Croats on the Muslim civilian population was not collateral; it was the primary purpose of the attack.

763. The herding together of the Muslims, who had survived the killing and shooting, during and after the attack, and their ensuing detention at places such as the Dubravica school, underlines the Croatian objective of making sure that no Muslim was left free to live in the village. The systematic burning of the Muslim houses is proof of a “scorched-earth” policy on the part of the Croats, done in order to further the aim that, as one witness put it, “no Muslim foot shall tread this soil”.

764. The Defence’s claim that Ahmi}i was not an undefended village must thus be rejected as completely unfounded.

#### **D. Irrelevance of Similar Conduct by Muslims against Croats in Other Villages**

765. As pointed out above in the section on the applicable law, in international law there is no justification for attacks on civilians carried out either by virtue of the *tu quoque* principle (i.e. the argument whereby the fact that the adversary is committing similar crimes offers a valid defence to a belligerent’s crimes) or on the strength of the principle of reprisals. Hence the accused cannot rely on the fact that allegedly there were also atrocities committed by Muslims against Croatian civilians.

## E. The Accused

### 1. Dragan Papi}

766. Dragan Papi} was charged under count 1 with persecution as a crime against humanity under Article 5(h) of the Statute.

767. The accused Dragan Papi} was mobilised in the HVO during some of the time relevant to this indictment although his precise role is not clear. He wore a uniform and carried a rifle in the village. In relation to the armed conflict on 20 October 1992, the Prosecution relies on one crucial witness, Mehmed Ahmi}, who identified the accused as shooting from his house early in the morning and firing an anti-aircraft machine gun in the afternoon. This witness's evidence is not accepted by the Trial Chamber. That the accused participated in the armed conflict that day has not been proved

768. In relation to the armed conflict on 16 April 1993, the Trial Chamber does not find that it can rely on the evidence of Witness G. Witness G was an honest witness who had been through a dreadful ordeal on 16 April. However, he was under the most stressful conditions imaginable and there must be some doubt about the accuracy of his identification of Dragan Papi}. None of the remaining Prosecution evidence is sufficient to establish that Dragan Papi} was an active participant in the conflict.

769. Therefore, the Trial Chamber finds that there is reasonable doubt as to whether Dragan Papi} participated in the conflict that day, and accordingly finds the accused **not guilty** under **count 1**.

### 2. Zoran Kupre{ki}

#### (a) Count 1

770. The accused, together with his brother Mirjan Kupre{ki}, was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute under count 1 of the indictment.

771. The Trial Chamber has defined the *actus reus* of persecution under Article 5(h) of the Statute as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 of the Statute. As a crime against humanity the common prerequisites of a link with an armed conflict, a widespread or systematic attack on a civilian population in furtherance of a systematic policy, and the grave nature of the offences also apply. The requisite *mens rea* is the intent to discriminate, to attack persons on account of their racial or religious characteristics or political affiliation as well as knowledge of the widespread or systematic nature of the attack on civilians.

772. The mode of participation in the wider sense under Article 7(1) of the Statute and as charged in the indictment is either direct commission by the accused, i.e. as the sole perpetrator or as a co-perpetrator, or as an aider and abettor. The definition for both categories was recently given by the Appeals Chamber in its Judgement in *Tadić* of 15 July 1999.<sup>981</sup> Co-perpetration requires a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute and participation of the accused in the common design. As far as *mens rea* is concerned, what is required is the intent to perpetrate a certain crime as the shared intent on the part of all co-perpetrators. An aider and abettor as opposed to a principal perpetrator carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime; this support must have a substantial effect upon the perpetration of the crime. The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.

773. The Trial Chamber is satisfied that the accused was an active member of the HVO. Zoran Kupreški} was a local HVO Commander and his activities were not limited to assigning village guard duties. Zoran Kupreški} took part in the oath-taking ceremony and was present on duty on the front line as stated by Witness JJ in her testimony. The

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<sup>981</sup> *Tadić*, Appeal Chamber Judgement, 15 July 1999 at para. 227-228.

Trial Chamber accepts the evidence of Witness B and Abdulah Ahmi} in relation to the negotiations for the return of the Muslims after the conflict of 20 October and finds that Zoran Kupreški}'s role in these negotiations was more active than he himself admitted. Finally, the Trial Chamber notes that Zoran Kupreški}, as a reserve officer and in charge of a maintenance unit at work, was used to the exercise of authority. The accused did know of the planned attack on the village the next morning, for which preparations were already under way, and was ready to play a part in it.

774. With regard to the alleged participation of the accused in murder and arson at the house of Witness KL on 16 April 1993, the Trial Chamber has already analysed that witness's evidence and found it wanting in credibility. Thus, there is no reliable evidence that the accused, together with his brother Mirjan, participated in the crimes at the house of Witness KL. The Trial Chamber, having heard the evidence of Jozo Alilovi}, is not satisfied as to the accuracy of Witness C's identification of the accused, given the stressful conditions under which it was made and the appalling ordeal to which the young Witness C had been subjected.

775. As to the murders and arson at the house of Suhret Ahmi}, the Trial Chamber has already analysed the evidence of Witness H, and is in no doubt that she was a truthful and accurate witness of events on 16 April. The Trial Chamber places no reliance on the statements of Witness SA.

776. Zoran Kupre{ki}, together with his brother Mirjan Kupreški}, was in the house of Suhret Ahmi} immediately after he and Meho Hrstanovi} were shot and immediately before the house was set on fire, as part of the group of soldiers who carried out the attack.

777. The Trial Chamber accepts that Zoran Kupreški} admitted to Witness JJ that the Jokers had been firing on fleeing civilians and that under threat, he himself had fired into the air.

778. The Trial Chamber rejects the evidence of the accused and his witnesses to the effect that he took no part in the crimes alleged and was elsewhere when they took place.

