UNITED
NATIONS

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

Case No.	IT-98-34-A
Date:	3 May 2006
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IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **3 May 2006**

PROSECUTOR

v.

MLADEN NALETILIĆ, *a.k.a.* "TUTA"
VINKO MARTINOVIĆ, *a.k.a.* "ŠTELA"

JUDGEMENT

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter M. Kremer
Ms. Marie-Ursula Kind
Mr. Xavier Tracol
Mr. Steffen Wirth

Counsel for Naletilić and Martinović:

Mr. Matthew Hennessy and Mr. Christopher Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

CONTENTS

I. INTRODUCTION 1

II. STANDARD OF REVIEW ON APPEAL 5

III. ERRORS ALLEGED BY NALETILIĆ AND MARTINOVIĆ CONCERNING DENIAL OF DUE PROCESS OF LAW 7

A. ALLEGED VAGUENESS OF THE INDICTMENT 7
1. Introduction 7
2. Law applicable to indictments 10
3. Alleged defects in the Indictment 13
(a) Failure to sufficiently plead the incident of turning a private property into the headquarters of the Vinko Škrobo ATG 13
(b) Failure to sufficiently plead three incidents of prisoners' beatings in Martinović's area of command 15
(c) Failure to sufficiently plead incidents of unlawful transfer of civilians from the DUM area in Mostar on 13-14 June 1993 and from the Centar II area in Mostar on 29 September 1993 18
(i) Whether the Indictment suffered from a material defect in the way the two incidents were pleaded in relation to Martinović 20
(ii) Whether the Indictment suffered from a material defect in the way the two incidents were pleaded in relation to Naletilić 23
(d) Failure to sufficiently plead incidents of plunder in Mostar other than those taking place at the DUM area on 13 June 1993 24
(e) Failure to sufficiently plead incidents of mistreatment in Ljubuški prison 29
(f) Conclusion 31
B. ALTERNATIVE CHARGING 32

IV. ERROR ALLEGED BY NALETILIĆ AND MARTINOVIĆ CONCERNING THE INTERNATIONAL CHARACTER OF THE ARMED CONFLICT 35

A. ARGUMENT THAT THE EVIDENCE PRESENTED TO THE TRIAL CHAMBER WAS UNRELIABLE AND/OR UNAUTHENTICATED 35
B. ARGUMENT THAT NALETILIĆ AND MARTINOVIĆ CANNOT BE MADE RESPONSIBLE FOR THE CHARACTER OF THE ARMED CONFLICT 36

V. GROUNDS OF APPEAL OF THE PROSECUTION 42

A. ALLEGED ERROR RELATING TO PERSECUTIONS (FIRST GROUND OF APPEAL) 42
1. Arguments of the Parties 42
2. Precise errors alleged 44
3. Specific findings challenged 45
4. Conclusion 50
B. DEPORTATION (THIRD GROUND OF APPEAL) 50

VI. GROUNDS OF APPEAL OF NALETILIĆ 53

A. COMMAND POSITION (FIRST, THIRD, FOURTH AND SIXTH GROUNDS OF APPEAL) 53
1. Exhibit PP 704 54
(a) Paragraph 103, footnotes 280, 281, 282, 284, 285, 286, 287 and 288 of the Trial Judgement 55
(b) Paragraph 115, footnote 328 of the Trial Judgement 55
(c) Paragraph 168, footnote 475 of the Trial Judgement 56
(d) Paragraph 428 of the Trial Judgement 57
(e) Paragraph 431, footnote 1146 of the Trial Judgement 57
2. Testimony of Witness Falk Simang 59
(a) Concession of earlier lies 60

(b) Speculation allegedly aimed at bolstering the Prosecution's case 60
(c) Alleged lies contained in testimony 61
(i) Whether Witness Falk Simang participated in the Sovići action 63
(ii) Whether the witness spent only one day in Doljani 63
(iii) Whether another action took place in Doljani 64
(iv) Whether Naletilić had settled in Doljani 64
(v) Killings in the forest 65
(vi) Whether Bofors and other vehicles were used for transporting belongings of Muslims looted during the second action in Mostar 65
(vii) Naletilić and Ivan Andabak each killed one prisoner of war in front of the Ministry in Mostar on 10 May 1993 65
(d) Trial Chamber's alleged selective approach to Witness Falk Simang's testimony 66
(i) Aim of the first action in Doljani 66
(ii) Units involved in the first action in Doljani 67
(e) Challenge to conclusions of the Trial Chamber based upon the testimony of Witness Falk Simang 67
(i) Footnote 54 of the Trial Judgement 68
(ii) Paragraphs 33 and 587, footnotes 72 and 1461 of the Trial Judgement 68
(iii) Paragraph 44, footnote 113 of the Trial Judgement 69
(iv) Paragraph 193, footnote 533 of the Trial Judgement 69
(v) Paragraph 125, footnote 358 of the Trial Judgement 70
(vi) Paragraphs 629 and 631, footnotes 1554 and 1560 of the Trial Judgement 70
3. Exhibit PP 928 (Radoš Diary) 72
(a) Alleged hearsay evidence 73
(b) Conditions required under Rule 92 *bis* 75
(c) Opportunity to cross-examine Alojz Radoš 76
4. Conclusion 77
B. SEARCH WARRANT OF 18 SEPTEMBER 1998 (SECOND GROUND OF APPEAL) 77
1. Opportunity to review and challenge the underlying affidavit 78
2. Admission of evidence secured by Search Warrant executed without the assistance of local authoritites in BiH 79
3. Allegation that the Search Warrant was executed with excessive use of force 82
C. DENIAL OF REQUEST TO SUBPOENA A PROSECUTION TRIAL ATTORNEY AS A WITNESS (FIFTH GROUND OF APPEAL) 82
D. PROSECUTION REBUTTAL CASE (EIGHTH GROUND OF APPEAL) 85
1. Arguments of the Parties 85
2. Procedural background to the rebuttal case 85
3. Discussion 86
(a) Witness Safet Idrizović 86
(b) Witness Apolonia Bos 87
(c) Radoš Diary 87
E. ADMISSION OF TRANSCRIPTS FROM OTHER CASES (10TH GROUND OF APPEAL) 91
F. ATTACK ON SOVIĆI AND DOLJANI AS PART OF A LARGER HVO OFFENSIVE AIMED AT TAKING JABLANICA (13TH GROUND OF APPEAL) 92
1. Jablanica as the main city under Muslim control in the area 93
2. Exhibit PP 928, the Radoš Diary, as evidence of HVO military operations with regard to taking Jablanica 93
3. Attack on Sovići and Doljani as part of a larger offensive aimed at taking Jablanica 94
4. Naletilić's role in the Sovići and Doljani operation 95
5. Conclusion 96
G. WELL-PLANNED ATTACK BY HVO TARGETING MOSTAR'S BH MUSLIM CIVILIAN POPULATION (14TH AND 20TH GROUNDS OF APPEAL) 97
H. SIGNING OF ORDERS (16TH GROUND OF APPEAL) 98
I. TORTURE AND WILFULLY CAUSING GREAT SUFFERING (17TH GROUND OF APPEAL) 98
1. Findings of torture 99

(a) Witness TT, Fikret Begić and Witness B at the Doljani fishfarm 99
(b) Witness FF at the Heliodrom 100
2. Findings of wilfully causing great suffering and cruel treatment 101
(a) Witness AA 101
(b) Group of prisoners taken from the Vranica building to the Tobacco Institute in Mostar 102
3. Discussion 103
J. *MENS REA* REGARDING THE ACTIVITIES OF ATG UNITS IN LJUBUŠKI AND MOSTAR (21ST GROUND OF APPEAL) 104
1. Arguments on Naletilić's *mens rea* 104
2. Arguments on Naletilić's failure to prevent or punish 107
3. Arguments concerning the direct perpetrators and Witness FF 108
4. Conclusion 108
K. ERNEST TAKAČ'S RELATIONSHIP WITH NALETILIĆ IN MAY 1993 (22ND GROUND OF APPEAL) 109
L. RESPONSIBILITY FOR ABUSES AT THE MUP STATION AND THE TOBACCO STATION IN ŠIROKI BRIJEG (23RD GROUND OF APPEAL) 110
1. MUP station in Široki Brijeg 110
2. Tobacco station in Široki Brijeg 112
3. Conclusion 112
M. UNLAWFUL LABOUR FOR THE USE OF DETAINEES TO DIG A TRENCH (24TH GROUND OF APPEAL) 112
1. No evidence that Naletilić ordered 112
2. Authority over and knowledge of the conditions in which the prisoners worked 113
3. Evidence of Witness NH 114
4. Conclusion 115
N. UNLAWFUL TRANSFER OF CIVILIANS (19TH, 25TH AND 26TH GROUNDS OF APPEAL) 115
1. Unlawful transfer of civilians in Sovići and Doljani 116
(a) Chain of command 116
(b) Exchange of captured civilians 118
(c) Participation in plan to transfer civilians 119
(d) Contradictions between exhibits and the findings of the Trial Chamber 120
(i) Exhibit PP 333 120
(ii) Exhibits DD1/426 and PP 362 120
(iii) Exhibit PP 928 121
(e) Agreement between the HVO and the ABiH 122
(f) Knowledge of the transfer of civilians 123
(g) The "guarding" of civilians 123
(h) Arguments based on purported additional evidence 124
(i) Articles 7(1) and 7(3) of the Statute 124
(j) Estimation of evidence 126
2. Unlawful transfer of civilians from Mostar 126
(a) Trial Chamber's reliance on Witness AC's hearsay testimony 126
(b) Naletilić's knowledge of the acts of the Benko Penavić and the Vinko Škrobo ATG units and effective control over these units 127
3. Conclusion 129
O. WANTON DESTRUCTION OF PROPERTY IN DOLJANI (27TH GROUND OF APPEAL) 129
P. ARTICLE 7(3) RESPONSIBILITY FOR PLUNDER (28TH GROUND OF APPEAL) 131
Q. ALLEGED ERROR RELATING TO PERSECUTIONS (18TH GROUND OF APPEAL) 132
R. MISTREATMENT OF WITNESSES SALKO OSMIĆ, TT, B AND RR (29TH GROUND OF APPEAL) 132
S. MOSTAR "LOST FILES" (30TH GROUND OF APPEAL) 134
T. TRIAL CHAMBER'S DECISIONS ON THE ADMISSION OF EVIDENCE (31ST GROUND OF APPEAL) 136
U. EVALUATION OF CONFLICTING EVIDENCE (32ND GROUND OF APPEAL) 136
V. NON-COMBATANT STATUS OF WITNESS FF (33RD GROUND OF APPEAL) AND UNLAWFUL DETENTION OF WITNESS O (34TH GROUND OF APPEAL) 137
W. RUDOLF JOZELIĆ (35TH GROUND OF APPEAL) 139
X. CREDIBILITY OF WITNESS EKREM LULIĆ (36TH GROUND OF APPEAL) 139
Y. CUMULATIVE EFFECT OF ALLEGED ABUSES OF DISCRETION (39TH GROUND OF APPEAL) 140

VII. SECOND GROUND OF APPEAL OF MARTINOVIĆ 141

A. UNLAWFUL LABOUR AND HUMAN SHIELDS 141
1. Unlawful labour in the area of responsibility of the Vinko Škrobo ATG 141
(a) Jurisdiction over prisoners of war at work for the Vinko Škrobo ATG 141
(b) Treatment of prisoners of war 143
(c) Nature of the labour performed in the Vinko Škrobo ATG 143
(d) Injuries sustained by prisoners of war at work for the Vinko Škrobo ATG 144
(e) Martinović's individual criminal responsibility 145
2. Wooden rifles incident 146
(a) Evaluation of evidence 146
(b) Logic of using human shields in the attack 149
(c) Credibility of witnesses 149
(d) Martinović's individual criminal responsibility 151
(e) Whether the prisoners taken out on 17 September 1993 were returned to the Heliodrom .. 152
3. Turning a private property into the headquarters of Vinko Škrobo ATG 153
4. Use of detainees in looting private property 153
5. Conclusion 157
B. WILFULLY CAUSING GREAT SUFFERING AND CRUEL TREATMENT 157
C. MURDER OF NENAD HARMANDŽIĆ 160
1. Trial Chamber's findings 160
2. Arguments of the Parties 163
3. Evaluation of the autopsy report and the evidence of Expert Witnesses Dr. Hamza Zujo and Professor Josip Skavić 163
4. Evaluation of the evidence of Witness Halil Ajanić 165
5. Evaluation of the evidence of Witness AE 168
6. Evaluation of the evidence of Witness AF and Witness Y 169
7. Evaluation of the evidence of Witness AD 171
8. Evaluation of Exhibits PP 434, PP 520 and PP 774 172
9. Conclusion 175
D. UNLAWFUL TRANSFER 175
1. 13-14 June 1993 176
2. 29 September 1993 178
3. Conclusion 179
E. PLUNDER 180
1. Plunder on 13 June 1993 in the DUM area in Mostar 181
2. Other incidents of plunder 181
3. Conclusion 181
F. PERSECUTIONS 182
1. General errors alleged 182
2. Alleged errors in the findings on unlawful confinement and detention as underlying acts of persecutions 184
3. Alleged errors in the findings on forcible transfer and deportation as underlying acts of persecutions 185
4. Alleged errors in the findings on torture, cruel treatment and wilfully causing great suffering as underlying acts of persecutions 186
5. Alleged errors in the findings on plunder as an underlying act of persecutions 187
6. Conclusion 189

VIII. CUMULATIVE CONVICTIONS 190

A. MARTINOVIĆ'S SUBGROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW IN ENTERING CUMULATIVE CONVICTIONS AGAINST HIM 190
B. PROSECUTION'S FOURTH GROUND OF APPEAL: ALLEGED ERROR IN APPLYING CUMULATIVE CONVICTIONS TO PERSECUTIONS AND ANOTHER ARTICLE 5 CRIME 191

IX. APPEALS FROM SENTENCE ... 194

A. GENERAL CONSIDERATIONS ... 194
B. MARTINOVIĆ'S APPEAL AGAINST SENTENCE ... 194
1. Alleged error regarding voluntary surrender ... 194
2. Alleged error regarding assistance and general attitude to others ... 197
3. Alleged error regarding command role as an aggravating factor ... 199
4. Alleged error regarding unduly severe sentence ... 201
5. Implications of the findings of the Appeals Chamber ... 202
C. NALETILIĆ'S APPEAL AGAINST SENTENCE ... 202
1. Relationship with other grounds of appeal ... 202
2. Alleged error regarding command role as an aggravating factor ... 203
3. Comparison with other sentences ... 204
4. Implications of the findings of the Appeals Chamber ... 205

X. DISPOSITION ... 207

XI. DECLARATION OF JUDGE SHAHABUDDEEN ... 210

XII. OPINION DISSIDENTE CONJOINTE DES JUGES GÜNEY ET SCHOMBURG SUR LE CUMUL DE DÉCLARATIONS DE CULPABILITÉ ... 211

XIII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE SCHOMBURG ... 212

THE OBLIGATION OF THE APPEALS CHAMBER TO DEFINE DEPORTATION IN THE INSTANT CASE .. 212
THE "CROSS-BORDER" TRANSFER REQUIREMENT OF DEPORTATION IN THE TRIBUNAL'S JURISPRUDENCE AND IN CUSTOMARY INTERNATIONAL LAW ... 214
THE NEED FOR DEVELOPMENT OF A SUITABLE "CROSS-BORDER" TRANSFER REQUIREMENT FOR DEPORTATION IN THE TRIBUNAL'S JURISPRUDENCE ... 217
THE SUITABLE DEFINITION OF DEPORTATION WITHIN THE FRAMEWORK OF CUSTOMARY INTERNATIONAL LAW AND INTERNATIONAL PRINCIPLES OF INTERPRETATION ... 219
THE *MENS REA* OF DEPORTATION ... 222
CONCLUSION ... 223

XIV. ANNEX 1: PROCEDURAL BACKGROUND ... 224

A. HISTORY OF THE TRIAL ... 224
B. THE APPEAL ... 225
1. Notices of appeal ... 225
2. Assignment of Judges ... 225
3. Counsel ... 225
4. Filing of Appeal Briefs ... 226
5. Motions pursuant to Rule 115 ... 228
(a) Naletilić ... 228
(b) Martinović ... 230
(c) Prosecution ... 231
6. Status Conferences ... 231
7. Hearings on appeal ... 231

XV. ANNEX 2: GLOSSARY OF TERMS ... 232

A. LIST OF INTERNATIONAL TRIBUNAL AND OTHER DECISIONS ... 232
1. International Tribunal ... 232
2. ICTR ... 238
3. Other decisions ... 238
B. LIST OF OTHER LEGAL AUTHORITIES ... 238
C. LIST OF ABBREVIATIONS ... 239

I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seized of three appeals from the judgement rendered by the Trial Chamber on 31 March 2003 in the case *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T ("Trial Judgement"), its English text being authoritative.

2. The events giving rise to this appeal took place during the conflict between the Croatian Defence Council ("HVO") and the Army of Bosnia and Herzegovina ("ABiH") in Mostar and its surrounding municipalities in south-western Bosnia and Herzegovina. Following the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY"), BH Croats and BH Muslims in 1992 fought together under the auspices of the HVO against the Serb-Montenegrin forces.[1] However, after the withdrawal of these forces, tensions between BH Croats and BH Muslims increased. By mid-April 1993, Mostar had become a divided city, and a full-scale conflict had developed between the HVO and ABiH in both central and south-western Bosnia and Herzegovina.[2] This appeal deals with events occurring in the time period of April 1993 until January 1994 and with crimes related to three attacks by the HVO.[3] These attacks are: first, the attack beginning on 17 April 1993 on the villages of Sovići and Doljani, located in the municipality of Jablanica some 50 kilometres north of Mostar; second, the attack on Mostar that began on 9 May 1993; and third, the attack on the village of Raštani, located slightly north of Mostar on the west bank of the Neretva River, beginning on 22 September 1993. The Trial Chamber found that these three attacks resulted in thousands of BH Muslim civilians being forced to leave their homes in Sovići, Doljani and West Mostar. In addition, a large number of both prisoners of war and civilian prisoners were held in detention centres in the area, with some being taken to perform labour in various locations, mainly on the frontline in Mostar.[4]

3. The Appellant Mladen Naletilić, *a.k.a.* "Tuta" ("Naletilić"), was born in 1946 in Široki Brijeg, which is 14 kilometres west of Mostar in Bosnia and Herzegovina.[5] Naletilić founded a military group called the Convicts' Battalion ("KB") which fought under his leadership against

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[1] Trial Judgement, paras 1, 18. The Trial Chamber referred to "BH Croats" and "BH Muslims", instead of to "Bosnian Croats" and "Bosnian Muslims", which are the terms most commonly used in the jurisprudence of the International Tribunal. For the purposes of this Judgement, the Appeals Chamber will also employ the terms "BH Croats" and "BH Muslims" to describe the members of these groups.
[2] Trial Judgement, paras 1, 18, 25, 38-39.
[3] Trial Judgement, paras 1, 25.
[4] Trial Judgement, paras 55, 56.
[5] Trial Judgement, para. 2.

the Serb-Montenegrin forces in Mostar during the spring of 1992.[6] After the HVO was restructured at the end of 1992 and the beginning of 1993, the KB became a so-called professional or independent unit put into action for special combat purposes, and as such was under the direct command of the HVO Main Staff.[7] Attached to the KB were several Anti-Terrorist Group ("ATG") units.[8] The Trial Chamber found that Naletilić was the highest-ranking commander of the KB during the period of time relevant to this appeal.[9]

4. On 31 March 2003, the Trial Chamber convicted Naletilić of eight Counts.[10] It acquitted him of nine Counts either because it found the evidence to be insufficient or because the convictions would have been impermissibly cumulative.[11] Naletilić was convicted pursuant to Article 7(1) of the Statute of the International Tribunal ("Statute")[12] of the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war under Article 3(b) (Count 20).[13] Naletilić was convicted pursuant to Article 7(3) of unlawful labour as a violation of the laws or customs of war under Article 3 (Count 5)[14] and of plunder of public or private property as a violation of the laws or customs of war under Article 3(e) (Count 21).[15] Naletilić was further convicted of the following crimes: persecutions on political, racial and religious grounds as a crime against humanity under Article 5(h) (Count 1);[16] torture as a crime against humanity under Article 5(f) (Count 9);[17] torture as a grave breach of the Geneva Conventions of 1949 under Article 2(b) (Count 10);[18] wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Article 2(c) (Count 12);[19] and unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 under Article 2(g) (Count 18).[20] For some of the acts underlying the latter crimes Naletilić's responsibility was established pursuant to Article 7(1) and for others pursuant to Article 7(3).[21] Naletilić was sentenced to a single term of 20 years of imprisonment.[22]

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[6] Trial Judgement, paras 2, 86.
[7] Trial Judgement, para. 87.
[8] Trial Judgement, para. 87.
[9] Trial Judgement, para. 94.
[10] Trial Judgement, para. 763.
[11] Trial Judgement, paras 720-728, 764.
[12] Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993).
[13] Trial Judgement, paras 589, 596-597, 763.
[14] Trial Judgement, paras 325-326, 333, 763.
[15] Trial Judgement, paras 631, 763.
[16] Trial Judgement, paras 646-648, 671-672, 679, 681-682, 701, 705-706, 710-715, 763.
[17] Trial Judgement, paras 366-369, 411, 447, 449, 451, 453-454, 763.
[18] Trial Judgement, paras 366-369, 411, 447, 449, 451, 453-454, 763.
[19] Trial Judgement, paras 379, 394, 403-404, 412, 427-428, 435-436, 438, 450, 451, 453-454, 763.
[20] Trial Judgement, paras 527, 531-532, 556-558, 566, 570-571, 763.
[21] The Appeals Chamber takes note of the discrepancy between paragraphs 411 and 453 of the Trial Judgement. Paragraph 453 appears under the heading "Summary of findings" and states that Naletilić bears responsibility for torture pursuant to Article 7(1) and for cruel treatment and willfully causing great suffering pursuant to Article 7(1) and 7(3).

5. The Appellant Vinko Martinović, *a.k.a.* "Štela" ("Martinović"), was born in 1963 in Mostar.[23] When the conflict against the Serb-Montenegrin forces began in Mostar in 1992, Martinović joined the Croatian Defence Forces ("HOS") and became a commander.[24] At least from mid-May 1993 onward, Martinović was the commander of a group of soldiers who held positions at a confrontation line in Mostar.[25] Martinović was the commander of the Vinko Škrobo ATG, which the Trial Chamber found was part of the KB.[26]

6. On 31 March 2003, the Trial Chamber convicted Martinović of nine Counts.[27] It acquitted him of eight Counts either because it found the evidence to be insufficient or because the convictions would have been impermissibly cumulative.[28] Martinović was convicted pursuant to Article 7(1) of the Statute of the following crimes: persecutions on political, racial and religious grounds as a crime against humanity under Article 5(h) (Count 1);[29] inhumane acts as a crime against humanity under Article 5(i) (Count 2);[30] inhuman treatment as a grave breach of the Geneva Conventions of 1949 under Article 2(b) (Count 3);[31] wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Article 2(c) (Count 12);[32] murder as a crime against humanity under Article 5(a) (Count 13);[33] wilful killing as a grave breach of the Geneva Conventions of 1949 under Article 2(a) (Count 14);[34] and unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 under Article 2(g) (Count 18).[35] Martinović was further convicted of unlawful labour as a violation of the laws or customs of war under Article 3 (Count 5),[36] and of plunder of public or private property as a violation of the laws or customs of war under Article 3(e) (Count 21).[37] For some of the acts underlying the latter crimes Martinović's responsibility was established pursuant to Article 7(1) and

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Paragraph 411, however, unequivocally states that: "[t]he Chamber thus finds that Mladen Naletilić bears *command responsibility* for the torture of witnesses BB and CC under Articles 5(f) and 2(b) of the Statute (Counts 9 and 10)" (emphasis added). The Appeals Chamber also notes the discrepancy between paragraphs 648 (where the Trial Chamber finds that Naletilić's responsibility for the unlawful confinement of civilians is most appropriately described by Article 7(1) of the Statute) and 710 (where the Trial Chamber finds that Naletilić bears responsibility under Article 7(3) of the Statute for the unlawful confinement of civilians as an act of persecutions).

[22] Trial Judgement, para. 765.
[23] Trial Judgement, para. 3.
[24] Trial Judgement, para. 3.
[25] Trial Judgement, para. 102.
[26] Trial Judgement, paras 98, 100-102.
[27] Trial Judgement, para. 767.
[28] Trial Judgement, paras 729-738, 768.
[29] Trial Judgement, paras 650-652, 672, 676, 683, 702, 710-713, 715, 767.
[30] Trial Judgement, paras 271-272, 289-290, 334, 767.
[31] Trial Judgement, paras 271-272, 289-290, 334, 767.
[32] Trial Judgement, paras 389, 439, 455-456, 767.
[33] Trial Judgement, paras 508, 511, 767.
[34] Trial Judgement, paras 508, 511 767.
[35] Trial Judgement, paras 551-554, 563-564, 569, 767.
[36] Trial Judgement, paras 271-272, 289-290, 310-313, 334, 767.
[37] Trial Judgement, paras 627-628, 767.

for others pursuant to Article 7(3). Martinović was sentenced to a single sentence of 18 years of imprisonment.[38]

7. Naletilić and Martinović lodged individual Notices of Appeal on 29 April 2003 and the Prosecution on 2 May 2003.[39] Naletilić and Martinović appeal against each of their convictions and sentences on the basis that the Trial Chamber committed errors of both law and fact.[40] The Appeals Chamber has identified certain issues that are common to Naletilić's and Martinović's grounds of appeal and has addressed these issues together in the judgement under the headings of: "Errors Alleged by Naletilić and Martinović Concerning Denial of Due Process of Law", "Error Alleged by Naletilić and Martinović Concerning the International Character of the Armed Conflict" and "Appeals From Sentence". The Prosecution's appeal alleges three errors of law.[41] Two of these are dealt with together, while the Prosecution's arguments concerning cumulative convictions are addressed alongside Martinović's arguments on this issue.

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[38] Trial Judgement, para. 769.

[39] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Notice of Appeal of Mladen Naletilić a.k.a. Tuta, 29 April 2003 ("Naletilić Notice of Appeal"); *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Notice of Appeal Against Judgement No. IT-98-34-T of 31 March 2003 in the case: Prosecutor vs. Vinko Martinović, 29 April 2003 ("Martinović Notice of Appeal"); *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Notice of Appeal, 2 May 2003 ("Prosecution Notice of Appeal"). The Procedural Background to the appellate proceedings can be found in Annex 1.

[40] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of Mr. Vinko Martinović (Public –Redacted Version), 24 May 2005 ("Martinović Appeal Brief"), para. 2; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Revised Appeal Brief Redacted, 10 October 2005 ("Naletilić Revised Appeal Brief"), p. 1.

[41] The Prosecution originally alleged four grounds of appeal: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of the Prosecution, 14 July 2003 ("Prosecution Appeal Brief"), paras 2.1-2.3, 3.1, 4.1, 5.1-5.3. On 30 September 2005, the Prosecution notified the Appeals Chamber that it withdrew its second ground of appeal on unlawful labour, contained in paras 3.1-3.27 of the Prosecution Appeal Brief: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Notice of Withdrawal of its Second Ground of Appeal, 30 September 2005 ("Prosecution Notice of Withdrawal"), para. 1.

II. STANDARD OF REVIEW ON APPEAL

8. Article 25 of the Statute provides for appeals on the ground of an error of law that invalidates the decision or an error of fact that has occasioned a miscarriage of justice.[42] It also states that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

9. The Appeals Chamber has stated that:

> A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[43]

10. If the Appeals Chamber finds that an error of law arises from the application of a wrong legal standard by a Trial Chamber, it is open to the Appeals Chamber to correct the legal error and apply the correct legal standard to the evidence contained in the record to determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence, before affirming that finding on appeal.[44]

11. As to alleged errors of fact, the Appeals Chamber recalls that the responsibility for evaluating the evidence and making findings of fact resides primarily with the Trial Chamber.[45] Thus, the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.[46] In assessing an alleged error of fact with respect to a particular ground where no additional evidence has been admitted on appeal, the Appeals Chamber will apply a standard of reasonableness in reviewing the finding, namely, whether the conclusion is one which no reasonable trier of fact could have reached.[47] Where, as in this case, a factual error is alleged with respect to a particular ground of appeal on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules of Procedure and Evidence ("Rules")[48] provides that the Appeals Chamber shall pronounce judgement "on the basis of the record on appeal together with such additional evidence as has been presented to it."

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

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[42] Article 25(1) of the Statute states: "[t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."
[43] *Vasiljević* Appeal Judgement, para. 6.
[44] *Blaškić* Appeal Judgement, para. 15; *Kordić and Čerkez* Appeal Judgement, para. 17.
[45] *See Kupreškić et al.* Appeal Judgement, paras 30-32.
[46] *Blaškić* Appeal Judgement, para. 17.

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.[49]

The standard of review employed by the Appeals Chamber in that context was whether a reasonable trier of fact could have been satisfied beyond reasonable doubt as to the finding in question, a deferential standard. In that situation, the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself,* beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.[49bis]

13. The Appeals Chamber reiterates that a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber. Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[50]

14. With regard to form, the parties are expected to provide precise references to relevant transcript pages or paragraphs in the judgement to which the challenge is being made, as well as exact references to the parts of the record on appeal invoked in its support.[51] If a party makes submissions that are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies, the Appeals Chamber will dismiss the submissions as unfounded without providing detailed reasoning.[52]

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[47] *Blaškić* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 18.
[48] Rules of Procedure and Evidence, IT/32/Rev. 37, 6 April 2006.
[49] *Kupreškić et al.* Appeal Judgement, para. 75.
[49bis] *Blaškić* Appeal Judgement, para. 22.
[50] *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21.
[51] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4(b).
[52] *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, paras 22-23.

III. ERRORS ALLEGED BY NALETILIĆ AND MARTINOVIĆ CONCERNING DENIAL OF DUE PROCESS OF LAW

A. Alleged vagueness of the Indictment

1. Introduction

15. As part of his second ground of appeal, Martinović submits that the Indictment is too vague in that it does not plead the following incidents for which he was found responsible: (1) the turning of a private property into the headquarters of the Vinko Škrobo ATG[53] (Count 5); (2) three incidents of beating of prisoners in his area of command[54] (Counts 11 and 12); (3) unlawful transfer of civilians from the DUM area in Mostar on 13 and 14 June 1993 and from the Centar II area in Mostar on 29 September 1993[55] (Count 18); and (4) incidents of plunder[56] (Count 21).

16. Naletilić submits under his 12th ground of appeal that the Indictment is too vague in that it does not plead the incidents of unlawful transfer of civilians from the DUM area in Mostar on 13 and 14 June 1993 and from the Centar II area in Mostar on 29 September 1993 (Count 18), for which he was found responsible.[57] He further submits under his 21st ground of appeal that the Indictment is too vague also with respect to the charges on which he was found responsible for mistreatment in Ljubuški prison (Counts 11 and 12).[58]

17. The Martinović Notice of Appeal does not mention the allegation of vagueness of the Indictment. As for the Naletilić Notice of Appeal, the 12th ground of appeal includes an explicit challenge to the Indictment whereas the 21st ground of appeal does not.[59] Because both Naletilić and Martinović make challenges to the Indictment in their briefs that are not included in their Notices of Appeal, they should have sought leave to amend their Notices of Appeal pursuant to Rule 108 as soon as possible after identifying this new allegation, but both failed to do so. This notwithstanding, the Prosecution itself does not raise an objection to these grounds of appeal in

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[53] Martinović Appeal Brief, para. 143.
[54] Martinović Appeal Brief, para. 184.
[55] Martinović Appeal Brief, paras 417, 498.
[56] Martinović Appeal Brief, paras 431, 434, 453.
[57] Naletilić Notice of Appeal, p. 5; Naletilić Revised Appeal Brief, para. 143.
[58] Naletilić Revised Appeal Brief, para. 176. Naletilić "incorporates his arguments in his 21st ground of appeal" in his 35th ground of appeal: Naletilić Revised Appeal Brief, para. 270.
[59] Naletilić raises the issue of notice in relation to his 21st and 35th grounds of appeal only in his Appeal Brief: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Brief on Appeal, 15 September 2003 (Confidential – Under Seal) ("Naletilić Appeal Brief"), paras 176, 270; Naletilić Revised Appeal Brief, paras 176, 270.

Naletilić's and Martinović's briefs and has responded to them in full.[60] As a result, the Appeals Chamber turns to consider them.[61]

18. At the pre-trial stage, Naletilić and Martinović filed preliminary motions pursuant to Rule 72(A)(ii) alleging defects in the form of the Initial Indictment.[62] Martinović challenged the following paragraphs of the Initial Indictment: 44 (unlawful labour in areas other than the front line, Counts 2 to 8);[63] 49 (cruel treatment and wilfully causing great suffering or serious injury to body or health, Counts 11 and 12);[64] 54 (forcible transfer, Count 18);[65] and 57 (destruction and plunder of property, Counts 19 to 22).[66] Naletilić raised a general objection to the descriptions of the acts alleged under Counts 1 to 22 of the Initial Indictment, arguing that they did not provide a "clear indication of the time of the crime perpetration, the manner, location, consequences, and the form of guilt", including the particular form of responsibility under Article 7 of the Statute.[67]

19. The Trial Chamber denied Naletilić's and Martinović's preliminary motions on the form of the Initial Indictment in a Decision of 15 February 2000[68] ("15 February 2000 Decision") for Martinović and in a Decision of 11 May 2000[69] ("11 May 2000 Decision") for Naletilić. It held, *inter alia*, that: the discovery material in Naletilić's and Martinović's possession was meant to

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[60] *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Public Redacted Version of "Prosecution's Respondent's Brief to Mladen Naletilić's Appeal Brief" Filed on 30 October 2003, 21 March 2005 ("Prosecution Response to Naletilić Revised Appeal Brief"), para. 2.41; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Public Redacted Version of Prosecution's Respondent's Brief to Vinko Martinović's Appeal Brief, 21 March 2005 ("Prosecution Response to Martinović Appeal Brief"), paras 3.35, 4.4, 7.8-7.13, 8.27-8.31; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Respondent's Brief to Vinko Martinović's Appeal Brief, 8 October 2003 (Confidential) ("Confidential Prosecution Response to Martinović Appeal Brief"), paras 7.10-7.12, 8.30-8.31.

[61] *Cf. Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004 ("*M. Nikolić* Decision on Motion to Amend"), pp. 2-3; *Prosecutor v. Blagoje Simić,* Case No. IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004 ("*B. Simić* Decision on Motion to Amend"), pp. 4-5.

[62] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-1, Indictment, 18 December 1998 ("Initial Indictment"); *Prosecutor v. Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Objection to the Indictment, 4 October 1999 (Confidential) ("Martinović Objection to the Initial Indictment"); *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović a.k.a. "Štela"*, Case No. IT-98-34-PT, Defence's Preliminary Motion, 20 April 2000 ("Naletilić Objection to the Initial Indictment").

[63] Martinović Objection to the Initial Indictment (Confidential), AD-XV.

[64] Martinović Objection to the Initial Indictment (Confidential), AD-XVI and XVII read: "the arguments stated under counts V, VI, VII, VIII, X, XI and XII are still valid". Sections AD-V, VI and VII argue that the Initial Indictment was too vague.

[65] Martinović Objection to the Initial Indictment (Confidential), AD-XXI and XXII.

[66] Martinović Objection to the Initial Indictment (Confidential), AD-XXI and XXII.

[67] Naletilić Objection to the Initial Indictment, paras III-12 and IV-2,3. *See* also *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Preliminary Motion of Mladen Naletilić, 11 May 2000, p. 3.

[68] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000.

[69] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Preliminary Motion of Mladen Naletilić, 11 May 2000.

contain details of specific events that the Prosecution intended to present at trial;[70] Naletilić and Martinović did not contend that that material did not provide sufficient particulars to prepare their case;[71] and "the next logical step is that the Defence review those materials".[72] Naletilić and Martinović did not seek leave to appeal these Decisions of the Trial Chamber pursuant to Rule 72(B)(ii).

20. The Prosecution argues that Martinović did not seek leave to appeal the 15 February 2000 Decision nor has he demonstrated that he maintained the objection before the Trial Chamber that he was unable to prepare his defence in relation to the plunder charges in the Indictment.[73] The Prosecution further argues that Martinović does not appear to have raised at trial that he was unable to prepare his defence with respect to the incident of unlawful transfer on 13 and 14 June 1993, nor does he appear to have raised the issue of lack of notice regarding this particular incident in his Pre-Trial Brief or in his Final Trial Brief.[74]

21. The Appeals Chamber recalls that a party is under the obligation to formally raise before the Trial Chamber, either at the pre-trial stage or during trial, any issues that require resolution.[75] If a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances,[76] the Appeals Chamber will find that the party has waived its right to bring the issue as a valid ground of appeal.[77]

22. All the defects in the Indictment that Martinović is alleging on appeal were formally raised by him before the Trial Chamber at the pre-trial stage in his preliminary motion objecting to the form of the Initial Indictment.[78] Although he did not raise again the issue of specificity in his subsequent objection to the first and second Amended Indictments, he was under no obligation to do so, as the Trial Chamber had already heard and rejected his argument and the amendments did not affect the Indictment's factual allegations.[79] The Prosecution suggests that, in order to preserve

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[70] 15 February 2000 Decision, para. 23. The 11 May 2000 Decision refers to the explanation in the 15 February 2000 Decision.
[71] 15 February 2000 Decision, paras 19, 27, 30.
[72] 15 February 2000 Decision, para. 27.
[73] Prosecution Response to Martinović Appeal Brief, para. 7.13.
[74] Prosecution Response to Martinović Appeal Brief, paras 8.30-8.31; Confidential Prosecution Response to Martinović Appeal Brief, paras 8.30-8.31.
[75] *Blaškić* Appeal Judgement, para. 222; *Furundžija* Appeal Judgement, para. 174.
[76] The waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. An accused who fails to object to a defect indictment at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired by the indictment defect. *Niyitegeka* Appeal Judgement, para. 200.
[77] *Blaškić* Appeal Judgement, para. 222; *Akayesu* Appeal Judgement, para. 361.
[78] *See supra*, paras 15, 18.
[79] Count 5 (unlawful labour) of the Initial Indictment was subsequently amended to also include a charge of unlawful labour under Article 52 of Geneva Convention III: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-PT, Decision on Prosecution Motion to Amend Count 5 of the Indictment, 28 November 2000 ("Decision to Amend Count 5"). However, no new factual allegations or additional witnesses were added through this amendment: Decision to Amend Count 5, p. 2; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and*

his objections for appeal, Martinović had to seek leave to appeal the 15 February 2000 Decision and/or continue to sustain these objections at trial. The practice of the International Tribunal on the issue of waiver does not impose such obligations. As Martinović formally raised his challenges to the form of the Indictment during the pre-trial stage, the Appeals Chamber finds that he has not waived his right to put forth these arguments on appeal. As far as Naletilić is concerned, however, the challenges to the Indictment he has raised on appeal were only generally comprised in his preliminary motion objecting to the form of all Counts.[80] This notwithstanding, the Prosecution does not seek to argue that Naletilić did not raise this issue until now. In fact, it is apparent from the Trial Chamber's 11 May 2000 Decision that the Trial Chamber considered that Naletilić had raised the same challenge to the sufficiency of the pleading in the Indictment that Martinović had.[81] This conclusion is further borne out by the Trial Judgement wherein, under the section entitled "Preliminary motion on the form of the Indictment", the Trial Chamber recalled that it had "rejected both motions [alleging defects in the form of the Indictment] and [had] held that the Indictment is not too vague".[82] As a result, the Appeals Chamber will proceed on the basis that both Martinović and Naletilić raised before the Trial Chamber the allegations of defects in the Indictment they are bringing on appeal. For this reason, in the event that the Appeals Chamber agrees with Naletilić and Martinović that the Indictment was defective, it will be for the Prosecution to discharge the burden of showing that Naletilić's and Martinović's ability to prepare their defence was not thereby materially impaired.[83]

2. Law applicable to indictments

23. In accordance with Article 21(4)(a) of the Statute, an accused has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". It is well established in the case law of the International Tribunal that Articles 18(4)

Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Amended Indictment, 4 December 2000 ("Amended Indictment"). Naletilić's and Martinović's objections to the Amended Indictment, which the Trial Chamber subsequently rejected, did not contain the allegation that it was vague: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 2, points 1-3. Finally, Counts 9, 10 and 19 to 22 of the Amended Indictment were amended to "clarify that the accused Martinović is not charged in Counts 9, 10, 19, 20 and 22", to which amendment he did not object: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Prosecutor's Motion to Amend the Amended Indictment, 16 October 2001, p. 2; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Second Amended Indictment, 28 September 2001 ("Indictment").

[80] Naletilić Objection to the Initial Indictment, paras III-12 and IV-2,3 state that "the description of the acts alleged under Count 1 to 22 of the CHARGES […] are not indicated in such a way as to be clear indication of the time of the crime perpetration, the manner, location, consequences, and the form of guilt". *See* also 11 May 2000 Decision, p. 3.

[81] The Trial Chamber held that it "already rejected [Martinović's] objections that the same portions of the indictment do not provide sufficient details in [the 15 February 2000 Decision]" and that "the explanations given in that Decision for rejecting Mr. Martinović's objections are equally applicable here": 11 May 2000 Decision, p. 3

[82] Trial Judgement, Annex II, para. 7.

and 21(2), 21(4)(a) and 21(4)(b) of the Statute require the Prosecution to plead in the indictment all material facts underpinning the charges in the indictment, but not the evidence by which the material facts are to be proven.[84] Whether an indictment is pleaded with sufficient particularity is depends on whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him or her so that the accused may prepare a defence.[85]

24. Whether particular facts are "material" depends on the nature of the Prosecution case. Where the Prosecution alleges that an accused personally committed the criminal acts in question, it must, so far as possible, plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."[86] However, less detail may be acceptable if the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[87] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[88]

25. On occasion, material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession. In this context, however, the Appeals Chamber emphasises that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.[89] Other defects in an indictment that may arise at a later stage of the proceedings because the evidence turns out differently than

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[83] *Kvočka et al.* Appeal Judgement, para. 35; *Niyitegeka* Appeal Judgement, para. 200; *Ntakirutimana* Appeal Judgement, para. 58.

[84] *Kvočka et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 88.

[85] *See Kupreškić et al.* Appeal Judgement, para. 88.

[86] *Blaškić* Appeal Judgement, para. 213; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* 11 February 2000 Decision"), para. 18; *Kupreškić et al.* Appeal Judgement, para. 89.

[87] *Kupreškić et al.* Appeal Judgement, para. 89. The Appeals Chamber in *Ntakirutimana* pointed out that "the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. […] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual": *Ntakirutimana* Appeal Judgement, paras 73-74.

[88] *Blaškić* Appeal Judgement, para. 213. *See* also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13; *Krnojelac* 11 February 2000 Decision, para. 18; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 20.

expected call for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[90]

26. In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment.[91] If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial.[92] In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[93] Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result.[94] When challenges to an indictment are raised on appeal, amendment of an indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment "invalidat[ed] the decision" and warrants the Appeals Chamber's intervention.[95]

27. In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her.[96] In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecution's pre-trial brief[97] or its opening statement.[98] The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment,[99] may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to the disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial.[100] Finally, an accused's submissions at trial, for example the motion for judgement of acquittal, final trial brief or closing arguments, may

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[89] *Kvočka et al.* Appeal Judgement, para. 30; *see* also *Kupreškić et al.* Appeal Judgement, para. 92.
[90] *Kvočka et al.* Appeal Judgement, para. 31; *Kupreškić et al.* Appeal Judgement, para. 92.
[91] *Kvočka et al.* Appeal Judgement, para. 33.
[92] *Kvočka et al.* Appeal Judgement, para. 33.
[93] *See Kupreškić et al.* Appeal Judgement, para. 114; *Kvočka et al.* Appeal Judgement, para. 33.
[94] *Kvočka et al.* Appeal Judgement, para. 33.
[95] Article 25(1)(a) of the Statute; *Kvočka et al.* Appeal Judgement, para. 34.
[96] *See Kordić and Čerkez* Appeal Judgement, para. 142; *Rutaganda* Appeal Judgement, para. 303.
[97] *See e.g. Kupreškić et al.* Appeal Judgement, para. 117.
[98] *Kordić and Čerkez* Appeal Judgement, para. 169.
[99] *See e.g.* Rule 65 *ter* (E) (ii).
[100] *Ntakirutimana* Appeal Judgement, para. 27 (citing *Prosecution v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62).

in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[101]

3. Alleged defects in the Indictment

28. The Appeals Chamber will now deal with Naletilić's and Martinović's arguments alleging defects in the Indictment. Whether the Trial Chamber erred in failing to find the Indictment defective will be analysed only in relation to the criminal conduct for which Naletilić and Martinović were found responsible.[102]

(a) Failure to sufficiently plead the incident of turning a private property into the headquarters of the Vinko Škrobo ATG

29. Under Count 5, the Trial Chamber found Martinović responsible for unlawful labour pursuant to Articles 3 and 7(1) of the Statute for ordering prisoners to turn a private property into the headquarters of the Vinko Škrobo ATG around 7 July 1993.[103] Martinović challenges this finding because the incident was not described in the Indictment.[104] The Prosecution responds that this omission was cured by its Chart of Witnesses and List of Facts.[105]

30. The Trial Chamber's findings in paragraph 313 of the Trial Judgement make clear that it found Martinović personally responsible for this incident. Thus, the Prosecution was required to set forth the details of the incident with precision, so far as possible, in the Indictment. In addition, because the crime in question consisted of forcing prisoners to perform labour that was connected to war operations,[106] the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact. Neither requirement was met here.

31. The relevant part of the Indictment reads as follows:

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[101] *Kvočka et al.* Appeal Judgement, paras 52, 53; *Kordić and Čerkez* Appeal Judgement, para. 148.
[102] *See Kupreškić et al.* Appeal Judgement, para. 79. Naletilić and Martinović do not claim on appeal that the Indictment was vague in relation to the form of responsibility alleged. With respect to those charges for which the Trial Chamber found that Naletilić's and Martinović's responsibility was established pursuant to both Article 7(1) and 7(3) of the Statute, and for which it found that Article 7(1) more appropriately described their responsibility, only the pleadings in the Indictment relating to Article 7(1) have been examined.
[103] Trial Judgement, paras 311, 313, 334.
[104] Martinović Appeal Brief, para. 143.
[105] Confidential Prosecution Response to Martinović Appeal Brief, para. 3.35 (citing *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's Chart of Witnesses and List of Facts Submitted Pursuant to the Trial Chamber's Scheduling Order of 16 June 2000, 18 July 2000 (Under Seal) ("Prosecution Chart of Witnesses and List of Facts").
[106] *See* Trial Judgement, paras 255-257 (observing, correctly, that such forced labour violates Article 50 of Geneva Convention III).

[Counts 2 to 8: Unlawful Labour and Human Shields as Inhuman Treatment and Wilful Killing]

> 44. [From about April or May 1993 through at least January 1994],[107] MLADEN NALETILIĆ, VINKO MARTINOVIĆ and their subordinates also forced Bosnian Muslim detainees to perform labour in locations other than the front lines. The Bosnian Muslim detainees were forced, *inter alia*, to engage and participate in the following works: building, maintenance and reparation works in private properties of the members and commanders of the KB; digging trenches, building defences in the positions of the KB or other HV and HVO forces; and assisting the KB members in the process of looting houses and properties of Bosnian Muslims.[108]

32. The incident of turning a private property into the headquarters of the Vinko Škrobo ATG is not as such explicitly mentioned in the Indictment. The Indictment charges Martinović with forcing prisoners to perform some labour with a military character or purpose, for example "digging trenches" and "building defences", but does not include the allegation that prisoners were also forced to empty apartments of furniture for that purpose. Furthermore, the allegation in the Indictment that prisoners were forced to "assist in the process of looting houses and properties of Bosnian Muslims" does not sufficiently allege this specific incident (stating only that unlawful labour occurred at "locations other than the front line" somewhere within a nine-month range), nor its military purpose.[109] The Indictment was thus defective, and the Trial Chamber erred in failing to so find.

33. As to whether the defects were cured, the information in the Prosecution Pre-Trial Brief, filed on 11 October 2000, as well as in its Chart of Witnesses and List of Facts, filed on 18 July 2000, was provided to Naletilić and Martinović in a timely manner, as these documents were filed eleven and fourteen months prior to the commencement of trial, respectively. With regard to unlawful labour in locations other than the frontline, the Prosecution Pre-Trial Brief states that "prisoners were forced to work at the premises of Martinović" and that "detainees were forced by Martinović to loot the homes of Bosnian Muslims who had been evicted across the front-line into East Mostar".[110] The Prosecution Chart of Witnesses and List of Facts provides that Martinović forced Muslim detainees to perform "work such as construction, maintenance, repairs on the front line or at other locations either in support of the military effort of the Croatian forces or for their personal gain".[111]

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[107] *See* Indictment, paras 35, 39, 40.

[108] Indictment, para. 44.

[109] The Appeals Chamber considers that the reference to "Bosnian Muslim detainees" was, however, sufficient to give Martinović notice as to the identity of the victims.

[110] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's Pre-Trial Brief, 11 October 2000 ("Prosecution Pre-Trial Brief"), para. 3.8.

[111] Prosecution Chart of Witnesses and List of Facts (Under Seal), Annex 2, paras 176-177. *See* also Prosecution Chart of Witnesses and List of Facts (Under Seal), Annex 1, p. 46, where a summary of Witness SS (upon whose testimony the Trial Chamber based its finding regarding this incident) is provided and which does not contain the material facts absent from the Indictment with regard to the incident of turning a private property into the headquarters of the Vinko Škrobo ATG.

34. The Appeals Chamber finds that these passages could not have cured the defect in the Indictment, because they suffer from the same insufficiencies as did the Indictment itself: a failure to specify the place, time, and military purpose of the particular incident in question. No additional information is contained in the Prosecution Opening Statement.

35. Thus, Martinović was not put on notice of the incident of turning a private property into the headquarters of the Vinko Škrobo ATG. The Appeals Chamber finds that the trial against Martinović was thereby rendered unfair, and as a result he could not have been found responsible for this incident.

(b) <u>Failure to sufficiently plead three incidents of prisoners' beatings in Martinović's area of command</u>

36. The Trial Chamber found that Martinović participated in frequent beatings of prisoners as established for three incidents: one in July or August 1993 involving several prisoners; another with a prisoner known as the "Professor"; and a third concerning a prisoner called Tsotsa. Solely on the basis of these three incidents, Martinović was found guilty under Counts 11 and 12 of wilfully causing great suffering and of cruel treatment pursuant to Articles 2(c), 3 and 7(1) of the Statute.[112]

37. Martinović submits that the Trial Chamber erred in law by finding him responsible for the three incidents because they were not pleaded in the Indictment.[113] In addition he argues that "the defence was not given the elementary information about these events: place, time of commission, the name of the victim, the names of any possible eye-witnesses, etc."[114]

38. The Prosecution responds that Martinović has not identified a miscarriage of justice with regard to the alleged lack of precision of dates of crimes.[115] It submits that the dates and the time periods in the Indictment were approximate.[116] According to the Prosecution, the witness statements and discovery material in Martinović's possession substantiated the details of the charges alleged.[117]

39. The relevant paragraphs of the Indictment read:[118]

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[112] Trial Judgement, paras 385, 386, 388, 389. As a result of cumulative convictions coming into play, only a conviction for wilfully causing great suffering under Count 12 was entered: Trial Judgement, paras 734, 767, 768.
[113] Martinović Appeal Brief, paras 184, 186.
[114] Martinović Appeal Brief, para. 185.
[115] Prosecution Response to Martinović Appeal Brief, para. 4.4.
[116] Prosecution Response to Martinović Appeal Brief, para. 4.4.
[117] Prosecution Response to Martinović Appeal Brief, para. 4.4.
[118] The criminal acts for which Martinović is alleged to be responsible under Counts 11 and 12 are stated in paragraphs 45, 49 and 50 of the Indictment. Paragraph 50 is relevant to Martinović's alleged responsibility pursuant to Article 7(3), for which he was not convicted: Trial Judgement, para. 455. The Trial Chamber relied on the allegations in paragraph 49 of the Indictment when reaching its findings for the three incidents: Trial Judgement, paras 382, 452.

[Counts 9 to 12: Torture and Wilfully Causing Great Suffering]

> 45. Beginning in May 1993 and at least through January 1994, MLADEN NALETILIĆ, VINKO MARTINOVIĆ and their subordinates tortured or wilfully caused great suffering to Bosnian Muslim civilians and prisoners of war captured by the KB or detained under the authority of the HVO. Severe physical and mental suffering was intentionally inflicted on Bosnian Muslim detainees for the following purposes: to obtain from them information; to punish them; to retaliate due to adverse developments in the front lines; or to intimidate them, based on their ethnicity or religion. Throughout this period, MLADEN NALETILIĆ and VINKO MARTINOVIĆ repeatedly committed, aided and abetted torture, wilfully caused great suffering, and by their example instigated and encouraged their subordinates to torture or cause great suffering on Bosnian Muslim detainees.
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> 49. Throughout this period, VINKO MARTINOVIĆ repeatedly beat in the presence of his subordinates Bosnian Muslim detainees in the area under his command and Bosnian Muslim civilians in the process of their eviction and deportation.

40. The Appeals Chamber notes that with respect to the material facts pertaining to the allegations that Martinović personally beat prisoners, only the place of the beatings is sufficiently pleaded.[119] Information on the date and the identity of the victims of the beatings is missing from the Indictment.[120] The Appeals Chamber therefore finds that the Indictment's allegations with respect to Martinović's personal involvement in beatings were too vague to provide adequate notice. The Appeals Chamber will now consider whether this vagueness was cured, with respect to each of the three incidents, by the Prosecution's Chart of Witnesses and Opening Statement.[121]

41. The Trial Chamber relied on the evidence of Witnesses K, SS and NN to establish Martinović's responsibility for having beaten several prisoners in July or August 1993.[122]

42. Whilst the Prosecution Chart of Witnesses made it clear that Witness K would provide evidence that Martinović beat *a* prisoner at his headquarters in July 1993,[123] the Trial Chamber found that *several* prisoners were beaten in the incident that took place in July or August 1993.[124] The summaries of Witnesses SS and NN merely indicate that several individuals were beaten by Martinović on *one* occasion, without specifying the approximate date.[125] Only the summary of Witness NN identifies any of the victims of the beatings.[126] The Appeals Chamber concludes that the summaries of these witnesses (Witnesses K, SS and NN), whether taken separately or together, failed to provide clear and consistent information.

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[119] "[T]he area under [Martinović's] command": Indictment, para. 49.
[120] The Prosecution was not, however, required to identify possible eyewitnesses in the Indictment, contrary to Martinović's suggestion.
[121] The Prosecution does not claim that its Pre-Trial Brief provided additional information on any of the three incidents.
[122] Trial Judgement, para. 385.
[123] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 46-47, 56.
[124] Trial Judgement, para. 385.
[125] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 46, 47, 56.
[126] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 56.

43. In the part of its Opening Statement related to the charges on torture and willfully causing great suffering (Counts 9 to 12) of the Indictment, the Prosecution made no specific reference to these incidents.[127]

44. For these reasons, the Appeals Chamber finds that Martinović was not provided with sufficiently clear and consistent information that would have put him on notice of the incident of beatings in July or August 1993 for which he was found responsible.

45. For its findings on the incident involving the "Professor", the Trial Chamber relied on the testimonies of Witnesses II and OO.[128] In the summary of Witness II in the Prosecution Chart of Witnesses and List of Facts, the incident involving the "Professor" is not mentioned, nor is any reference made to Counts 9 to 12 or paragraph 49 of the Indictment.[129] The summary of Witness OO, however, explicitly refers to paragraph 49 of the Indictment, which alleges that Martinović beat prisoners in his area of command. The summary specifies the victim's identity as "the Professor" and states that the victim was beaten by Martinović until he collapsed after which Martinović put him in a garbage can.[130] These details were specifically reiterated by the Prosecution in its Opening Statement.[131] Although no exact date is provided, the Appeals Chamber considers that the rather detailed information otherwise provided was sufficient to put Martinović on notice of what specific incident was being alleged. Thus, the defect in the Indictment was cured with respect to this incident by the provision of timely, clear and consistent information.

46. With respect to the incident involving a prisoner called Tsotsa, the Trial Chamber relied on the evidence of Witness Y.[132] The summary of Witness Y in the Prosecution Chart of Witnesses does not mention beatings administered by Martinović.[133]

47. The victim, Tsotsa, is not mentioned elsewhere in the Prosecution Chart of Witnesses. No reference to this incident was made in the Prosecution Opening Statement.[134] Martinović was thus not put on notice of the incident of beatings involving a prisoner called Tsotsa.

48. For the foregoing reasons, the Appeals Chamber sets aside the findings that Martinović was responsible for the incident in July or August 1993 as well as for the incident involving a prisoner

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[127] T. 1849-1853.
[128] Trial Judgement, para. 386, fn. 1010.
[129] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 45.
[130] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 22-23.
[131] T. 1851.
[132] Trial Judgement, para. 388.
[133] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 41.
[134] T. 1804-1860. Examples of alleged beatings administered by Martinović are given by the Prosecution at T. 1851-1853.

called Tsotsa. With respect to the incident involving the "Professor", Martinović's appeal is dismissed.

(c) Failure to sufficiently plead incidents of unlawful transfer of civilians from the DUM area in Mostar on 13-14 June 1993 and from the Centar II area in Mostar on 29 September 1993

49. The Trial Chamber found Martinović guilty under Count 18 of committing unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949, pursuant to Articles 2(g) and 7(1) of the Statute, as well as under Count 1 for persecutions under Articles 5(h) and 7(1) of the Statute through the underlying act of forcible transfer. These convictions were based on the finding that Martinović transferred civilians on 13-14 June 1993 from the DUM area in Mostar and on 29 September 1993 from the Centar II area in Mostar.[135] These were the only incidents of unlawful transfer for which Martinović was found responsible.[136] Naletilić was convicted of the same crimes under Article 7(3) of the Statute. In addition, he was also found responsible under Article 7(1) for another instance of transfer that took place in Sovići on 4 May 1993.[137]

50. Martinović submits that his convictions should be set aside because these incidents were not set out in the Indictment.[138] Therefore, Martinović contends, he never addressed these incidents in his Final Trial Brief.[139] Martinović further argues that he was only charged with forcible transfers in Mostar on the days following 9 May 1993 and during the first days of July 1993 as underlying acts of persecutions.[140]

51. Under his 12th ground of appeal, Naletilić also submits that he could not have been found responsible for the incidents of unlawful transfer in Mostar on 13-14 June and 29 September 1993 because the Indictment did not put him on notice of these charges or of the allegation that he was

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[135] Trial Judgement, paras 569, 672, 711. The Trial Chamber also found that Martinović's responsibility pursuant to Article 7(3) of the Statute had been established, but found that his responsibility for these incidents was most appropriately described under Article 7(1) of the Statute: Trial Judgement, para. 569. In Count 1 of the Indictment Naletilić and Martinović were charged with "forcible transfer" as an underlying offence of persecutions as a crime against humanity. Count 18 charged them with "unlawful transfer" as a grave breach of the Geneva Conventions of 1949. The Trial Chamber held that "the underlying act of forcible transfer as a crime against humanity may be proven even if not all the requirements of grave breaches of the Geneva Conventions of 1949 in Article 2(g) are met": Trial Judgement, fn. 1659. The Appeals Chamber notes that the acts of forcible transfer which the Trial Chamber found constituted persecutions were in fact the same three incidents that it also found constituted unlawful transfer, namely the incidents of 13 and 14 June 1993, 29 September 1993 and 4 May 1993: Trial Judgement, paras 671-672. For the purposes of the present ground of appeal only, the term "unlawful transfer" is also meant to encompass the underlying act of forcible transfer as persecutions.

[136] Trial Judgement, para. 569.

[137] Trial Judgement, paras 570-571, 671-672, 711.

[138] Martinović Appeal Brief, paras 417, 494-498.

[139] Appeals Hearing, T. 270.

[140] Martinović Appeal Brief, paras 495-496.

responsible under Article 7(3) of the Statute.[141] He contends that his defence focused on the "two large waves" of unlawful transfer in May and July 1993 which were alleged in the Indictment.[142]

52. In response to Martinović's submissions, the Prosecution contends that the Initial Indictment pleaded:[143] (1) the specific date (9 May 1993) when the forced expulsions allegedly began; (2) that they continued over the next six months; (3) that there were two large waves of transfers in May and July 1993; and (4) that all the events were said to have occurred in and around the city of Mostar, a confined geographic area.[144] The Prosecution further contends that its subsequent submissions cured any defect in the Indictment, as evidenced by Martinović's failure to raise an objection at the pre-trial stage.[145]

53. In response to Naletilić's submissions, the Prosecution submits that the Indictment charged him under Articles 7(1) and 7(3) of the Statute for persecutions and forcible transfer starting on 9 May 1993 and lasting until at least January 1994, and specified that these offences were carried out by members of the KB in places in and around Mostar.[146] The Prosecution further submits that, to the extent that the Indictment would be deemed defective, the Prosecution's 65 *ter* filings and Chart of Witnesses put Naletilić on notice.[147]

54. As a preliminary remark, it is necessary to note that paragraph 34(a) of the Indictment, which appears under the persecutions Count, explicitly cross-references to paragraphs 53 and 54 under the unlawful transfer Count, thus making it plain that the same allegations of unlawful transfer constitute underlying acts for persecutions. Notice of forcible transfer as an underlying act of persecutions would thus suffice for notice of the charge of unlawful transfer, and *vice versa*.

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[141] Naletilić Revised Appeal Brief, paras 143, 146 (citing, *inter alia*, Trial Judgement, para. 571); Appeals Hearing, T. 102. Naletilić also incorporates this argument to his 26th ground of appeal: Naletilić Revised Appeal Brief, para. 225.
[142] Appeals Hearing, T. 102.
[143] Prosecution Response to Martinović Appeal Brief, para. 8.28 (citing 15 February 2000 Decision).
[144] Prosecution Response to Martinović Appeal Brief, para. 8.29 (citing 15 February 2000 Decision, para. 27).
[145] Prosecution Response to Martinović Appeal Brief, paras 8.29 (citing 15 February 2000 Decision, para. 27), 8.30, 8.31; Confidential Prosecution Response to Martinović Appeal Brief, paras 8.30-8.31, fn. 344 (citing the evidence of Witnesses P, GG and WW, the summary of their statements in the Prosecution's Chart of Witnesses and List of Facts (Under Seal), *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's List of Witnesses pursuant to Rule 65 *ter* (E)(iv), 11 October 2000 (Under Seal) ("Prosecution Rule 65 *ter* Witnesses' List") and a number of exhibits upon which the Trial Chamber relied, including Ex. PP 456 which according to the Prosecution were disclosed to Naletilić and Martinović in September 2001). The Prosecution further refers to the summary of Witness Jeremy Bowen in its Rule 65 *ter* Witnesses' List (Under Seal): Appeals Hearing, T. 250-251.
[146] Prosecution Response to Naletilić Revised Appeal Brief, para. 7.9 (citing Indictment, paras 23-24, 26, 53-54); Appeals Hearing, T. 133.
[147] Appeals Hearing, T. 133-135; Prosecution Response to Naletilić Revised Appeal Brief, para. 7.13; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Respondent's Brief to Mladen Naletilić's Appeal Brief, 30 October 2003 (Confidential) ("Confidential Prosecution Response to Naletilić Revised Appeal Brief"), para. 7.14, fn. 406 (citing the summaries of the statements of Witnesses AB, WW, GG and two other witnesses in Prosecution Chart of Witnesses and List of Facts (Under Seal) and a number of exhibits upon which the Trial Chamber relied, including Ex. PP 456, which according to the Prosecution were disclosed to Naletilić and Martinović in September 2001).

Consequently, the allegations in paragraphs 25 to 34 of the Indictment on persecutions must be read together with the allegations in paragraphs 53 and 54 and *vice versa*.[148]

55. The relevant paragraphs of the Indictment read as follows:

> [Count 1: Persecutions]
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> 26. In the municipality of Mostar, the forcible transfer and imprisonment of Bosnian Muslim civilians started simultaneously with the HV and HVO attack of 9 May 1993 and continued until at least January 1994. However, there were two large waves of forcible transfers and imprisonment: one in the days following the 9 May 1993 attack, and a second during the first days of July 1993. Once the KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them to detention centres under HVO authority, or across the confrontation lines to the territories under ABiH control.
>
> 32. Under the command of MLADEN NALETILIĆ and VINKO MARTINOVIĆ, the KB forcibly transferred Bosnian Muslim civilians to the confrontation line in the municipality of Mostar and forced them to cross the confrontation line towards the ABiH side. MLADEN NALETILIĆ and VINKO MARTINOVIĆ gave orders to expel the Bosnian Muslim population and loot and destroy their houses and properties.
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> 34. Between about April 1993 and at least January 1994, MLADEN NALETILIĆ, as commander of the KB, and VINKO MARTINOVIĆ, as commander of the "Mrmak" or "Vinko Škrobo" sub-unit of the KB, together with other leaders, agents and members of the HV and HVO, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of a crime against humanity, through the widespread or systematic persecutions of Bosnian Muslim civilians on political, racial, ethnic or religious grounds, throughout the territory claimed to belong to the HZ H-B and HR H-B by the following means, including, as applicable, the acts and conduct described in Counts 2 through 22 below:
>
> (a) unlawfully confining, detaining, forcibly transferring and deporting Bosnian Muslim civilians, including as described in paragraphs 53 and 54; […]
>
> [Count 18: Forcible Transfer]
>
> 54. In the municipality of Mostar, MLADEN NALETILIĆ and VINKO MARTINOVIĆ were responsible for and ordered the forcible transfer of Bosnian Muslim civilians that started on the 9 May 1993 and continued until at least January 1994. The KB members under their command were prominent in the eviction, arrest and forcible transfers of Bosnian Muslim civilians throughout the relevant period, and particularly during the two large waves of forcible transfers that took place in May and July 1993. Once the KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them across the confrontation lines to the territories under ABiH control. The ABiH held a section of the city which was under siege by the HV and HVO forces, who were shelling intensely the area and preventing the arrival of humanitarian aid and basic supplies. MLADEN NALETILIĆ and VINKO MARTINOVIĆ commanded operations for this purpose and gave orders to their subordinates to proceed with the forcible transfers.

(i) Whether the Indictment suffered from a material defect in the way the two incidents were pleaded in relation to Martinović

56. Since the Prosecution alleged that Martinović personally committed the acts constituting unlawful transfer, it was necessary for it to set out, so far as possible, the identity of the victims, the

[148] *See Kordić and Čerkez* Appeal Judgement, paras 132-134.

place and approximate date of these alleged criminal acts, and the means by which they were committed "with the greatest precision".[149]

57. The Indictment states that the unlawful transfers included "identif[ying] persons of Muslim ethnic background" and "forcibly transferr[ing] them across the confrontation lines to the territories under ABiH control".[150] The Indictment further alleges that Martinović "commanded operations" of unlawful transfers.[151] The Appeals Chamber finds that the means by which Martinović committed the unlawful transfers were sufficiently pleaded in the Indictment.

58. The victims of the unlawful transfers are generally identified in the Indictment as "Bosnian Muslim civilians".[152] However, since in relation to the charge of unlawful transfer, it was the Prosecution's case that the unlawful transfers took place repeatedly and on a large scale, it is sufficient that the victims were identified by category in the Indictment.[153]

59. The Indictment further alleges that unlawful transfers took place in "the municipality of Mostar", from 9 May 1993 until at least January 1994 in general, and during "two large waves": "one on the days following the 9 May 1993 attack, and a second during the first days of July 1993".[154] Martinović was found responsible for incidents of unlawful transfer from West to East Mostar which took place on 13-14 June and 29 September 1993. The Appeals Chamber finds that the allegations that unlawful transfer took place in the municipality of Mostar in "the days following the 9 May 1993 attack" and "during the first days of July 1993"[155] do not sufficiently plead the dates of the 13-14 June and 29 September 1993 incidents of unlawful transfer, and that the more general reference to a nine-month range is insufficiently specific. Therefore, the Trial Chamber erred in failing to find that the Indictment was defective with regard to these incidents for which Martinović was found responsible.

60. For its argument that Martinović was put on notice of the incidents of unlawful transfer on 13-14 June 1993 and on 29 September 1993, the Prosecution invokes information provided in its Chart of Witnesses, in the summary of Witness Jeremy Bowen in the Prosecution Rule 65 *ter* Witnesses' List as well as in Exhibits PP 456, PP 455.1 and PP 620.1.[156]

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[149] *Blaškić* Appeal Judgement, para. 213 (footnote omitted).
[150] Indictment, para. 54.
[151] Indictment, para. 54.
[152] Indictment, para. 54.
[153] *Kupreškić* Appeal Judgement, para. 90.
[154] Indictment, paras 26, 54.
[155] Indictment, para. 26.
[156] Prosecution Response to Martinović Appeal Brief, para. 8.31; Confidential Prosecution Response to Martinović Appeal Brief, para. 8.31; Appeals Hearing, T. 250-252.

61. The Appeals Chamber notes that the summary of Witness Jeremy Bowen stated that he would give evidence on the conditions of the population in East Mostar in August and September 1993, and that the documentary that he had made included footage of civilians expelled across the front-line from West to East Mostar. The summary did not provide any specific information as to the incidents of 13-14 June and 29 September 1993 or as to Martinović's role therein.[157] With respect to Exhibits PP 456, PP 455.1 and PP 620.1, the Appeals Chamber notes that none of the Prosecution's written submissions at the pre-trial stage made clear the significance of these exhibits in detailing the forcible transfer charges; indeed, with the exception of one, none of the exhibits were even mentioned in the Prosecution Rule 65 *ter* Exhibits' List.[158] The Appeals Chamber considers that, as with witness statements,[159] the mere service of potential exhibits pursuant to the disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial.

62. The Prosecution Pre-Trial Brief and Opening Statement provide that 9 May 1993 marked the beginning of an extended period of forced evictions from West Mostar into East Mostar,[160] and that unlawful transfers from West Mostar into East Mostar took place following 30 June 1993.[161] The Prosecution List of Facts states that Muslim civilians were forcibly transferred "in very large numbers in the days following the attack of 9 May 1993 and during the first days of July 1993".[162] This information does not contradict the Indictment, but confirms and provides further particulars of the allegations in the Indictment regarding the "two large waves" of unlawful transfers in May and July 1993.[163] These post-indictment submissions of the Prosecution thus indicate that it intended to rely primarily on the "two large waves".

63. In light of the foregoing, the question is whether the information in the Prosecution Chart of Witnesses alone put Martinović on notice of the unlawful transfers of 13-14 June and 29 September 1993.

64. As stated earlier, the information in the Prosecution Chart of Witnesses was provided to Martinović in a timely manner. It mentions the date of the 13 June 1993 incident in the summaries

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[157] Prosecution Rule 65 *ter* Witnesses' List (Under Seal), p. 9.
[158] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's List of Exhibits pursuant to Rule 65 *ter* (E)(v), 11 October 2000 (Under Seal) ("Prosecution Rule 65 *ter* Exhibits' List"). The Report of the European Community Monitoring Mission subsequently admitted as Exhibit PP 456.3 may be seen as having been generally referred to in the Prosecution Rule 65 *ter* Exhibits' List under point 13, which was entitled "Reports of the European Community Monitoring Mission". However, no mention was made in the Prosecution Rule 65 *ter* Exhibits' List of the particular charges or paragraphs in the Indictment that the exhibits referred to therein went to prove.
[159] *Ntakirutimana* Appeal Judgement, para. 27.
[160] Prosecution Pre-Trial Brief, para. 2.22; T. 1833.
[161] Prosecution Pre-Trial Brief, paras 2.23, 2.32; T. 1835-1836.
[162] Prosecution Chart of Witnesses and List of Facts (Under Seal), Annex 2, p. 9.

of five witnesses, including the summary of Witness WW, upon whose testimony the Trial Chamber mainly relied to establish that this incident took place,[164] and also provides precise details about the incident.[165] Furthermore, all these summaries explicitly refer to the charge of unlawful transfer in the Indictment as well as the charge of forcible transfer as an underlying act of persecutions.[166] This information is clear and was consistently repeated so that it put Martinović on notice that he would have to answer to an allegation of having participated in the unlawful transfer that took place on 13-14 June 1993.[167] The Appeals Chamber therefore concludes that the defect in the Indictment regarding the date of this incident was cured by the Prosecution in relation to Martinović.

65. The Prosecution Chart of Witnesses also mentions the exact date of the unlawful transfer of 29 September 1993. It provides precise details regarding what happened during the incident, and further identifies the victims and the location of the incident.[168] It moreover refers to the charge of forcible transfer as an underlying act of persecutions. As noted above, the Indictment made it clear that the same allegations of unlawful transfer constitute underlying acts for persecutions. The Appeals Chamber therefore concludes that the defect in the Indictment regarding the date of this incident was cured by the Prosecution in relation to Martinović.

66. For the foregoing reasons, this part of Martinović's sub-ground of appeal is dismissed.

(ii) Whether the Indictment suffered from a material defect in the way the two incidents were pleaded in relation to Naletilić

67. Because the relevant facts to be pleaded depend on the mode of responsibility alleged,[169] the Appeals Chamber's finding that the two incidents of unlawful transfer were inadequately pleaded with respect to Martinović does not automatically transfer to Naletilić, who was charged under Article 7(3) of the Statute. Among the material facts which must be pleaded in an indictment in relation to an allegation of superior responsibility are "the conduct of the accused by which he may be found" to have had the requisite *mens rea*, the "[acts] of those others for which he is alleged to be responsible" and "the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed

[163] Indictment, paras 26, 54.
[164] Trial Judgement, paras 549-550.
[165] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 11, 12, 21, 22, 25.
[166] Indictment, paras 26, 34(a), 54.
[167] Only the date of 13 June 1993 is mentioned, not the dates of 13 and 14 June 1993. However, the fact that this incident spanned over 13-14 June 1993 is undisputed.
[168] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 18, 25.
[169] *See supra*, para. 24.

them".[170] The Appeals Chamber understands Naletilić to be arguing that his own conduct and *mens rea* in relation to the two incidents were insufficiently pleaded in the Indictment, not the conduct of his subordinates.[171]

68. The Trial Chamber found that Naletilić had the requisite *mens rea* on the basis that unlawful transfers conducted by his subordinates took place with sufficient regularity that he must have known about them.[172] The Appeals Chamber finds that the material facts underlying this finding were adequately pleaded in the Indictment. Specifically, the Indictment alleges that unlawful transfers "continued" throughout the period between 9 May 1993 and January 1994, which implies that they occurred with certain regularity.[173] Naletilić's subordinates are alleged to have been "prominent" in this regular activity "throughout" the relevant nine month period.[174]

69. The Trial Chamber further found that Naletilić did nothing to prevent or punish but rather endorsed unlawful transfers.[175] The Indictment alleges that "KB members under [Naletilić's] command were prominent in the eviction, arrest and forcible transfers of Bosnian Muslim civilians throughout the relevant period" and that he was "responsible for and ordered" the unlawful transfers.[176] In light of these allegations and the fact that the Indictment charges Naletilić with responsibility pursuant to Article 7(3) of the Statute, it is apparent that Naletilić is alleged to have endorsed rather than prevented the unlawful transfers.