779. In summary, the Trial Chamber concludes that Zoran Kupreški, together with his brother Mirjan, participated in the attack on Ahmići on 16 April 1993 as a soldier in the HVO. Zoran Kupreški, together with his brother Mirjan Kupreški, was present as an attacker on that day and actively involved in the events. It can be safely inferred that he also provided local knowledge to the HVO and Military Police not familiar with the situation of the village, and entered the house and expelled the family of Suhret Ahmić. Zoran Kupreški, as the local HVO Commander, played the more leading role.

780. On the basis of his participation in the events from October 1992 until 16 April 1993, as outlined above, the Trial Chamber finds that the accused attacked his Muslim neighbours solely due to their ethnicity and with the aim of cleansing the village of any Muslim inhabitants.

781. The accused, together with his brother Mirjan, in a gross and blatant manner denied his Muslim fellow citizens their fundamental rights to life, freedom of movement and free enjoyment of their family life and property, all against the background of numerous killings, woundings etc. committed by the HVO and the Military Police. His actions and their consequences are of such a heinous nature that there can be no dispute that they match in gravity the other offences commonly included under Article 5 of the Statute. The civilian character of the victims cannot seriously be called into question.

782. The accused acted as a co-perpetrator, together with his brother Mirjan Kupreški, within the meaning of Article 7(1) of the Statute, because he adhered to a common plan for the execution of the cleansing campaign in the village, which by necessity was a highly coordinated effort and required full prior knowledge of the intended activities and subordination to a common plan of action.

783. There can be no doubt on the basis of the circumstances proven that the accused was aware of the wider background to the attack mentioned above, especially with respect to the connection with the beginning of a large-scale armed conflict against the BiH, and that the main if not sole motivation for his participation was the forced expulsion of Muslims from the Lašva River Valley region, thus displaying a clear discriminatory intent. From this it follows that the accused was aware that he would not



engage in a battle between military units, but would be attacking helpless and unprepared civilians.

784. Accordingly the Trial Chamber finds Zoran Kupreški} **guilty** of persecution as a crime against humanity under Article 5(h) of the Statute under **count 1** of the indictment.

(b) Counts 2 - 11

785. The accused, together with his brother Mirjan Kupreški}, was charged with murder, inhumane acts as crimes against humanity under Article 5(a), (i) and cruel treatment under Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions under counts 2 – 11 of the indictment.

786. As to these counts, pertaining to the attack on the family of Witness KL, the Trial Chamber finds on the basis of the evidence before it, as set out above, that it is not satisfied beyond reasonable doubt that the accused was present at the scene of the crime and thus cannot draw any inference as to his possible participation in these events.

787. The Trial Chamber thus finds the accused Zoran Kupreški} **not guilty** with regard to **counts 2 – 11**.

3. Mirjan Kupreški}

(a) Count 1

788. The accused, together with his brother Zoran Kupreški}, was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute under count 1 of the indictment.

789. Mirjan Kupreški} was an active member of the HVO. This finding is based on the HVO Register and is to be inferred from his activities on 16 April 1993 described above under the heading of his brother Zoran.

790. With regard to his involvement in the activities from October 1992 until 16 April 1993, the Trial Chamber refers to the facts set out above with regard to his

brother, Zoran Kupre{ki}. They were all committed together with the accused Mirjan Kupre{ki} and thus apply *mutatis mutandis* to him. The same is true for the requisite *mens rea* of the accused.

791. Accordingly the Trial Chamber finds Mirjan Kupre{ki} **guilty** of persecution as a crime against humanity under Article 5(h) of the Statute under **count 1** of the indictment.

(b) Counts 2 - 11

792. The accused, together with his brother Zoran, was charged with murder, inhumane acts as crimes against humanity under Article 5(a), (i) and cruel treatment under Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions under counts 2 – 11 of the indictment.

793. As to these counts, pertaining to the attack on the family of Witness KL, the Trial Chamber finds on the basis of the evidence before it, as set out above, that it is not satisfied beyond reasonable doubt that the accused was present at the scene of the crime and thus cannot draw any inference as to his possible participation in the events.

794. The Trial Chamber finds the accused Mirjan Kupre{ki} **not guilty** with regard to **counts 2 – 11**.

4. Vlatko Kupre{ki}

(a) Count 1

795. Under count 1 the accused was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

796. Prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice. In 1992-1993, Vlatko Kupreški} was a member of the police, namely an "Operations Officer for the Prevention of Crimes of Particular State Interest", with the rank of Inspector 1<sup>st</sup> Class. The accused was not merely concerned to make inventories of supplies for the police, as he instead claims. He was unloading

weapons from a car in front of his house in October 1992 and April 1993 and was again seen there on the afternoon of 15 April 1993.

797. With regard to the evidence of the accused that he did not return to Ahmi}i on 15 April until the evening when he got back from the trip to Split, the Trial Chamber accepts the prosecution evidence that he was seen in Ahmi}i during the morning of 15 April, at the Hotel Vitez and during the afternoon and in the early evening in the vicinity of soldiers who were at his house.

798. The Trial Chamber also accepts the testimony given by the prosecution witnesses in relation to the troop activity in and around the accused's house on the evening of 15 April, which is also confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreški} houses.

799. Vlatko Kupreški} was involved in the preparations for the attack on Ahmi}i in his role as police operations officer and as a resident of the village. He allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before.

800. With regard to the shooting of the Pezer family, those responsible for these crimes were a group of soldiers standing in front of Vlatko Kupreški}'s house. However, the Trial Chamber is not satisfied that Vlatko Kupreški} was among them. Only one witness identified the accused, Witness Q, at a distance of over 50 metres: a distance at which a witness is as likely to be mistaken as not. In the absence of confirmation of the correctness of this identification the Trial Chamber is not able to be sure that it is correct. That Vlatko Kupreški} was present when these crimes were committed is thus not proven.

801. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, of the accused being in the vicinity of Suhret Ahmi}'s house at about 5.45 a.m., and shortly after the latter was murdered. The Trial Chamber finds that this identification was correct and that Vlatko Kupreški} was in the vicinity shortly after the attack on Suhret Ahmi}'s house. There is no further evidence as to what the accused was doing there, but he was present, ready to lend assistance in

whatever way he could to the attacking forces, for instance by providing local knowledge.

802. The evidence of the accused and his witnesses as to his non-participation in the conflict is not credible.

803. Vlatko Kupre{ki} helped prepare and supported the attack carried out by the other accused, the HVO and Military Police, by unloading weapons in his store and by agreeing to the use of his house as a strategic point and staging area for the attacking troops. His role is thus not quite as prominent as that of the other accused, which is why the Trial Chamber finds that he merely supported the actions of the others, conduct which must be subsumed under aiding and abetting and not under co-perpetration. The accused had the requisite *mens rea*, as he was aware that his actions would substantially and effectively assist the attackers in their activities, that he would help them in carrying out their mission of cleansing Ahmi}i of its Muslim inhabitants. He also knew that the attack would not be a battle between soldiers, but that the Muslim civilians of his own village would be targeted.

804. Accordingly the Trial Chamber finds the accused **guilty** under **count 1** of aiding and abetting persecution as a crime against humanity pursuant to Article 5 (h) of the Statute.

(b) Counts 12 – 15

805. Under counts 12 – 15, the accused was charged with murder and inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, and with murder and cruel treatment as a violation of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

806. With respect to these counts, the Trial Chamber finds that it cannot be satisfied beyond reasonable doubt that the accused was present at the scene of the crime, and cannot draw any inference as to his involvement in the events.

807. The Trial Chamber therefore finds the accused **not guilty** with regard to **counts 12 to 15**.

5. Drago Josipovi}

(a) Count 1

808. The accused, together with Vladimir [anti}, was charged under count 1 with persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

809. Drago Josipovi} was a member of the HVO prior to 16 April 1993; he was a member of the village guard and was seen in the village in uniform and with a rifle.

810. As to the direct participation of the accused in the conflict on 16 April 1993, the Trial Chamber accepts the evidence of Witness EE, who identified him, together with the accused Vladimir [anti}, as a participant in the attack on her house when her husband was murdered. The Trial Chamber finds that Drago Josipovi} participated in the attack on the Pu{cul house: he was part of the group of soldiers who attacked and burned the house and murdered Musafar Pu{cul.

811. Drago Josipovi} also participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14 year old son were killed. This was not charged as a separate count in the indictment, nor did the Prosecutor request after the commencement of the trial to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge. Consequently, in light of the principle set out above in the part on the applicable law, these facts cannot be taken into account by the Trial Chamber as forming the basis for a separate and specific charge. They constitute, however, relevant evidence for the charge of persecution. The Trial Chamber is satisfied that Witness DD accurately identified the accused, and that the witness accurately described the role played by the accused in the attack and that he was, in fact, in a position of command with regard to the troops involved.

812. Having heard the evidence of Witness CB, the Trial Chamber is, however, not satisfied that Drago Josipovi} participated in the attack on the house of Fahrhan Ahmi}.

The Trial Chamber accepts the evidence of Witness Z concerning the presence of the accused leading soldiers near the Ogrjev plant on the afternoon of 16 April.

813. The Trial Chamber rejects the evidence put forward by Drago Josipovi} of him spending the day moving around the locality to very little apparent purpose. The truth is that he was armed and active, playing his full part in the attacks on his neighbours, sometimes having command over a group of soldiers.

814. The Trial Chamber concludes therefore that Drago Josipovi} participated in the murder of Musaf{er Pu{cul, participated in the attack on the house of Nazif Ahmi} and was actively involved in the burning of private property. On this basis, the Trial Chamber finds that the accused, together with Vladimir [anti}, was present at the scene of the crime as part of a group that went to the house with the common intent to kill and/or expel its inhabitants and to set it on fire. He did this solely because the victims were Muslims, for the same reasons set out above with respect to Mirjan and Zoran Kupre{ki}. The accused was aware that he would be attacking unarmed and helpless civilians, and that this attack was part of the beginning of a large-scale campaign of "ethnic cleansing" of Muslims from the La{va River Valley.

815. These actions fulfil the requirements of persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

816. The Trial Chamber therefore finds the accused **guilty** of persecution as a crime against humanity pursuant to Article 5(h) of the Statute under **count 1**.

(b) Counts 16 - 19

817. The accused was charged under counts 16 to 19 with murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, as well as murder and cruel treatment as violations of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

818. Murder under Article 5(a) of the Statute comprises the death of the victim as a result of the acts or omissions of the accused. Moreover, the conduct of the accused must

be a substantial cause of the death of the victim. The offence requires the intent to kill or the intent to inflict serious injury in reckless disregard of human life. Inhumane acts under Article 5(i) of the Statute are intentional acts or omissions which infringe fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes covered by Article 5.

819. The accused, even though he may not himself have killed Musafër Puçul, by his active presence in the group, together with Vladimir [anti], has fulfilled the *actus reus* of murder as a co-perpetrator. The same applies for the suffering caused to the family by being forced to witness the murder of Musafër Puçul, being expelled from their family home and having their home destroyed. These acts clearly constitute the *actus reus* of other inhumane acts.

820. Drago Josipović, as may be safely inferred from his actions, had the requisite intent both for murder and inhumane acts. He knew that the inhabitants of that house were going to be killed, and if not killed then at least expelled and their house burned down. That witnessing the death of a loved one and the loss of the family home would cause serious mental suffering was equally obvious to the accused when he embarked upon his crimes. He also acted in pursuance of a common design together with the accused Vladimir [anti]. This is borne out by his actions described under count 1. The accused also had the requisite *mens rea*.

821. As stated above with regard to multiple charges in the part on the applicable law, Article 5(a) and (i), as crimes against humanity, protect different values and interests and may be charged cumulatively. This also applies to charging these acts under Article 5(h) as persecution.

822. The Trial Chamber accordingly finds the accused **guilty** of murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute under **counts 16 and 18**.