70. For the foregoing reasons, the Appeals Chamber finds that Naletilić has failed to show that the Indictment was defective with respect to his responsibility for these two incidents.

(d) Failure to sufficiently plead incidents of plunder in Mostar other than those taking place at the DUM area on 13 June 1993

71. In paragraph 628 of its Judgement, the Trial Chamber found as follows:

> Regarding the other plunder incidents, Vinko Martinović was present on some occasions when his soldiers committed acts of looting; sometimes explicitly organising how plunder should take place. On other occasions, apartments were looted by soldiers in areas under his responsibility and by soldiers subordinate to Martinović himself, even if he was not present on the spot. The evidence shows that Vinko Martinović knew that plunder was occurring in several instances during this period and failed to take the necessary and reasonable measures to prevent it or to punish the

[170] *Blaškić* Appeal Judgement, para. 218(b) and (c) (footnotes omitted).

[171] Naletilić argues that the Indictment does not contain "any statement, concise or not, that [he] participated in the unlawful transfer of civilians on 13 and 14 June, and 29 September 1993", and that "reversal is warranted when a defendant stands convicted under *conduct* not even generally plead in the indictment": Naletilić Revised Appeal Brief, para. 146 (emphasis added).

[172] Trial Judgement, paras 557, 558, 566.

[173] Indictment, paras 26, 54.

[174] Indictment, para. 54.

[175] Trial Judgement, paras 558, 566.

[176] Indictment, para. 54.

> perpetrators. The Chamber finds him responsible of plunder in locations other than the DUM neighbourhood under Articles 3(e) and 7(3) of the Statute.

Based in part on the same incidents, Martinović was also convicted of persecutions under Articles 5(h) and 7(1) of the Statute.[177]

72. The Trial Chamber based its findings regarding these incidents, *inter alia*, on the following testimonies: Witness OO gave evidence to being forced by the Vinko Škrobo ATG to carry looted goods in Mostar between the end of July and 17 September 1993;[178] Witness F gave evidence to being forced on one occasion to loot apartments in an area under the responsibility of Martinović between July 1993 and March 1994;[179] and Witness II testified about being frequently ordered by soldiers of the Vinko Škrobo ATG to loot abandoned apartments between the end of July and December 1993.[180]

73. Martinović submits that he should not have been found responsible for these incidents because they were insufficiently pleaded in the Indictment.[181] The Prosecution responds that its pre-trial submissions cured this defect.[182]

74. In light of these findings of the Trial Chamber, the Appeals Chamber will now address whether the Indictment put Martinović on notice of: (1) his own alleged conduct and *mens rea*, and (2) the conduct of those others for which he is alleged to be responsible.[183]

75. Paragraph 57 of the Indictment contains the allegations on plunder and puts these allegations in the context of the campaign of persecutions. In turn, the allegations on persecutions in the Indictment refer back to paragraph 57.[184] The charges on plunder must thus be read in conjunction with the persecutions charges. Paragraph 57 of the Indictment reads as follows:

> [Counts 19 to 22: Destruction and Plunder of Property:]
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> 57. Following the HV and HVO attack on Mostar of 9 May 1993 and in the context of the subsequent campaign of persecutions against the Bosnian Muslim population, the units under the

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[177] Trial Judgement, para. 702.
[178] Trial Judgement, para. 621.
[179] Trial Judgement, paras 621, 622.
[180] Trial Judgement, para. 622.
[181] Martinović Appeal Brief, paras 431, 434, 453, 454; Appeals Hearing, T. 208-209.
[182] Prosecution Response to Martinović Appeal Brief, paras 7.9 (citing 15 February 2000 Decision, para. 27), 7.13; Confidential Prosecution Response to Martinović Appeal Brief, paras 7.10-7.11 (citing Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 22-23), 7.12 (citing Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 45-46); Appeals Hearing, T. 249-250.
[183] *See Blaškić* Appeal Judgement, para. 218(b) and (c). Martinović does not claim that the superior-subordinate relationship was inadequately pleaded. With respect to the persecutions charge, although the conviction was entered pursuant to Article 7(1) rather than Article 7(3), Martinović was not convicted of personally committing the offence, so precise detailing of the incidents is not necessary; it is sufficient that the Prosecution identify the course of conduct on the part of the accused forming the basis for the conviction: *see supra*, para. 24.
[184] Indictment, para. 34(d).

command of MLADEN NALETILIĆ and VINKO MARTINOVIĆ plundered systematically the Bosnian Muslim houses and properties.[185]

The plunder about which Witnesses OO, F and II gave evidence took place in Mostar.[186] The relevant part of the persecutions allegations in the Indictment reads as follows:

> [Count 1: Persecutions:]
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> 26. In the municipality of Mostar, the forcible transfer and imprisonment of Bosnian Muslim civilians started simultaneously with the HV and HVO attack of 9 May 1993 and continued until at least January 1994. However, there were two large waves of forcible transfers and imprisonment: one in the days following the 9 May 1993 attack, and a second during the first days of July 1993. Once the KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them to detention centres under HVO authority, or across the confrontation lines to the territories under ABiH control.[187]

Count 21 of the Indictment charges Martinović with responsibility for plunder under Article 7(3) of the Statute. The section in the Indictment on "General Allegations" states the legal prerequisites for Article 7(3).[188] The Appeals Chamber notes that the law on indictments requires more than a mere restatement of Article 7(3) in an indictment.[189] Among the material facts which must be pleaded are the conduct of the accused by which he may be found to have had the *mens rea* required under Article 7(3) and the conduct of those others for which he is alleged to be responsible.[190]

76. As regards Martinović's own conduct, the Indictment alleges that the base of the Vinko Škrobo ATG "was used as centre for the attacks against Bosnian Muslim civilians, particularly […] looting"[191] and that Martinović gave orders to loot the houses and properties of the BH Muslim population.[192] The Indictment further alleges that "units under the command" of Martinović "plundered systematically the Bosnian Muslim houses and properties" in the "municipality of Mostar".[193] This information was sufficiently detailed to enable Martinović to prepare his defence.[194] The Indictment put Martinović on notice of the conduct by which he may have been found to have known or had reason to know that plunder was about to be committed or had been

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[185] Indictment, para. 57.
[186] Trial Judgement, paras 621, 702.
[187] Indictment, para. 26.
[188] Indictment, para. 24 reads: "MLADEN NALETILIĆ and VINKO MARTINOVIĆ are also, or alternatively, responsible as superiors for the acts of their subordinates pursuant to Article 7(3) of the Statute of the Tribunal. A superior is responsible for the acts of his subordinates if the superior knew, or had reason to know, that his subordinate was about to commit such acts, or had done so, and the superior failed to take the necessary and reasonable measures to prevent such further acts, or to punish the perpetrators thereof."
[189] Indeed, "an indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice": *Kvočka et al.* Appeal Judgement, para. 28. *See* also *Blaškić* Appeal Judgement, para. 218.
[190] *See Blaškić* Appeal Judgement, para. 218(b) and (c).
[191] Indictment, para. 30.
[192] Indictment, para. 32.
[193] Indictment, paras 26, 57, read in conjunction.
[194] *See Kupreškić et al.* Appeal Judgement, para. 88.

committed by his subordinates as well as the conduct by which he may have been found to have failed to take the necessary and reasonable measures to prevent these acts or to punish those who committed them.

77. As regards the conduct of Martinović's subordinates for which he is alleged to be responsible, the Trial Chamber found that the incidents of plunder that Witnesses OO, F and II gave evidence to concerned incidents where prisoners of war were forced to assist in the plunder,[195] and that these incidents took place from the end of July 1993 onwards.[196] Even if there was no explicit cross-reference between these sections of the Indictment, the charges in the Indictment on unlawful labour (Count 5) put Martinović on notice that plunder was also alleged to have been carried out by forcing prisoners of war to assist in the looting.[197]

78. However, the Indictment's allegations were inadequate as to the date of the alleged incidents. The Indictment alleges that the incidents of plunder took place from 9 May 1993 until at least January 1994,[198] a nine month period. As noted by the Trial Chamber in its 15 February 2000 Decision, no specific examples of plunder were provided in the Indictment[199] although the Indictment does plead that Martinović's unit "systematically" plundered BH houses and properties. The Appeals Chamber finds that, even taking into consideration that Martinović was found responsible pursuant to Article 7(3) of the Statute, these allegations did not put Martinović on notice of a sufficiently specific time span within which those incidents may have taken place. The date of these plunder incidents was therefore insufficiently pleaded in the Indictment.

79. On the basis of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective with respect to the allegations against Martinović under Count 21 of the Indictment for Article 7(3) responsibility for incidents of plunder in Mostar other than those that took place in the DUM area on 13 June 1993.

80. The Prosecution invokes the summaries of Witnesses OO and II in its Chart of Witnesses for its argument that Martinović was put on notice of the incidents of plunder in Mostar other than those that took place in the DUM area on 13 June 1993.[200] The summary of Witness OO in the Prosecution Chart of Witnesses indicates that forced labour took place in Martinović's area of

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[195] Trial Judgement, paras 621-622.
[196] Trial Judgement, paras 621 (Witnesses OO and F), 622 (Witness II) .
[197] Indictment, para. 44.
[198] Indictment, paras 26, 57.
[199] 15 February 2000 Decision, para. 27.
[200] Confidential Prosecution Response to Martinović Appeal Brief, paras 7.11-7.12. The Prosecution also invokes the summary of Witness AB: Appeals Hearing, T. 249. The Appeals Chamber notes that Martinović does not contend that he was not put on notice of the plunder incidents to which Witness AB gave evidence.

responsibility and that this activity was carried out from 4 July 1993 onwards.[201] The explicit reference in the summary of Witness OO to the allegations of plunder in the Indictment indicated that this forced labour included looting.[202] The summary of Witness II indicates that he, while in custody of Martinović's unit, was taken to assist in the looting of houses from early August 1993.[203]

81. The sections of the Chart of Witnesses invoked by the Prosecution did not, as such, put Martinović on notice as to the date of the aforementioned incidents. The Appeals Chamber further notes that the summary of Witness F indicated that from 1 July 1993 onwards prisoners from the Heliodrom were forced by Martinović's unit to loot furniture from abandoned Muslim houses.[204] This summary also did not provide specifics about the date of the aforementioned incidents.

82. The Prosecution Opening Statement does not provide any information beyond that in the Indictment on the relevant incidents of plunder.[205]

83. However, the Appeals Chamber notes that the Indictment alleges evictions and forcible transfers that took place in "two large waves" in May and July 1993.[206] The Prosecution Pre-Trial Brief clearly and repeatedly puts the allegations of plunder in close connection with the alleged eviction and forcible transfer of BH Muslims.[207] This would indicate that plunder is also alleged to have taken place in May and July 1993. The Chart of Witnesses indicates that Witnesses OO, F and II were to testify to plunder incidents taking place in July and early August 1993.[208] The summaries of all these witnesses clearly refer to the plunder charges against Martinović.[209] The Appeals Chamber finds that this information is clear and consistent and was provided in a timely manner to put Martinović on notice of the dates of the relevant incidents.

84. For these reasons, the Appeals Chamber finds that the defect in the Indictment regarding the plunder incidents referred to by Witnesses OO, F and II was subsequently cured by the Prosecution.

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[201] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 22-23.
[202] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 23 (citing Indictment, para. 57, Count 21).
[203] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 45-46.
[204] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 38.
[205] T. 1804-1860.
[206] Indictment, para. 54.
[207] The Prosecution Pre-Trial Brief states that Count 21 "is largely based on the widespread looting of Bosnian Muslim homes that occurred after Bosnian Muslims were expelled from West Mostar" (para. 3.26), that the widespread practice of plunder of Bosnian Muslim property was carried out in the wake of the forced evictions (para. 3.2(d)) and that "after evicting the Bosnian Muslims, MARTINOVIĆ and his subordinates systematically looted their houses, often forcing Bosnian Muslim detainees to loot the houses of their Bosnian Muslim neighbours" (para. 2.33).
[208] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 22-23, 38, 45.
[209] Prosecution Chart of Witnesses and List of Facts (Under Seal), pp. 23, 38, 46.

(e) Failure to sufficiently plead incidents of mistreatment in Ljubuški prison

85. Under Counts 11 and 12, the Trial Chamber found, *inter alia*, that Naletilić bore responsibility, pursuant to Articles 2(c), 3 and 7(3) of the Statute, for certain incidents of mistreatment committed by members of the KB in Ljubuški prison.[210] Naletilić claims that the Indictment failed to allege the time, place, manner and exact perpetrators of these incidents.[211] He further contends that he did not know from the Indictment whether and when Ljubuški prison was under the command of the KB, or that the warden, as found by the Trial Chamber, was a member of the KB.[212]

86. The Prosecution argues that the charges against Naletilić in paragraph 50 of the Indictment include beatings and torture in Ljubuški and that the same paragraph clearly sets out that he knew or had reason to know that his subordinates were about to commit such acts, or had done so.[213]

87. Paragraph 50 of the Indictment reads as follows:

> 50. Throughout this period [beginning in May 1993 and at least through January 1994],[214] the beatings and torture of Bosnian Muslim civilians and prisoners of war became a common practice of the members of the KB. Beatings and torture of Bosnian Muslim civilians and prisoners of war were committed by a large number of members of the KB, including commanders. These beatings and tortures were committed at different bases of the KB in Mostar, Lištica – Široki Brijeg and Ljubuški. Beatings and tortures were also inflicted at other detention centres and camps under the authority of the HVO, such as the Ljubuški prison, the HELIODROM camp. Beatings and tortures were additionally inflicted at several other locations following the capture of prisoners. MLADEN NALETILIĆ and VINKO MARTINOVIĆ knew, or had reason to know, that their subordinates were about to commit such acts, or had done so, and they failed to take the necessary and reasonable measures to prevent such further acts, or to punish the perpetrators thereof.

88. Paragraph 50 of the Indictment charges Naletilić with command responsibility for the mistreatment of prisoners in Ljubuški prison. Only "members of the KB" are alleged to have been involved in this mistreatment. The material fact that subordinates to Naletilić carried out mistreatment is thereby sufficiently pleaded.[215] The manner of the mistreatment is sufficiently pleaded in the allegations that it amounted to cruel treatment and wilfully causing great suffering. Naletilić's arguments that he was not put on notice of the place, perpetrators and manner of mistreatment are therefore dismissed.

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[210] Trial Judgement, paras 427, 428, 453.
[211] Naletilić Revised Appeal Brief, para. 176. *See* also Naletilić Revised Appeal Brief, para. 270.
[212] Appeals Hearing, T. 89, 105.
[213] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.41.
[214] *See* Indictment, para. 45.
[215] Indictment, para. 14 alleges that "at all times relevant to this indictment, MLADEN NALETILIĆ was the commander of the KB". *Cf. Blaškić* Appeal Judgement, para. 218(a) (citing *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002, para. 19).

89. The mistreatment allegedly took place from May 1993 through at least January 1994.[216] No particular incidents of mistreatment in Ljubuški are mentioned in the Indictment. However, it is clear from paragraph 50 of the Indictment, especially from the allegation that beatings and torture of BH Muslim civilians and prisoners of war became a "common practice", that Naletilić is alleged to have known or had reason to know of the regular occurrence of beatings in Ljubuški prison, rather than of specific incidents. Naletilić's ability to prepare a defence for this charge did not depend on his ability to know each and every beating that took place there.

90. However, the Prosecution was obliged to allege in the Indictment the specific acts or course of conduct of Naletilić himself that formed the basis for his liability. In this respect, the Indictment was inadequate. The Trial Chamber's findings reveal that one incident in particular was critical to the establishment of Naletilić's command responsibility, namely, his observation of the beating of Witness Y during his transportation to Ljubuški prison:

> The Chamber finds that it has been proven beyond reasonable doubt that soldiers of the KB and the Vinko Škrobo under the command of Mladen Naletilić and Vinko Martinović, namely Romeo Blažević, Ernest Takač, Robo and Ivan Hrkač, the brother of Čikota, participated in those severe beatings of the helpless prisoners. The Chamber notes that the name Ivića Kraljević [the warden of Ljubuški prison[217]] appears on Exhibit PP 704, the salary list of the KB as of November 1993. The Chamber is satisfied that Mladen Naletilić had reason to know about [beatings at Ljubuški] being committed by his subordinates after he had seen for himself how KB soldiers, in particular Robo, had severely mistreated some of the same prisoners, as for instance, witness Y, already on the bus ride on their way to the Ljubuški prison.[218] The evidence shows that Mladen Naletilić merely told his soldiers on that occasion to stop and to get back on the bus. The Chamber finds that Mladen Naletilić's failure to punish his soldiers for the mistreatment of witness Y near Sovići conveyed the message that their behaviour was tolerable. After this incident, he knew that his soldiers engaged in brutal mistreatment of prisoners. He had reason to know that there was a high risk of his soldiers visiting the Ljubuški prison to continue their revenge action on enemy soldiers by maltreating prisoners there. The evidence from several witnesses regarding the complaint of the warden about his inability to prevent KB soldiers from entering the prison and mistreating prisoners is telling. Mladen Naletilić bears command responsibility pursuant to Article 7(3) of the Statute (Counts 11 and 12).[219]

91. The incident involving Witness Y[220] thus supported the Trial Chamber's findings that Naletilić knew that his soldiers engaged in brutal mistreatment and that he "conveyed the message that their behaviour was tolerable". Naletilić's knowledge of the mistreatment of Witness Y constituted a material fact which should have been pleaded in the Indictment. In its absence, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective with respect to Naletilić's responsibility for events alleged to have occurred in Ljubuški prison under Counts 11 and 12.

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[216] *See* Indictment, para. 45.
[217] Trial Judgement, paras 422, 426.
[218] *See* Trial Judgement, paras 349-351.
[219] Trial Judgement, para. 428 (footnotes omitted).
[220] Trial Judgement, paras 349-351.

92. As to Naletilić's argument that he was not put on notice of the allegation that the warden of Ljubuški prison was a member of the KB, the Appeals Chamber notes that, for reasons which will be stated below, no reasonable trier of fact could have concluded that Ivica Kraljević, the warden of Ljubuški prison, was the same Ivica Kraljević listed in Exhibit PP 704, a salary list for November 1993 of members of the KB and ATG units.[221] The question as to whether Naletilić was put on notice of the allegation that the warden of Ljubuški prison was a member of the KB is therefore moot.

93. The Prosecution Pre-Trial Brief and its Opening Statement do not mention Naletilić's knowledge of the mistreatment of Witness Y.[222] The summary of Witness Y in the Prosecution Chart of Witnesses provides that, during the bus transport to Ljubuški prison, he was beaten by four or five of Naletilić's soldiers, including Robo, in the presence of Naletilić. The summary further states that Naletilić's soldiers would often beat prisoners in Ljubuški prison, and also made explicit reference to Counts 9 to 12 and paragraph 50 of the Indictment.[223]

94. The Appeals Chamber considers that the summary of Witness Y in the Prosecution Chart of Witnesses provided timely, clear and consistent information of Naletilić's knowledge of the mistreatment of Witness Y on the way to Ljubuški. It therefore cured the defect in the Indictment.

(f) Conclusion

95. The Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective because it failed to plead material facts in relation to all the charges examined in the present section, with the exception of the allegations on Naletilić's command responsibility for unlawful transfer. The defects in the Indictment pertaining to (1) the incident of beating involving the "Professor"; (2) the 13-14 June 1993 and 29 September 1993 incidents of unlawful transfer; (3) the plunder incidents described by Witnesses OO, F and II; and (4) Naletilić's *mens rea* with respect to mistreatment in Ljubuški prison were cured by the Prosecution's post-indictment communications.

96. The Appeals Chamber finds that the Trial Chamber erred in finding Martinović responsible for: (1) turning a private property into the headquarters of his unit; and (2) the incidents of beating in July or August 1993 involving several prisoners and that involving a prisoner called Tsotsa. For the incident of turning a private property into the headquarters of Martinović's unit, the finding that Martinović was responsible for unlawful labour pursuant to Articles 3 and 7(1) of the Statute is set

[221] *Infra*, para. 167.
[222] Prosecution Pre-Trial Brief, paras 3.12-3.15; T. 1804–1860.
[223] Prosecution Chart of Witnesses and List of Facts (Under Seal), p. 41.

aside.[224] For the incidents of beating in July or August 1993 involving several prisoners and that involving a prisoner called Tsotsa, the findings that Martinović was responsible for wilfully causing great suffering and for cruel treatment pursuant to Articles 2(c), 3 and 7(1) of the Statute are set aside.[225] The implications of these findings on the sentence of Martinović will be duly considered in the context of his appeal from sentence.

97. For the foregoing reasons, Martinović's sub-ground of appeal under his second ground of appeal is allowed in part. Naletilić's 12th ground of appeal is dismissed in its entirety, and his 21st ground of appeal is dismissed in so far as it relates to the vagueness of the Indictment.

B. Alternative charging

98. As part of his first ground of appeal Martinović submits that the Trial Chamber erred in law in finding that alternative charges could be brought against him and cumulative convictions entered against him.[226] His submissions on cumulative convictions will be considered elsewhere in this judgement, together with the Prosecution's fourth ground of appeal.

99. Under Counts 13 to 15 of the Indictment, Martinović was charged with the murder of Nenad Harmandžić as a crime against humanity under Article 5(a) and as a violation of the laws or customs of war under Article 3, and with wilful killing as a grave breach of the Geneva Conventions of 1949 under Article 2(a) of the Statute. In the alternative, under Counts 16 and 17 of the Indictment, Martinović was charged with the cruel treatment of Nenad Harmandžić as a violation of the laws or customs of war under Article 3 and with wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Article 2(c) of the Statute. In its Pre-Trial Brief, the Prosecution requested the Trial Chamber to consider Counts 16 and 17 only in the event that the Trial Chamber were to conclude that the Prosecution had failed to prove beyond reasonable doubt Martinović's responsibility under Counts 13 to 15 for the unlawful killing of Nenad Harmandžić.[227]

100. The Trial Chamber found Martinović responsible for the cruel treatment and wilfully causing great suffering or serious injury to body or health of Nenad Harmandzic pursuant to Articles 2(c), 3 and 7(1) of the Statute (Counts 16 and 17).[228] The Trial Chamber was also satisfied that Martinović bore individual criminal responsibility for aiding and abetting the murder and wilful killing of Nenad Harmandžić pursuant to Articles 2(a), 3, 5(a) and 7(1) of the Statute (Counts 13 to

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[224] Trial Judgement, paras 311, 313 and 334.
[225] Trial Judgement, paras 385, 388, 389.
[226] Martinović Notice of Appeal, pp. 2-4; Martinović Appeal Brief, paras 2, 3.
[227] Prosecution Pre-Trial Brief, p. 18. *See* Trial Judgement, para. 509.
[228] Trial Judgement, para. 496.

15).[229] The Trial Chamber entered a conviction for Counts 13, 14 and 15 of the Indictment and held that, "[d]ue to their character as alternative charges, the findings on the alternative Counts 16 and 17 will not be considered".[230]

101. Martinović argues that these alternate charges put him in a position where he could not know "against which criminal act he must defend himself".[231] Martinović further argues that alternative charging based on the same conduct is prejudicial to him because the same act or event is given multiple and aggravating characterisations, and that as a result he was placed in a more onerous position than he would have been had he been tried and charged in his own country.[232] He further argues that alternative charging based on the same conduct results in a failure to accurately or fairly reflect the role and knowledge of an accused of events with which that accused is charged or convicted.[233] Martinović provides no specific reason that he was prejudiced under the circumstances of this case; rather he appears to be arguing more generally that alternative charging is impermissible as a matter of law.

102. For the reasons set out below, the Appeals Chamber finds that, while alternative charging on the basis of the same conduct is generally permissible, it depends on the circumstances of the case. In this case, the Appeals Chamber agrees with the Trial Chamber's finding that alternative charging was permissible.

103. The Appeals Chamber has previously held that cumulative charging on the basis of the same acts is generally allowed on the basis that "prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."[234] The same reasoning allows for alternative charging. As with cumulative charging, "[t]he Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence."[235]

104. Martinović further submits that the convictions entered against him for Counts 13 (murder as a crime against humanity) and 14 (wilful killing as a grave breach of the Geneva Conventions of 1949) went beyond the allegations made in the Indictment and convicted him of acts for which the Prosecution did not charge him.[236] This assertion appears to be irrelevant to Martinović's claims

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[229] Trial Judgement, para. 508.
[230] Trial Judgement, para. 511.
[231] Martinović Appeal Brief, para. 13.
[232] Martinović Appeal Brief, paras 14-15.
[233] Martinović Appeal Brief, para. 15.
[234] *Kupreškić et al.* Appeal Judgement, paras 385-386 (citing *Čelebići* Appeal Judgement, para. 400).
[235] *Čelebići* Appeal Judgement, para. 400.
[236] Martinović Appeal Brief, para. 13. *Cf.* Martinović Notice of Appeal, p. 4 (emphasis added): "[i]n this particular case we are of the opinion that the court, having accepted charging in counts 13 and 14, went beyond the indictment,

concerning the permissibility of alternative charging. Furthermore, the Appeals Chamber finds that the material facts underpinning the charges in Counts 13 and 14 are sufficiently set out in paragraphs 51 and 52 of the Indictment.

105. For the foregoing reasons, Martinović's sub-ground of appeal is dismissed.

convicting Vinko Martinović for the acts that not even the [P]rosecutor charged him *exclusively* with, not even in his closing argument".

IV. ERROR ALLEGED BY NALETILIĆ AND MARTINOVIĆ CONCERNING THE INTERNATIONAL CHARACTER OF THE ARMED CONFLICT

106. The Trial Chamber found Naletilić guilty, pursuant to Article 2 of the Statute, of three counts of grave breaches of the Geneva Conventions of 1949, namely: Count 10 (torture), Count 12 (wilfully causing great suffering or serious injury to body or health) and Count 18 (unlawful transfer of a civilian). It found Martinović guilty, pursuant to Article 2 of the Statute, of four counts of grave breaches of the Geneva Conventions of 1949, namely: Count 3 (inhuman treatment), Count 12 (wilfully causing great suffering or serious injury to body or health), Count 14 (wilful killing) and Count 18 (unlawful transfer of a civilian).[237]

107. Naletilić, under his 37th ground of appeal, and Martinović, under his first ground of appeal, submit that the Trial Chamber erred in law by holding that an international armed conflict existed during the period and in the area relevant to the Indictment, and consequently by finding them guilty of grave breaches of the Geneva Conventions of 1949 pursuant to Article 2 of the Statute.[238] They submit that the evidence presented to the Trial Chamber was unreliable and/or unauthenticated[239] and, in addition, that they cannot be held responsible for the character of the armed conflict.[240]

A. Argument that the evidence presented to the Trial Chamber was unreliable and/or unauthenticated

108. The Appeals Chamber finds that Naletilić's and Martinović's claims concerning the unreliability of the evidence of an international armed conflict are limited to a mere assertion and are insufficiently precise. In the absence of any substantiation, this sub-ground of appeal fails to meet the formal requirements for raising an appeal as explicated in the section of this Judgement on

[237] *See* Trial Judgement, paras 763, 767. The Appeals Chamber notes that Naletilić and Martinović were convicted for grave breaches of Geneva Conventions III and IV, not for grave breaches of Geneva Conventions I or II.
[238] Naletilić and Martinović challenge paras 181 through 244 of the Trial Judgement: Naletilić Revised Appeal Brief, para. 272; Martinović Appeal Brief, para. 4. The Appeals Chamber notes that paras 224 to 231 of the Trial Judgement address the requirements for Article 3 of the Statute and paras 232 to 244 of the Trial Judgement deal with the requirements for Article 5 of the Statute; therefore, these paragraphs are not relevant to the issue of the requirements of Article 2 of the Statute addressed by Naletilić and Martinović.
[239] Naletilić Notice of Appeal, pp. 10-11; Naletilić Revised Appeal Brief, paras 272-274; Martinović Notice of Appeal, pp. 1-2; Martinović Appeal Brief, paras 3-7.
[240] Naletilić Notice of Appeal, pp. 10-11; Naletilić Revised Appeal Brief, para. 275; Martinović Notice of Appeal, p. 2; Martinović Appeal Brief, paras 8-9.

the standard of review.[241] Consequently, the Appeals Chamber will not consider this sub-ground of appeal on its merits, and it is hereby dismissed.

B. Argument that Naletilić and Martinović cannot be made responsible for the character of the armed conflict

109. Naletilić's and Martinović's assertions that they "cannot be held responsible for the character of the armed conflict" because it was beyond their knowledge[242] mischaracterise the Trial Chamber's findings. They were not found responsible for the fact that the conflict was international, but rather for the crimes committed in the context of the international armed conflict.[243] However, the Appeals Chamber will also consider a related argument that both Naletilić and Martinović assert by implication: that the Trial Chamber erred in law by failing to require the Prosecution to prove, as an element of crimes under Article 2 of the Statute, that they were aware of the international character of the conflict.

110. The Appeals Chamber recalls that the *chapeau* in Article 2 of the Statute states as follows:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions [. . .]

In the *Tadić* case, the Appeals Chamber interpreted this *chapeau* as encompassing "general legal ingredients", which must be found to exist in addition to the "specific legal ingredients" for an individual crime listed under Article 2 in order for an accused to be convicted of that crime.[244] The Appeals Chamber listed one of those general legal ingredients as follows:

> (i) *The nature of the conflict*. According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case, the international nature of the conflict is a prerequisite for the applicability of Article 2.[245]

This statement on the international character of the armed conflict as a general legal ingredient that must be found in order for Article 2 to apply has been consistently followed in the jurisprudence of the International Tribunal.[246]

111. The Appeals Chamber considers that in *Tadić,* the Appeals Chamber specifically stated that the international character of the armed conflict is a prerequisite for determining whether Article 2

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[241] *See supra*, para. 14.
[242] Naletilić Revised Appeal Brief, para. 275; Martinović Appeal Brief, paras 8-9; Appeals Hearing, T. 177-178.
[243] Trial Judgement, paras 176-223.
[244] *Tadić* Appeal Judgement, para. 80.
[245] *Tadić* Appeal Judgement, para. 80 (footnotes omitted).
[246] *Aleksovski* Appeal Judgement, para. 119; *Blaškić* Appeal Judgement, para. 170.

applies in the first place to particular conduct allegedly committed by an accused.[247] It held that the first question of importance under Article 2 was whether the conflict was international at all relevant times.[248] This holding was based upon an earlier interlocutory appeal decision on jurisdiction in *Tadić* whereby the Appeals Chamber found that Article 2 incorporates the grave breaches regime of the Geneva Conventions of 1949, which includes the requirement that the grave breaches must have been committed in the context of an international armed conflict.[249] The Appeals Chamber observed that:

> The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches."[250]

The Appeals Chamber concluded that the "international armed conflict element" is merely a function of the system of "universal mandatory jurisdiction" that was established for the enforcement of the grave breaches provisions of the Geneva Conventions of 1949.[251] It is not part of the enumeration of particular offences falling within the grave breaches regime. The Appeals Chamber held that it serves as a "necessary" limitation on the universal mandatory jurisdiction enforcement mechanism "in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents."[252]

112. While the Appeals Chamber in *Tadić* recognised that universal mandatory jurisdiction as an enforcement mechanism under the Geneva Conventions of 1949 for the grave breaches regime had not been imported into Article 2 of the Statute due to the obvious fact that the International Tribunal itself constitutes an enforcement mechanism, it nevertheless concluded that the international armed conflict element had been incorporated.[253] It found that this interpretation of Article 2 of the Statute "is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions as well as by a logical construction of their interplay as dictated by Article 2."[254] Furthermore, the Appeals Chamber concluded that "in the present state of development of

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[247] *Tadić* Appeal Judgement, para. 80.
[248] *Tadić* Appeal Judgement, para. 82.
[249] *Prosecutor v. Duško Tadić, a.k.a. "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction"), paras 80-84.
[250] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 80.
[251] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 80.
[252] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 80.
[253] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 81.
[254] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83.

[customary international] law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[255]

113. *Tadić* did not directly address the further question posed by this case: whether the mental state element of Article 2 crimes encompasses knowledge of the international character of the armed conflict. In *Kordić and Čerkez*, the Appeals Chamber provided an affirmative answer to that question, stating that although the accused need not "make a correct legal evaluation as to the international character of the armed conflict", he must be "aware of the *factual* circumstances, *e.g.*, that a foreign state was involved in the armed conflict".[256] The Appeals Chamber considers it necessary to elucidate the matter further. In the Appeals Chamber's view, the conclusion of *Kordić and Čerkez* was correct, and follows logically from the principles established in *Tadić*.

114. The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[257]

115. The critical question before the Appeals Chamber is therefore this: what conduct constitutes a crime amounting to a "grave breach" of the Geneva Conventions? Is it the mere commission of acts listed in Article 2(a) to (h) of the Statute, such as "wilful killing"? Or is it the commission of such acts on the basis that they were committed in the course of an international armed conflict?

116. The Appeals Chamber concludes that the existence and international character of an armed conflict are both jurisdictional prerequisites (as established in *Tadić*) and substantive elements of crimes pursuant to Article 2 of the Statute. The fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime. If certain conduct becomes a crime under the Statute only if it occurs in the context of an international armed conflict, the existence of such a conflict is not merely a jurisdictional prerequisite: it is a substantive element of the crime charged. Thus, the Prosecution's obligation to prove intent also encompasses the accused's knowledge of the facts pertinent to the internationality of an armed conflict.

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[255] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 83-84.
[256] *Kordić and Čerkez* Appeal Judgement, para. 311.
[257] In some contexts, particularly with respect to a commander's knowledge of his subordinates' crimes, it suffices that an accused had "reason to know" of the facts in question: *see* Article 7(3) of the Statute.

117. Article 2 of the Statute gives the Tribunal "the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely, [certain] acts against persons or property protected under the provisions of the relevant Geneva Convention". The language of the Geneva Conventions makes clear that the article applies "only in international armed conflicts".[258] It is not possible to speak of "grave breaches" or of "persons or property protected under the provisions of the relevant Geneva Convention" without implying that there is an on-going international armed conflict during which the offence is committed or during which the relevant Geneva Convention grants protection. Those statutory references form part of the text creating the crime; they are integral parts of the crime; they are not external to it. The existence of an international armed conflict is therefore an element of a grave breach.

118. The principle of individual guilt, as explained above, requires that fundamental characteristics of a war crime be mirrored in the perpetrator's mind. In this context, it is useful to remark that, in the case of crimes falling under Article 2 of the Statute, there has to be a nexus between the act of the accused and the international armed conflict.[259] It is illogical to say that there is such a nexus unless it is proved that the accused has been aware of the factual circumstances concerning the nature of the hostilities. Likewise, in relation to crimes against humanity, the Appeals Chamber has said:

> Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.[260]

Applying similar reasoning to the context of grave breaches of the Geneva Conventions, the Prosecution has to show "that the accused *knew* that his crimes" had a nexus to an international armed conflict, or at least that he had knowledge of the factual circumstances later bringing the Judges to the conclusion that the armed conflict was an international one.

119. This aspect of the *mens rea* requirement for Article 2 crimes does not require that a perpetrator correctly subsume facts known to him during the commission of the crime into a particular legal characterization. This is the task of the judge (*iura novit curia*). The perpetrator only needs to be aware of factual circumstances on which the judge finally determines the existence of the armed conflict and the international (or internal) character thereof. It is a general principle of

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[258] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 71, 74, 78 and 81; *Tadić* Appeal Judgement, paras 80-82, 163-164. There would have to be an international armed conflict before a person can be a protected person, but the existence of such a conflict is the basis on which protection is granted.

[259] *See e.g. Čelebići* Appeal Judgement, fn. 652; *Blaškić* Trial Judgement, para. 69. This requirement applies also to Article 3 of the Statute, although in that context the conflict need not be international: *see Kunarac et al.* Appeal Judgement, para. 58.

[260] *Tadić* Appeal Judgement, para. 271 (emphasis in original).

criminal law that the correct legal classification of a conduct by the perpetrator is not required.[261] The principle of individual guilt, however, demands sufficient awareness of *factual* circumstances establishing the armed conflict and its (international or internal) character.

120. This thinking arguably also underlies the position adopted by the Preparatory Commission of the International Criminal Court, which spoke of the duty to show that the "perpetrator was aware of factual circumstances that established the existence of an armed conflict".[262] It is true that the Commission ultimately decided not to require knowledge of the international character of the "international armed conflict". Nonetheless, the history of its negotiations is instructive as to the pre-existing state of customary international law. The question as to what extent the existence of an armed conflict and its nature should be reflected in the *mens rea* of the accused proved highly controversial.[263] Consequently, if the issue could not be clearly answered even in 1998 and lacking any indications to the contrary, the existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute to the conduct at issue in this case. Again, this result is rooted in the inalienable principle of individual guilt.

121. Consequently, the Appeals Chamber finds that the principle of individual guilt requires that the accused's awareness of factual circumstances establishing the armed conflict's international character must be proven by the Prosecution.[264] The Trial Chamber erred in law in failing to so find explicitly.

122. However, the Appeals Chamber finds that this error did not affect the Trial Judgement. Based on the entirety of the findings contained in the Trial Judgement and partially discussed elsewhere in this Appeal Judgement, a reasonable trier of fact could only have found that Naletilić and Martinović were aware of the factual circumstances based on which the Trial Chamber held

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[261] *Kordić and Čerkez* Appeal Judgement, para. 311.

[262] With respect to war crimes, Article 8(2)(a)(i)(5) (like many other provisions of Article 8(2)) of the Elements of Crimes adopted by the Commission on 30 June 2000 requires proof that the "perpetrator was aware of factual circumstances that established the existence of an armed conflict": *see* PCNICC/2000/1/Add.2; Knut Dörmann, *International Review of the Red Cross No. 839*, 30 September 2000 (International Committee of the Red Cross), pp. 771-795; Knut Dörmann with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002), pp. 20 ff.; Antonio Cassese *et al.* (ed.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1 (Oxford University Press, 2002), pp. 928-929; Knut Dörmann, Eve La Haye, Herman von Hebel, "The Elements of War Crimes", in R.S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) ("Dörmann, La Haye, & Von Hebel"), pp. 112-123.

[263] For an overview of the discussions, *see* Dörmann, La Haye, & Von Hebel, pp. 112-123.

[264] For an analysis of the principle of individual guilt in this context, *see* Kai Ambos, "Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC Statute", in: Lal Chand Vohrah *et al.* (ed.), *Man's Inhumanity To Man, Essays on International Law in Honour of Antonio Cassese* (Kluwer International Law, 2003), pp 34-37.

that the armed conflict was international in character.[265] For example, in light of the Trial Chamber's findings concerning Naletilić's and Martinović's status as military commanders and their active involvement in the conflict in the Mostar area,[266] it would not have been reasonable to conclude that they were unaware of the participation of Croatian troops in that conflict.[267]

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[265] The Appeals Chamber has routinely held that the requisite mental state, including knowledge and intent, may be inferred from circumstances: *see e.g. Kvočka et al.* Appeal Judgement, para. 243; *Krstić* Appeal Judgement, para. 33.
[266] *See e.g.* Trial Judgement, paras 2-3.
[267] *See* Trial Judgement, paras 191-202 (detailing the involvement of the Republic of Croatia in the conflict and noting that this involvement was internationally known, having been condemned by United Nations resolutions).

V. GROUNDS OF APPEAL OF THE PROSECUTION

A. Alleged error relating to persecutions (first ground of appeal)

1. Arguments of the Parties

123. As its first ground of appeal, the Prosecution contends that the Trial Chamber erred in law and in fact in holding that certain crimes found to have been committed by Martinović did not constitute underlying acts of persecutions due to insufficient evidence that they were committed on racial, political or religious grounds.[268] The Prosecution asserts that the only reasonable conclusion that could result from a correct application of the legal principles relating to the evaluation of evidence is that these crimes were carried out on requisite discriminatory grounds, thus they were underlying acts of persecutions.[269]

124. The Prosecution raises a number of instances in which it considers that the Trial Chamber adopted an incorrect approach in law to the evaluation of the evidence. However, it states that it is bringing this ground of appeal "primarily in order to seek a pronouncement by the Appeals Chamber on the correct legal approach to the evaluation of evidence of discriminatory intent in charges of persecutions".[270] As such, "in the interests of judicial economy and of not unduly protracting these appellate proceedings", it does not appeal all the instances in which it considers the Trial Chamber to have erred.[271] Rather, it confines itself to three specific occasions, namely:

> (1) the beatings by Martinović of BH Muslim detainees at his headquarters and at the frontline on the Bulevar, referred to in paragraph 677 of the Trial Judgement;
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> (2) the crimes of unlawful labour, inhumane acts, inhumane treatment and cruel treatment as a result of the use of prisoners of war for unlawful labour in the area of responsibility of Vinko Škrobo ATG, referred to in paragraph 692 of the Trial Judgement;
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> (3) the crimes of unlawful labour, inhumane acts, inhumane treatment and cruel treatment as a result of the incident involving the use of prisoners carrying wooden rifles across the confrontation line on 17 September 1993 as referred to in paragraph 693 of the Trial Judgement.[272]

125. The Prosecution submits that the Appeals Chamber should revise Martinović's conviction under Count 1 for persecutions to include these three underlying crimes. It argues that these

[268] Prosecution Notice of Appeal, pp. 1-2; Prosecution Appeal Brief, para. 2.1.
[269] Prosecution Appeal Brief, para. 2.3.
[270] Prosecution Appeal Brief, paras 2.5-2.6.
[271] Prosecution Appeal Brief, paras 2.5-2.6.
[272] Prosecution Appeal Brief, para. 2.2.

additional convictions for persecutions should entail an increase in the length of his sentence, albeit an insignificant one in light of the number of crimes for which he has already been convicted.[273]

126. The Prosecution contends that when an individual is charged with persecutions, "the question whether the relevant discriminatory intent has been established must be determined in the light of all the relevant evidence in the case as a whole."[274] It argues that:

> (1) where there is a widespread or systematic attack that has a discriminatory aim such that the victims are targeted on relevant discriminatory grounds (in this case, an attack against BH Muslims with the aim of transforming the area into territory populated by an ethnically pure BH Croat population);
>
> (2) where a person accused of persecutions is a participant in that widespread or systematic attack and commits the relevant crime during the course of that widespread or systematic attack;
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> (3) where the victim of that crime is a person falling within the class that is the target of the widespread or systematic attack;[275] and
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> (4) where the crime is an act of the type being committed as part of or in furtherance of that widespread or systematic attack;

the only reasonable conclusion is that the crime "was committed as part of that widespread or systematic attack, and was committed on the discriminatory grounds of the attack, unless there is some specific evidence that indicates that the crime was committed on some other specific ground."[276] The Prosecution contends that, in determining whether the required discriminatory grounds had been established, the Trial Chamber implicitly confined itself to an examination of the evidence relating to the specific incident in question and did not consider whether the discriminatory grounds could be inferred from the context of the incident or the evidence as a whole.[277]

127. According to Martinović, the jurisprudence of the International Tribunal requires that discriminatory intent be specifically proven with respect to each individual persecutory act.[278] He contends that the Prosecution's approach would shift the burden of proof on the discriminatory intent issue to the accused, in violation of Article 21(3) of the Statute.[279] In reply, the Prosecution contests Martinović's interpretation of the case law, and claims that its position would not shift the

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[273] Prosecution Appeal Brief, paras 2.7, 2.25.
[274] Prosecution Appeal Brief, para. 2.10.
[275] *See* also Appeals Hearing, T. 287: "each one of the victims referred to in the paragraphs related to the findings of [the three incidents challenged by the Prosecution] were Muslim".
[276] Prosecution Appeal Brief, para. 2.11.
[277] Prosecution Appeal Brief, para. 2.12.
[278] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Response Brief of Vinko Martinović, 26 September 2003 ("Martinović Response to Prosecution Appeal Brief"), para. 18 (citing *Kvočka et al.* Trial Judgement, para. 203 and *Krnojelac* Trial Judgement, paras 432-436).
[279] Martinović Response to Prosecution Appeal Brief, para. 22.

burden of proof, but would rather allow the Trial Chamber to make permissible inferences from the evidence.[280]

2. Precise errors alleged

128. The Appeals Chamber notes that the Prosecution in its Appeal Brief is challenging not the factual findings of the Trial Chamber themselves, but the inferences to be drawn from them. That is, in its Appeal Brief, the Prosecution is challenging the legal approach to the evaluation of the findings.[281] In the course of the Appeals Hearing, however, the Prosecution supplemented these arguments alleging an error of law with arguments alleging that, in an instance which is analysed below, the Trial Chamber erred in fact.[282] As far as the latter arguments are concerned, the Appeals Chamber will analyse whether the conclusion challenged is one which no reasonable trier of fact could have reached.

129. Insofar as the Prosecution's submission concerns a legal issue, the Appeals Chamber considers the law in this area to be clear. As it stated in the case of *Kvočka et al*., "the discriminatory intent of crimes cannot be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity. However, the discriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime."[283] According to the *Krnojelac* Appeal Judgement, such circumstances include the operation of a prison, in particular the systematic nature of crimes committed against a particular group within the prison, and the general attitude of the alleged perpetrator as seen through his behaviour.[284]

130. The Appeals Chamber has had occasion to apply this approach in a number of cases. According to the Appeals Chamber in the case of *Kordić and Čerkez,* in the situation in which all the guards belong to one ethnic group and all the prisoners to another, it could reasonably be

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[280] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Consolidated Reply Brief of the Prosecution, 13 October 2003 ("Prosecution Consolidated Reply Brief"), paras 2.13-2.32.

[281] *See* Prosecution Appeal Brief, paras 2.3, 2.6, 2.13.

[282] The specific instance concerns the Trial Chamber's findings in para. 692 and fn. 1685 of the Trial Judgement: *see infra*, paras 136-139; Appeals Hearing, T. 295-296.

[283] *Kvočka et al.* Appeal Judgement, para. 366. *See* also *Krnojelac* Appeal Judgement, para. 184; *Blaskić* Appeal Judgement, para. 164.

[284] *Krnojelac* Appeal Judgement, para. 184. In the *Krnojelac* case the Appeals Chamber found that, since only non-Serb detainees were beaten in prison, it could reasonably be concluded that the beatings were committed because of the political or religious affiliation of the victims and hence that the acts were committed with the requisite discriminatory intent. The Appeals Chamber further stated that even assuming that the beatings took place in order to punish non-Serb detainees for violating regulations, "the decision to inflict such punishment arose out of a will to discriminate against them on religious or political grounds since punishment was only inflicted upon non-Serb detainees": *Krnojelac* Appeal Judgement, para. 186.

inferred that the latter group was being discriminated against.[285] In the *Kvočka et al.* Appeal Judgement, the Appeals Chamber stated that since almost all the detainees in the camp belonged to the non-Serb group, it could reasonably be concluded that the reason for their detention was membership of that group and that the detention was therefore of a discriminatory character.[286]

131. Thus, provided that it is substantiated by the circumstances surrounding the acts allegedly underlying the crime of persecutions, the discriminatory intent may be inferred from the context of the attack.

3. Specific findings challenged

132. The Trial Chamber found that Martinović mistreated BH Muslim civilians in the process of their eviction and that he beat BH Muslim prisoners in the area under his command.[287] For the beatings of BH Muslim prisoners in the area under his command, the Trial Chamber found Martinović responsible pursuant to Articles 2(c), 3 and 7(1) of the Statute.[288] The Trial Chamber found that the mistreatment of BH Muslim civilians during their eviction constituted an underlying act of persecutions under Article 5(h) of the Statute but that evidence had not been led to show that the beatings of BH Muslim prisoners in Martinović's area of command were carried out on discriminatory grounds. Instead, according to the Trial Chamber, the evidence reflected that the beatings in Martinović's area of command "occurred randomly and without a specific religious, political or racial background".[289] The Appeals Chamber notes that the Trial Chamber did not refer to any specific piece of evidence in coming to its conclusion. Previously, the Trial Chamber had held that it was satisfied that Martinović repeatedly beat BH Muslim detainees at his headquarters and at the frontline on the Bulevar,[290] and that the individuals beaten at Martinović's headquarters were transported from the Heliodrom.[291] With respect to the beatings in Martinović's area of command, the Appeals Chamber recalls that the findings that Martinović was responsible for the incidents involving several prisoners in July and August 1993 and involving a prisoner called "Tsotsa" have been set aside as a result of defects in the Indictment.[292] For this reason, in addressing the Prosecution's arguments the Appeals Chamber has confined itself to the incident of beating involving a prisoner called the "Professor". As concerns this incident, the Appeals Chamber

[285] *Kordić and Čerkez* Appeal Judgement, para. 950.
[286] *Kvočka et al.* Appeal Judgement, para. 366.
[287] Trial Judgement, paras 380-389, 676, 677.
[288] Trial Judgement, para. 389.
[289] Trial Judgement, paras 676, 677.
[290] Trial Judgement, para. 382.
[291] Trial Judgement, paras 385-386, fn. 1010.
[292] *See supra*, para. 48.

notes that the "Professor" was brought from the Heliodrom[293] to work in Martinović's area of command.[294]

133. Next, the Trial Chamber found Martinović responsible for unlawful labour under Article 3 of the Statute and for inhumane acts, inhuman treatment and cruel treatment under Articles 5(i), 2(b) and 3 of the Statute for the labour of prisoners of war in the area of responsibility of the Vinko Škrobo ATG.[295] It did not find Martinović responsible for persecutions under Article 5(h) of the Statute in light of insufficient evidence to conclude that the prisoners were taken to perform labour on the basis of one of the required discriminatory grounds.[296] Rather, it found that the prisoners were used because Martinović would have used the enemy rather than his own soldiers to perform dangerous tasks.[297] Prior to this, the Trial Chamber had noted that Martinović did not contest that prisoners of war detained at the Heliodrom were regularly sent to work for the Vinko Škrobo ATG, and found that detainees were selected by the Vinko Škrobo ATG from the Heliodrom to work in that unit.[298]

134. Finally, for the use of prisoners of war carrying wooden rifles across the confrontation line on 17 September 1993, the Trial Chamber found Martinović responsible for unlawful labour under Article 3 of the Statute and inhumane acts, inhuman treatment and cruel treatment under Articles 5(i), 2(b) and 3 of the Statute.[299] It did not find Martinović responsible for persecutions under Article 5(h) of the Statute for the reason that no evidence was introduced regarding the grounds upon which the four prisoners involved were selected.[300] The Trial Chamber had previously found that:

> In the morning of 17 September 1993, Dinko Knežović came to fetch approximately 30 prisoners from the Heliodrom to take them to the headquarters of the Vinko Škrobo ATG. Upon their arrival, Vinko Martinović ordered Ernest Takač to select four prisoners, who were taken down to the basement of the headquarters. There, Štela ordered them to wear camouflage uniforms. The prisoners also received wooden rifles.[301]

135. For all three incidents the Prosecution argues that, in finding that there was insufficient or no evidence that they were carried out on discriminatory grounds, the Trial Chamber failed to take into account the following circumstances surrounding these incidents: (1) Martinović addressed the victims of these incidents in derogatory terms; (2) only BH Muslims were selected for these

[293] Trial Judgement, fn. 1010 (citing Witness II, T. 4973-4974).
[294] Witness OO, T. 5938, 5956.
[295] Trial Judgement, paras 271-272.
[296] Trial Judgement, para. 692.
[297] Trial Judgement, fn. 1685.
[298] Trial Judgement, paras 263-265.
[299] Trial Judgement, paras 289-290.
[300] Trial Judgement, para. 693.
[301] Trial Judgement, para. 276 (footnotes omitted).

incidents; and (3) Martinović acted with discriminatory intent when he evicted and forcibly transferred BH Muslims and when he plundered their property.[302]

136. The Appeals Chamber notes that, in its determination as to whether unlawful labour in the area of responsibility of the Vinko Škrobo ATG was carried out on discriminatory grounds, the Trial Chamber took into account the evidence of Witness J that Martinović often called the prisoners "balijas", a derogatory term for BH Muslims. This notwithstanding, the Trial Chamber found that there was "not any evidence (*sic*) showing that the prisoners were taken to work on this specific basis".[303] The Trial Chamber was satisfied instead that "the prisoners were used because Vinko Martinović would have used the enemy to perform dangerous tasks rather than his own soldiers".[304] For its latter finding, the Trial Chamber relied on the evidence of Witness SS that "he was selected, together with the other 'Blue Orchestra prisoners', because he had been serving in the ABiH".[305] The Appeals Chamber understands this finding to mean that the Trial Chamber was satisfied that Martinović would have rather used enemy combatants than his own soldiers.

137. The Prosecution submits that although this may have been true for the basis upon which Witness SS was selected, the evidence shows that it was not the case for the other prisoners selected to work for Martinović's unit.[306] It argues that Witnesses J, PP, OO, M and K gave evidence that Martinović called the prisoners "extremists", "fundamentalists", "cattle" and "balijas".[307] It further submits that Witnesses H, KK and YY were civilians and that two of the four victims of the wooden rifles incident were in fact BH Muslims who had served in the HVO.[308] The Prosecution also contends that the Trial Chamber failed to take into consideration that "[e]very time detainees [from the Heliodrom] were chosen for unlawful labour, they were Muslim[s]"[309] and that the BH Croats detainees at the Heliodrom were not selected for unlawful labour.[310]

138. In the first place, the Appeals Chamber notes that there is no indication that the Trial Chamber completely disregarded the evidence of Witnesses J, PP, OO, M and K invoked by the

[302] Appeals Hearing, T. 290. The Prosecution also refers to other facts which it claims amount to "circumstances surrounding the commission of the acts charged": *see* Prosecution Appeal Brief, paras 2.8(1)-(4); Prosecution Consolidated Reply Brief, para. 2.19. The Appeals Chamber notes that these facts relate to the context of the attack against the BH Muslim population in and around Mostar.
[303] Trial Judgement, fn. 1685 (citing Witness J, T. 1503-1504).
[304] Trial Judgement, fn. 1685.
[305] Trial Judgement, fn. 1685 (citing Witness SS, T. 6793).
[306] Appeals Hearing, T. 295-296.
[307] Appeals Hearing, T. 291 (citing Witness J, T. 1503); *ibid*., T. 292 (citing Witness PP, T. 6089); *ibid*., T. 293 (citing Witness OO, T. 5940); *ibid*., T. 294 (citing Witness M, T. 1679); *ibid*., T. 294 (citing Witness K, T. 1581-1582 (private session)).
[308] Appeals Hearing, T. 291-292.
[309] Appeals Hearing, T. 287, 289-290, 293-294.
[310] Appeals Hearing, T. 293-294.

Prosecution that Martinović addressed the victims of the incidents in derogatory terms.[311] The Trial Chamber referred extensively to the testimonies of these witnesses in its findings on unlawful labour in the area of responsibility of the Vinko Škrobo ATG, and it referred in particular to Witness J's evidence on derogatory terms in its finding regarding whether unlawful labour in Martinović's area of responsibility was carried out on discriminatory grounds.[312]

139. In the second place, the Appeals Chamber notes that two of the victims of the wooden rifles incident, namely Witnesses J and OO, were BH Muslims who were, up until their arrest, serving in the HVO.[313] These witnesses were also subject to other forms of unlawful labour while in Martinović's unit.[314] In addition, the Appeals Chamber notes that the following detainees, Witnesses H, KK and YY, were civilians used for unlawful labour while in Martinović's unit.[315] In light of this evidence, the Appeals Chamber finds that no reasonable trier of fact could have concluded that the basis for the prisoners' selection was that Martinović would have rather used enemy combatants than his own soldiers.[316]

140. This notwithstanding, the Appeals Chamber notes that the Trial Chamber's error in finding that the basis for the prisoners' selection was their status as enemy combatants does not impact upon the Trial Chamber's finding that there was insufficient evidence to conclude that the prisoners were taken to perform labour on discriminatory grounds.[317] Therefore, the Trial Chamber's factual error did not lead to a miscarriage of justice.

141. The Prosecution also submits that the Trial Chamber failed to take into consideration that "[e]very time detainees were chosen for unlawful labour, they were Muslim[s]"[318] and that the BH Croat detainees at the Heliodrom were not selected for unlawful labour.[319] The Appeals Chamber notes that the great majority of the victims of the incidents challenged by the Prosecution were

[311] *See Kvočka et al.* Appeal Judgement, para. 23.
[312] Trial Judgement, fns 722-724, 734, 736, 1685.
[313] Witness J, T. 1495-1496; Witness OO, T. 5935.
[314] Trial Judgement, fns 722, 724.
[315] Witness H, T. 1280-1281, 1294 (private session); Witness KK, T. 5178, 5183; Witness YY, T. 7252 (private session); Trial Judgement, fns 722-724.
[316] Trial Judgement, fn. 1685.
[317] Trial Judgement, para. 692, fn. 1685. The Appeals Chamber notes in this regard that Witnesses J, PP, OO, M and K, as well as Witnesses H, KK and YY did not give evidence that the reason why they had been selected to work for Martinović's unit was that they were Muslims: *see* Witness J, T. 1501; Witness PP, T. 6076-6081, 6084; Witness OO, T. 5938; Witness M, T. 1674; Witness K, T. 1576, 1582 (private session); Witness H, T. 1309-1310, 1312-1313; Witness YY, T. 7264. Witness KK gave evidence that he was in a group of Muslim civilians taken by HVO soldiers to Štela's headquarters: Witness KK, T. 5182-5184. According to this witness, Štela received the prisoners and told them that "there would be no problems": Witness KK, T. 5184.
[318] Appeals Hearing, T. 287, 289-290, 293-294.
[319] Appeals Hearing, T. 293-294.

shown to be BH Muslims.[320] However, this fact does not in itself show that it was unreasonable for the Trial Chamber to conclude that the detainees were not selected on discriminatory grounds.

142. In addition, the Appeals Chamber notes that only a "majority" of the detainees at the Heliodrom were of BH Muslim ethnicity[321] and that BH Croats were also detained at the Heliodrom.[322] Thus, as opposed to the circumstances in the *Kordić and Čerkez* and *Kvočka et al.* cases, the detainees at the Heliodrom did not belong exclusively or almost exclusively to one ethnic group and the guards to another. In this case, it cannot without more be inferred from the fact that the prisoners were selected from the Heliodrom that they were chosen to work for Martinović's unit on discriminatory grounds, for it has not been shown that a discriminatory pre-selection had already taken place.[323]

143. Finally, the Prosecution argues that the Trial Chamber failed to take into consideration the fact that Martinović acted with discriminatory intent when evicting and forcibly transferring Muslims and plundering their property.

144. The Appeals Chamber does not see the immediate relevance of this fact to the Trial Chamber's determination as to whether the three incidents challenged by the Prosecution were committed on discriminatory grounds. The Appeals Chamber considers that, if out of a group of persons selected on the basis of racial, religious or political grounds, only certain persons are singled out and subjected to acts such as, in this case, beatings and plunder, those acts may be inferred as having been carried out on discriminatory grounds. The Trial Chamber correctly concluded that the beatings of BH Muslim civilians in the course of their eviction were inflicted on discriminatory grounds since only BH Muslims were forcibly evicted and mistreated.[324] The same

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[320] According to the Trial Judgment, the victims of unlawful labour in the area of responsibility of the Vinko Škrobo ATG were Witnesses A, AF, EE, F, H, I, II, J, K, KK, M, MG, NN, OO, Salko Osmić, PP, S, SS, YY: Trial Judgement, fns 722-728, 734, 736. Out of the four victims of the wooden rifles incident, Witnesses J, OO and PP gave evidence: Trial Judgement, paras 277-279, 290. The Appeals Chamber notes that it is apparent from the evidence of Witnesses A, AF, EE, F, H, I, II, J, K, MG, NN, OO, Salko Osmić, PP and S that they were Muslims: Witness A, T. 492; Witness AF, T. 15916; Witness EE, T. 4509 (private session); Witness F, T. 1087; Witness H, T. 1310; Witness I, T. 1383; Witness II, T. 4939; Witness J, T. 1494 (private session); Witness K, T. 1569; Witness MG, T. 14207 (private session); Witness NN, T. 5871-5872; Witness OO, T. 5935; Witness Salko Osmić, T. 3120; Witness PP, T. 6072, 6083; Witness S, T. 2506, 2649. Regarding the beating in Martinović's area of command, there is insufficient evidence as to whether the "Professor" was Muslim.

[321] Trial Judgement, para. 46. Martinović conceded that a majority of the detainees at the Heliodrom were BH Muslims: Appeals Hearing, T. 308.

[322] Trial Judgement, para. 431, fn. 1139. The Prosecution conceded that BH Croats were also detained at the Heliodrom: Appeals Hearing, T. 293-294.

[323] Although it was not referred to by the Parties, the Appeals Chamber notes the evidence of Witness H that he believed that he was arrested and detained at the Heliodrom because he was Muslim: Witness H, T. 1309-1310. Witnesses J and OO believed the reason for their arrest to be that they were Muslims: Witness, J, T. 1497; Witness OO, T. 5935. The Appeals Chamber considers that, in light of the Trial Chamber's findings that a "majority" of those detained at the Heliodrom were BH Muslims and that BH Croats were also detained there, the evidence of these witnesses is insufficient to show that a discriminatory pre-selection had taken place.

[324] Trial Judgement, para. 676.

applies to the Trial Chamber's findings pertaining to the incidents of plunder in connection with these evictions.[325] As regards the three incidents challenged, however, the Heliodrom housed a majority of BH Muslims but also included BH Croat detainees, and the mere fact that a great majority of the victims of the incidents challenged by the Prosecution were shown to be BH Muslims does not in itself show that the Trial Chamber erred in finding that they were not selected on discriminatory grounds.

145. The Appeals Chamber therefore considers that, under these circumstances, the fact that Martinović acted with discriminatory intent when evicting and forcibly transferring BH Muslims and plundering their property is not relevant for the purpose of determining the circumstances surrounding the three incidents challenged.

4. Conclusion

146. The Appeals Chamber recalls that, where it is substantiated by the circumstances surrounding the acts allegedly underlying the crime of persecutions, the discriminatory intent may be inferred from the context of the attack. It follows from the foregoing discussion that the Prosecution has failed to show that the circumstances surrounding the three incidents substantiate its claim that the acts in question were carried out with discriminatory intent.

147. The Prosecution's first ground of appeal is dismissed in its entirety.

B. Deportation (third ground of appeal)

148. As its third ground of appeal, the Prosecution contends that the Trial Chamber erred in law in holding that deportation requires the transfer of persons across State borders in order to distinguish it from forcible transfer.[326]

149. The Trial Chamber, citing the *Krstić, Krnojelac* and *Blaškić* Trial Judgements, stated that "[t]he jurisprudence of the Tribunal has found that deportation requires transfer beyond state borders, to be distinguished from forcible transfer, which may take place within national borders."[327] Since the acts described in the Indictment contained no allegations of cross-border transfer and no evidence had been introduced to that effect, the Trial Chamber found that there was

[325] Trial Judgement, para. 702.
[326] Prosecution Notice of Appeal, p. 3; Prosecution Appeal Brief, para. 4.1.
[327] Trial Judgement, para. 670.

no basis upon which it could find that persecutions was conducted by means of the underlying act of deportation.[328]

150. The Prosecution requests that the Appeals Chamber revise Naletilić's conviction under Count 1 for persecutions as a crime against humanity pursuant to Article 7(3) of the Statute to include deportation in addition to his conviction for forcible transfer as underlying acts of persecutions.[329] The Prosecution also requests that the Appeals Chamber revise Martinović's conviction under Count 1 for persecutions as a crime against humanity pursuant to Article 7(1) of the Statute to include deportation in addition to his conviction for forcible transfer as underlying acts of persecutions.[330]

151. The Prosecution contends that deportation as a crime against humanity under Article 5 of the Statute is not limited to unlawful displacements across a national boundary but also encompasses unlawful displacements within a State's national boundaries.[331] It argues that the *Blaškić* Trial Chamber was correct to define deportation as an underlying act of persecutions under Article 5 of the Statute as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".[332] In the alternative, the Prosecution states that, should the Appeals Chamber consider that deportation requires a cross-border displacement, this requirement would be satisfied "by proof that the victims were expelled by a belligerent party from the territory held by that party, regardless of whether the boundary concerned is internationally recognised."[333]

152. The Appeals Chamber notes that there is no occasion, in this case, to define the elements of deportation as a crime against humanity under Article 5(d) of the Statute, as the Indictment included no charges under that Article. The Appeals Chamber therefore need not address the Trial Chamber's comments in paragraph 870 of its Judgement to the effect that the International Tribunal's jurisprudence defines deportation as transfer across a State border. The Prosecution urges the Appeals Chamber to consider the issue nonetheless as a matter of general significance to

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[328] Trial Judgement, para. 670.
[329] Prosecution Appeal Brief, paras 4.2, 4.28. The Prosecution does not seek an increase in sentence: Prosecution Appeal Brief, para. 6.1.
[330] Prosecution Appeal Brief, paras 4.3, 4.28. The Prosecution does not seek an increase in sentence: Prosecution Appeal Brief, para. 6.1.
[331] Prosecution Appeal Brief, para. 4.5.
[332] Prosecution Appeal Brief, para. 4.5 (citing *Blaškić* Trial Judgement, para. 234 in turn citing "Article 7(2)(d) of the Statute of the International Criminal Court (*Cf.* in particular the 1996 ILC Report, pp. 100-101)").
[333] Prosecution Appeal Brief, para. 4.22.

the International Tribunal's jurisprudence, but the Appeals Chamber sees no need to do so as the issue has been settled in the *Stakić* Appeal Judgement.[334]

153. With respect to the counts of persecutions as a crime against humanity under Article 5(h) of the Statute, the Appeals Chamber considers that the issue at hand was settled in the *Krnojelac* Appeal Judgement, which stated:

> The Appeals Chamber holds that acts of forcible displacement underlying the crime of persecution[s] punishable under Article 5(h) of the Statute are not limited to displacements across a national border. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.[335]

154. In other words, the question whether "deportation" encompasses a border element is irrelevant for the purposes of liability under Article 5(h) of the Statute, because acts of forcible displacement are equally punishable as underlying acts of persecutions whether or not a border is crossed. It is moreover not necessary, for the purposes of a persecutions conviction, to distinguish between the underlying acts of "deportation" and "forcible transfer"; the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement. To the extent the Trial Chamber suggested otherwise, it erred in law, but this error did not affect the judgement, as both Naletilić and Martinović were in any event convicted for persecutions through the underlying act of forcible transfer. For these reasons, Judge Schomburg dissenting, this ground of appeal of the Prosecution is dismissed.

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[334] *Stakić* Appeal Judgement, paras 274-308.
[335] *Krnojelac* Appeal Judgement, para. 218.

VI. GROUNDS OF APPEAL OF NALETILIĆ

155. As a preliminary matter, the Appeals Chamber notes that it will not separately address Naletilić's seventh, 11th, 15th or 38th grounds of appeal, each of which simply repeats or incorporates by reference arguments made in other sections of the Naletilić Notice of Appeal and Revised Appeal Brief. Nor will the Appeals Chamber address the ninth ground of appeal included in his Notice of Appeal, as this ground was omitted from the Naletilić Revised Appeal Brief.[336] The remainder of Naletilić's grounds of appeal will be grouped as appropriate for the purpose of the Appeals Chamber's discussion.

A. Command position (first, third, fourth and sixth grounds of appeal)

156. The Trial Chamber stated that it was "satisfied that Mladen Naletilić was the highest level commander of the KB in 1993 and 1994"[337] and that it had been "established that throughout the relevant time of the Indictment Mladen Naletilić was the overall commander of the KB and the attached ATG units".[338] The Trial Chamber found Naletilić responsible pursuant to Article 7(3) of the Statute for the following offences: 1) unlawful labour to dig a trench in the vicinity of his private villa in very arduous conditions;[339] 2) torture against prisoners at the Tobacco station in Široki Brijeg and cruel treatment and wilfully causing great suffering against prisoners at the fishfarm in Doljani, the Tobacco Institute in Mostar, the Tobacco station and the MUP Station in Široki Brijeg, Ljubuški prison and the Heliodrom;[340] 3) unlawful transfer on 13 and 14 June 1993 from the DUM area and on 29 September 1993 from the Centar II area, in Mostar;[341] 4) plunder in Mostar;[342] and 5) persecutions through the underlying acts of beatings, forcible transfer, destruction and plunder.[343]

157. Under his first, third and sixth grounds of appeal, as well as part of his fourth ground of appeal, Naletilić challenges the Trial Chamber's finding of a superior-subordinate relationship supporting criminal responsibility under Article 7(3) of the Statute.[344] Specifically, he challenges the Trial Chamber's reliance on three pieces of evidence in support of that finding: Exhibit PP 704, the testimony of Witness Falk Simang and Exhibit PP 928, the so-called "Radoš Diary". The Appeals Chamber will consider these challenges in turn.

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[336] Naletilić Notice of Appeal, pp. 4, 5. The Prosecution responded that it considered this ground as having been withdrawn: Prosecution Response to Naletilić Appeal Brief, para. 5.1. Naletilić offered no reply.
[337] Trial Judgement, para. 94.
[338] Trial Judgement, para. 116.
[339] Trial Judgement, paras 326, 333, 696.
[340] Trial Judgement, para. 453. *See* also *ibid.,* paras 390-438, particularly paras 394, 404, 411-412, 428, 436, 438.
[341] Trial Judgement, paras 558, 566, 571.
[342] Trial Judgement, para. 631.

1. Exhibit PP 704

158. Naletilić challenges the probative value of Exhibit PP 704, an unsigned list of members of the KB and various ATG units for November 1993 which, "[a]ccording to the Prosecution and the Trial Chamber, […] proved membership of individuals in the respective units" and Naletilić's authority over most of them.[345] He submits that, because this document was generated in November 1993, it cannot prove that he had authority over subordinates prior to this date, as the Trial Chamber considered,[346] but that it could only prove the state of affairs in November 1993.[347] According to Naletilić, Exhibit PP 704 also "suffer[s] for lack of authenticity, reliability and relevancy" because there was no evidence of who its author was and no possibility to cross-examine him or her.[348]

159. Naletilić is correct in stating that Exhibit PP 704, which is a salary list for members of the KB and ATG units dated November 1993, is of limited probative value in establishing the membership of those units before that date. That does not necessarily mean, however, that it is completely devoid of evidentiary value, but its evidentiary value is, at best, corroborative. The Appeals Chamber will consider each of the instances in which Naletilić claims that the Trial Chamber relied on Exhibit PP 704 inappropriately to determine whether it gave too much weight to this evidence.[349]

160. At the outset, the Appeals Chamber notes that in several of these instances, the Trial Chamber did not cite Exhibit PP 704 to identify members of the KB and ATG units during the Indictment period or to demonstrate Naletilić's command responsibility, but rather for other purposes: as background information concerning the size and characteristics of the KB as of November 1993[350] and to show that Naletilić was called "Tuta".[351] In other instances, the exhibit was cited merely as corroborative evidence of individuals' membership, which was also demonstrated by other evidence before the Trial Chamber. Naletilić has not shown that it was

[343] Trial Judgement, paras 672, 682, 701, 705-706, 711-715.
[344] Naletilić Notice of Appeal, p. 2; Naletilić Revised Appeal Brief, paras 2, 6-9.
[345] Naletilić Revised Appeal Brief, para. 6.
[346] Naletilić Revised Appeal Brief, para. 6.
[347] Naletilić Revised Appeal Brief, para. 71.
[348] Naletilić Revised Appeal Brief, para. 67; Naletilić Reply Brief, para. 13.
[349] Naletilić specifically refers to paragraphs 88 and 428 and footnotes 102, 218, 233, 259, 280-282, 284-288, 322, 323, 325, 327-329, 338, 473, 475, 479, 480, 482, 703, 1061, 1132 and 1146 of the Trial Judgement: Naletilić Revised Appeal Brief, paras 6, 67. The Appeals Chamber notes that footnotes 338 and 703 do not refer to Ex. PP 704 at all. Further, Naletilić refers to footnotes 482 and 1061 of the Trial Judgement, without alleging a particular error or arguing how the footnotes in question support his general submission that the Trial Chamber erred in relying on Ex. PP 704 and how this lead to a miscarriage of justice.
[350] Trial Judgement, para. 88, fn. 233; *ibid*., para. 95, fn. 259.
[351] Trial Judgement, para. 86, fn. 218.

unreasonable for the Trial Chamber to rely on Exhibit PP 704 for these purposes or to reach the factual conclusions that it reached.[352]

(a) Paragraph 103, footnotes 280, 281, 282, 284, 285, 286, 287 and 288 of the Trial Judgement

161. Naletilić alleges that the Trial Chamber erred in basing on Exhibit PP 704 its conclusion at paragraph 103 of the Trial Judgement that Vinko Martinović's subordinates were Dubravko Pehar (called "Dubi"), who was the deputy commander of the Vinko Škrobo ATG, Ernest Takač (called "Brada"), who was a group leader of the Vinko Škrobo ATG, Nino Pehar (called "Dolma"), Marin Čuljak, Semir Bošnjić (called "Sema"), Dinko Knežović, Otto Wild, Zdenko Zdena and Zdravko Buhovac (called "Hecko").[353]

162. The Appeals Chamber notes that the challenged conclusion follows paragraph 102 of the Trial Judgement where the Trial Chamber found, in the first place, that Martinović founded the Vinko Škrobo ATG on an undefined date and, in the second place, on the basis of Exhibit PP 492 and the testimonies of Defence Witnesses NO, MT, NT, MQ, MP and Jadranko Martinović, that he was "the commander of a group of soldiers, who held positions at the confrontation line next to the Health Centre, at least from mid-May 1993."[354] Naletilić fails to argue why in this particular instance it was unreasonable for the Trial Chamber to rely *inter alia* (for Dubravko Pehar, Ernest Takač, Nino Pehar, Marin Čuljak, Semir Bošnjić, Zdenko Zdena and Zdravko Buhovac) or even solely (for Dinko Knežović[355] and Otto Wild) on Exhibit PP 704 to reach the aforementioned conclusion. He also fails to argue how the alleged error would lead to a miscarriage of justice. For these reasons, the Appeals Chamber has not considered this submission further.

(b) Paragraph 115, footnote 328 of the Trial Judgement

163. Naletilić alleges that, since Exhibit PP 704 is not proof of membership in the KB prior to November 1993, the Trial Chamber erred at paragraph 115 of the Trial Judgement by concluding on

[352] Trial Judgement, para. 40, fn. 102 (referring to Željko Bošnjak); *ibid.*, para. 115, fns 322-323, 325, 327-328 (Željko Bošnijak, Miroslav Kolobara, Romeo Blažević, Ivan Hrkač, Robert Medić); *ibid.*, para. 168, fn. 473 (Miroslav Kolobara); *ibid.*, para. 169, fns 479-480 (Robert Kolobarić). The Appeals Chamber also rejects Naletilić's contentions that the Trial Chamber erred in finding that Robert Medić was also called "Robo" and other nicknames – a fact that was demonstrated by other evidence – and that Ex. PP 704 listed at least sixteen persons named "Robert", which is irrelevant as it listed only one "Robert Medić": *see* Naletilić Revised Appeal Brief, para. 72. In addition, the Appeals Chamber rejects Naletilić's claim that Ex. PP 704 lists Željko Bošnjak as a member of the Defence Department and not the KB; the exhibit makes clear that members of the Defence Department are included under the KB. *See* Naletilić Revised Appeal Brief, para. 68.