823. By contrast, the Trial Chamber finds that counts 17 and 19 were improperly charged cumulatively with the more serious offences under Article 5 of the Statute. As pointed out above in the part on the applicable law, Article 3 of the Statute, as far as

murder and cruel treatment are concerned, protects the same interests as Article 5(a) and (i). However, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime and must therefore prevail.

824. For reasons of law, the Trial Chamber therefore finds the accused **not guilty** with regard to **counts 17 and 19**.

#### 6. Vladimir [anti]

825. The accused, together with Drago Josipovi}, was charged under count 1 with persecution as a crime against humanity pursuant to Article 5(h) of the Statute

826. Vladimir Šanti} in April 1993 was the commander of the 1<sup>st</sup> Company of the 4<sup>th</sup> Battalion of the Military Police. He was also Commander of the Jokers.

827. As was described with respect to the accused Drago Josipovi}, Vladimir [anti], together with the latter, participated in the murder of Musafet Pu{cul and the burning of his house. In addition, from his position as a company commander of the Military Police and commander of the Jokers, it can be safely inferred that he passed on the orders of his superiors to his men, and his presence on the scene of the attack also served as an added encouragement for his subordinates to abide by the orders they had received.

828. The Trial Chamber refers to the facts and the law explained above with respect to the accused Drago Josipovi}. They apply *mutatis mutandis* to the accused Vladimir [anti}.

829. The Trial Chamber accordingly finds the accused **guilty** of persecution as a crime against humanity pursuant to Article 5(h) of the Statute under **count 1**.



(a) Counts 16 – 19

830. Under counts 16 to 19, the accused, together with Drago Josipovi}, was charged with murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, as well as murder and cruel treatment as violations of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

831. The Trial Chamber refers to the facts and the law set out above with respect to the accused Drago Josipovi}. They apply *mutatis mutandis* to the accused Vladimir [anti}.

832. The Trial Chamber accordingly finds the accused **guilty** of murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute under **counts 16 and 18**.

833. For reasons of law, the Trial Chamber therefore finds the accused **not guilty** with regard to **counts 17 and 19**.

## VII. SENTENCING

### A. Introduction

834. The Trial Chamber will proceed to sentence each of the accused pursuant to the findings of guilt pronounced.

835. The Prosecutor made submissions regarding sentence in her Closing Brief, filed on 5 November 1999, as well as oral submissions in the hearing of 9 November 1999. Written submissions on sentencing were made on behalf of the following accused: Zoran Kupre{ki},<sup>982</sup> Dragan Papi,<sup>983</sup> Mirjan Kupre{ki},<sup>984</sup> Vladimir Šanti,<sup>985</sup> and Drago Josipovi.<sup>986</sup> No express written submissions on sentencing were made on behalf of Vlatko Kupre{ki}.<sup>987</sup> No oral submissions were made on behalf of any of the accused.<sup>988</sup>

### B. Sentencing Provisions

836. The Statute and the Rules contain certain provisions relating to sentencing that are to be considered by the Trial Chamber.

837. Article 23 ("Judgement") of the Statute provides that "[t]he Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law". Article 24 of the Statute and Rule 101 of the Rules of Procedure and Evidence deal with the penalties a Trial Chamber may impose.

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<sup>982</sup> Closing Argument of the Counsel of the Accused Zoran Kupre{ki}, filed on 5 Nov. 1999.

<sup>983</sup> Defence's Closing Brief, filed on 5 Nov. 1999.

<sup>984</sup> *Idem*.

<sup>985</sup> The Defence Final Trial Brief for the Accused Vladimir Šanti, filed on 5 Nov. 1999, p 65.

<sup>986</sup> Closing Argument of the Counsel of the Accused Drago Josipovi, filed on 5 Nov. 1999, p 60.

<sup>987</sup> The Defence Closing Brief for the Accused Vlatko Kupre{ki}, filed on 5 Nov. 1999.

<sup>988</sup> In the case of Zoran Kupre{ki}, it was submitted that no arguments in mitigation need be made since the innocence of the accused is presumed: T. 12763.

838. Read together, Article 24 and Rule 101, as supplemented by Rule 85(A)(vi), allow for factors other than those expressly mentioned to be considered when determining the proper sentences to be imposed.

### C. Factors to be Considered in Sentencing

#### 1. SFRY Criminal Code Provisions

839. Pursuant to Article 24(1) of the Statute, the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" in determining the terms of imprisonment. Rule 101(B) also requires the Trial Chamber to "take into account" such general practice.

840. It is clear from these provisions - in particular the phrase "have recourse to" and "take into account" - that the Trial Chamber is not bound to follow the sentencing practice of the courts of the former Yugoslavia. Reference should be made to the said sentencing practice as an aid in determining the sentences to be imposed by the Trial Chamber.

841. In general terms, Article 41 ("General principles in determining punishment") of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") sets out the various factors to be taken into account in determining sentence.<sup>989</sup> This Article is essentially similar to the sentencing provisions of the Statute and the Rules of the International Tribunal.

842. Articles 38, 48 and 142 of the SFRY Criminal Code should also be considered. Article 38 ("Imprisonment") of the SFRY Criminal Code reads in part:

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<sup>989</sup> In particular, Art. 41(1) of the SFRY Criminal Code provides: "The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, bearing in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment (mitigating and aggravating circumstances), and in particular: the degree of criminal responsibility; motives for the commission of the offence; the severity of threat or injury to the protected value; circumstances of the commission of the offence; the perpetrator's previous conduct; the perpetrator's personal circumstances and his behaviour subsequent to the commission of the offence; as well as other circumstances relating to the perpetrator".

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.

(2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.

(3) For premeditated criminal acts for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute.

[...]

(6) A convicted person who has served half of his term of imprisonment, and exceptionally a convicted person who has served a third of his term, may be excused from serving the rest of his term on the condition that he does not commit a new criminal act by the end of the period encompassed by his sentence.

Capital punishment was abolished by constitutional amendment in 1977 in some of the republics of the SFRY other than Bosnia and Herzegovina. Since then, the maximum sentence has been 20 years imprisonment.<sup>990</sup> A 20 year prison sentence may only be imposed for the most serious types of criminal offences.<sup>991</sup>

843. Article 48 ("Combination of criminal acts") of the SFRY Criminal Code deals with the question of punishment of offenders found guilty of several offences.<sup>992</sup>

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<sup>990</sup> Official Gazette of the FRY, no. 37 of 16 July 1993, p. 817, *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1193; *Tadi}*, Sentencing Judgement, 14 July 1997, para. 7.

<sup>991</sup> *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1206.

<sup>992</sup> Art. 48 of the SFRY Criminal Code provides: (1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.

(2). The single sentence shall be imposed according to the following rules:

i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

iii) if sentences of imprisonment are determined for concurrent criminal offences, the single sentence shall be greater than each individual sentence determined, but it shall not be greater than the sum of the sentences determined, nor shall it be greater than a term of imprisonment of fifteen years;

844. Chapter Sixteen of the SFRY Criminal Code is entitled "Criminal Acts Against Humanity and International Law". Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code falls within the said Chapter, and it provides the following:

Whosoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack on civilian populations, an inhabited area, individual civilian persons or persons *hors de combat* which results in death, serious injury or serious deterioration of health [... or], causing immense suffering or a violation of bodily integrity or health; displacement or resettlement [...]; forcible prostitution or rape; introduction of measures of intimidation and terror, [...], imposing collective punishment, [...]; confiscation of property, plunder of property belonging to the civilian population, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military necessity, [...] or whosoever commits any of the foregoing acts, shall be punished by imprisonment of not less than five years or by the death penalty.

845. As has been held in the *Tadić* Sentencing Judgement, this Article gives effect in the former Yugoslavia to the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its Protocols, which is incorporated into the jurisdiction of the International Tribunal by Article 2 ("Grave breaches of the Geneva Conventions of 1949") of the Statute.<sup>993</sup> There appear to be no provisions of the SFRY Criminal Code which give specific effect to those crimes against humanity referred to in Article 5 ("Crimes against humanity") of the Statute. However, genocide, itself a specific category of crime against humanity, is dealt with in Article 141 of the SFRY Criminal Code.<sup>994</sup> Article 141 also prescribes imprisonment for not less than five years or the death penalty. Further, Article 154 of the SFRY Criminal Code deals with racial and other discrimination, which, in some respects, could be said to relate to the counts on persecution as a crime against humanity. Article 154(1) reads as follows:

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iv) if sentences of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

<sup>993</sup> *Tadić*, Sentencing Judgement, 14 July 1997, para. 8.

<sup>994</sup> *Idem*.

Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.

846. As has already been made clear, the provisions of the SFRY Criminal Code serve as a guide. In particular, the Trial Chamber is not bound to impose a maximum sentence of 20 years imprisonment only. According to Rule 101, the Trial Chamber may impose a sentence of life imprisonment.

847. Article 33 of the SFRY Criminal Code provides for three reasons for the imposition of sentences, namely,

- (1) preventing the offender from committing criminal acts and his rehabilitation;
- (2) deterrent effect upon others not to commit criminal acts;
- (3) [...] influence on the development of the citizens' social responsibility and discipline.

## 2. General Sentencing Policy of the International Tribunal

848. The Trial Chamber is of the view that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences in cases before the International Tribunal. As regards the former, despite the primitive ring that is sometimes associated with retribution,<sup>995</sup> punishment for having violated international humanitarian law is, in light of the serious nature of the crimes committed, a relevant and important consideration. As to the latter, the purpose is to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons worldwide from committing crimes in similar circumstances against international humanitarian law.<sup>996</sup> The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done

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<sup>995</sup> *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1231.

<sup>996</sup> *Ibid.*, at para. 1234; *Furundžija*, Judgement, 10 Dec. 1998, para. 288.

in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice.

849. The Trial Chamber also supports the purpose of rehabilitation for persons convicted in the hope that in future, if faced with similar circumstances, they will uphold the rule of law.

### 3. Factors Relevant to Sentencing in Respect of Each Accused

850. The Trial Chamber will next consider the various factors which influence the determination of appropriate sentences for each accused convicted, in accordance with the provisions of Article 24 of the Statute and Rule 101 of the Rules of Procedure and Evidence.

#### (a) Zoran Kupre{ki} and Mirjan Kupre{ki}

851. Zoran Kupre{ki} and Mirjan Kupre{ki} have been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute).

852. The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. Zoran and Mirjan Kupre{ki} have been found guilty of persecution in the form of the expulsion of Muslim civilians, including women and children from Ahmi}-[anti}i and its environs, the destruction of Bosnian Muslim homes and property and their active presence in the area whilst armed. In particular, they entered the house and expelled the family of Suhret Ahmi}. This is in spite of the fact that even as late as March 1993 both attended Muslim holiday celebrations. Of the two accused, Zoran Kupre{ki} played a more leading role as the local commander.

853. The fact that Zoran Kupre{ki} and Mirjan Kupre{ki} voluntarily surrendered to the International Tribunal on 6 October 1997 is a factor in mitigation of their sentence.

(b) Vlatko Kupre{ki}

854. Vlatko Kupre{ki} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute).

855. Vlatko Kupre{ki} has been found guilty of persecution in the form of aiding and abetting, by helping in the preparation of the attack on Ahmi}i, such as unloading weapons in his store and allowing his house to be used in the attack. He was also present near the house of Suhret Ahmi}, shortly after the attack on the latter's house. Thus he was clearly supportive of the attack.

856. It is noted that prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice.

857. Unlike the other accused, Vlatko Kupre{ki} did not surrender to the International Tribunal. He was arrested on 18 December 1997. During the arrest there was an exchange of fire with the arresting forces.