[353] Naletilić Revised Appeal Brief, paras 6 and 67.

[354] Trial Judgement, para. 102.

[355] Although footnote 286 of the Trial Judgement refers solely to Exhibit PP 704 to support the Trial Chamber's conclusion that Dinko Knežovic was subordinated to Martinović, further corroboration is to be found in Trial Judgement, fn. 711 (citing Witness I, T. 1391-92; Witness J, T 1503; Witness PP, T 6078-79, Witness MI, T .14342 [private session]; Witness MT, T. 15295).

the sole basis of Exhibit PP 704 that Ivica Kraljević was a member.[356] The Prosecution concedes,[357] and the Appeals Chamber notes, that the only reference in footnote 328 of the Trial Judgement to support the Trial Chamber's finding at paragraph 115 that an individual by the name Ivica Kraljević was member of the KB is Exhibit PP 704. For reasons which are developed further below and which concern the confidential additional evidence admitted on appeal, the Appeals Chamber does not need to consider whether the Trial Chamber erred in relying solely on Exhibit PP 704 for proof that an individual by the name of Ivica Kraljević was a member of the KB.[358]

(c) Paragraph 168, footnote 475 of the Trial Judgement

164. Naletilić also argues that the Trial Chamber erred when it concluded in paragraph 168 of the Trial Judgement that Vedran Bijuk, *a.k.a.* "Splićo", was also a member of the KB.[359] Naletilić alleges the presence of inconsistencies in relation to footnote 475 of the Trial Judgement which reads "Exhibits PP 538.1, report on a statement of 'Vedran Bijuk *a.k.a.* Splićo' dated 26 July 1993, in which Splićo stated that he was under the command of Juka Prazina; [E]xhibit PP 704, KB salary list for November 1993, p 9. *See* also [E]xhibits PP 607.2, PP 614, which corroborate that Vedran Bijuk took part in the action." Naletilić argues (a) that Juka Prazina is not listed in Exhibit PP 704; (b) that the Trial Chamber established as a fact at paragraph 168 of the Trial Judgement that Vedran Bijuk was a member of the KB; (c) that Vedran Bijuk, *a.k.a.* Splićo, stated that he was under the command of Juka Prazina; and (d) that the Trial Chamber referred to page 9 of Exhibit PP 704 as proof that Vedran Bijuk, *a.k.a.* Splićo, belonged to the KB.

165. It is not apparent whether Naletilić is seeking to argue that the fact that certain persons were not listed as members of the KB in Exhibit PP 704 should have led a reasonable trier of fact to disregard other evidence suggesting that those persons were indeed members, or instead to disregard Exhibit PP 704. In any event, Naletilić has failed to establish that it was unreasonable for the Trial Chamber to fail to find that the fact that Juka Prazina's name does not appear on Exhibit PP 704, listing members of the KB as of November 1993, is inconsistent with the statement attributed to Vedran Bijuk and dated 26 July 1993, according to which he was under the command of Juka Prazina. Furthermore, Naletilić does not explain why it was unreasonable for the Trial Chamber to find that Exhibits PP 607.2 and PP 614 corroborate that Vedran Bijuk took part in the Raštani operation which the Trial Chamber found to have taken place on 22 and 23 September 1993.

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[356] Naletilić Revised Appeal Brief, para. 71.
[357] Prosecution Response to Naletilić Appeal Brief, fn. 128.
[358] *Infra*, para. 167.
[359] Naletilić Revised Appeal Brief, paras 73-74.

(d) Paragraph 428 of the Trial Judgement

166. Naletilić argues that the Trial Chamber erred when it noted at paragraph 428 of the Trial Judgement that "the name Ivica Kraljević appears on Exhibit PP 704, the salary list of the KB as of November 1993." Naletilić argues that the Trial Chamber found at paragraph 426 of the Trial Judgement that the prison warden in Ljubuški was Ivica Kraljević and that no explanation is given as to whether more than one person shared the same name, or whether the same person had multiple functions and "no ink is spent examining the likelihood of either possibility".[360]

167. At paragraph 426 of the Trial Judgement, in the context of finding that detainees were mistreated by soldiers of the KB and the Vinko Škrobo ATG under the command of Mladen Naletilić in Ljubuški prison,[361] the Trial Chamber found that "the [Ljubuški] prison warden was Ivica Kraljević". At paragraph 428 of the Trial Judgement, the Trial Chamber noted that "the name of Ivića Kraljević appears on Exhibit PP 704, the salary list of the KB as of November 1993." The Appeals Chamber notes that the additional evidence admitted on appeal shows that the warden of Ljubuški prison, Ivica Kraljević, was not the same Ivica Kraljević that appears listed as a member of the KB in Exhibit PP 704.[362] As a result, based on the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings, the Appeals Chamber finds that no reasonable trier of fact could have concluded that Ivica Kraljević, the warden of Ljubuški prison, was the same Ivica Kraljević listed in Exhibit PP 704.

(e) Paragraph 431, footnote 1146 of the Trial Judgement

168. Naletilić alleges that the Trial Chamber erred at footnote 1146 in considering on the basis of Exhibit PP 704 that Miroslav *a.k.a.* Miro Marjanović and Marinko Marjanović are the same person when in fact they are not. Naletilić refers to his Rule 115 filing in this respect.[363]

169. Paragraph 431 of the Trial Judgement describes the relevant testimonies of victims of beatings in the Heliodrom. The Trial Chamber found that, in several cases, some of the beatings were administered by BH Croat co-prisoners but "[t]here is however also overwhelming evidence that establishes that Miro Marjanović, Ante Smiljanić, Ante Buhovac, Jozo Pole, Slavko Skender,

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[360] Naletilić Revised Appeal Brief, para. 76.
[361] *See* Trial Judgement, para. 428.
[362] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Decision on Prosecution's Motions for Additional Evidence in Favour of Mladen Naletilić and for Protective Measures, 13 October 2005 (Confidential) ("Confidential Decision on Prosecution Motions for Additional Evidence and for Protective Measures"), p. 4; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Motion for Additional Evidence in favour of Mladen Naletilić, 6 October 2005 (Confidential) ("Prosecution Rule 115 Motion").
[363] Naletilić Revised Appeal Brief, para. 77.

and Juka Prazina were among the most notorious perpetrators."[364] Whereas the Trial Chamber considered that "the Prosecution failed to adduce evidence to prove that [Ante Buhovac, Slavko Skender, Jozo Pole and Ante Smiljanić] were under the command of Mladen Naletilić as KB members or subordinated to Vinko Martinović",[365] it concluded that Juka Prazina "was a member of the KB and, as such, subordinated to Mladen Naletilić."[366] It also found at paragraph 431 that "the name of Marinko Marjanović appears on a salary list of the KB dated November 1993." Footnote 1146 of the Trial Judgment is inserted after this finding, and refers exclusively to Exhibit PP 704. The Trial Chamber found that the beatings administered to prisoners at the Heliodrom "by Juka Prazina and Miro Marjanović amount[ed] to cruel treatment and wilfully causing great suffering under Article 2(c) and 3 of the Statute and that […] Naletilić bears command responsibility pursuant to Article 7(3) of the Statute for those acts committed by his subordinates".[367]

170. However, the Trial Chamber, in mentioning the salary list of the KB dated November 1993, did not conclude that Miro Marjanović was under the command of Naletilić prior to or after November 1993. Moreover, the Trial Chamber did not make a finding as to when Miro Marjanović administered beatings on the prisoners in the Heliodrom. In the absence of a finding by the Trial Chamber to this effect, the Appeals Chamber has reviewed the evidence of those witnesses who the Trial Chamber relied on for its finding that Miro Marjanović was among the most notorious perpetrators of beatings at the Heliodrom.[368] These are cited at footnote 1140 of the Trial Judgement, and are as follows: Witnesses HH, QQ, O, RR and W. With the exception of Witness HH, who refers to an incident in which he was beaten by a certain "Marijanović" in late May 1993,[369] none of the other witnesses provide specific dates as to when Miro Marjanović beat prisoners at the Heliodrom. What these witnesses do provide are the approximate dates for the beginning of their detention in and release from the Heliodrom. Those ranges of time are too broad, stretching from late May 1993 to late March 1994. No reasonable trier of fact could have found, solely on the basis of Exhibit PP 704, the KB salary list for November 1993, that it had been established beyond reasonable doubt that Miro Marjanović was a subordinate of Naletilić when he administered beatings to prisoners in the Heliodrom. The Trial Chamber's error lead to a miscarriage of justice since, absent the finding that Miro Marjanović was a subordinate of Naletilić at the relevant time, Naletilić could not have been found responsible pursuant to Article 7(3) for the cruel treatment and wilfully causing great suffering under Article 2(c) and 3 of the Statute inflicted by Miro Marjanović on prisoners at the Heliodrom. Accordingly, this finding that Naletilić was

[364] Footnotes omitted.
[365] Trial Judgement, para. 431, fn. 1147.
[366] Trial Judgement, para. 431.
[367] Trial Judgement, para. 436.
[368] Trial Judgement, para. 431.

responsible is set aside. Any implications on the sentence of Naletilić will be considered in the section dealing with the appeals from sentence. In light of this conclusion, it is not necessary to decide whether the Trial Chamber also erred in concluding that Miro Marjanović and Marinko Marjanović were the same person.

171. In conclusion, other than the finding that, based on the evidence before the Trial Chamber together with the additional evidence admitted on appeal, no reasonable trier of fact could have concluded that Ivica Kraljević, the warden of Ljubuški prison, was the same Ivica Kraljević listed in Exhibit PP 704, and the finding that the Trial Chamber erred by concluding, solely on the basis of Exhibit PP 704, that Miro Marjanović was a subordinate of Naletilić when he administered beatings to prisoners in the Heliodrom, none of the instances of reliance by the Trial Chamber upon Exhibit PP 704 brought by Naletilić constitutes an error. Naletilić's first and third grounds of appeal are allowed in part.

2. Testimony of Witness Falk Simang

172. Regarding the second piece of evidence, Witness Falk Simang's testimony, Naletilić alleges that the Trial Chamber erred in attaching any probative value to it.[370] Naletilić submits that the Trial Chamber should have disregarded the testimony of Witness Falk Simang in its entirety, on the basis that the witness had every motivation to lie, and was repeatedly shown to have done so.[371] The Appeals Chamber understands Naletilić's submission that "in many instances, the Trial Chamber relied solely on [Witness Falk] Simang's testimony as proof of [his] command responsibility for crimes of others"[372] as an explanation of the impact of the alleged error rather than as a second allegation of error. The Appeals Chamber has regrouped the specific arguments raised by Naletilić into five categories which it will examine in turn: (1) concession of earlier lies; (2) speculation, allegedly aimed at bolstering the Prosecution's case; (3) alleged lies contained in Witness Falk Simang's testimony; (4) the Trial Chamber's alleged selective approach to his testimony; and (5) challenges to conclusions of the Trial Chamber based upon his testimony.

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369 Witness HH, T. 4814-4818.
370 Naletilić Revised Appeal Brief, para. 7. Naletilić alleges that the Trial Chamber erred and abused its discretion in giving the testimony of Witnesses Falk Simang and Ralf Mrachacz any weight: Naletilić Notice of Appeal, p. 3. As noted by the Prosecution, Naletilić does not substantiate his allegations regarding the testimony of Witness Ralf Mrachacz in his Revised Appeal Brief: Prosecution Response to Naletilić Appeal Brief, para. 4.1. Naletilić only does so in his Reply Brief, without having sought leave, thus depriving the Prosecution from the opportunity to respond: *see* Naletilić Reply Brief, para. 19. Therefore, the Appeals Chamber will limit its consideration of Naletilić's arguments under his fourth ground of appeal to the extent that they relate to Witness Falk Simang's testimony.
371 Naletilić Revised Appeal Brief, paras 7, 85.
372 Naletilić Revised Appeal Brief, para. 7. The Appeals Chamber notes that Naletilić does not indicate what are the "many instances" where in his submission "the Trial Chamber relied solely on the testimony in question as proof of his command role and as proof of [his] command responsibility for the crimes of others".

173. The Trial Chamber made the following finding regarding the credibility of Witnesses Falk Simang and Ralf Mrachacz and the reliability of their evidence:

> Regarding the testimonies of witnesses Ralf Mrachacz and Falk Simang, both German mercenaries serving in the KB, the Naletilić Defence alleges that they "were bought and paid" and that their testimonies are "worthless," Naletilić Final Brief, pp 89-110. They are both currently serving sentences in Germany for having committed murder of two other mercenaries while serving in the KB. The Chamber has considered their testimonies against this background. Their testimonies were corroborated by other evidence. They showed respect for Mladen Naletilić as a leader and for leading his troops with concern for his soldiers. The fact that Falk Simang expressed hope that his case in Germany would be reopened following these proceedings does not in the view of the Chamber make his testimony less reliable and credible. The Chamber finds their testimonies reliable and consistent.[373]

(a) <u>Concession of earlier lies</u>

174. Naletilić argues that Witness Falk Simang conceded during his testimony that he had lied on various occasions. First, he lied to Naletilić, by falsely pretending to have prior military experience. Secondly, he lied to the German police about events in Herzegovina during the war.[374] In addition, Naletilić argues that the witness confessed to robbing and then murdering two fellow soldiers. This, according to Naletilić, "does not lend itself to support a finding that [Witness Falk] Simang's testimony was reliable or credible."[375]

175. In the Appeals Chamber's view, the fact that, at trial, Witness Falk Simang admitted to having lied on the two aforementioned occasions and to having committed the crimes mentioned above fails to demonstrate that the Trial Chamber erred in its assessment of the overall credibility of the witness in spite of these admissions.

176. Naletilić argues next that Witness Falk Simang lied about the fact that "he received his HVO Military Identification Card on 27 April 1993, Exhibit PP 354.1, and that he had been waiting for a few weeks for the card because it had been sent off somewhere" and that the Trial Chamber erred in concluding that Naletilić gave the identification card to Witness Falk Simang "when [Naletilić] did not even sign it."[376] Naletilić provides no support for his argument that Witness Falk Simang lied in this instance; his submission constitutes a bare assertion, which, as a result, is dismissed.

(b) <u>Speculation allegedly aimed at bolstering the Prosecution's case</u>

177. At trial, Witness Falk Simang was asked whether, to his knowledge, Naletilić had any superiors. He responded, "[n]ot that I would be aware of. Maybe, perhaps in Zagreb, but I don't

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[373] Trial Judgement, fn. 48.
[374] Naletilić Revised Appeal Brief, para. 87.
[375] Naletilić Revised Appeal Brief, para. 87.
[376] Naletilić Revised Appeal Brief, para. 88.

know."[377] Later, Witness Falk Simang was asked who promoted Ivan Andabak to the rank of general, and responded "[t]hat was direct orders from Zagreb".[378] Naletilić claims that each of these statements was mere speculation intended to bolster the Prosecution's theory that Naletilić was connected with the Republic of Croatia.[379] The Appeals Chamber finds that Naletilić has failed to show that these statements reveal any improper motivation on the part of the witness that would have made it unreasonable for the Trial Chamber to rely on his testimony.

178. Naletilić argues next that Witness Falk Simang attempted to connect the Croatian authorities with the conflict in Mostar by mentioning HV units, but that he never mentioned the locations or names of the supposed units, because, in his submission, the witness had no personal knowledge thereof.[380] The Prosecution responds that the witness testified that he could identify a group of HV soldiers because they wore HV patches but that he did not know the unit.[381] It stresses that the witness could not communicate with most people around him because he did not speak their language and that it is therefore not surprising that whereas he could recognise an HV patch, he would not know many further details.

179. In the Appeals Chamber's view, Naletilić's argument fails to show that it was unreasonable for the Trial Chamber to accept this portion of the testimony of Witness Falk Simang.[382]

(c) Alleged lies contained in testimony

180. Naletilić argues that Witness Falk Simang lied on the following two occasions: (1) when he provided what the Trial Chamber found to be direct evidence about the action in Doljani, which occurred on 19 and 20 April 1993, because at that time he was not a member of the HVO;[383] and (2) when he testified that he was a member of the KB until February-March 1994, because the Trial Chamber found that the KB was disbanded at the end of 1993.[384]

181. The Appeals Chamber notes that the Trial Chamber relied on the evidence of Witness Falk Simang to find that he was a member of the KB Široki Brijeg from February 1993 until February or March 1994.[385] Naletilić's submission that Exhibit PP 354.1 ("HVO identification card of KB

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377 Witness Falk Simang, T. 3789.
378 Witness Falk Simang, T. 3793.
379 Naletilić Revised Appeal Brief, paras 90, 91. *See* also Naletilić Reply Brief, para. 23.
380 Naletilić Revised Appeal Brief, para. 99.
381 Prosecution Response to Naletilić Appeal Brief, para. 4.19.
382 *See* Trial Judgement, para. 193, fn. 533.
383 Naletilić Revised Appeal Brief , paras 88-89 (citing Ex. PP 354.1); Appeals Hearing, T. 167, 168.
384 Naletilić Revised Appeal Brief, para. 89; Appeals Hearing, T. 167, 168 (citing Trial Judgement, fn. 261, Witness NN, Witness NP).
385 Trial Judgement, para. 91, fn. 240 (citing Witness Falk Simang, T. 3787).

member Falk Simang")[386] shows that "he was not even a formal member of the HVO until the 27th day of April [1993]",[387] is premised on the argument that Witness Falk Simang lied when he stated that he had to wait some weeks for this identification card, an argument which the Appeals Chamber has already dismissed as constituting a bare assertion.

182. Footnote 261 to paragraph 96 of the Trial Judgement is inserted after the Trial Chamber's finding that, after the death of Mario Hrkač, Ivan Andabak became the operative commander of the KB Široki Brijeg. The text of the footnote makes clear that, contrary to Naletilić's submission, the Trial Chamber did not make a finding as to when the KB ceased to exist, but was merely paraphrasing the evidence of witnesses as to the dates during which, according to them, Ivan Andabak was also a commander of the HVO Main Staff.[388] Naletilić's submission that Witness Falk Simang lied when he gave evidence that he was a member of the KB until February or March 1994 is dismissed.

183. Furthermore, Naletilić argues that Witness Falk Simang lied because his testimony on seven additional issues related to the crimes committed in Sovići/Doljani and Mostar is either contrary to all other evidence, self-contradictory or uncorroborated.[389]

184. The Trial Chamber considered the attack on Sovići and Doljani to be part of a larger HVO offensive aimed at attacking Jablanica, which had already started on 15 April 1993.[390] It found that the shelling of Sovići continued uninterrupted until the afternoon of 17 April 1993,[391] that 70 to 75 ABiH soldiers surrendered while others fled into the hills and woods or hid in houses and continued to shoot, that HVO soldiers searched the houses for weapons and soldiers, and that a few civilians were detained in the elementary school,[392] where captured soldiers were also interrogated before being transported in the evening of 18 April 1993 to Ljubuški prison.[393] The Trial Chamber also found that, following that transport, the fighting continued in the hills surrounding Sovići, the HVO's attitude hardened and, on 20 April 1993, Doljani was shelled and a smaller group of ABiH soldiers who had resisted the HVO for some days were captured and brought for interrogation to the HVO headquarters at the fishfarm, where they received harsher treatment. The Trial Chamber also

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[386] *See* Trial Judgement, fn. 208.
[387] Appeals Hearing, T. 162, 168.
[388] Trial Judgement, fn. 261 states in relevant part as follows: "For some time Ivan Andabak was also assistant commander of the HVO Main Staff for the professional units, which was probably after the KB ceased to exist at the end of 1993, witness NM, T 12755 [private session]; witness NP for late 1993 or 1994, T 13078; witness NR for December 1995, T 13295-13296 [private session]; *see* also exhibit PP 299.1, which mentions Colonel Ivan Andabak as representative of the HVO Main Staff for 15 April 1993". The Appeals Chamber notes that the correct citation to the evidence of Witness NM should be: Witness NM, T. 12753, 12754-12755 (private session).
[389] Naletilić Revised Appeal Brief, paras 94-98, 100-105.
[390] Trial Judgement, para. 30.
[391] Trial Judgement, para. 31.
[392] Trial Judgement, para. 31.

found that, in the evening of 20 April 1993, the operative commander of the KB based in Široki Brijeg, Mario Hrkač (Čikota), was killed in combat and the KB then withdrew to Široki Brijeg to pay its respects.[394]

(i) Whether Witness Falk Simang participated in the Sovići action

185. Naletilić argues that if one is to believe that Witness Falk Simang participated in the Doljani action, he of necessity would also have had to participate in the Sovići action, for the reasons that (a) one must pass through Sovići to reach Doljani; (b) the witness himself stressed that the entire KB participated in the Doljani action and; (c) according to Naletilić, it is undisputed that the action in Doljani occurred after the action in Sovići. According to Naletilić, therefore, Witness Falk Simang never participated in the Doljani action.[395]

186. The Appeals Chamber recalls that the Trial Chamber considered, at footnote 356 of the Trial Judgement, that "[a]s [W]itness Falk Simang was in Doljani, but not in Sovići, he could well have forgotten [the name Sovići] or he might not have heard of Sovići at all." In the Appeals Chamber's view Naletilić's arguments set out above do not support his assertion that if one is to believe that Witness Falk Simang participated in the Doljani action, he of necessity would have had to participate in the Sovići action, and that it was unreasonable for the Trial Chamber to conclude as it did. The Appeals Chamber understands the Trial Chamber's conclusion that the witness was not in Sovići to mean that he did not take part in the events that occurred in Sovići (on 17-18 April 1993) rather than that he did not cross Sovići on his way to Doljani (on 20 April 1993). Even if it were true that "one must pass through Sovići to reach Doljani", the Appeals Chamber is not satisfied that the fact that the witness testified that "Sovići does not ring a bell with [him]" necessarily means that he never passed through Sovići.[396]

(ii) Whether the witness spent only one day in Doljani

187. Naletilić argues that the witness' testimony that he spent only one day in Doljani is contrary to all other evidence concerning the Sovići/Doljani action. He refers to paragraphs 27 and 33 of the Trial Judgement and submits that the entire operation lasted four days and that, out of these days, the HVO was in Doljani on 19 and 20 April 1993.[397] Witness Falk Simang testified that on the day he arrived in Doljani, Čikota was killed; the Trial Chamber dated Čikota's death at 20 April 1993 and stated that the larger HVO offensive on Jablanica started on 15 April 1993, while Doljani was

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[393] Trial Judgement, para. 32.
[394] Trial Judgement, para. 33.
[395] Naletilić Revised Appeal Brief , para. 104.
[396] Witness Falk Simang, T. 3894.

shelled on 20 April 1993. The Appeals Chamber sees no inconsistency in this timeline. Naletilić also argues that Witness Falk Simang contradicted the timeline established by other evidence at trial as to the timing of the first and second actions in Mostar.[398] As the Trial Chamber noted, however, "Witness Falk Simang repeatedly said that he could not remember dates and that he might confuse them."[399] The Appeals Chamber considers that it was reasonable for the Trial Chamber to credit the witness' testimony in other respects in spite of his frankly acknowledged difficulty with certain dates.

(iii) Whether another action took place in Doljani

188. Naletilić alleges that Witness Falk Simang lied when he testified about another action in Doljani and an order from Naletilić to "take no prisoners" in this other action. Naletilić argues that the record is devoid of evidence of another action in Doljani aimed at avenging the death of Čikota.[400] Likewise, he argues that the portion of the witness' testimony relating to civilians' eviction and their transfer to the Mostar Gymnasium was also uncorroborated.[401] The Appeals Chamber notes that there is no requirement that witness testimony be corroborated,[402] and finds that Naletilić has not demonstrated that the Trial Chamber was unreasonable in relying on Witness Falk Simang's testimony in these respects.

(iv) Whether Naletilić had settled in Doljani

189. Naletilić submits that the Trial Chamber erred in stating, at paragraph 26 of the Trial Judgement and on the basis of Witness Falk Simang's testimony, that he (Naletilić) had settled in Doljani and had a base there. According to Naletilić, the testimony in question is incorrect and in direct opposition to the testimonies of Defence Witnesses NL, NM and NR as well as to Exhibit PP 928 (the Radoš Diary), where the author mentioned seeing Naletilić in Doljani a total of three times in the period from 19 April to 25 April 1993.[403]

190. In the Appeals Chamber's view, Naletilić has not demonstrated why it was unreasonable for the Trial Chamber to conclude, on the basis of the evidence of Prosecution Witnesses Ralf Mrachacz, TT and Y, and Defence Witnesses NN and NW, that, from early April 1993, the HVO

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[397] Naletilić Revised Appeal Brief, para. 94.
[398] Naletilić Revised Appeal Brief, paras 97, 98, 100, 102, 105.
[399] Trial Judgement, fn. 426.
[400] Naletilić Revised Appeal Brief, para. 94.
[401] Naletilić Revised Appeal Brief, para. 98.
[402] *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, paras 492, 506; *Kupreškić et al.* Appeal Judgement, para. 33; *Kunarac et al.* Appeal Judgement, para. 268; *Kordić and Čerkez* Appeal Judgement, paras 274-275; *Kvočka et al.* Appeal Judgement, para. 576.
[403] Naletilić Revised Appeal Brief, para. 95.

headquarters were housed in a building known as the "fishfarm" in Orlovac, which is one of the hamlets in Doljani.[404]

(v) Killings in the forest

191. Naletilić alleges that the Trial Chamber erred in relying on the testimony of Witness Falk Simang that, after the departure of UNPROFOR, prisoners were taken to a forest and killed.[405] The Trial Chamber did not, however, rely on this portion of the witness' testimony in reaching its findings, and thus Naletilić has not demonstrated an error.[406] Likewise, the Trial Chamber never found, contrary to Naletilić's allegation, that Witness Falk Simang participated in the action in Mostar on 13 June 1993.[407]

(vi) Whether Bofors and other vehicles were used for transporting belongings of Muslims looted during the second action in Mostar

192. Naletilić argues that Witness Falk Simang contradicted himself when he testified first that Bofors (a type of mobile artillery) could not be used during the second attack on Mostar, and later that they were used in that action in order to carry plundered goods.[408] The Appeals Chamber finds that this testimony is not irreconcilable, as a vehicle that could not be used for offensive attack purposes could still be loaded with plundered goods. Moreover, the Trial Chamber did not rely on these statements of Witness Falk Simang, and Naletilić has not demonstrated that, even if contradictory, the statements so discredited the witness as to preclude the Trial Chamber from relying on other portions of his testimony.

(vii) Naletilić and Ivan Andabak each killed one prisoner of war in front of the Ministry in Mostar on 10 May 1993

193. Naletilić alleges that Witness Falk Simang lied when he testified that he (Naletilić) and Ivan Andabak each shot a prisoner of war in the head, in front of the Ministry in Mostar on 10 May 1993. He argues that, although many witnesses testified, including Witnesses AA, BB, CC and ZZ who were prisoners at the Ministry on that day, only Witness Falk Simang gave evidence about the killings in question. He argues further that even the Prosecution did not appear to believe the witness since it did not charge him for that murder. In addition, according to him, none of the

[404] Trial Judgement, para. 26, fn. 48.
[405] Naletilić Revised Appeal Brief, para. 96.
[406] Witness Falk Simang, T. 3805-3806. *See* Trial Judgement, para. 358, fn. 956.
[407] *See* Naletilić Revised Appeal Brief, para. 105. Naletilić was asked by the Appeals Chamber to identify the challenged finding in the Trial Judgement: *see Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Letter from the Senior Legal Officer Regarding Preparation of the Appeals Hearing in the Naletilić and Martinović Case ("SLO Letter"), 16 September 2005, p.1, but could not do so.

other witnesses present confirmed Witness Falk Simang's testimony that women and a child were also there during the incident.[409]

194. The Appeals Chamber accepts the proposition that, had any of the prisoners of war detained at the Ministry witnessed Naletilić killing another prisoner of war, they would most likely have testified about it. This notwithstanding, the mere fact that no witness other than Witness Falk Simang testified about the killings in question does not suffice to show that the Trial Chamber was unreasonable in finding this witness to be credible.

(d) Trial Chamber's alleged selective approach to Witness Falk Simang's testimony

195. Naletilić submits that the Trial Chamber erred in selectively considering the testimony of Witness Falk Simang in such a way that it determined as credible all evidence which confirmed the allegations in the Indictment, while it disregarded all testimony which was adverse to the allegations in the Indictment without providing an explanation for why it did so.[410] While Naletilić provides a number of alleged examples of the Trial Chamber's disregard of testimony adverse to the allegations in the Indictment, he only provides one alleged example of the Trial Chamber's acceptance of Witness Falk Simang's testimony to confirm the allegation in the Indictment, and he does so only in reply.[411] Since Naletilić fails to identify any particular finding of the Trial Chamber and does not attempt to substantiate the allegation in question, the Appeals Chamber will not consider the merit of Naletilić's allegation that the Trial Chamber erred in determining as credible all of Witness Falk Simang's evidence which confirmed the allegations in the Indictment. For the same reason, the Appeals Chamber will limit its assessment of the merits of Naletilić's allegation that the Trial Chamber erred in disregarding all of Witness Falk Simang's testimony which was adverse to the allegations in the Indictment to the examples identified by him.

(i) Aim of the first action in Doljani

196. Naletilić argues that the Trial Chamber erred in concluding that the Doljani action had a persecutory motive, whereas Witness Falk Simang had testified that it had a legitimate military

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[408] Naletilić Revised Appeal Brief, para. 101; Witness Falk Simang, T. 3817.
[409] Naletilić Revised Appeal Brief, para. 103.
[410] Naletilić Revised Appeal Brief, para. 84.
[411] Naletilić Reply Brief, para. 22, according to which "[t]he Trial Chamber's finding that Witness Simang, pursuant to his testimony, was a member of the KB until February or March 1993 [*sic*], and Mrachacz until mid 1995 (fn. 240 of the judgement) is but another example of the Trial Chamber construing these witness' testimony as weighty while disregarding defence witnesses who testified the KB disbanded in late 1993. *See*, T 13190." This argument has been dealt with above: *see supra*, para. 182.

objective, namely the rescue of surrounded HVO soldiers and BH Croats following an attack by BH Muslim forces.[412]

197. The Appeals Chamber notes that the Trial Chamber concluded that the "attack on Sovići and Doljani was part of a larger HVO offensive aimed at taking Jablanica,"[413] that "there was a plan early on in the operation to have the BH Muslim civilian population transferred from Sovići, intending to use them in exchange for BH Croat prisoners taken by the ABiH elsewhere"[414] and that the "transfer of the civilian population from Sovići was part of a plan drawn up by among others, Mladen Naletilić."[415] Naletilić does not establish why the evidence of Witness Falk Simang that the aim of the attack on the bunker in which he participated in Doljani was to rescue surrounded HVO soldiers and BH Croats following a BH Muslim attack made it unreasonable for the Trial Chamber to conclude as it did. That an attack has a military objective does not exclude the concurrent existence of a plan to transfer the civilian population for the purpose of exchanging it for captured soldiers. The Appeals Chamber notes in this respect that Witness Falk Simang himself testified about the transfer of population.[416]

(ii) Units involved in the first action in Doljani

198. Naletilić alleges further that the Trial Chamber erred in disregarding the evidence of Witness Falk Simang where he only mentioned the KB and the ATG Baja Kraljević as being involved in the first action in Doljani. Naletilić refers to paragraphs 120 and 591 of the Trial Judgement and argues that the Trial Chamber disregarded the testimony in question and found that other units definitely participated in the action.[417] However, the transcript reveals that Witness Falk Simang was not asked, and did not testify, about whether groups other than the KB and the ATG were deployed.[418] Naletilić's argument on this point is dismissed.

(e) Challenge to conclusions of the Trial Chamber based upon the testimony of Witness Falk Simang

199. Naletilić points to various parts of the Trial Judgement referring to Witness Falk Simang's testimony which, he submits, demonstrate that the testimony in question was variously and repeatedly flawed, illogical and contradictory.[419] He also challenges the Trial Chamber's

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[412] Naletilić Revised Appeal Brief, para. 92.
[413] Trial Judgement, para. 30.
[414] Trial Judgement, para. 529.
[415] Trial Judgement, para. 531.
[416] Witness Falk Simang, T. 3795.
[417] Naletilić Revised Appeal Brief, para. 93.
[418] Witness Falk Simang, T. 3795.
[419] Naletilić Revised Appeal Brief, paras 108, 121.

conclusions based on it on the ground that the Trial Chamber failed to properly and correctly establish the facts and apply the law.[420]

(i) Footnote 54 of the Trial Judgement

200. Naletilić submits that the Trial Chamber erred at footnote 54 of the Trial Judgement in relying, as evidence of Witness Falk Simang's credibility, on a portion of his testimony apparently displaying knowledge that the date on which Čikota was killed was 20 April 1993. He argues in this respect that knowledge of a notorious fact is no evidence of credible knowledge of anything else.[421]

201. Naletilić's reading of the footnote in question is incorrect. Rather, the footnote addresses the reliability of the Radoš Diary. The relevant portion of footnote 54 reads "[t]he Chamber has found the [Radoš] [D]iary to be very reliable in describing the events since other evidence corroborates the content. *Inter alia* the following evidence has assisted the Chamber in finding the Radoš Diary reliable; […] the fact that it also mentions that Čikota (Mario Hrakć) was killed on 20 April 1993 and that they stopped fighting in order to pay last respects, (see Radoš Diary, p 77), which is also corroborated by [W]itness Falk Simang." There is therefore no need to further examine Naletilić's argument in this respect.

(ii) Paragraphs 33 and 587, footnotes 72 and 1461 of the Trial Judgement

202. Naletilić alleges that the Trial Chamber erred in fact when it concluded at paragraph 33 of the Trial Judgement, on the basis of Witness Falk Simang's testimony, that "[f]ollowing the transfer of the captured ABiH soldiers to Ljubuški prison, the fighting continued in the hills surrounding Sovići and the HVO attitude hardened." He also contests the Trial Chamber's citation of Witness Falk Simang's testimony in footnote 1461 of the Trial Judgement to support its account of the fighting on 19-22 April.[422]

203. The Appeals Chamber notes that the footnotes to the relevant paragraphs of the Trial Judgement cite mostly other evidence, and that the only references to Witness Falk Simang's testimony state that the witness testified about "fighting around a bunker" on 20 April 1993, when Čikota was killed.[423] Naletilić has not demonstrated that the Trial Chamber erred in citing this testimony or in reaching the conclusions it did.

[420] Naletilić Revised Appeal Brief, paras 109, 121.
[421] Naletilić Revised Appeal Brief, para. 109.
[422] Naletilić Revised Appeal Brief, para. 115.
[423] Trial Judgement, fn. 72 (citing Witness Falk Simang, T. 3794-3796); *ibid*., fn. 1461.

(iii) Paragraph 44, footnote 113 of the Trial Judgement

204. Naletilić argues that the Trial Chamber erred in citing Witness Falk Simang's testimony that the KB drove BH Muslims from their homes and "transported them mostly to Velež Stadium"; he claims that in fact the witness referred to the "Mostar gymnasium" and not to a stadium.[424] The Appeals Chamber notes that Witness Falk Simang referred to the same location variously as a "stadium" and a "gymnasium".[425] Even if the Trial Chamber were wrong in identifying the location specifically as the Velež Stadium in Mostar, Naletilić has not shown how this error would lead to a miscarriage of justice. His argument is therefore dismissed.

(iv) Paragraph 193, footnote 533 of the Trial Judgement

205. Naletilić alleges that the Trial Chamber erred when it relied on the testimony of Witness Falk Simang to conclude, at paragraph 193 of the Trial Judgement, that HV soldiers "at times took part in the crimes committed against the Muslim population" in Mostar on 9 May 1993. Naletilić argues that the Trial Chamber found that the witness in question was on the Bofors artillery guns in the hills above Mostar and that a review of his testimony reveals that he did not mention contact with the civilian population.[426]

206. Paragraph 193 must be read together with the preceding paragraph of the Trial Judgement, according to which "[i]n spite of the denial of political officials from the Republic of Croatia and [HZ H-B], personnel from the ECMM and UNPROFOR witnessed the presence and direct intervention of HV troops in Bosnia and Herzegovina in general, and in the area of Mostar in particular, throughout 1993." In this context, the Trial Chamber's finding at paragraph 193 that "[t]his evidence is further corroborated by the testimony of many witnesses, who saw HV troops in several relevant locations," and that those HV soldiers "at times took part in the crimes committed against the Muslim population" is obviously not limited to a specific incident. Further, while footnote 533 refers to a portion of the testimony of Witness AE describing the arrest of Muslim civilians by soldiers wearing both HV and HVO insignia on 9 May 1993, the portion of the testimony of Witness Falk Simang referred to by the Trial Chamber does not provide an exact date.[427] Therefore, Naletilić's argument fails.

[424] Naletilić Revised Appeal Brief, para. 111.
[425] Witness Falk Simang, T. 3817, 3820.
[426] Naletilić Revised Appeals Brief, para. 114.
[427] Witness Falk Simang, T. 3817, 3819.

(v) Paragraph 125, footnote 358 of the Trial Judgement

207. Naletilić alleges that the Trial Chamber erred at paragraph 125 of the Trial Judgement in relying upon the testimony of Witness Falk Simang that "captured Muslims in uniform were interrogated by Mladen Naletilić and Ivan Andabak at the headquarters next to a fish basin" and that he (Naletilić) "ordered the complete cleansing of Doljani." Naletilić notes that, according to the witness, the incidents in question occurred during the second action in Doljani. He argues that it is fair to assume that the witness' testimony about the second action is a lie since it is uncorroborated,[428] and that Witness Ralf Mrachacz testified that the second action in Doljani was "aborted".[429]

208. The Appeals Chamber has already rejected Naletilić's submission that the Trial Chamber erred in relying upon Witness Falk Simang's testimony about a second action in Doljani.[430] The Appeals Chamber notes further that footnote 358 of the Trial Judgement, which supports the Trial Chamber's aforementioned finding on the interrogation of prisoners, refers to various portions of the testimony of Witness Falk Simang discussing not only the second but also the first operation in Doljani.[431] As to Naletilić's argument that Witness Ralf Mrachacz described that the second Doljani action was aborted, the Trial Chamber noted that "[a]s a result of the death of 'Čikota', the witness described the operation as divided into two actions".[432] The Appeals Chamber notes that Witness Ralf Mrachacz gave evidence that he could not attend the first action in Doljani during which Čikota fell but that he was present during the second action when they were given the order to take no prisoners.[433] The Appeals Chamber notes that the Trial Chamber made no finding as to whether Witnesses Falk Simang and Ralf Mrachacz were referring to the same "action", a term which is not unambigous, when referring to the "second action".

(vi) Paragraphs 629 and 631, footnotes 1554 and 1560 of the Trial Judgement

209. Naletilić alleges that the Trial Chamber erred at paragraphs 629 and 631 of the Trial Judgement by relying on Witness Falk Simang's testimony that "following the attack of 9 May 1993 on Mostar, Mladen Naletilić, together with Ivan Andabak and Mario Hrkač (Čikota), was present when soldiers were loading looted goods to their cars after BH Muslims were evicted from their houses" and by concluding on the basis of that testimony that "Mladen Naletilić knew that this

[428] Naletilić Revised Appeal Brief, paras 118, 119.
[429] Naletilić Reply Brief, para. 35. *See* also *ibid*., para. 19, where Naletilić refers to the testimony of Witness Ralf Mrachacz (T. 2758) according to which the second action in Doljani was aborted.
[430] *Supra*, para. 188.
[431] *I.e.*, the witness' testimony that Muslims were captured during the first operation and brought for interrogation to the base where "General Tuta" and Andabak interrogated them: Witness Falk Simang, T. 3798-3799.
[432] *See* Trial Judgement, para. 125. *See* also Witness Ralf Mrachacz, T. 2711, 2712.
[433] *See* Witness Ralf Mrachacz, T. 2711-2712.

kind of operations was being carried out by soldiers under his authority since he was present in some instances of plunder."[434]

210. The Appeals Chamber notes that the relevant portion of the transcript of Witness Falk Simang referred to at footnotes 1554 and 1560 of the Trial Judgement in relation to the Mostar looting incidents reads as follows:

> Q. Now, after the Muslims were removed from their homes and their flats, what happened to their property that was inside those places?
>
> A. Well, the same as in Doljani. What we could carry away, we took it away as our property.
>
> Q. Were any of your commanding officers aware that this was taking place?
>
> A. Yes, they were.
>
> Q. And why do you say that?
>
> A. Because they have seen so. We have loaded things on to the Bofors and on to our cars.
>
> Q. Now, when we talk about commanders, who are we talking about that knew about the taking of property?
>
> A. General Tuta, Ivan Andabak and Čikota.[435]

211. As the Trial Chamber had found that Čikota died on 20 April 1993, it was obviously in error in stating that he was present during the looting three weeks later. However, this error has no bearing on the Trial Chamber's finding that Naletilić knew that the plunder was being carried out, and Naletilić does not demonstrate otherwise that the error occasioned a miscarriage of justice. In particular, the error provides no reason to doubt the credibility of Witness Falk Simang's testimony, for the mistake was in the Trial Chamber's interpretation of that testimony, not in the testimony itself. Review of the above testimony reveals that, although the first question put to Witness Falk Simang was clearly related to the looting of Muslim property in Mostar, the witness' answer as to what happened to the property in question was "the same as in Doljani. What we could carry away, we took it away as our property." The Appeals Chamber notes that the witness answered in the affirmative to the next question as to whether any of his commanding officers were aware "that this [looting of Muslim properties] was taking place". In this context, the Appeals Chamber finds that a reasonable trier of fact would have understood the witness' testimony that "General Tuta, Ivan Andabak and Čikota" *saw* looting (and thus generally knew that looting was taking place) to refer only to the Doljani looting. The error thus does not undermine the witness' credibility. Naletilić's argument is dismissed.

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[434] Naletilić Revised Appeal Brief, para. 120.
[435] Witness Falk Simang, T. 3830.

212. In conclusion, the Appeals Chamber dismisses all of Naletilić's arguments concerning the testimony of Witness Falk Simang.

3. Exhibit PP 928 (Radoš Diary)

213. Naletilić alleges that the Trial Chamber erred in admitting Exhibit PP 928, the so-called "Radoš Diary", an allegedly contemporaneous journal by Alojz Radoš chronicling events in and around Doljani during the time relevant to the Indictment, and in relying on it for its findings on Naletilić's command position, since it "is not competent evidence".[436] Before turning to the specific arguments raised by Naletilić to support this allegation, the Appeals Chamber will consider the Prosecution's general argument that the Trial Chamber does not appear to have relied on Exhibit PP 928 for the disputed finding relating to Naletilić's command position.[437]

214. The section of the Trial Judgement entitled "Mladen Naletilić's command position", which encompasses paragraphs 89 through 94 and corresponding footnotes 235 through 258, does not refer to the Radoš Diary. The Trial Chamber did, however, cite the Radoš Diary in support of its findings concerning Naletilić's command position in the operation in Sovići/Doljani specifically.[438] The Appeals Chamber will therefore consider Naletilić's challenge to the credibility and reliability of the Radoš Diary.

215. The Appeals Chamber recalls the relevant portions of the Trial Judgement in this regard:

> (…) The Chamber has found the diary to be very reliable in describing the events since other evidence corroborates the content. *Inter alia* the following evidence has assisted the Chamber in finding the Radoš Diary reliable; exhibits PP 314.1 and PP 314.2, which confirm that Mladen Naletilić released a detained Muslim because his brother was in his unit (*see* Radoš Diary, p 75); exhibit PP 314, which confirms that on 19 April 1993 two members of the KB died, (*see* Radoš Diary, p 76); the fact that it also mentions that Čikota (Mario Hrakć) was killed on 20 April 1993 and that they stopped fighting in order to pay last respects, (*see* Radoš Diary, p 77), which is also corroborated by [W]itness Falk Simang. In addition, little personal details, which have nothing to do with the war, are described. Therefore, the Chamber considers the Radoš Diary as a reliable source despite the testimony of Defence [W]itness NW, who testified that the Radoš Diary is not reliable since it listed Defence [W]itness NW as a participant in a meeting he claimed he did not attend, Defence [W]itness NW, T 14987-14989. The Naletilić Defence argues that the Radoš

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[436] Naletilić Notice of Appeal, pp. 2, 4; Naletilić Revised Appeal Brief, paras 8, 127-131. Naletilić specifically points to fns 54-58, 67, 72, 82, 350, 361, 362, 371, 374-381, 384, 728, 912, 929, 1456, 1461, 1462, 1472, 1494 and 1700 and paras 28, 124, 126, 131, 132, 596, 609 and 610 of the Trial Judgement. The Appeals Chamber notes that, contrary to Naletilić's assertion, footnotes 728 and 912 of the Trial Judgement do not refer to the Radoš Diary but respectively to the testimony of Witness A that a person named Asif Radoš was wounded and the testimony of Witness B that a person named Hasan Radoš was beaten. The Appeals Chamber notes further that the references by the Trial Chamber to the Radoš Diary at fns 929, 1461 and 1462 of the Trial Judgement are irrelevant to the Trial Chamber's finding on Naletilić's command position, while paras 609 and 610 and fn. 1494 of the Trial Judgement go to the Trial Chamber's finding that "[t]he Indictment in paragraph 56 only refers to the mosque in Sovići" and that "[t]he Chamber […] makes no findings with regard to the reliability of [W]itness Falk Simang's testimony or the Radoš Diary relating to the alleged involvement of the KB and the accused Mladen Naletilić in the destruction of the mosque in Doljani".

[437] Prosecution Response to Naletilić Appeal Brief, para. 2.3, fn. 16 (according to which this document is not referred to in paras 92 to 96 of the Trial Judgement, nor in any of the accompanying footnotes).

[438] Trial Judgement, paras 126, 131, 132; *ibid.*, fns 361, 362, 371, 374-381, 384.

> Diary was not written in Alojz Radoš's hand-writing relying on [W]itness Safet Idrizović, Naletilić Final Brief, p 35. However, [W]itness Safet Idrizović testified that he is not familiar with Alojz Radoš's hand-writing when it is written in capital letters, but confirmed that it was the diary of Radoš, [W]itness Safet Idrizović, T 16374.[439]
>
> (…) The Chamber finds that the Radoš Diary accurately describes the atmosphere that existed in the area prior to the attack and that it confirms that the HVO was determined to implement the Vance–Owen [Peace] Plan.[440]
>
> According to the Radoš Diary, which was written by a member of the HVO 3rd Mijat Tomić Battalion who was present at the HVO headquarters at the fish farm in Doljani during the whole Sovići/Doljani operation, "Tuta arrived almost exactly at noon" at the HVO headquarters on 19 April 1993. The Chamber finds that the diary reflects the accurate time of Mladen Naletilić's arrival at Doljani on 19 April 1993 as this evidence is very precise in describing the first time Mladen Naletilić came to the fish farm leaving an impression of great authority.[441]

216. Naletilić's arguments regarding the admission of and reliance on the Radoš Diary can be divided into three main categories: (1) it was given the weight of live, cross-examined testimony when it was nothing more than "rank hearsay";[442] (2) the Trial Chamber treated it as a written statement although it was not in the form required for written statements under Rule 92 *bis* and in any case the factors described at Rule 92 *bis* (A)(ii)(a) through (c) weighed against its admission;[443] (3) the author of the diary was not brought to trial and the Prosecution never sought to bring Alojz Radoš to sponsor the diary,[444] as a result of which Naletilić was denied his right to confront and cross-examine the purported author of the diary.[445] These arguments will be examined in turn. The Appeals Chamber notes that, under his eighth ground of appeal, Naletilić further challenges the admissibility of, *inter alia,* the Radoš Diary as Prosecution evidence in rebuttal.[446] The Appeals Chamber will address this argument under Naletilić's eighth ground of appeal.

(a) Alleged hearsay evidence

217. Naletilić's arguments that the Radoš Diary constitutes hearsay evidence and provided evidence which came from no other source[447] are unacceptably vague and do not support a finding that the Trial Chamber erred in ascribing the weight it did to those sections of the Radoš Diary it relied upon. In particular, Naletilić does not substantiate his allegation that Alojz Radoš, the author of Exhibit PP 928, who according to the Trial Judgement was present at the fishfarm during the whole operation and kept a diary of the events in Doljani, "[had no] personal knowledge *of all*

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[439] Trial Judgement, fn. 54.
[440] Trial Judgement, fn. 55.
[441] Trial Judgement, para. 124 (footnotes omitted).
[442] Naletilić Revised Appeal Brief, paras 8, 130, 131.
[443] Naletilić Revised Appeal Brief, paras 128-129.
[444] Naletilić Revised Appeal Brief, paras 8, 127, 131.
[445] Naletilić Revised Appeal Brief, paras 127, 131.
[446] Naletilić Revised Appeal Brief, para. 8.
[447] Naletilić Revised Appeal Brief, para. 130.

matters recorded".[448] Moreover, "it is settled jurisprudence that […] hearsay evidence is admissible as long as it is of probative value" and that a Trial Chamber is free to rely on it.[449] Although in some circumstances hearsay may be unreliable, Naletilić has not demonstrated that this was the case here.

218. Nor does Naletilić demonstrate that the Trial Chamber gave the Radoš Diary the weight of live testimony. The Trial Chamber did find the diary reliable, noting at footnote 54 of the Trial Judgement that "the Radoš Diary is a reliable source despite the testimony of Defence [W]itness NW, who testified that the Radoš Diary is not reliable since it listed Defence [W]itness NW as a participant in a meeting he claimed he did not attend." However, Naletilić does not attempt to demonstrate why no reasonable trier of fact could have reached the aforementioned conclusion.

219. In the course of the Appeals Hearing, Naletilić referred to a statement which according to him was made by Judge Clark during the rendering of the Trial Judgement that "Mr. Radoš was a brave and humble man" to show that the diary was given the weight of live evidence.[450] The full quote is actually as follows: "The Chamber also received the humble diary of a careful and observant man who recorded in a pre-used notebook the daily happenings of the HVO command at Orlovac at the old fishfarm outside Doljani".[451] With this, however, Naletilić has not identified an error in the Trial Judgement. This statement formed part of the summary of the Trial Judgement which was read out when the latter was rendered. The summary forms no part of the judgment which is delivered, and, as the Presiding Judge stated at the time the summary was read out, the only authoritative account of the Trial Chamber's findings, and of its reasons for those findings, is to be found in the written judgment.[452]

220. Naletilić also submits that the diary's prejudicial effect outweighs its probative value because "[t]he diary was used to corroborate the testimony of a motivated liar, [Witness] Falk Simang".[453]

221. The Appeals Chamber considers that the fact that the Radoš Diary corroborates a number of facts to which Witness Falk Simang gave evidence would only raise doubt as to the reliability of the two sources of evidence if it were established that the facts in question are false or inaccurately depicted by the said evidence. The Appeals Chamber recalls that Naletilić failed to establish that

[448] Naletilić Revised Appeal Brief, para. 130 (emphasis added).
[449] *Semanza* Appeal Judgement, para. 159.
[450] Appeals Hearing, T. 97.
[451] T. 16942.
[452] T. 16932.
[453] Naletilić Revised Appeal Brief, para. 131.

Witness Falk Simang lied in the course of his testimony at trial.[454] Therefore, Naletilić's argument in this respect is without merit.

(b) Conditions required under Rule 92 *bis*

222. As for Naletilić's argument that the Trial Chamber treated the Radoš Diary as a written statement although it was not in the form required for written statements under Rule 92 *bis*, the Appeals Chamber notes that the Trial Chamber in its decision to admit the Radoš Diary into evidence clearly referred to Rule 89(C), according to which a Chamber may admit any relevant evidence which it deems to have probative value.[455] The Trial Chamber also considered that the mere admission of a document does not necessarily mean that the document gives an accurate portrayal of the facts and recalled that it was without prejudice to the value or weight which would be accorded to the document at the final stage of the trial.[456] The Appeals Chamber notes that the form required by Rule 92 *bis*(B) for written statements to be admitted under Rule 92 *bis* is not required for documents admitted pursuant to Rule 89(C). Naletilić further argues that, even if the formal requirements of Rule 92 *bis* had been met, the factors which pursuant to Rule 92 *bis*(A)(ii) militate against the admission of evidence in the form of a written statement were present in the case of the Radoš Diary.[457] Again, that argument is irrelevant in the case of a written document admitted pursuant to Rule 89(C). Naletilić's additional assertion that the Trial Chamber improperly treated the Radoš Diary as a written statement is unsupported.

223. This is not to say, of course, that the requirements of Rule 92 *bis* may simply be circumvented by stating that admission of a particular written statement is sought under Rule 89(C) instead of under Rule 92 *bis*. The Appeals Chamber rejected such a notion in *Galić*, observing that "Rule 92 *bis* is the *lex specialis*, which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C)."[458] However, Rule 92 *bis* only governs the admission of "written statements prepared for the purposes of legal proceedings".[459] The Radoš Diary is not such a document; instead, it is a document "made in the ordinary course" of events by a person with "no interest other than to record as accurately as

[454] *Supra*, Section VI.A.2(c).
[455] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered During the Rebuttal Case, 23 October 2002 (Confidential) ("Decision on Admission of Rebuttal Exhibits"), p. 2.
[456] Decision on Admission of Rebuttal Exhibits (Confidential), p. 3.
[457] Naletilić Revised Appeal Brief, para. 129.
[458] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* 92 *bis* Decision"), para. 31; *see* also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, 30 September 2003 ("*Milošević* 92 *bis* Decision"), paras 9-10.
[459] *Galić* 92 *bis* Decision, para. 28; *Milošević* 92 *bis* Decision, para. 13.

possible” the matters described therein.[460] As such, is not governed by Rule 92 *bis*. The Trial Chamber was correct to apply the ordinary standards of Rule 89(C) to it.

(c) Opportunity to cross-examine Alojz Radoš

224. Finally, as to Naletilić’s argument that he should have been given the opportunity to cross-examine Alojz Radoš himself, the Prosecution responds that it has been waived since Naletilić never tried to call Alojz Radoš, to move for the Trial Chamber to call him or to order the Prosecution to do so.[461] Naletilić’s replies that it was not his duty to call Alojz Radoš as a witness and that since the diary was admitted at such a late stage of the proceedings, there was absolutely no chance for him to call the purported author.[462]

225. The Appeals Chamber notes that the Prosecution took various steps towards obtaining the live testimony of Alojz Radoš, including successfully moving the Trial Chamber for a summons to Mr. Radoš directing his appearance before it and for a request to the Federation of Bosnia and Herzegovina to take all reasonable and necessary measures to obtain his appearance.[463] These measures were to no avail, since Alojz Radoš did not appear.

226. The Appeals Chamber does not consider it necessary to decide whether or not Naletilić has waived his right to bring this submission on appeal because the Appeals Chamber nevertheless finds that this sub-ground of appeal is without merit. The admission of the diary did not violate Naletilić’s right to confront the witnesses against him because its author was not, in fact, a witness

[460] *Galić* 92 *bis* Decision, para. 29.
[461] Prosecution Response to Naletilić Appeal Brief, para. 4.52. *See* also *ibid.*, fn. 272 where the Prosecution stresses that Naletilić stated only once that the evidence from the diary could only be presented through Alojz Radoš himself, but did not take any further steps: *Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-PT, Statement of the Defence of Mladen Naletilić to the Prosecutor’s Statement in Respect of Pre-Trial Filings of 11 October 2000, 25 October 2000, p. 4.
[462] Naletilić Reply Brief, paras 37, 38, 39.
[463] *See Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-T, Prosecutor’s *Ex Parte* Submission concerning Admission of the Radoš Diary, 15 October 2002 (Confidential); *Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-T, Prosecutor’s Motion for Issuance of a Summons (Alojz Radoš) and Request for Judicial Assistance Directed to the Federation of Bosnia and Herzegovina, 13 September 2002 (Confidential). The Prosecution lifted the *ex parte* status of these two filings on 14 October 2005: *Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-A, Notice Lifting *Ex Parte* Status of Prosecutor’s Motion for Issuance of a Summons (Alojz Radoš) and Request for Judicial Assistance Directed to the Federation of Bosnia and Herzegovina of 13 September 2002, 14 October 2005 (Confidential); Notice Lifting *Ex Parte* Status of Prosecutor’s *Ex Parte* Submission concerning Admission of the Radoš Diary of 15 October 2002, 14 October 2005 (Confidential). In addition, the Appeals Chamber lifted the *ex parte* status of the following filings: *Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-T, Decision on the Prosecutor’s Request for Issuance of a Summons (Alojz Radoš), Request for Judicial Assistance Directed to the Federation of Bosnia and Herzegovina, 17 September 2002 (Confidential) and “the confidential […] letter with attachments from the Embassy of Bosnia and Herzegovina of 16 October 2002 filed on 18 October 2002”: *see Prosecutor v. Mladen Naletilić, a.k.a. “Tuta”, and Vinko Martinović, a.k.a. “Štela”*, Case No. IT-98-34-A, Decision on Naletilić’s Urgent Motion for Production of Information Regarding the Radoš Diary, 19 October 2005 (Confidential), whereby Naletilić was given seven additional days from the date of the decision to file further submissions regarding the filings for which the *ex parte* status had been lifted. Naletilić did not file any further submissions.

against him; the diary was not testimonial in nature. This is for the same reason that the diary was not governed by Rule 92 *bis*: it was not prepared for the purposes of legal proceedings. To elucidate, it is useful to recall again the *Galić* and *Milošević* 92 *bis* Decisions. In those decisions, the Appeals Chamber discussed the balance that the Rules have struck between the competing approaches to hearsay evidence taken in common and civil law systems. It explained that the Rules' compromise approach imposes relatively strict restrictions on written statements prepared for the purpose of legal proceedings, while permitting other written materials to be admitted pursuant to the more flexible standards of Rule 89(C).[464]

227. The Appeals Chamber is satisfied that, in this respect, the Rules' compromise approach is consistent with the right of an accused under Article 21(4)(e) of the Statute to confront the witnesses against him.[465]

228. Materials, such as the Radoš Diary, may depending on the circumstances be excluded or given limited weight due to reliability or credibility concerns, pursuant to Rule 89(C), but they should not be excluded on the grounds of confrontation rights. Naletilić's arguments in this regard are therefore dismissed.

4. Conclusion

229. Naletilić's first and third grounds of appeal are allowed in part. His fourth and sixth grounds of appeal are dismissed in their entirety.

B. Search warrant of 18 September 1998 (second ground of appeal)

230. Under this ground of appeal, Naletilić alleges that the Trial Chamber erred and abused its discretion in denying him the right to challenge the validity of the underlying affidavit in support of the search warrant signed by Judge May on 18 September 1998 ("Search Warrant")[466] and admitting evidence obtained as a result of its execution on 23 September 1998 at a location known as the Tobacco Station in Široki Brijeg.[467] Naletilić asks to independently review the affidavit to

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[464] *Galić* 92 *bis* Decision, paras 29-30; *see* also *Milošević* 92 *bis* Decision, para. 13.
[465] In this context, it should be noted that in the United States, a common law country with a relatively robust conception of a criminal defendant's right to confront the witnesses against him, the Supreme Court has recently clarified that this right is not violated by the introduction of out-of-court statements or documents that are not testimonial in nature: *see Crawford v. Washington*, 541 U.S. 36, 51 (2004).
[466] Case No. IT-98-31-Misc. 1, Order and Search Warrant, signed on 18 September 1998 and filed on 28 September 1998, pp. D176-189 (Confidential) ("Search Warrant").
[467] Naletilić Notice of Appeal, pp. 2-3; Naletilić Revised Appeal Brief, para. 10. *See* also *ibid.*, para. 18, in which, referring to the Search Warrant, Naletilić indicates that during the conflict, part of the Tobacco Station was used as the KB headquarters and that, when the war ended in 1995, it housed the War Military Archive and the offices, depots and storage facilities of the Široki Brijeg Regiment, the KB, the 22nd Sabotage Squadron and the Široki Brijeg HVO Military Police.

determine if there was probable cause for Judge May to sign the Search Warrant, and, if there was not, to grant him the opportunity to challenge it. Further, he seeks the exclusion of all evidence seized pursuant to the Search Warrant.[468] Naletilić alleges two further errors in his Revised Appeal Brief, namely: (1) that the Trial Chamber erred and violated his right to a fair trial by admitting evidence seized as a result of an arbitrary, unilateral and unreasonable execution of the Search Warrant; and (2) that the Trial Chamber erred in admitting evidence seized in execution of the Search Warrant constitutive of an excessive use of force.[469]

1. Opportunity to review and challenge the underlying affidavit

231. In its Access Decision of 1 November 2001,[470] the Trial Chamber denied Naletilić's "Request for All Documents Relating to Search Warrant Issued on the 18th September 1998", filed confidentially on 28 September 2001, by which Naletilić sought to be provided with copies of all affidavits, or transcripts of any sworn testimony, on which Judge May relied to support issuing the Search Warrant. A bench of three judges of the Appeals Chamber further denied Naletilić's application for leave to appeal the Access Decision.[471]

232. In support of his allegation that the Trial Chamber erred and abused its discretion by denying him the opportunity to review and challenge the affidavit underlying the Search Warrant, Naletilić argues that if evidence obtained via a search warrant is sought to be used against an accused, the accused should have a right to challenge whether the warrant was valid when executed.[472] According to Naletilić, the standard for review of the validity of search warrants is that of "probable cause." Naletilić also relies on the case law of the United States, according to which, he argues, except where national security is concerned, an accused is always entitled to compel the production of the affidavit in support of a search warrant when evidence obtained via the warrant is to be used against him.[473] Naletilić argues that he had a substantial need to review the affidavit for sufficient probable cause in order to have a fair opportunity to challenge the Search Warrant and the evidence derived therefrom.[474] As a result, relying on Rule 89(D), which provides that a "Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair

[468] Naletilić Notice of Appeal, p. 3.
[469] Naletilić Revised Appeal Brief, paras 12, 13.
[470] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Order Relating to Request for All Documents Relating to Search Warrant Issued on the 18th September 1998 and Signed by the Honorable Judge May and Decision on Motions for Extension of Time to File Objections Concerning Admissibility of Evidence Seized Pursuant to Search Warrant", 1 November 2001 (Confidential) ("Access Decision").
[471] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-AR73.5, Decision on Application by Mladen Naletelić for Leave to Appeal the Order and Decision of Trial Chamber I Section A dated 1 November 2001, 18 January 2002 ("Decision Denying Leave to Appeal").
[472] Naletilić Revised Appeal Brief, para. 23.
[473] Naletilić Revised Appeal Brief, para. 31.
[474] Naletilić Revised Appeal Brief, para. 36.

trial", and Rule 95, which guarantees an accused the right to challenge the admissibility of evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings", Naletilić seeks the exclusion of all evidence seized pursuant to the Search Warrant.[475]

233. The Appeals Chamber observes that the International Tribunal has recognised that a right of access to material under seal exists when the applicant is able to show that the material in question is likely to be of material assistance in his case.[476] In the present case, the Appeals Chamber notes that Naletilić did not succeed in moving the Trial Chamber for access to the material underlying the Search Warrant and that he was denied leave to appeal the Access Decision by a Bench of the Appeals Chamber.[477] In its Access Decision, the Trial Chamber, having viewed the Search Warrant "and its attachments which are under seal", and "aware of the special circumstances in which the Tribunal is operating", noted that the Search Warrant applied "to multiple investigations into alleged war crimes and serious violations of the Geneva Convention against an extensive number of suspects" and not merely against Naletilić and Martinović.[478] The Appeals Chamber has itself reviewed the affidavit underlying the Search Warrant and finds that the Trial Chamber did not abuse its discretion in denying access to the material sought by Naletilić on the grounds that its release "could jeopardise those other investigations or trials".[479] For this reason, Naletilić's argument is dismissed.

234. The Appeals Chamber turns now to the issue of whether the Trial Chamber erred in admitting evidence secured by the Search Warrant, which was executed without the assistance of Bosnian authorities.

2. Admission of evidence secured by Search Warrant executed without the assistance of local authoritites in BiH

235. Under this sub-ground of appeal, Naletilić argues that the Prosecution should have been required to honour customary international consent-based judicial assistance and cooperate with the local authorities in accordance with Bosnian domestic law in executing the Search Warrant.

[475] Naletilić Revised Appeal Brief, paras 38, 66.
[476] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić*, 16 May 2002, para. 14; *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p. 4; *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000, para. 61.
[477] Access Decision (Confidential); Decision Denying Leave to Appeal.
[478] Access Decision (Confidential), p. 3.
[479] Access Decision (Confidential), p. 3.

According to him, as a result of its failure to do so, all evidence seized in the execution of the Search Warrant should have been excluded as being in violation of his right to a fair trial. He notes that, under Article 18(2) of the Statute, the Prosecutor may seek assistance in the execution of search and seizure operations, and, if the Prosecution makes such request, the assistance must be provided pursuant to Article 29(2) of the Statute.[480] Naletilić recalls that Rule 95 proscribes the admission of evidence that would threaten the credibility of proceedings, and contends that contradictory terms for the implementation of search warrants provide the Prosecutor with unchecked power to unreasonably execute search and seizure operations.[481] He affirms that Section (6) and Section (7) of the Search Warrant are contradictory, and that it provides little assurance of reasonable enforcement.[482] He argues that the Prosecution acted unreasonably and in violation of international law and Bosnian domestic law, and contends that the Statute of the International Criminal Court "should provide the controlling precedent concerning international customary law in the area of consent-based judicial assistance for the reasonable execution of search warrants".[483]

236. The Appeals Chamber notes that this sub-ground of appeal is new.[484] In addition, Naletilić does not appear to have raised this argument before the Trial Chamber.[485] Naletilić did not seek leave to vary the second ground of appeal detailed in his Notice of Appeal pursuant to the requirements of Rule 108. This notwithstanding, the Appeals Chamber further notes that the Prosecution itself does not raise an objection to this sub-ground of appeal in Naletilić's brief and has responded to it in full.[486] As a result, the Appeals Chamber considers that the Prosecution is not unfairly prejudiced by this sub-ground and, in the interests of justice, turns to consider it.[487]

237. The Prosecution contests Naletilić's standing to bring a challenge related to State cooperation because, according to it, the alleged violation had no bearing on his rights.[488] The *Tadić*

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[480] Naletilić Revised Appeal Brief, para. 43.
[481] Naletilić Revised Appeal Brief, para. 47.
[482] Naletilić Revised Appeal Brief, paras 48-50.
[483] Naletilić Revised Appeal Brief, paras 51-54.
[484] Pages 2-3, II, of the Naletilić Notice of Appeal read as follows: "The Trial Chamber erred and abused its discretion in denying the accused the right to challenge the validity of the Underlying affidavit in support of the search warrant executed on or about the 20th day of September 1998 in Široki Brijeg and admitting evidence obtained as the result of said search warrant. (Order of 1 November 2001 & Decision of 14 November 2001). Relief Sought: The Accused seeks to independently review the underlying affidavit to determine if there was probable cause for the Judge to sign the search warrant, and if not, then the opportunity to challenge the underlying affidavit in support of the search warrant. Further, the Accused seeks the exclusion of all evidence seized pursuant to said search warrant."
[485] At the Appeals Hearing, Naletilić was asked to further develop his submission regarding the alleged error on the admission of evidence secured by the Search Warrant and whether, at trial, he challenged the admission of evidence on this basis: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Scheduling Order for Appeals Hearing, 16 September 2005 ("Scheduling Order for Appeals Hearing"), p. 2. He did not do so: Appeals Hearing, T. 172.
[486] *See* Prosecution Response to Naletilić Revised Appeal Brief, paras 3.17-3.29.
[487] *Cf. M. Nikolić* Decision on Motion to Amend, pp. 2-3; *B. Simić* Decision on Motion to Amend, pp. 4-5.
[488] Prosecution Response to Naletilić Revised Appeal Brief, para. 3.25.

Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction recognised an accused's standing to challenge the International Tribunal's jurisdiction based on an alleged violation of State sovereignty because it considered that "an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty."[489] In the *Kordić and Čerkez* case, Kordić argued that he had standing to challenge the introduction of evidence obtained in execution of the same Search Warrant as in this case on the basis of, *inter alia,* the fact that the Prosecution did not seek the consent of BiH and was therefore in violation of customary international law provisions on State sovereignty.[490] Referring expressly to the *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, the Trial Chamber in the *Kordić and Čerkez* case admitted that Kordić had standing to challenge, pursuant to Rule 95, the admission of evidence obtained in execution of the Search Warrant.[491]

238. An accused, being entitled pursuant to Rule 95 to challenge the admissibility of evidence if it is obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings, should not be deprived of a full defence based on an alleged violation of State sovereignty. The Appeals Chamber therefore concurs with the approach taken by the Trial Chamber in the *Kordić and Čerkez* case and considers that Naletilić has standing to challenge the Search Warrant on the ground of lack of cooperation by the Prosecution with the authorities of BiH in its execution. However, for Naletilić to successfully challenge on that ground the admissibility of the documents seized in execution of the Search Warrant, he must not only show that the Prosecution was under the obligation to seek the cooperation of the local authorities, but also that the failure to do so "cast[s] substantial doubt" on the reliability of the evidence in question or that its admission "is antithetical to, and would seriously damage, the integrity of the proceedings." Having reviewed Naletilić's arguments, the Appeals Chamber finds that he fails to demonstrate how the fact that the Search Warrant was executed without prior request for assistance from the local authorities affects the reliability of the evidence obtained and/or is antithetical to and would seriously damage the integrity of the proceedings. As a result, there is no need to consider the issue of whether the Prosecution was effectively under the obligation alleged by Naletilić.

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[489] *Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 55. *See* also, *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 97.

[490] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Motion to Suppress Evidence, signed 25 June 1999 and filed 28 June 1999 ("*Kordić* Decision Rejecting Motion to Suppress Evidence"), p. 3.

[491] *See Kordić* Decision Rejecting Motion to Suppress Evidence, pp. 4-5.

3. Allegation that the Search Warrant was executed with excessive use of force

239. Naletilić finally submits that the unilateral execution of the Search Warrant without the cooperation of the local authorities and using a heavily-armed SFOR contingent constituted excessive force and urges the following: (1) that the Trial Chamber's decision regarding all issues relative to the Search Warrant be overturned; and (2) that all evidence seized pursuant to the Search Warrant be excluded and disregarded by the Appeals Chamber.[492]

240. The Appeals Chamber again notes that this last sub-ground of appeal is new and that Naletilić did not seek leave to amend his Notice of Appeal with regard to his second ground of appeal pursuant to Rule 108. This notwithstanding, the Appeals Chamber further notes that the Prosecution itself does not raise an objection to this sub-ground of appeal in Naletilić's brief and has responded to it in full.[493] As a result, the Appeals Chamber considers that the Prosecution is not unfairly prejudiced by this sub-ground and, in the interests of justice, turns to consider it.[494]

241. With regard to Naletilić's alleged mandatory State security assistance argument,[495] the Appeals Chamber finds that Naletilić has misinterpreted the terms of the Search Warrant. The Appeals Chamber recalls that the Trial Chamber, being seized of the "Accused Naletilić's Reasons why Documents Seized per Search Warrant are Inadmissible", considered that "a complaint regarding the use of force is primarily a matter for the Government of that country but that in any event, the attached statements and photographs do not show any excessive force".[496] The Appeals Chamber notes that Naletilić repeats here the arguments he raised before the Trial Chamber without attempting to demonstrate how the Trial Chamber erred in making the aforementioned decision.[497]

242. For the aforementioned reasons, Naletilić's second ground of appeal is dismissed in its entirety.

C. Denial of request to subpoena a Prosecution Trial Attorney as a witness (fifth ground of appeal)

243. Under his fifth ground of appeal, Naletilić alleges that the Trial Chamber abused its discretion in denying him the opportunity to subpoena a Prosecution Trial Attorney as a witness to

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[492] Naletilić Revised Appeal Brief, paras 63-66.
[493] *See* Prosecution Response to Naletilić Revised Appeal Brief, para. 3.31.
[494] *Cf. M. Nikolić* Decision on Motion to Amend, pp. 2-3; *B. Simić* Decision on Motion to Amend, pp. 4-5.
[495] Naletilić Revised Appeal Brief, para. 59.
[496] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Accused Naletilić's Reasons why Documents Seized per Search Warrant are Inadmissible, 14 November 2001, pp. 2-3.

"promises" or "agreements" made between the Office of the Prosecutor and Witnesses Falk Simang and Ralf Mrachacz, both ex-members of the KB, serving life sentences in Germany for the murder of two German soldiers in Bosnia in 1993, in exchange for their testimonies.[498] Naletilić claims that the Trial Chamber's decision denying his request for a subpoena was inadequately reasoned and erroneous.

244. According to Rule 54, "a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". The Appeals Chamber will "review the order made and […] substitute its own exercise of discretion for that of the Trial Chamber […] once [it] is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise".[499]

245. As to Naletilić's argument that the Trial Chamber never adequately explained why it denied his request for a subpoena, the Appeals Chamber notes that the Trial Chamber expressed its reasons as follows:

> Considering that the Defence was given the opportunity to cross-examine Mr. Simang on this matter, which it did at length;
>
> Considering that the Motion does not provide any further clarification as to how the testimony of Witness SS would assist the Defence in the presentation of its case, as for instance a party cannot cross-examine its own witness;
>
> Considering therefore that the Chamber considers that it is in a position to assess the credibility of the witness Mr. Simang and give the appropriate weight to his testimony, and that it does not need to hear further evidence on this specific issue;
>
> Considering that it is therefore not necessary for the Chamber to determine whether and when prosecuting attorneys may be called to testify.[500]

The Appeals Chamber considers that this reasoning is appropriate and sufficiently well explained to satisfy the reasoned opinion requirement, even if it is not articulated in extensive detail.[501]

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[497] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Reasons why Documents Seized per Search Warrant are Inadmissible, 6 November 2001 (Confidential), pp. 4-5; Naletilić Revised Appeal Brief, paras 57-64.

[498] Naletilić Notice of Appeal, pp. 3-4; Naletilić Revised Appeal Brief, para. 122; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Revised Appeal Brief, 10 October 2003 (Confidential) ("Confidential Naletilić Revised Appeal Brief"), para. 122.

[499] *Prosecutor v. Slobodan Milosević*, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Joinder Decision"), para. 6.

[500] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Accused Naletilić's Reply to Prosecutor's Motion on Defence Witness Issues and Renewed and New Requests for Relief, and Request for Issuance of Subpoena Pursuant to Rule 54, 4 June 2002 (Confidential), p. 3 (footnotes omitted).

246. Naletilić's argument that the fact that the individual in question was a member of the Prosecution was no valid ground to refuse to compel her testimony is irrelevant because it does not appear from the Decision on Attorney's Subpoena that this was an element taken into consideration by the Trial Chamber in rejecting Naletilić's application. The same applies to Naletilić's argument in reply that the right of an appellant to a fair trial must outweigh the interest of the Prosecution.[502]

247. As to Naletilić's argument that the Trial Chamber ignored and refused to discuss the fact that the Prosecution had promised Witness Falk Simang to intercede before the German authorities on his behalf, the Appeals Chamber first observes that Naletilić's allegation about these promises is only substantiated by the letters Witness Falk Simang sent to the Prosecution. Naletilić refers to these, without specifying particular portions of the numerous letters in question.[503] Additionally, review of these letters reveals that Witness Falk Simang did not explicitly mention any promise made by the Prosecution to intercede on his behalf to obtain his liberty, but, at most, to guarantee his safety and that he would not be disadvantaged by agreeing to give evidence before the International Tribunal.[504] Furthermore, during his cross-examination, Witness Falk Simang stated that the only promises the Prosecution had made to him were that his life would be protected and that he would get a copy of his testimony at trial.[505] Such promises, if made, would not have been inappropriate.