(c) Drago Josipovi}

858. Drago Josipovi} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute); Count 16 (murder as a crime against humanity under Article 5(a) of the Statute); and Count 18 (other inhumane acts as a crime against humanity under Article 5(i) of the Statute).

859. As far as persecution is concerned, Drago Josipovi} played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region. In particular, Drago Josipovi} participated in the attack on the Pušcul house, during which the house was burnt down and Musafet Pušcul was killed and the family was expelled from their home after having been forced to witness the murder of Musafet Pušcul. He also participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14-year old son were killed and he was actively involved in the burning of private property.



The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape.

860. In mitigation, the evidence shows that Drago Josipovi} lent an HVO army vest to Mr. Osmanovi}, a Muslim, to assist him to escape. During the attack on 16 April he stopped other soldiers from killing Witness DD. Another factor in mitigation is that he voluntarily surrendered to the International Tribunal on 6 October 1997.

(d) Vladimir [anti}

861. Vladimir [anti} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute); Count 16 (murder as a crime against humanity under Article 5(a) of the Statute); and Count 18 (other inhumane acts as a crime against humanity under Article 5(i) of the Statute).

862. Concerning the conviction on the persecution count, Vladimir Šanti}'s role was most serious, since he was a commander, who assisted in the strategic planning of the whole attack. He also passed on orders from his superiors to his subordinates, which amounted to the reissuing of the orders that were illegal in the circumstances. This role renders particularly grave his participation in the offences committed. Furthermore, he played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region. In particular, Vladimir [anti} participated in the attack on the Pu{cul house, during which the house was burnt down, Musafer Pu{cul was killed and the family was expelled from their home after having been forced to witness the murder of Musafer Pu{cul. The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape.

863. Vladimir Šanti} voluntarily surrendered to the International Tribunal on 6 October 1997 which is treated by the Trial Chamber as a mitigating circumstance.

**D. The Sentence to be Imposed for a Multiple Conviction**

864. Drago Josipovi} and Vladimir [anti} have been convicted on more than one count.

865. The Trial Chamber has dealt with the problems relating to multiple convictions above. Here it will suffice to say the following: Article 48 of the SFRY Criminal Code, on the one hand, provides for the imposition of a single or composite sentence where an accused has been convicted for more than one criminal act based on the commission of one deed or several deeds. It also provides that a court shall first assess the sentence for each of the criminal acts before determining the composite sentence.

866. Where an accused has been convicted on more than one count based on the commission of one or several deeds, the practice of the International Tribunal, on the other hand, has been to impose sentences on each count to be served concurrently.<sup>997</sup>

867. In practice, there is no real difference in effect between the imposition of concurrent sentences for multiple sentences and one composite sentence for multiple offences. In the unlikely event of there being uncertainty about the length of the concurrent or consecutive sentences to be served, the State of imprisonment could approach the International Tribunal for clarification. Similarly, if a convicted person is eligible for pardon or commutation of sentences according to the law of the State of imprisonment, the State must inform the President of the Tribunal, who will determine whether pardon or commutation is appropriate. Further, in the event of a successful appeal on any count, there would be no problems with the sentences.

868. The Trial Chamber will thus follow the sentencing practice of the International Tribunal.

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<sup>997</sup> *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1286; *Tadi}*, Sentencing Judgement, 14 July 1997, para. 75; *Prosecutor v. Tadi}*, (IT-94-1-Tbis-R117), Sentencing Judgement, Trial Chamber, 11 Nov. 1999, (hereafter *Tadi}*, Sentencing Judgement II, 11 Nov. 1999), p. 17; *Furundžija*, Judgement, 10 Dec. 1998, paras. 292-296 and p. 112 (Disposition).

## VIII. DISPOSITION

### A. Sentences

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber finds, and imposes sentence, as follows.

#### 1. Dragan Papi}

With respect to the accused, Dragan Papi}:

Count 1: NOT GUILTY of a Crime against Humanity (persecution).

#### 2. Zoran Kupre{ki}

With respect to the accused, Zoran Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Zoran Kupre{ki} to **10** years' imprisonment.

Count 2: NOT GUILTY of a Crime against Humanity (murder).

Count 3: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 4: NOT GUILTY of a Crime against Humanity (murder).

Count 5: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 6: NOT GUILTY of a Crime against Humanity (murder).

Count 7: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 8: NOT GUILTY of a Crime against Humanity (murder).

Count 9: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 10: NOT GUILTY of a Crime against Humanity (other inhumane acts).

Count 11: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

3. Mirjan Kupre{ki}

With respect to the accused, Mirjan Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Mirjan Kupre{ki} to **8** years' imprisonment.

Count 2: NOT GUILTY of a Crime against Humanity (murder).

Count 3: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 4: NOT GUILTY of a Crime against Humanity (murder).

Count 5: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 6: NOT GUILTY of a Crime against Humanity (murder).

Count 7: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 8: NOT GUILTY of a Crime against Humanity (murder).

Count 9: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 10: NOT GUILTY of a Crime against Humanity (other inhumane acts).

Count 11: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

4. Vlatko Kupre{ki}

With respect to the accused, Vlatko Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Vlatko Kupre{ki} to **6** years' imprisonment.

Count 12: NOT GUILTY of a Crime against Humanity (murder).

Count 13: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 14: NOT GUILTY of a Crime against Humanity (other inhumane acts).

Count 15: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

5. Drago Josipovi}

With respect to the accused, Drago Josipovi}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **10** years' imprisonment.

Count 16: GUILTY of a Crime against Humanity (murder).

For murder as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **15** years' imprisonment.

Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 18: GUILTY of a Crime against Humanity (other inhumane acts).

For inhumane acts as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **10** years' imprisonment.

Count 19: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

6. Vladimir [anti}

With respect to the accused, Vladimir [anti}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **25** years' imprisonment.

Count 16: GUILTY of a Crime against Humanity (murder).

For murder as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **15** years' imprisonment.

- Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (murder).  
Count 18: GUILTY of a Crime against Humanity (other inhumane acts).

For inhumane acts as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **10** years' imprisonment.

- Count 19: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

### **B. Concurrence of Sentences**

The sentences of Drago Josipovi} and Vladimir Šanti} are to be served concurrently, *inter se*.

### **C. Credit for Time Served**

Pursuant to Rule 101(D) of the Rules, a convicted person is entitled to credit for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

#### **1. Zoran Kupre{ki}**

Zoran Kupre{ki} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Zoran Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Zoran Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

#### **2. Mirjan Kupre{ki}**

Mirjan Kupre{ki} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Mirjan Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Mirjan

Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

3. Vlatko Kupre{ki}

Vlatko Kupre{ki} was arrested on 18 December 1997. Accordingly, 24 months and 28 days shall be deducted from the sentence imposed on Vlatko Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Vlatko Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

4. Drago Josipovi}

Drago Josipovi} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Drago Josipovi}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Drago Josipovi}'s sentence, subject to the above-mentioned deduction, shall begin to run from today.

5. Vladimir [anti}

Vladimir [anti} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Vladimir [anti}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Vladimir [anti}'s sentence, subject to the above-mentioned deduction, shall begin to run from today.

**D. Enforcement of Sentences**

Pursuant to Article 27 of the Statute and Rule 103, Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} will serve their sentences in a State or States designated by the President of the International Tribunal.

The transfer of Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti}, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the final appeal by the Appeals Chamber. Until such time as their transfer is effected, Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} shall remain in the custody of the International Tribunal, in accordance with Rule 102.

**E. Immediate Release of Dragan Papi}**

Pursuant to Rule 99(A), the Trial Chambers orders the immediate release of Dragan Papi} from the United Nations Detention Unit. This order is without prejudice to any such further order as may be made by the Trial Chamber pursuant to Rule 99(B).

Done in English and French, the English text being authoritative.

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Antonio Cassese  
Presiding

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Richard May

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Florence Ndepele Mwachande Mumba

Dated this fourteenth day of January 2000,  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**



**ANNEX A - The Amended Indictment**

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER  
YUGOSLAVIA**

**Case: IT-95-16-PT**

**IN THE TRIAL CHAMBER**

**Before:** Judge Antonio Cassese, Presiding  
Judge Richard May  
Judge Florence Mumba

**Registrar:** Mrs. de Sampayo Garrido-Nijgh

**Date Filed:** 09 February 1998

**THE PROSECUTOR**

v.

**ZORAN KUPRE[KI]  
MIRJAN KUPRE[KI]  
VLATKO KUPRE[KI]  
DRAGO JOSIPOVI]  
DRAGAN PAPI]  
VLADIMIR [ANTI]  
also known as "VLADO"**

**AMENDED INDICTMENT**

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal, charges:

**ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO  
KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and  
VLADIMIR [ANTI]**

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS  
OF WAR**, as set forth below:

## **Background**

1. On 03 March 1992, Bosnia and Herzegovina declared its independence; it was recognised as an independent state by the European Council on 06 April 1992.
2. From at least 03 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside Bosnia and Herzegovina.
3. From at least October 1992 until at least the end of May 1993, the HZ-HB armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an armed conflict with the armed forces of the government of Bosnia and Herzegovina.
4. From the outset of hostilities in January 1993, the HVO systematically attacked villages chiefly inhabited by Bosnian Muslims in the Lašva River Valley Region in Central Bosnia and Herzegovina. These attacks resulted in the death and wounding of numerous civilians.
5. The persecution of Bosnian Muslim civilians escalated in frequency throughout the early part of 1993, culminating in simultaneous attacks throughout the Lašva River Valley Region on 16 April 1993.
6. On 16 April 1993, at approximately 0530 hrs., HVO forces attacked the town of Vitez and the nearby villages of Donja Ve-eriska, Sivrino Selo, [anti}i, Ahmi}i, Nadioci, Stara Bila, Ga-ice, Piri}i and Preo-ica. All the villages are within a ten kilometre radius from the village of Ahmi}i.
7. During the attacks, groups of HVO soldiers went from house-to-house killing and wounding Bosnian Muslim civilians and burning houses, barns and livestock. The offensive, which lasted several days, was a highly co-ordinated military operation involving hundreds of HVO troops.
8. When the HVO forces attacked the villages and towns in the Lašva River Valley on

16 April 1993, the village of Ahmi}i experienced significant killing and destruction. Located approximately five kilometres east of Vitez, Ahmi}i had a pre-attack population of approximately 466 inhabitants, with approximately 356 Bosnian Muslims and 87 Bosnian Croats. After the attack, there were no Bosnian Muslims left living in Ahmi}i.

9. ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] helped prepare the April attack on the Ahmi}i-[anti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-[anti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.
10. The HVO attack on Ahmi}i-[anti}i targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmi}i-[anti}i from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmi}i-[anti}i.
11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmi}i-[anti}i. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmi}i-[anti}i, along with two mosques.

### **The Accused**

12. ZORAN KUPRE[KI], son of Anto and brother of Mirjan, was born on 23 September 1958 in the village of Piri}i. He was a HVO soldier in the Ahmi}i

area. Before the war, he operated a business in Ahmi}i with his cousin, VLATKO KUPRE[KI] .

13. MIRJAN KUPRE[KI] , son of Anto and brother of Zoran, was born on 21 October 1963 in the town of Vitez. He was a HVO soldier in the Ahmi}i area, together with his brother, ZORAN KUPRE[KI] , and cousin, VLATKO KUPRE[KI] .
14. VLATKO KUPRE[KI] , son of Franjo, was born on 01 January 1958 in the village of Piri}i. Before the war, he lived and worked in Ahmi}i where he operated a business with his cousin, ZORAN KUPRE[KI] . He was a HVO soldier in the Ahmi}i area, together with his cousins, MIRJAN KUPRE[KI] and ZORAN KUPRE[KI] .
15. DRAGO JOSIPOVI] , son of Niko, was born on 14 February 1955 in [anti}i. Before the war, he was a chemical worker by profession. He was a HVO soldier in [anti}i.
16. DRAGAN PAPI] was born in the village of Šanti}i on 15 July 1967. He lived in Ahmi}i, Vitez and was a HVO soldier.
17. VLADIMIR ŠANTI] , also known as "VLADO", was born on 01 April 1958 in Donja Ve-eriska. Before the war he lived in Vitez and was a policeman by profession. He was a HVO soldier in Vitez.