248. It is not disputed that the witness in question expected at the very least that the Prosecution would intervene in his favour. The Trial Chamber acknowledged as much when it stated that "[t]he fact that [Witness] Falk Simang expressed hope that his case in Germany would be reopened following these proceedings does not in the view of the Chamber make his testimony less reliable and credible".[506] It does not follow from the fact that a witness may testify out of interest that such a witness is incapable of telling the truth.[507] Naletilić thus has not proven that the Trial Chamber erred in assessing Witness Falk Simang's credibility. Moreover, Naletilić also has not demonstrated that he was prejudiced by his inability to cross-examine the Trial Attorney.

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[501] *See Prosecutor v. Slobodan Milosević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 7.
[502] Naletilić Reply Brief, para. 36.
[503] Naletilić Revised Appeal Brief, para. 122; Confidential Naletilić Revised Appeal Brief, para. 122; Appeals Hearing, T. 160-161.
[504] In most Exhibits Witness Falk Simang merely mentions the Prosecution's promise to protect his life and that he would suffer no disadvantages: Exhibits DD1/23.6 *et seq*.
[505] Witness Falk Simang, T. 3848-3849, 3921-3926.
[506] Trial Judgement, fn. 48.
[507] *Kordić and Čerkez* Trial Judgement, para. 629; *see* also *Kordić and Čerkez* Appeal Judgement, paras 254 *et seq.,* 292-294.

249. For the aforementioned reasons, Naletilić's fifth ground of appeal is dismissed in its entirety.

D. Prosecution rebuttal case (eighth ground of appeal)

1. Arguments of the Parties

250. Under his eighth ground of appeal, Naletilić alleges that the Trial Chamber erred and abused its discretion in allowing the Prosecution to present improper rebuttal evidence that was merely used to support and bolster its case in chief.[508] He refers to the Trial Chamber's Confidential Decision of 9 October 2002 which, *inter alia*, allowed the Prosecution to introduce the Radoš Diary as rebuttal exhibit,[509] and seeks to have all evidence introduced in the rebuttal case as well as all findings and inferences derived from it disregarded.[510] The Prosecution contends that "it was not until the Prosecution's rebuttal case that the original diary was obtained", although a copy had been tendered earlier during the cross-examination of a defence witness, and that the Trial Chamber did not err in admitting it.[511] Moreover, it argues that Naletilić was not prejudiced by the fact that the Radoš Diary was not admitted until the rebuttal stage.[512]

2. Procedural background to the rebuttal case

251. In its Filing and Scheduling Order of 29 August 2002, the Trial Chamber set the dates for the parties' motions to lead evidence in rebuttal and rejoinder.[513] Pursuant to this order, the Prosecution submitted a motion to call six witnesses, including Safet Idrizović, who was said to be able to authenticate the Radoš Diary[514] and other documents.[515] In a subsequent filing, the

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[508] Naletilić Notice of Appeal, p. 4.

[509] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Prosecution's Supplemental Filing Concerning the Rebuttal Case, 9 October 2002 (Confidential) ("Confidential Decision of 9 October 2002"), p. 3.

[510] Naletilić Notice of Appeal, p. 4; Naletilić Revised Appeal Brief, paras 133, 135-137; Confidential Naletilić Revised Appeal Brief, para. 136.

[511] Prosecution Response to Naletilić Revised Appeal Brief, paras 4.57-4.60.

[512] Prosecution Response to Naletilić Revised Appeal Brief, para. 4.61.

[513] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Filing and Scheduling Order, 29 August 2002, p. 2.

[514] The Prosecution had earlier put passages of the Radoš Diary to Defence Witnesses NE (T. 11834-11836 (private session)), NL (T. 12700-12707 (private session)) and NW (T. 14987-14990 (private session)) on cross-examination and had tendered "P 928, [the] hand-written Diary", as an exhibit during the cross-examination of Witness NE: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Prosecutor's Submission of Cross-Examination Exhibits Concerning Witness NE, 3 June 2002 (Confidential and Under Seal) ("Prosecution Submission of Witness NE Exhibits"). However, the Trial Chamber reserved its position as to the admissibility of the Radoš Diary pending further information: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered through Witnesses NE and NH, 28 June 2002 ("Decision on Witnesses NE and NH Exhibits"), p. 4; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Order for Additional Information, 4 September 2002.

Prosecution sought to introduce the original version of the Radoš Diary itself, and to call its investigator Apolonia Bos to authenticate it.[516] Naletilić objected to Witnesses Safet Idrizović and Apolonia Bos, as well as to the introduction of the diary, on the basis that they were intended to bolster the Prosecution case in chief and were not appropriate for the rebuttal stage.[517] On 20 September 2002, the Trial Chamber ordered that Safet Idrizović be heard as a rebuttal witness and that his testimony be restricted to the Radoš Diary.[518]

252. On 23 October 2002, the Trial Chamber ordered, "in respect to the exhibits submitted in the course of the rebuttal case" that *inter alia* Exhibit P 928c be admitted.[519] Exhibit PP 928c consisted of the complete, handwritten B/C/S version of the Radoš Diary.[520] The Trial Judgement refers solely to Exhibit PP 928.

3. Discussion

(a) Witness Safet Idrizović

253. The Appeals Chamber notes that the Confidential Decision of 9 October 2002, the only decision referred to by Naletilić in his Notice of Appeal under his eighth ground of appeal, did not allow the testimony of Witness Safet Idrizović. That decision merely noted a previous decision whereby the Trial Chamber allowed three Prosecution witnesses, including Witness Safet Idrizović, to testify in rebuttal.[521] Naletilić was not entitled to submit arguments relating to the decision to allow this witness to be called in rebuttal without first obtaining leave to amend his Notice of Appeal to include it under his eighth ground of appeal as is required under Rule 108. The Appeals Chamber notes that Naletilić has not done so. Furthermore, the Prosecution does not respond to

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[515] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Prosecution's Filing Concerning Rebuttal Case, 13 September 2002 (Confidential and Under Seal) ("Prosecution Filing on Rebuttal Case"), paras 3(b), 4.

[516] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Prosecution's Supplemental Filing Concerning Rebuttal Case, 3 October 2002 (Confidential and Under Seal), para. 2(b) and (d).

[517] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Prosecution's Rebuttal Witness/Evidence Filing, 18 September 2002 (Confidential and Under Seal), paras 2, 4, 6; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Objections to Additional Rebuttal Witnesses and Violation of Previous Order Concerning the Rebuttal Case, 7 October 2002 (Confidential).

[518] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Prosecution's Filing Concerning Rebuttal Case, 20 September 2002 (Confidential) ("Decision on Rebuttal Witnesses"), p. 3.

[519] Decision on Admission of Rebuttal Exhibits (Confidential), p. 4.

[520] The Trial Chamber held that "translations of exhibits are not admitted as separate documents and that a complete translation of the Radoš Diary is required". It requested the Registry to arrange that the English translation of the Radoš Diary be compared with the admitted version of PP 928c and amended where necessary to match PP 928c. Exhibits P 928, P 928a, P 928b, P 928d, P 928e, P 928f, P 928g and P 928f/1 were denied admission: Decision on Admission of Rebuttal Exhibits (Confidential), pp. 4, 5.

[521] Confidential Decision of 9 October 2002, p. 2 (citing Decision on Rebuttal Witnesses (Confidential)).

Naletilić's arguments in his brief with respect to Witness Safet Idrizović.[522] As a result, the Appeals Chamber will not consider the merits of Naletilić's arguments in this regard, as doing so would result in unfair prejudice to the Prosecution.

(b) Witness Apolonia Bos

254. The Appeals Chamber notes that Naletilić merely restates the objections to the admissibility of the evidence of Witness Apolonia Bos that he made at trial, without explaining how the Trial Chamber erred in its decision to admit this evidence in rebuttal.[523] Naletilić's argument in this respect is dismissed.

(c) Radoš Diary

255. It is necessary as a preliminary matter to deal with the Prosecution's contention that Naletilić is mistaken in assuming that the standard for admissibility of the Radoš Diary was that applicable to the admission of evidence in rebuttal.[524] The Appeals Chamber notes that both the Confidential Decision of 9 October 2002 and the Decision on Admission of Rebuttal Exhibits rely on Rule 89(C), according to which a Trial Chamber may admit any relevant evidence which it deems to have probative value. The decisions reiterate the jurisprudence of the International Tribunal relevant to the admission of evidence in rebuttal, and recall that evidence in rebuttal "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated", "the Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it" and "only high evidence on a significant issue will be permitted in rebuttal".[525] The Prosecution correctly asserts that it tendered the Radoš Diary for the first time well before its rebuttal case, when it used it to challenge a Defence witness in cross-examination. However, the Trial Chamber did not admit the Radoš Diary at that point, but reserved its decision as to its admission.[526] Moreover, the wording of the Confidential Decision of 9 October 2002 ("[c]onsidering that the [Trial] Chamber is of the view that those principles [applicable to the admission of rebuttal evidence] apply equally to the submission of exhibits in rebuttal; that the [Trial] Chamber will therefore only allow for the submission of exhibits relating to the issues that the three previously authorised rebuttal witnesses were to testify upon") unequivocally shows that the Trial Chamber considered the Radoš Diary as evidence in rebuttal. This conclusion is further

[522] *See* Prosecution Response to Naletilić Revised Appeal Brief, paras 4.51-4.61; Confidential Prosecution Response to Naletilić Revised Appeal Brief, para. 4.57.
[523] Naletilić Revised Appeal Brief, para. 136; Confidential Naletilić Revised Appeal Brief, para. 136.
[524] Prosecution Response to Naletilić Appeal Brief, para. 4.59.
[525] Confidential Decision of 9 October 2002, pp. 2, 3; Decision on Admission of Rebuttal Exhibits (Confidential), pp. 2, 3.
[526] Decision on Witnesses NE and NH Exhibits, pp. 3-4.

borne out by the fact that the Trial Chamber subsequently admitted the complete, handwritten Radoš Diary as evidence in rebuttal in the Decision on Admission of Rebuttal Exhibits. Notwithstanding that it asserts that the standard for the admission of the Radoš Diary was not the same as the standard for admission of evidence in rebuttal, the Prosecution does not maintain that the Trial Chamber erred in admitting the Radoš Diary as evidence in rebuttal.

256. The Appeals Chamber understands Naletilić to be arguing that the Trial Chamber erred in admitting the Radoš Diary as evidence in rebuttal because it did not amount to evidence in rebuttal. Naletilić submits in support of his contention that the Prosecution was aware of the Radoš Diary years before the trial began,[527] and that the Diary was used to support and bolster the Prosecution's case in chief.[528] Naletilić seeks to have the Radoš Diary excluded from the body of evidence before the Trial Chamber.[529]

257. The Appeals Chamber notes that it will intervene to exclude evidence in the event that it finds that a Trial Chamber committed a discernible error in the exercise of its discretion to admit evidence and that this error resulted in unfair prejudice to the appellant, thereby rendering his trial unfair.[530]

258. The Appeals Chamber recalls that, for evidence to be admissible in rebuttal, the evidence must be "highly probative"[531] and it "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated".[532] The Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it".[533]

259. As noted earlier, the Trial Chamber directed itself to the proper legal standard in its decision to admit the Radoš Diary as evidence in rebuttal.[534] It erred, however, in applying this standard to the facts before it. The Trial Chamber found that the Radoš Diary was admissible as rebuttal evidence on the basis that it concerned "the events related to Sovići and Doljani".[535] The Appeals

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[527] Appeals Hearing, T. 98-99.
[528] Naletilić Notice of Appeal, p. 4; Naletilić Revised Appeal Brief, para. 135
[529] Naletilić Notice of Appeal, p. 4.
[530] *See Čelebići* Appeal Judgement, para. 533; *see* also *Milošević* Joinder Decision, paras 3-5.
[531] *Kordić and Čerkez* Appeal Judgement, paras 220-221; *see* also *Čelebići* Appeal Judgement, para. 274.
[532] *Čelebići* Appeal Judgement, para. 273.
[533] *Čelebići* Appeal Judgement, para. 275; *Kordić and Čerkez* Appeal Judgement, paras 220-221.
[534] Confidential Decision of 9 October 2002; Decision on Admission of Rebuttal Exhibits (Confidential).
[535] The Appeals Chamber notes that the Decision on Admission of Rebuttal Exhibits (Confidential), in which the Radoš Diary was finally admitted, did not provide any factual basis for the admissibility of the Diary. However, in its previous Confidential Decision of 9 October 2002, the Trial Chamber had stated that Exhibit PP 928c, the complete B/C/S version of the Diary which was subsequently admitted in the 23 October 2002 Decision, "may be introduced" as a rebuttal exhibit because it related to issues that previously authorised rebuttal witnesses were to testify upon, namely "the events related to Sovići and Doljani" and "the Radoš Diary": Confidential Decision of 9 October 2002, p. 3. *See* also Decision on Rebuttal Witnesses (Confidential), p. 3; Prosecution Filing on Rebuttal Case (Confidential), paras 3(a),

Chamber notes that the events related to Sovići and Doljani were not issues "arising directly out of defence evidence which could not reasonably have been anticipated". The events in Sovići and Doljani formed an integral part of a number of charges in the Indictment, and thus were fundamental to the case brought by the Prosecution.[536] Thus, evidence pertaining to the events in Sovići and Doljani should have been brought as part of the Prosecution case in chief and not in its case in rebuttal.[537] For this reason, the Appeals Chamber finds that the Trial Chamber committed a discernable error when it admitted the Radoš Diary as evidence in rebuttal on the basis that the Radoš Diary related to "the events in Sovići and Doljani".

260. The Appeals Chamber turns now to the question whether Naletilić suffered unfair prejudice as a result of the Trial Chamber's error.[538]

261. In the first place, the Appeals Chamber notes that the Radoš Diary was included in the Prosecution Rule 65 *ter* Exhibit's List[539] and that a typed-out version in B/C/S of the Radoš Diary was disclosed to Naletilić at the pre-trial stage.[540] Also at the pre-trial stage, the Prosecution indicated that the Radoš Diary might become relevant at trial.[541] When, at trial, the Prosecution put the Radoš Diary to Naletilić's Defence Witnesses, Naletilić questioned the provenance of the Radoš Diary,[542] and stated that he would "continue [his] investigation" to find the author of the Radoš Diary.[543] Naletilić does not argue that, when the Trial Chamber finally decided to admit the Radoš Diary, it did not take into consideration his objections to the admission of the Radoš Diary. There is no indication that this was actually the case.[544] To the contrary, the Trial Chamber on several occasions invited Naletilić to submit his objections in written form[545] and alerted him to the fact that it was in the process of considering the issue of the admissibility of the Radoš Diary.[546]

3(b). The Appeals Chamber further notes in this regard that the reference in the Trial Chamber's decision to "the Radoš Diary"as one of the issues that rebuttal witnesses were to testify upon was, for obvious reasons, not a valid basis for admitting the Diary as evidence in rebuttal.

[536] Indictment, paras 9, 25, 46, 53, 55, 56.

[537] *Čelebići* Appeal Judgement, para. 275.

[538] *See Čelebići* Appeal Judgement, para. 533.

[539] Prosecution Rule 65 *ter* Exhibit's List (Under Seal), item 20.

[540] On 7 December 2000, the Prosecution submitted that it had disclosed the Radoš Diary to Naletilić, to which submission he did not object: T. 394. When the Radoš Diary was put to Defence Witness NE during cross-examination, Naletilić objected that he had only received a printed version of it: T. 11844. In relation to the testimony of Defence Witness NL, the Prosecution stated that the typed out B/C/S version of the Radoš Diary was disclosed to Naletilić in September 2000: T. 12726. During the Appeals Hearing, the Prosecution stated, without objection from Naletilić, that it had disclosed the Diary to him on 18 September 2000: Appeals Hearing, T. 148. The Appeals Chamber considers that it is not in dispute that a typed out version in B/C/S of the Radoš Diary was disclosed by the Prosecution to Naletilić in September 2000.

[541] T. 395 (Status Conference of 7 December 2000).

[542] Witness NE, T. 11844 (private session); Witness NL, T. 12705, T. 12710-12711.

[543] T. 12730.

[544] Decision on Admission of Rebuttal Exhibits (Confidential), p. 2; *see* also T. 16224.

[545] T. 11844 (private session); T. 12731; T. 16224; Decision on Witnesses NE and NH Exhibits, p. 4. Naletilić also filed his objections in written form: *see Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*,

262. In the second place, the Appeals Chamber notes that Naletilić had and made use of the opportunity to conduct a detailed re-examination concerning the Radoš Diary of the Defence witnesses to whom it had been put by the Prosecution.[547] During the Prosecution case in rebuttal, he had and made use of the opportunity to cross-examine Witness Apolonia Bos extensively as to the discrepancies between the different copies of the Radoš Diary as well as to its provenance.[548]

263. Finally, Naletilić had and made use of the opportunity to lead evidence in rejoinder relating to the events in Sovići and Doljani and the Radoš Diary.[549] Indeed, Naletilić's examination of his sole witness in rejoinder, Defence Witness NX, concerned the events in Sovići and Doljani. Naletilić also examined Defence Witness NX as to the witness' knowledge of Alojz Radoš' position in the HVO.[550]

264. In light of the foregoing, the Appeals Chamber finds that Naletilić did not suffer unfair prejudice as a result of the Trial Chamber's error when it admitted the Radoš Diary as evidence in rebuttal on the basis that it related to "the events in Sovići and Doljani". Naletilić had ample time and opportunity to challenge the Radoš Diary and to respond to the allegations therein concerning

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Case No. IT-98-34-T, Accused Naletilić's Submission, Objection and Motion Concerning the Purported Radoš Diary, 10 October 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Documents Tendered by the Prosecution Through Witnesses Prelec and Idrizović, 17 October 2002.

[546] T. 12728. *See* also Decision on Witnesses NE and NH Exhibits, p. 4, where the Trial Chamber stated that it "reserves its decision [on admission] with regard to Exhibits P 928 and P 928/1".

[547] Witness NE, T. 11856-11858 (private session); Witness NW, T. 14997-14998 (private session). In relation to Witness NW, Naletilić himself put parts of the Radoš Diary to the witness in re-examination: Witness NW, T. 14997-14998 (private session). The Appeals Chamber also notes in this context that the Prosecution moved for the admission of a hand-written version of the Radoš Diary in relation to Defence Witness NE: Prosecution Submission of Witness NE Exhibits (Confidential).

[548] Witness Apolonia Bos, T. 16230-16243.

[549] Naletilić initially requested to call four witnesses in rejoinder, *inter alia*, Witnesses NX and X, who, he stated, would give evidence on "the events in Sovići and Doljani": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission Concerning Rejoinder, 23 September 2002 (Confidential). The Trial Chamber allowed Naletilić to call one of these witnesses in rejoinder and further allowed him, should he choose to call Witness X, to "file a request for another witness to be called in rejoinder regarding the Radoš Diary": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Accused Naletilić's Submission Concerning Rejoinder, 27 September 2002 (Confidential), p. 3. Naletilić chose to call Witness NX and specified that the witness would give evidence concerning the following issues in relation to Sovići: (1) Naletilić's alleged presence there at the relevant time; (2) the alleged capture and mistreatment of members of the ABiH; (3) the destruction of Muslim houses; and (4) the HVO commander in Sovići: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Filing Concerning Rejoinder Witnesses, 7 October 2002 (Confidential). Naletilić also requested the evidence of Witness X concerning "the fate" of the Radoš Diary to be admitted as evidence in rejoinder: *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Request for Additional Witness in Rejoinder, 7 October 2002 (Confidential), p. 2. The Trial Chamber granted Naletilić's requests, but ordered that the testimony of Witness X should be limited to "the alleged presence of the Accused Naletilić in Sovići [at the relevant time] and the authenticity of the Radoš Diary": *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on Accused Naletilić's Request for Additional Witness in Rejoinder, 9 October 2002 (Confidential), p. 2. Naletilić subsequently withdrew his application to bring Witness X because the witness could not appear before a date which, in Naletilić's submission, would have been too late in view of his "other obligation […] in terms of the closing brief and the closing argument": T. 16448 (private session).

[550] Witness NX, T. 16482-16483.

the events in Sovići and Doljani and did make extensive use of this opportunity at trial. This finding is further borne out by the detailed manner in which Naletilić addressed these issues in his Final Trial Brief and closing arguments.[551] For the foregoing reasons, Naletilić's eighth ground of appeal is dismissed in its entirety.

E. Admission of transcripts from other cases (10th ground of appeal)

265. Naletilić alleges under this ground of appeal that the Trial Chamber "erred and abused its discretion in admitting, over objection, the prior testimonies of twelve witnesses by way of introduction of transcripts of their testimony in other cases, thus violating [his] right to confront the witnesses against him and his right to a fair trial pursuant to Article 21 [of the Statute]".[552]

266. Naletilić argues that the Trial Chamber ignored the fact that, while these witnesses may have been cross-examined in the cases where they testified live, those cases dealt with conflicts in other parts of the former Yugoslavia, "not Herzegovina".[553] Naletilić states that the transcripts in question were obviously relied upon to show the international nature of the armed conflict and its "widespread and systematic nature", which was improper as the geographical areas involved in those cases were different from the instant case.[554]

267. The Appeals Chamber finds that Naletilić has failed to demonstrate how the admission of the transcripts absent cross-examination affected the judgement. In particular, even if some portions of the transcripts in question do deal with areas other than Herzegovina, he has not shown that reliance on them was critical to any of the Trial Chamber's findings. As to both the "widespread and systematic" requirement for crimes against humanity and the "international armed conflict" element of war crimes, the Trial Chamber relied on a substantial amount of live testimony and exhibits introduced before it, and made appropriate findings concerning the situation in and around Mostar, Doljani, and Sovići at the time relevant to the Indictment.[555] Thus, Naletilić has not

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[551] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Final Brief of the Accused Mladen Naletilić a.k.a Tuta, 4 November 2002 ("Naletilić Final Trial Brief"), pp. 19 *et seq. See* in particular, *ibid.,* pp. 35-36; T. 16854.

[552] Naletilić Notice of Appeal, p. 5. *See* also *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During the Testimony of Certain Blaškić and Kordić Witnesses, 27 November 2000; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent To Offer Transcripts Under 92 *bis* (D), 9 July 2001.

[553] Naletilić Revised Appeal Brief, para. 139.

[554] Naletilić Reply Brief, para. 41.

[555] *See* Trial Judgement, paras 181-202, 238-241. Moreover, with respect to the international armed conflict element, the Trial Chamber stated:

> [w]hile it is clear from the evidence that HV troops were directly involved in the conflict in and around Mostar, this is not the case as far as the HVO attacks on Sovići/Doljani and Raštani are concerned. This finding does not have the effect that the Geneva Conventions were not applicable in Sovići/Doljani and Raštani. There is no requirement to prove that HV troops were present in every single area where crimes were allegedly committed.

satisfied the standard for appeal arguments under Article 25 of the Statute, and the Appeals Chamber will not consider the merits of this argument.

268. Accordingly, Naletilić's tenth ground of appeal is dismissed in its entirety.

F. Attack on Sovići and Doljani as part of a larger HVO offensive aimed at taking Jablanica (13th ground of appeal)

269. Naletilić argues under his 13th ground of appeal that the Trial Chamber erred when it found in paragraphs 30 and 132 of the Trial Judgement that the attack on Sovići and Doljani was part of a larger HVO offensive aimed at taking Jablanica.[556]

270. The Trial Chamber found at paragraph 30 of the Judgement that:

> The attack on Sovići and Doljani was part of a larger HVO offensive aimed at taking Jablanica, the main BH Muslim dominated town in the area. The HVO commanders had calculated that they needed two days to take Jablanica. The location of Sovići was of strategic significance for the HVO as it was on the way to Jablanica. For the ABiH it was a gateway to the plateau of Risovac, which could create conditions for further progression towards the Adriatic coast. The larger HVO offensive on Jablanica had already started on 15 April 1993.[557]

271. The Trial Chamber further established at paragraph 132 of the Trial Judgement that Miljenko Lasić and Željko Šiljeg, "as commanders of the Southeast and Northwest Herzegovina operative zones," were in command of "the operations", which meant all operations that were part of the larger operation to take Jablanica and that:

> As operative zone commanders, Željko Šiljeg and Miljenko Lasić were both direct subordinates of the HVO Main Staff, in the same way as was Mladen Naletilić as the commander of a professional unit. The documentary evidence shows that all three men were planning the Sovići/Doljani operation, but that it was only Mladen Naletilić who took the final decision as to how to carry it out. The Chamber is therefore satisfied that Mladen Naletilić played the central command role in the Sovići/Doljani operation, which was part of the larger operation to take Jablanica.[558]

> On the contrary, the conflict between the ABiH and the HVO must be looked upon as a whole and, if it is found to be international in character through the participation of HV troops, then Article 2 of the Statute will apply to the entire territory of the conflict.

Ibid., at para. 194 (footnotes omitted). Naletilić has not disputed the legal validity of this holding, which undercuts the impact of his argument that the transcripts from other trials referred to the conflict in other regions. Because the Trial Chamber's findings regarding the existence of an international armed conflict did not depend on the specific facts surrounding the conflict in the immediate area where the crimes took place, Naletilić has not demonstrated that he was materially prejudiced by being denied the opportunity to cross-examine witnesses concerning events in that area.

[556] Naletilić Notice of Appeal, p. 6; Naletilić Revised Appeal Brief, paras 147-157.

[557] The Trial Chamber based its findings on Witness Safet Idrizović, Ex. PP 325 (Confidential), Ex. PP 928 and Witness Željko Glasnović. *See* Trial Judgement, fns 57-59.

[558] The Trial Chamber based its findings on Ex. PP 928, Ex. PP 299.1, Ex. PP 301.1 and Ex. PP 424.1. *See* Trial Judgement, fns 378-385.

1. Jablanica as the main city under Muslim control in the area

272. Naletilić first argues that the Trial Chamber erred by concluding in paragraph 30 of the Trial Judgement that Jablanica was the main city under Muslim control in the area of the conflict. Naletilić submits that the Trial Chamber failed to provide an explanation for this statement and therefore that it is "an unclear and unintelligible conclusion about the importance of this city".[559]

273. Naletilić's argument is without merit. Contrary to Naletilić's submission, the Trial Chamber's description of Jablanica as the main BH Muslim dominated town in the area is clear. Naletilić does not demonstrate how no reasonable trier of fact could have described Jablanica as such by, for example, pointing to evidence to the contrary. Furthermore, Naletilić fails to substantiate how any alleged error in this factual finding by the Trial Chamber would lead to a miscarriage of justice.[560]

2. Exhibit PP 928, the Radoš Diary, as evidence of HVO military operations with regard to taking Jablanica

274. Naletilić next submits that the Trial Chamber erred, at paragraph 30 of the Trial Judgement, in relying upon Exhibit PP 928, the Radoš Diary, as evidence of HVO military operations aimed at taking Jablanica. Naletilić argues that the Trial Chamber's finding that HVO commanders calculated that they needed two days to take Jablanica is not supported by the diary because there is no mention of "a military estimation" on page 65 of the Radoš Diary as referenced by the Trial Chamber.[561]

275. Naletilić also argues that the Trial Chamber erred by finding, on the basis of the Radoš Diary, that there was a complex military operation consisting of a few smaller military operations, and failed to establish what those smaller operations were, or where they occurred.[562] Naletilić contests the Trial Chamber's finding at paragraph 132 of the Trial Judgement that when "[r]eading the Radoš Diary in context, it can be concluded that 'the operations' [at page 65 of the diary] mean all operations that were part of the larger operation to take Jablanica". Naletilić argues that the Trial Chamber arrived at this conclusion erroneously because "[t]he author of this diary

[559] Naletilić Revised Appeal Brief, para. 149.
[560] *Kordić and Čerkez* Appeal Judgement, para. 19.
[561] Naletilić Revised Appeal Brief, para. 150.
[562] Naletilić Revised Appeal Brief, para. 153.

never mentioned that the wording 'the operation' [*sic*] is related to all operations which made up a larger operation aimed to take Jablanica".[563]

276. The Appeals Chamber finds that Naletilić's contention that there is no mention of a military time estimation in page 65 of the Radoš Diary is incorrect. According to page 65 of the Radoš Diary, "[t]hey were ready 'to do the job' in two days, 'to have coffee together in Jablanica'".[564] Naletilić has failed to show that the Trial Chamber's interpretation of the Radoš Diary that "they" were "[m]any high-ranking officials, led by Miljenko Lasić" and "the job" referred to was a military operation[565] was unreasonable. The Appeals Chamber therefore finds that the Trial Chamber did not err by concluding that "[t]he HVO commanders had calculated that they needed two days to take Jablanica".[566] The Appeals Chamber also notes that, on the basis of the Radoš Diary, the Trial Chamber established that "the operations" meant "all operations that were part of the larger operation to take Jablanica",[567] which encompassed the attack on Sovići and Doljani[568] and that Naletilić has failed to demonstrate that no reasonable trier of fact could have reached this conclusion. Naletilić is merely substituting his own interpretation of the Radoš Diary for the Trial Chamber's interpretation of that evidence.

3. Attack on Sovići and Doljani as part of a larger offensive aimed at taking Jablanica

277. Naletilić also submits that the Trial Chamber erred when it found, at paragraph 30 of the Trial Judgement, that the launching of the attack by the HVO on Sovići and Doljani on 17 April 1993 was part of the larger offensive aimed at taking Jablanica, which started on 15 April 1993.[569] Naletilić points to the Trial Chamber's reliance upon Exhibit PP 325,[570] a report from an international observer, for this finding and argues that that document mentions a "breaching towards Jablanica," which, in his view, does not mean the "taking" of Jablanica.[571] Instead, Naletilić argues that the aim of the attack on Sovići and Doljani was "to reinforce and take back the

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[563] Naletilić Revised Appeal Brief, para. 155. Furthermore, Naletilić reiterates his arguments that the author of the Radoš Diary was not available to be cross-examined on the extent of his military knowledge, that many of the events described are based on hearsay, and that there are a number of incorrect facts "which are in direct opposition with other [e]xhibits, which are addressed elsewhere in [the Naletilić Revised Appeal] Brief": Naletilić Revised Appeal Brief, paras 151-153. These arguments are identical to those in support of his sixth ground of appeal in relation to Exhibit PP 928, and have already been dealt with in their totality under Naletilić's first ground of appeal.

[564] Ex. PP 928, p. 65. According to Naletilić, the relevant part of the Radoš Diary reads: "[…] up there is everything ready, active and happy […] they are ready to do a job within two days, so we can drink coffee in Jablanica tomorrow […]": Naletilić Revised Appeal Brief, para. 150.

[565] Trial Judgement, para. 132, fn. 380.

[566] Trial Judgement, para. 30.

[567] Trial Judgement, para. 132.

[568] Trial Judgement, para. 30, fn. 57 (citing, *inter alia*, page 84 of Ex. PP 928 which specifically mentions operations in Sovići and Doljani: "I used to think what our men did at Doljani and Sovići was a great crime").

[569] Naletilić Revised Appeal Brief, paras 154, 157.

[570] *See* Trial Judgement, para. 30, fn. 57.

[571] Naletilić Revised Appeal Brief, para. 154.

front lines" lost following previous conflict in the area.[572] In support of this argument, Naletilić cites the Trial Chamber's finding at paragraph 27 of the Trial Judgement that, at the time of the shelling of the village of Sovići on the morning of 17 April 1993, "there had been extreme tensions in the area for some time and that there was provocation and high alert on both sides".

278. The Appeals Chamber finds that Naletilić has merely sought to substitute his own interpretation of some of the evidence relied upon by the Trial Chamber (such as Exhibit PP 325) for its finding with regard to the aim of the 17 April 1993 attack on Sovići and Doljani.[573] Naletilić has failed to demonstrate how the Trial Chamber's conclusion that the attack was aimed at taking Jablanica was unreasonable based upon all of the evidence before it.[574] Furthermore, Naletilić has failed to demonstrate how the Trial Chamber's finding that there were extreme tensions and provocations on both sides of the conflict in the Jablanica area prior to the 17 April 1993 attack on Sovići and Doljani is contradictory or inconsistent with its finding that this particular attack was part of a larger HVO offensive the purpose of which was to take Jablanica, regardless of whether or not it may also have been part of an attempt to take back the front lines.

4. Naletilić's role in the Sovići and Doljani operation

279. Finally, Naletilić argues that even if there was an operation to take Jablanica and, even if it was affirmed that he was a KB Commander, the Trial Chamber erred in finding that he participated in the planning of any operation to take Jablanica because there is no evidence in support of that finding.[575] In his Reply Brief, Naletilić further submits that the Trial Chamber ignored or improperly disregarded the evidence of Defence Witnesses NR and Željko Glasnović.[576] Naletilić also argues that the Trial Chamber erred in finding that he played a central command role in the Sovići/Doljani operation, as demonstrated by the Trial Chamber's own finding at paragraph 84 of

[572] Naletilić Revised Appeal Brief, para. 157.

[573] The Trial Chamber referred to Ex. PP 325 (Confidential), "report from an international observer dated on 21 April 1993, stating that the HVO offensive launched against Slatina and Doljani aims *to push on through to* Jablanica": Trial Judgement, fn. 57 (emphasis added).

[574] For its finding in para. 30 of the Trial Judgement, the Trial Chamber relied upon Witness Safet Idrizović, T. 16327 and Ex. PP 325 (Confidential) and Ex. PP 928. Ex. PP 928 states at p. 84: "Tuta and his men came earlier than ever before. He immediately sat down and worked out a plan. He said that he was going to see it through to the end this time, but thoroughly and safely […] This time it seems that the goal will be achieved and that they will reach Zlato and the entry into Jablanica".

[575] Naletilić Revised Appeal Brief, para. 156.

[576] Naletilić Revised Appeal Brief, para. 4. The Appeals Chamber will not consider Naletilić's arguments concerning the testimony of Witnesses NI, NL, NM, NO, NK, NT and NU because they were raised for the first time in the Naletilić Reply Brief (*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Reply to the Prosecution's Response to Naletilić's Appeal Brief, 17 November 2003 (Confidential) ("Confidential Naletilić Reply Brief"); *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Reply to the Prosecution's Response to Naletilić's Appeal Brief – Redacted, 10 October 2005 ("Naletilić Reply Brief")) and, unlike his submissions with regard to Witness NR and Željko Glasnović, do not respond directly to anything in the Prosecution Response Brief to Naletilić Revised Appeal Brief, para. 4.

the Trial Judgement that professional units attached themselves to the area commander of that sector of the frontline and stayed under the direct command of the HVO Main Staff, and that as a result Naletilić was unable to command the operations in Sovići and Doljani.[577]

280. At paragraphs 128 and 132 of the Trial Judgement, the Trial Chamber specifically noted and referenced documentary evidence that it concluded in its entirety proved that Naletilić took part in the strategic planning of the Sovići/Doljani operation as part of the larger operation to take Jablanica. Naletilić has failed to demonstrate any alleged error of fact by the Trial Chamber with regard to its reliance upon this evidence in support of this finding. At paragraph 132 and footnote 385 of the Trial Judgement, the Trial Chamber considered the evidence of Defence Witnesses NR and Željko Glasnović. Naletilić has also failed to demonstrate that the Trial Chamber ignored or improperly disregarded their evidence. Furthermore, the Appeals Chamber rejects Naletilić's argument that the KB professional unit was under the command of the area commander of that sector of the front line and under the direct command of the HVO Main Staff, and not under his command as commander of the KB unit. The Appeals Chamber finds that Naletilić has failed to support this contention or to demonstrate how the Trial Chamber's finding, relying upon the evidence before it, that as commander of the KB professional unit he was a direct subordinate of the HVO Main Staff in the Sovići/Doljani operation was unreasonable.[578]

5. Conclusion

281. Naletilić's 13th ground of appeal is dismissed in its entirety.

[577] Naletilić Revised Appeal Brief, para. 156.
[578] Trial Judgement, para. 132.

G. Well-planned attack by HVO targeting Mostar's BH Muslim civilian population (14th and 20th grounds of appeal)

282. Naletilić submits as his 14th ground of appeal that the Trial Chamber erred when it found that, on 9 May 1993, the HVO attacked Mostar in a well-planned attack,[579] and as his 20th ground of appeal that the Trial Chamber erred in finding that the HVO targeted Mostar's BH Muslim civilian population.[580] Under both grounds of appeal, Naletilić claims that the ABiH in fact attacked the HVO, and that the HVO's actions were only in response to this provocation. This argument is a bare assertion and does not demonstrate that the Trial Chamber erred, and the Appeals Chamber will not consider it further. In addition, the Appeals Chamber will not consider here Naletilić's various arguments concerning Witness Falk Simang, which are addressed elsewhere.