### **General Allegations**

18. At all times relevant to this indictment, the accused were required to abide by the laws or customs governing the conduct of war.
19. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering, or otherwise

aiding and abetting, in the planning, preparation or execution of any crimes referred to in Articles 2, 3 and 5 of the Tribunal Statute.

## Charges

### **COUNT 1 (Persecutions)**

20. From October 1992 until April 1993, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.
21. As part of the persecution, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] participated in or aided and abetted:
- (a) the deliberate and systematic killing of Bosnian Muslim civilians;
  - (b) the comprehensive destruction of Bosnian Muslim homes and property; and
  - (c) the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.
22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] committed the following crime:

**Count 1: A CRIME AGAINST HUMANITY**, punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the Tribunal.

**COUNTS 2-9  
(Ahmi} Family)  
(Murder, Inhumane Acts and Cruel Treatment)**

23. When the attack on Ahmi}i-[anti}i commenced in the early morning of 16 April 1993, Sakib Ahmi} was residing with his son, Naser Ahmi}, Naser's wife, Zehrudina, and their two children, Elvis (age 4) and Sejad (age 3 months).
24. Armed with an automatic weapon, ZORAN KUPRE[KI] entered the Ahmi} house and shot and killed Naser Ahmi}. ZORAN KUPRE[KI] then shot and wounded Zehrudina Ahmi}.
25. MIRJAN KUPRE[KI] then entered the Ahmic house and poured flammable liquid onto the furniture to set the house on fire. Then MIRJAN KUPRE[KI] and ZORAN KUPRE[KI], aiding and abetting each other, directed gunfire at the two children, Elvis and Sejad Ahmi}. When Sakib Ahmi} fled the burning residence, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire.
26. Naser Ahmi}, Zehrudina Ahmi}, Elvis Ahmi} and Sejad Ahmi} all died and Sakib Ahmi} received burns over his head, face and hands.
27. By the foregoing acts, ZORAN KUPRE[KI] and MIRJAN KUPRE[KI], aiding and abetting each other, committed the following crimes:

**Counts 2 and 3  
(Murder of Naser Ahmic)**

**Count 2:** By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

**Count 3:** By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the

Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 4 and 5  
(Murder of Zehrudina Ahmic)**

**Count 4:** By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

**Count 5:** By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 6 and 7  
(Murder of Elvis Ahmic)**

**Count 6:** By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

**Count 7:** By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 8 and 9  
(Murder of Sejad Ahmic)**

**Count 8:** By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

**Count 9:** By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 10 and 11  
(Inhumane Acts and Cruel Treatment of Sakib Ahmi)}**

**Count 10:** By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

**Count 11:** By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

**COUNTS 12-15  
(Pezer Family)  
(Murder, Inhumane and Cruel Treatment)**

28. Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of VLATKO KUPRE[KI] in Ahmi}i. When the attack commenced, several HVO units used VLATKO KUPRE[KI] 's residence as a staging area. Other HVO soldiers shot at Bosnian Muslim civilians from VLATKO KUPRE[KI] 's house throughout the attack.
29. As the shooting continued, members of the Pezer family, who were Bosnian Muslims, gathered in their shelter to hide from HVO soldiers. Shortly thereafter,



the Pezer family, along with other Bosnian Muslims who had taken refuge in the shelter, decided to escape through the forest.

30. As the Pezer family, with other Bosnian Muslims, ran by VLATKO KUPRE[KI] 's house toward the forest, VLATKO KUPRE[KI] and other HVO soldiers in front of VLATKO KUPRE[KI] 's house yelled at the fleeing civilians. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, shot at the group from in front of VLATKO KUPRE[KI] 's house. As the Pezer family fled toward the forest, VLATKO KUPRE[KI] and other HVO soldiers, aiding and abetting each other, wounded Dženana Pezer, the daughter of Ismail and Fata Pezer, and another woman. Dženana Pezer fell to the ground and Fata Pezer returned to assist her daughter. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, then shot Fata Pezer and killed her.
31. By the foregoing acts and omissions, VLATKO KUPRE[KI] committed the following crimes:

**Counts 12 and 13  
(Murder of Fata Pezer)**

**Count 12:** By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

**Count 13:** By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 14 and 15  
(Wounding of Dženana Pezer)**

**Count 14:** By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

**Count 15:** By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

**COUNTS 16-19**  
**(Killing of Musafet Pušić and Burning of the Pušić Home)**

32. On 16 April 1993 numerous HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR [ANTI] attacked the home of Musafet and Suhreta Pušić, while the family, which included two young daughters, was sleeping.
33. During the attack, DRAGO JOSIPOVI] , VLADIMIR [ANTI] and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafet Pušić.
34. As part of the attack, the HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR ŠANTI] , vandalised the home and then burned it to the ground.
35. By the foregoing acts, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed the following crimes:

**Counts 16 and 17**  
**(Murder of Musafet Pušić)**

**Count 16:** By killing or aiding and abetting the killing of Musafet Pušić, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of

the Statute of the Tribunal.

**Count 17:** By killing or aiding and abetting the killing of Musafer Pu{}ul, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

**Counts 18 and 19  
(Inhumane Acts and Cruel Treatment)**

**Count 18:** By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

**Count 19:** By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

Date:

Signed:  
Graham T. Blewitt  
Deputy Prosecutor

**ANNEX B – Map of the Ahmici Region**

**ANNEX C – Aerial Photograph of Ahmici with Highlighted Landmarks**