283. At paragraph 40 of the Trial Judgement, the Trial Chamber established that:

> One of the targets was the ABiH headquarters in the Vranica building, which also was residential housing for about 200 civilians. Around midday on 10 May 1993, the building caught fire and both civilians and soldiers surrendered. Before leaving the building 20 to 30 ABiH soldiers changed their uniforms into civilian clothes. They were then assembled in the yard outside the School of Economics, which is situated next to the Vranica building complex. They were met by Juka Prazina, the commander of the Kruško ATG and Colonel Željko Bošnjak, who was also a member of the KB. Juka Prazina ordered the prisoners to be separated into three groups: i) BH Croat men and women, who were free to leave; ii) Muslim civilian men, women, children and elderly who were transported to the Velež stadium; and iii) surrendered ABiH soldiers, who were moved to the Tobacco Institute in Mostar.[581]

284. At paragraph 42 of the Trial Judgement, the Trial Chamber was further satisfied that:

> The BH Muslim civilian population of Mostar was targeted on 9 May 1993. From about five o'clock in the morning, armed HVO units surrounded apartment buildings and houses and collected and rounded up BH Muslim civilians. In certain apartment-blocks where both BH Muslims and BH Croats lived, only the BH Muslims were forced to leave. Women, children, men and elderly were forced out of their homes. Witnesses have described these evictions in different manners.[582]

285. Naletilić submits that in paragraph 40 of the Trial Judgement the Trial Chamber found that the main targets of the HVO attack on 9 May 1993 in Mostar were the Command Headquarters of the ABiH in the Vranica Building, where approximately 200 civilians resided, and the Tito Bridge.[583] According to Naletilić, in contradiction to the aforementioned findings, in paragraph 42 of the Trial Judgement the Trial Chamber found that "the target of the attack was the civilian population of Mostar".[584]

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[579] Naletilić Notice of Appeal, p. 6; Naletilić Revised Appeal Brief, paras 158-159.
[580] Naletilić Notice of Appeal, p. 7; Naletilić's Revised Appeal Brief, paras 170-173.
[581] Trial Judgement, para. 40 (footnotes omitted).
[582] Trial Judgement, para. 42 (footnotes omitted).
[583] Naletilić Revised Appeal Brief, para. 170 (citing Trial Judgement, para. 40).
[584] Naletilić Revised Appeal Brief, para. 171 (citing Trial Judgement, para. 42).

286. Naletilić fails to show that the Trial Chamber's findings were contradictory. The Trial Chamber did not find that the Command Headquarters of the ABiH in the Vranica Building and the Tito Bridge were the only targets or even the "main" targets of the 9 May 1993 attack on Mostar. The Trial Chamber stated that "[o]ne of the targets was the ABiH headquarters in the Vranica building". It took into consideration that it was residential housing "for about 200 civilians".[585] The Trial Chamber also found that Juka Prazina ordered the prisoners to be separated into three groups, and that while BH Croat men and women were free to leave, Muslim civilian men, women, children and elderly were transported to the Velež stadium in Mostar.[586]

287. Accordingly, Naletilić's 14th and 20th grounds of appeal are dismissed in their entirety.

H. Signing of orders (16th ground of appeal)

288. Under this ground of appeal, Naletilić alleges that the Trial Chamber erred in finding that he had signed any orders.[587] Among the paragraphs of the Judgement to which he points, only two (paragraphs 91 and 169) make any reference to orders given by Naletilić; neither refers to any order being "signed". Paragraph 91 relies on the testimony of Witness Ralf Mrachacz,[588] while paragraph 169 cites a prison report and a letter of the Head of the Military Police Crime Department.[589] Naletilić does not even attempt to demonstrate in what way the Trial Chamber erred in relying on the evidence in question. For this reason, his 16th ground of appeal is dismissed in its entirety.

I. Torture and wilfully causing great suffering (17th ground of appeal)

289. Naletilić submits under his 17th ground of appeal that the Trial Chamber erred in finding him guilty, on the evidence before it, of torture as a crime against humanity and as a grave breach of the Geneva Conventions of 1949 pursuant to Articles 2(b) and 5(f) of the Statute under Counts 9 and 10. He argues that the evidence was insufficient to establish that he was responsible for torture

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[585] Trial Judgement, para. 40.
[586] Trial Judgement, para. 40.
[587] Naletilić Notice of Appeal, p. 6. Naletilić Revised Appeal Brief, para. 161 (citing Trial Judgement, paras 86, 90, 91, 93, 94, 114, 169; *ibid*., fns 223, 237).
[588] Paragraph 91 of the Trial Judgement refers to the testimony of "[Witness] Ralf Mrachacz about two orders, given by "Tuta" in front of the units, regarding military discipline. According to these orders, members of the KB, who committed a criminal act against civilians would be punished and foreigners who deserted and went to the other side had to be shot." It also refers to the fact that the same witness "also stated that in military operations they were directly subordinate to Mladen Naletilić. In his absence, "Čikota" and "Lija" would give orders".
[589] Paragraph 169 of the Trial Judgement refers to a "Central Military Prison Report, dated 21 September 1993 and signed by the warden of the [Ljubuški] prison Stanko Božić, [according to which] 24 detainees were released on 20 and 21 September 1993 on foot of (*sic*) an order from Mladen Naletilić, who needed them because of a lack of manpower at the frontline." The same paragraph also refers to the following corroborating evidence: "[a] letter of the Head of the Military Police Crime Department – Mostar Centre addressed on 29 September 1993 to the Head of the Defence Departments Bruno Stojić" noting *inter alia* that "the detainees were handed over the week before, because of Mladen Naletilić's order and that they all, allegedly, went off to take part in the action to liberate Raštani."

because a finding of torture requires at least proof of wilfully causing great suffering.[590] Naletilić does not challenge the Trial Chamber's legal definition of torture,[591] but contests its findings that particular acts of mistreatment reached the requisite level of seriousness to amount to wilfully causing great suffering.[592] In the course of the Appeals Hearing, Naletilić submitted that with respect to these incidents there was no evidence of the "degree" or "duration" of the suffering.[593]

290. The Appeals Chamber notes that Naletilić's submission that the Trial Chamber erred when it found him responsible for torture encompasses paragraphs 378 and 393 of the Trial Judgement, which describe acts for which the Trial Chamber found him responsible instead for wilfully causing great suffering and for cruel treatment pursuant to Articles 2(c) and 3 of the Statute.[594] Because the Trial Chamber did not find Naletilić responsible for torture for these acts, his argument is inapposite with respect to these paragraphs. Nevertheless, because Naletilić submits that the particular acts of mistreatment he challenges were not serious enough to amount to wilfully causing great suffering, the Appeals Chamber will also consider whether the Trial Chamber erred in finding him responsible for wilfully causing great suffering and cruel treatment for these. Naletilić specifically challenges the Trial Chamber's findings that the acts described in paragraphs 367, 368, 378, 393 and 446 of the Trial Judgement satisfied the requisite level of seriousness.

1. Findings of torture

(a) Witness TT, Fikret Begić and Witness B at the Doljani fishfarm

291. The Trial Chamber was satisfied beyond reasonable doubt that "severe mistreatment of Muslim detainees occurred at the fishfarm in Doljani on 20 April 1993 and that Mladen Naletilić participated as a perpetrator in that mistreatment".[595]

292. With regard to the level of mistreatment of detainees at Doljani fishfarm, at paragraph 367 of the Trial Judgement the Trial Chamber was specifically "satisfied that Mladen Naletilić inflicted torture on [W]itnesses TT and Fikret Begić by telling them that they would be put before a firing

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[590] Naletilić Revised Appeal Brief, para. 162.
[591] Naletilić Revised Appeal Brief, para. 163 (citing Trial Judgement, paras 367, 368, 378, 393, 446). On 2 September 2005, Naletilić sought leave to submit a pre-submission brief on torture to assist the Appeals Chamber in considering his 17th ground of appeal. The Appeals Chamber denied leave on 13 October 2005 on the basis that the pre-submission brief did not relate or supplement the error alleged under his 17th ground in the Naletilić Notice of Appeal and the Naletilić Revised Appeal Brief, but rather raised a whole new ground of appeal which was outside the Naletilić Notice of Appeal, and that good cause did not exist for amending the latter. *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005 ("Decision on Naletilić's Motion for Leave to File Pre-Submission Brief on Torture"), pp. 2 *et seq*.
[592] Naletilić Revised Appeal Brief, para. 163.
[593] Appeals Hearing, T. 100-101.
[594] Trial Judgement, paras 379, 394.
[595] Trial Judgement, para. 353.

squad".[596] The Trial Chamber took into consideration "the brutal context of the overall situation at the fishfarm on 20 April 1993 and that, in those particular circumstances, [W]itness TT and Fikret Begić could not but consider this death sentence as real".[597] Furthermore, the Trial Chamber noted the evidence of Witness RR "that only the intervention of another person prevented [W]itness TT and Fikret Begić from being executed, as demanded by Mladen Naletilić".[598] The Trial Chamber was satisfied that "the act was committed with the specific purpose of punishing [W]itnesses TT and Fikret Begić for having caused the death" of Naletilić's soldiers.[599] The Trial Chamber then considered that the mental suffering inflicted upon Witnesses TT and Fikret Begić was of the "requisite seriousness to amount to torture within the meaning of Articles 2(c) and 5(f) of the Statute (Counts 9 and 10)".[600]

293. With regard to another incident at the Doljani fishfarm on 20 April 1993, the Trial Chamber was specifically satisfied in paragraph 368 of the Trial Judgement that Naletilić inflicted torture on Witness B "by demonstratively putting his pistol on the desk while demanding information from [W]itness B or face being killed".[601] The Trial Chamber took into account the context of violent beatings that took place outside the shed and systematic violent interrogations conducted by Naletilić inside the shed. The Trial Chamber also took into consideration that "[W]itness B at the time was only 16 years old and must have been particularly vulnerable and scared by the beatings inflicted on him before he was brought to the interrogation and was threatened with being killed".[602] The Trial Chamber was satisfied that the mental suffering was sufficiently severe to amount to the crime of torture, and that it was inflicted with the aim of obtaining information from Witness B, and as a result it found that the elements of torture pursuant to Articles 2(c) and 5(f) of the Statute had been met.[603]

(b) Witness FF at the Heliodrom

294. The Trial Chamber was satisfied that it had been established beyond reasonable doubt that Witness FF was tortured by Naletilić while being detained at the Heliodrom prison.[604] The Trial Chamber found in paragraph 446 that a few days after Witness FF was brought to the Heliodrom in early June 1993, he was taken into a room in which Naletilić, Josip Marcinko and Samir Bošnjić

[596] Trial Judgement, para. 367.
[597] Trial Judgement, para. 367.
[598] Trial Judgement, para. 367.
[599] Trial Judgement, para. 367.
[600] Trial Judgement, para. 367.
[601] Trial Judgement, para. 368.
[602] Trial Judgement, para. 368.
[603] Trial Judgement, para. 368.
[604] Trial Judgement, para. 445.

were awaiting him.[605] Naletilić started interrogating Witness FF, and when Witness FF answered that he did not know anything about the whereabouts of his father and other members of his family, Samir Bošnjić started hitting him.[606] The Trial Chamber then found that:

> He was struck three times in the stomach before Mladen Naletilić ordered Bošnijć to stop. After about 20 minutes of interrogation, Mladen Naletilić suddenly expressed his condolences to [W]itness FF and told him that they had shot his father this very morning. Witness FF was so shocked that he felt like collapsing. Before [W]itness FF was escorted to an isolation cell, Mladen Naletilić leant over the table and asked him whether he felt his stomach burning. Witness FF was kept in the isolation cell for about an hour during which he felt terrified because he did not know what would happen to him next and because some guards passed by who threatened that they would return in the evening to beat him up.[607]

295. The Trial Chamber found that Naletilić inflicted great suffering and mental pain on Witness FF with the "purpose of obtaining information about [W]itness FF's father and to punish him for being the son of this politically prominent person".[608] The Trial Chamber was satisfied that Naletilić "allowed [W]itness FF to be physically mistreated by Samir Bošnjic after he did not answer his questions and he also inflicted severe mental suffering on the witness by falsely informing him that they had killed his father on that morning".[609] The Trial Chamber found that Naletilić's acts possessed the requisite seriousness to amount to torture.[610]

2. Findings of wilfully causing great suffering and cruel treatment

(a) Witness AA

296. With regard to the incident involving Witness AA, the Trial Chamber found that "the evidence submitted by the Defence witnesses does not raise any reasonable doubt as to whether the incident took place as charged".[611] In paragraph 378 of the Trial Judgement, the Trial Chamber was satisfied that Naletilić mistreated Witness AA in the Ministry of Defence building.[612]

> Mladen Naletilić approached [W]itness AA and started hitting him with his Motorola on the left side of his forehead, swearing at his "balija" mother. After [W]itness AA told him [Naletilić] that his mother was a Catholic, Mladen Naletilić struck him several times more with the Motorola. Mladen Naletilić then drew a cross on [W]itness AA's forehead with the aerial of the Motorola and stated that he sentenced him to death to serve as an example to others.[613]

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605 Trial Judgement, para. 446.
606 Trial Judgement, para. 446.
607 Trial Judgement, para. 446 (footnotes omitted).
608 Trial Judgement, para. 447.
609 Trial Judgement, para. 447.
610 Trial Judgement, para. 447.
611 Trial Judgement, para. 376. The incident in question is that in paragraph 48 of the Indictment, where Witness AA is referred to as "Witness 'M'".
612 Trial Judgement, paras 377-378.
613 Trial Judgement, para. 378.

The Trial Chamber concluded that "[w]hile the injuries following the physical and psychological mistreatment of [W]itness AA by Mladen Naletilić may not possess the requisite seriousness to amount to the crime of torture under Articles 2(b) and 5(f) of the Statute, the threat of a death sentence is severe enough to amount to the crime of cruel treatment and wilfully causing great suffering pursuant to Articles 2(c) and 3 of the Statute".[614] The Trial Chamber found that this act took on a more serious aspect as it was committed in the presence of many of Naletilić's subordinates. It found that Naletilić bore individual criminal responsibility for these crimes as a perpetrator.[615]

(b) Group of prisoners taken from the Vranica building to the Tobacco Institute in Mostar

297. In paragraph 393 of the Trial Judgement, the Trial Chamber was satisfied that, after Naletilić had stopped beating Witness AA,[616] this witness was also beaten in his presence "by Juka, Dujmović, Slezak and some others two or three times until he fell down".[617] Furthermore, the Trial Chamber found that chaos erupted after a soldier named Mišić started shooting. The Trial Chamber stated that:

> The mistreatment by the soldiers only started after Mladen Naletilić had hit another person in the face with his Motorola. Witness E testified that if Mladen Naletilić marked out someone by a blow or some other way, then a person belonging to the ABiH would be attacked.[618]

The Trial Chamber found that Naletilić "was present when KB soldiers under his command, among them Juka Prazina, maltreated the group of prisoners who had been taken from the Vranica building to the Tobacco Institute in Mostar by swearing at them, shooting at them and beating several of them".[619] Furthermore, the Trial Chamber found that:

> The random beating of and shooting at the prisoners created an atmosphere of terror that caused severe physical and mental suffering to the prisoners. The mistreatment committed by the soldiers under Mladen Naletilić's command was therefore sufficiently severe to amount to crimes under the Statute. The Chamber is further satisfied that Mladen Naletilić had the material ability to prevent those crimes and that he wilfully chose not to do so but instead set the pattern for the mistreatment of prisoners.[620]

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[614] Trial Judgement, para. 379.
[615] Trial Judgement, para. 379.
[616] This incident was charged under para. 48 of the Indictment.
[617] Trial Judgement, para. 393.
[618] Trial Judgement, para. 393 (footnotes omitted).
[619] Trial Judgement, para. 394.
[620] Trial Judgement, para. 394.

298. As a result, the Trial Chamber found that Naletilić bore command responsibility for wilfully causing great suffering and for cruel treatment pursuant to Articles 2(c) and 3 of the Statute (Counts 11 and 12).[621]

3. Discussion

299. As stated in the *Kunarac et al.* Appeal Judgement, torture "is constituted by an act or an omission giving rise to 'severe pain or suffering, whether physical or mental', but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture".[622] Thus, while the suffering inflicted by some acts may be so obvious that the acts amount *per se* to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted. Similar case-by-case analysis is necessary regarding the crime of wilfully causing great suffering.

300. The Appeals Chamber is satisfied that the Trial Chamber's analysis in this case was appropriate. In particular, the Appeals Chamber agrees that telling prisoners falsely that they will be executed, in a "brutal context" that makes the statement believable, can amount to wilfully causing great suffering. In addition, severe physical abuse in the course of interrogation, as was inflicted on Witnesses B, FF and AA, also generally amounts to wilfully causing great suffering, particularly when combined with acts designed to cause psychological torment, such as falsely informing a prisoner that his father had been killed or firing guns at prisoners so as to create an atmosphere of terror. The Appeals Chamber also rejects Naletilić's claim that these incidents involved insufficient "duration" to satisfy the requisite legal threshold. He provides no factual basis for his claim, and moreover, although the duration over which suffering is inflicted may affect the determination whether it amounts to torture or wilfully causing great suffering, no rigid durational requirement is built into the definition of either crime.[623] In short, Naletilić has not demonstrated that the Trial Chamber erred in characterising each of the acts in question as wilfully causing great suffering. He raises no further challenge to the Trial Chamber's conclusion that some (although not all) of these acts constituted torture. Thus, Naletilić's 17th ground of appeal is dismissed in its entirety.

[621] Trial Judgement, para. 394.
[622] *Kunarac et al.* Appeal Judgement, para. 149.
[623] *See*, *e.g*., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article I(1).

J. *Mens rea* regarding the activities of ATG units in Ljubuški and Mostar (21st ground of appeal)

301. Under this ground of appeal Naletilić primarily alleges that the Trial Chamber erred in finding that he had the requisite *mens rea* regarding any alleged activities carried out by any ATG's in Ljubuški and Mostar and seeks the reversal of the related convictions. He specifically refers to paragraphs 116, 428 and 432 of the Trial Judgement.[624] Naletilić also alleges that the Trial Chamber erred when it concluded: (1) that he failed to prevent or punish;[625] (2) that there was sufficient evidence to support its findings that a number of direct perpetrators were Naletilić's subordinates during the time of the alleged events (May 1993);[626] and (3) that Witness FF's testimony was reliable.[627]

1. Arguments on Naletilić's *mens rea*

302. The Appeals Chamber will turn first to Naletilić's arguments challenging the Trial Chamber's finding that he possessed the requisite *mens rea* (*i.e.* that he knew or had reason to know) to be found responsible pursuant to Article 7(3) of the Statute for the mistreatment of prisoners carried out by ATG units in Ljubuški prison. Naletilić refers to paragraph 428 of the Trial Judgement which reads as follows:

> The Chamber finds that it has been proven beyond reasonable doubt that soldiers of the KB and the Vinko Škrobo ATG under the command of Mladen Naletilić and Vinko Martinović, namely Romeo Blažević, Ernest Takač, Robo and Ivan Hrkač, the brother of Čikota, participated in those severe beatings of the helpless prisoners. The Chamber notes that the name Ivica Kraljević appears on Exhibit PP 704, the salary list of the KB as of November 1993. The Chamber is satisfied that Mladen Naletilić had reason to know about these crimes being committed by his subordinates after he had seen for himself how KB soldiers, in particular Robo, had severely mistreated some of the same prisoners, as for instance, [W]itness Y, already on the bus ride on their way to the Ljubuški prison. The evidence shows that Mladen Naletilić merely told his soldiers on that occasion to stop and to get back on the bus. The Chamber finds that Mladen Naletilić's failure to punish his soldiers for the mistreatment of [W]itness Y near Sovići conveyed the message that their behaviour was tolerable. After this incident, he knew that his soldiers engaged in brutal mistreatment of prisoners. He had reason to know that there was a high risk of his soldiers visiting the Ljubuški prison to continue their revenge action on enemy soldiers by maltreating prisoners there. The evidence from several witnesses regarding the complaint of the warden about his inability to prevent KB soldiers from entering the prison and mistreating prisoners is telling. Mladen Naletilić bears command responsibility pursuant to Article 7(3) of the Statute (Counts 11 and 12) […].

303. Naletilić argues that the "time of the specific crimes is critical [to establish the required *mens rea*] because such evidence showed that he did not have command responsibility over Ernest Takač and/or Ivan Hrkač during the time period of the allegations included in the [Trial]

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[624] Naletilić Notice of Appeal, p. 7.
[625] Naletilić Revised Appeal Brief, para. 179.
[626] Naletilić Revised Appeal Brief, paras 178, 182, 185, 186, 189.
[627] Naletilić Revised Appeal Brief, para. 190.

Judgement".[628] He also argues that evidence that he once saw a soldier mistreating an ABiH soldier does not suffice to establish his criminal responsibility under Article 7(3) of the Statute, especially in light of the fact that the Trial Chamber found that he actually put a stop to that mistreatment.[629] He further argues that: (1) there was no evidence that he was present during the events in Ljubuški in May 1993 or that he was warned or informed about them;[630] and (2) the Trial Chamber failed to acknowledge the distance between Ljubuški prison and his home.[631]

304. The Prosecution responds that, at paragraph 428 of the Trial Judgement, the Trial Chamber referred to the fact that Naletilić personally saw how his subordinates, and in particular "Robo", had severely mistreated some of the prisoners. The Trial Chamber referred back to the incident involving Witness Y, who was being beaten while the bus which took him to Ljubuški prison got stuck in the mud: Naletilić stopped the beating and told his soldiers to get going. When Witness Y arrived at Ljubuški he was beaten again by all of the soldiers, including Robo.[632] The Prosecution recalls the Trial Chamber's finding that this incident alone shows that Naletilić knew that his subordinates were beating prisoners and therefore that he was put on notice of the fact that there was a risk that similar crimes would be committed by his subordinates at Ljubuški prison. The Prosecution adds that although the incident involving Witness Y in the bus may be "ambiguous or ambivalent", on 20 April 1993 Naletilić set "an example for his men that continue[d] throughout the conflict by personally beating prisoners at the fishfarm and being present and observing his men beat prisoners at the fishfarm".[633]

305. The Trial Chamber's finding that Naletilić had reason to know about the mistreatment of prisoners by his subordinates in Ljubuški prison is essentially based on the fact that Naletilić was present when KB soldiers, and in particular Robo, severely mistreated Witness Y on one occasion while the bus transporting Witness Y and other prisoners to Ljubuški prison got stuck in the mud. The Appeals Chamber is of the view that no reasonable trier of fact could have found beyond reasonable doubt, on the sole basis of this incident, that Naletilić had reason to know that his subordinates would commit such crimes in Ljubuški prison. A series of findings of fact material to a finding of responsibility are absent from the reasoning of the Trial Chamber. The Trial Chamber failed to make a finding that Naletilić was on notice that his subordinates would return to Ljubuški

[628] Naletilić Revised Appeal Brief, para. 177.
[629] Naletilić Revised Appeal Brief, para. 179.
[630] Naletilić Revised Appeal Brief, paras 180, 192, 194.
[631] Naletilić Revised Appeal Brief, para. 193. Naletilić's additional arguments concerning the pleading of *mens rea* in the Indictment are considered elsewhere in this Judgement.
[632] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.42, fn. 74 (citing Trial Judgement, para. 351).
[633] Appeals Hearing, T. 130. The Prosecution alleges that this happened on 20 April 1993, which was "the very next day" after the beating of Witness Y in the bus. Contrary to this submission, however, the Trial Chamber found that the transport of Witness Y from Sovići to Doljani during which this witness was beaten took place on 18 April 1993: Trial Judgement, para. 350.

prison to mistreat prisoners there. As noted by the Trial Chamber itself, the evidence shows that, on the particular occasion when he witnessed the mistreatment of Witness Y on the way to Ljubuški, Naletilić told his soldiers to stop the beating and to get going. Although the Trial Chamber found that evidence from several witnesses regarding the complaint of the warden of Ljubuški prison about his inability to prevent KB soldiers from entering the prison and mistreating prisoners was telling, it did not find that Naletilić knew of that complaint. The Prosecution refers to other findings of the Trial Chamber[634] to show that Naletilić knew about incidents involving his subordinates mistreating prisoners and that he himself had beaten Witness AA on 10 May 1993 in Mostar. These are irrelevant as to the issue at stake since they do not relate to Ljubuški prison and refer to a later date.

306. The Trial Chamber's error led to a miscarriage of justice since, without proof of Naletilić's *mens rea* with respect to Ljubuški prison, Naletilić could not have been held responsible pursuant to Article 7(3) of the Statute for the cruel treatment and wilfully causing great suffering inflicted upon prisoners at Ljubuški prison, and for persecutions by these underlying acts. With respect to the incidents of mistreatment of prisoners in Ljubuški prison, the findings that Naletilić was responsible for cruel treatment as a violation of the laws or customs of war, for wilfully causing great suffering as a grave breach of the Geneva Conventions of 1949, and for persecutions as a crime against humanity pursuant to Articles 2(c), 3, 5 and 7(3) of the Statute, are set aside.[635] Any implications of this on the sentence of Naletilić will be considered in the section dealing with the appeals from sentence.

307. As a result of this finding by the Appeals Chamber, there is no need to address the consequences for the Trial Judgement of the additional evidence admitted on appeal which shows that the warden of Ljubuški prison, Ivica Kraljević, was not the same Ivica Kraljević that appears listed as a member of the KB in Exhibit PP 704, and which could have shown that the finding that Naletilić was responsible pursuant to Article 7(3) of the Statute for the torture of Witness Z in Ljubuški prison was unsafe.[636]

308. The Appeals Chamber turns now to Naletilić's arguments supporting his allegation that the Trial Chamber erred in establishing his *mens rea* for superior responsibility in relation to mistreatment of prisoners in Mostar, specifically in the Heliodrom.[637] Naletilić argues that the Trial Chamber did not have any evidence before it to find that he knew that his soldiers were mistreating

[634] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.43, fn. 75.
[635] Trial Judgement, paras 453, 682.
[636] Confidential Decision on Prosecution Motions for Additional Evidence and for Protective Measures, p. 4; Prosecution Rule 115 Motion (Confidential).
[637] Trial Judgement, para. 436.

prisoners in the Heliodrom.[638] According to the Prosecution, the Trial Chamber found that Naletilić visited this prison, and had even by mistake entered the prisoner's premises; that he had personally visited Witness Y in the Heliodrom when this victim was already in a bad physical state after having been beaten on a daily basis for the 47 days he was detained in Ljubuški prison; that he had told Witness Y that his fate was not that bad compared to what he had done; and that Witness Y was beaten again severely five minutes after Naletilić left. The Trial Chamber also found that Naletilić had encounters in the prison with another victim: Witness UU, who testified that Naletilić was in a position to see his mistreatment[639] and further that he did not intervene when Juka Prazina let his dog loose on another hapless prisoner.[640]

309. Naletilić merely asserts that the Trial Chamber did not have any evidence before it to find that he knew that his soldiers were mistreating prisoners in the Heliodrom. He fails to demonstrate that no reasonable Trial Chamber could have found beyond reasonable doubt, on the basis of the evidence referred to by the Trial Chamber at paragraphs 432 to 435 of the Trial Judgement, that he had the *mens rea* required to find him responsible as a superior for mistreatment perpetrated by individuals whom the Trial Chamber found to be his subordinates.[641]

2. Arguments on Naletilić's failure to prevent or punish

310. The Appeals Chamber turns now to the alleged error in the Trial Chamber's conclusion that Naletilić failed to prevent and/or punish the mistreatment in question. Naletilić argues first that there was no evidence for this finding and that the Trial Chamber noted in paragraph 352 of the Trial Judgement that he had stopped the soldier from mistreating an ABiH soldier; second, that the guards and the Governor of Ljubuški prison were incapable of preventing members of the KB and other HVO soldiers from coming into the prison[642]; and third, that Ljubuški prison was under the control of the Military Police.[643]

311. In light of the Appeals Chamber's finding that Naletilić could not have been held responsible pursuant to Article 7(3) of the Statute for the cruel treatment and wilfully causing great suffering inflicted upon prisoners at Ljubuški prison, and for persecutions by these underlying acts, there is no need for the Appeals Chamber to address these arguments of Naletilić.

[638] Naletilić Revised Appeal Brief, paras 188, 189.
[639] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.46 (citing Trial Judgement, para. 433).
[640] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.46 (citing Trial Judgement, para. 434).
[641] The Trial Chamber refers to the testimony of Witnesses Salko Osmić, Y and UU.
[642] Naletilić Revised Appeal Brief, para. 179.
[643] Naletilić Revised Appeal Brief, para. 190.

3. Arguments concerning the direct perpetrators and Witness FF

312. Naletilić alleges that the Trial Chamber erred when it concluded that there was sufficient evidence for its findings that a number of direct perpetrators were Naletilić's subordinates during the time of the alleged events (May 1993) as well as when it found that Witness FF's testimony was reliable.[644] The Appeals Chamber finds that, although the existence of a superior-subordinate relationship between the commander or superior and the principal offenders is one of the three elements required for a finding of responsibility pursuant to Article 7(3) of the Statute, it is separate from the *mens rea* requirement. Therefore, Naletilić was required to seek leave to amend his 21st ground of appeal in his Notice of Appeal to include these arguments on this issue pursuant to Rule 108. The Appeals Chamber notes that Naletilić failed to do so. Furthermore, the Prosecution clearly objects to these arguments in the Naletilić Revised Appeal Brief and has not fully responded to them.[645] As a result, the Appeals Chamber dismisses Naletilić's challenges to the Trial Chamber's findings that a number of direct perpetrators were his subordinates during the events of May 1993 and declines to address them on the basis that doing so would result in unfair prejudice to the Prosecution.

313. Exactly the same is true of his argument under this ground that the Trial Chamber erred in relying upon the testimony of Witness FF as credible because he lied under oath,[646] and for this reason the Appeals Chamber dismisses Naletilić's argument in this regard and declines to address it. Furthermore, the Appeals Chamber notes that the Trial Chamber relied upon the testimony of Witness FF to reach its conclusion that Naletilić bore individual responsibility for the torture of Witness FF.[647] Thus, Naletilić's argument concerning Witness FF's testimony is irrelevant as to the Trial Chamber's findings on Naletilić's *mens rea* in relation to mistreatment of prisoners at the Heliodrom by his subordinates.

4. Conclusion

314. Naletilić's 21st ground of appeal is allowed in part, and, for the incidents of mistreatment to prisoners in Ljubuški prison, the findings of Naletilić's responsibility for cruel treatment as a violation of the laws or customs of war, for wilfully causing great suffering as a grave breach of the Geneva Conventions of 1949, and for persecutions as a crime against humanity pursuant to Articles 2(c), 3, 5 and 7(3) of the Statute are set aside.[648]

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[644] Naletilić Revised Appeal Brief, paras 178, 182, 185, 186, 189-190.
[645] Prosecution Response to Naletilić Revised Appeal Brief, para. 2.38.
[646] Naletilić Revised Appeal Brief, para. 190; Naletilić Reply Brief, para. 8.
[647] *See* Trial Judgement, paras 435, 445-447, 681-682.
[648] Trial Judgement, paras 453, 682.

K. Ernest Takač's relationship with Naletilić in May 1993 (22nd ground of appeal)

315. Under this ground of appeal Naletilić alleges that the Trial Chamber erred in finding that Ernest Takač was his subordinate during the period of May 1993.[649] The Trial Chamber relied on the evidence of several witnesses and exhibits to find that Naletilić was the highest level commander of the KB and the attached ATG units in 1993 and 1994.[650] Further, the Trial Chamber was satisfied that the Vinko Škrobo ATG was part of the KB.[651] It also found on the evidence of several witnesses and exhibits that Ernest Takač was a subordinate of Martinović who was the commander of the Vinko Škrobo ATG.[652] It found at paragraph 102 of the Trial Judgement that "[w]hile the evidence is not consistent as to exactly when the Vinko Škrobo ATG was formally established, […] Vinko Martinović was the commander of a group of soldiers, who held positions at the confrontation line next to the Health Centre, at least from mid-May 1993".

316. Paragraph 143 of the Trial Judgement appears in the section dealing with the attack on Mostar on 9 May 1993, and states as follows:

> Witness F, a Muslim member of the HVO 4th Battalion, testified that on 9 May 1993 members of the HVO 4th Battalion together with "Tuta's and Juka's men" were taking out Muslims from their flats. Witnesses WW and GG gave evidence that Vinko Martinović, Ernest Takač and Nino Pehar, called "Dolma", were amongst the soldiers who took them out of their apartments and that Vinko Martinović was in charge of the operation.[653]

317. As concerns the attack on Mostar, the Trial Chamber was "satisfied that several units of the KB took part in the military operation in Mostar on 9 and 10 May 1993", and that Naletilić "ordered members of the KB to fire artillery at Mostar and ordered in the presence of high representatives of the military and civilian HVO that the captured BH Muslim soldiers were to be brought to Široki Brijeg". On the basis of these findings, the Trial Chamber was satisfied that Naletilić was one of the commanders in charge of the operation.[654]

318. Naletilić's argument that the Trial Chamber found that Ernest Takač was Naletilić's subordinate on 9 May 1993 is not borne out by paragraph 143 of the Trial Judgement and, in addition, is misconceived. That the Trial Chamber did not find that Ernest Takač was Naletilić's subordinate on 9 May 1993 is further shown by paragraph 652 of the Trial Judgement, where the Trial Chamber declined to enter a finding of responsibility pursuant to Article 7(3) against

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[649] Naletilić Notice of Appeal, p. 7; Naletilić Revised Appeal Brief, para. 195. *See* also *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Consolidated Motion to Present Additional Evidence Pursuant to Rule 115, Incorporating his Previously-filed Motion and Supplement, 8 September 2003 (Confidential) ("Naletilić Consolidated Rule 115 Motion").
[650] Trial Judgement, paras 91-92, 94, 116.
[651] Trial Judgement, para. 100.
[652] Trial Judgement, paras 100-103; *see ibid.*, fn. 281.
[653] Trial Judgement, para. 143 (footnotes omitted).
[654] Trial Judgement, para. 147.

Martinović for the events in Mostar on that day on the ground that "the Vinko Škrobo ATG had not yet been founded on 9 May 1993".[655] Finally, Naletilić has not demonstrated that it was unreasonable for the Trial Chamber to rely on the evidence of Witnesses F, WW and GG for the findings it *did* make in paragraph 147.

319. As concerns the incidents of mistreatment in Ljubuški prison, in light of the Appeals Chamber's finding under Naletilić's 21st ground of appeal that Naletilić could not have been held responsible pursuant to Article 7(3) of the Statute for the cruel treatment and wilfully causing great suffering inflicted upon prisoners at Ljubuški prison, and for persecutions by these underlying acts, there is no need for the Appeals Chamber to address Naletilić's arguments regarding the mistreatment administered by KB soldiers, *inter alia*, Ernest Takač on prisoners at Ljubuški prison.

320. Naletilić refers to his Consolidated Rule 115 Motion where new evidence was submitted that according to him affirmatively demonstrated that Ernest Takač was not his subordinate. The Appeals Chamber recalls that it found that none of the additional evidence submitted by Naletilić in his Consolidated Motion met the requirements for admission pursuant to Rule 115 and, as a consequence, dismissed it entirely. Therefore this argument is moot.

321. For the aforementioned reasons, Naletilić's 22nd ground of appeal is dismissed in its entirety.

L. Responsibility for abuses at the MUP station and the Tobacco station in Široki Brijeg (23rd ground of appeal)

322. Naletilić submits under his 23rd ground of appeal that the Trial Chamber erred in finding that he bore command responsibility pursuant to Article 7(3) of the Statute for the cruel treatment and great suffering inflicted by his subordinates in violation of Articles 2(c) and 3 of the Statute at the MUP station and the Tobacco station in Široki Brijeg (Counts 11 and 12).[656] Naletilić's central argument is that the Trial Chamber "completely disregarded" the evidence presented by him when reaching its conclusion and that, in doing so, the Trial Chamber "abused its discretion and acted arbitrarily and capriciously."[657]

1. MUP station in Široki Brijeg

323. Naletilić submits that the testimony of Defence Witness NG shows that the Trial Chamber's conclusion was erroneous with regard to any abuse at the MUP station in Široki Brijeg. Witness NG

[655] Trial Judgement, para. 652, fn. 1618 (citing Trial Judgement, para. 102); *see* also i*bid.*, fn. 1549.
[656] Naletilić Notice of Appeal, pp. 7-8; Naletilić Revised Appeal Brief, paras 196-197. *See* also Trial Judgement, paras 404, 412.
[657] Naletilić Revised Appeal Brief, para. 196.

stated that he was told by the Military Police that the prisoners would be there for a few days for investigation and that it was only the Military Police who could communicate with them.[658] Naletilić recalls that Witness NG testified that he was at the MUP station every day in May 1993 and that it was the civil police who guarded and looked after the prisoners.[659] Witness NG stated that the alleged beatings of these prisoners could not have happened at the MUP station since there were always several people on duty and that he personally verified that they were treated correctly.[660]

324. The Trial Chamber considered that Witness NG testified that he would have known if any prisoner had been ill-treated and that he kept details of who was interrogated by whom in archived logbooks. Nevertheless, the Trial Chamber rejected Witness NG's statement that he would have such knowledge, noting that "the MUP [s]tation logbook was never produced and […] the testimonies of Defence witnesses NG and NQ are contradictory" with regard to the events at MUP Station.[661] The Trial Chamber further found that, in any event:

> It is irrelevant whether Defence witness NG was aware of the mistreatment of prisoners or whether he did not want to know about it […] the strongly corroborated, credible and reliable evidence submitted by witness AA, BB, CC, DD, EE, ZZ and VV proves that brutal mistreatment of prisoners took place at the MUP Station on various occasions as set out below.[662]

325. The Trial Chamber accordingly took Witness NG's testimony into consideration and gave specific reasons for rejecting it. Naletilić fails to demonstrate that the Trial Chamber's decision to disregard the testimony of Witness NG was unreasonable.

326. Furthermore, Naletilić fails to allege any specific error with regard to the Trial Chamber's overall findings as to his responsibility for abuses at the MUP station apart from repeating nearly *verbatim* Witness NG's testimony and the arguments proffered at trial with regard to that testimony. The Appeals Chamber recalls that an appellant is not merely to repeat unsuccessful arguments offered at trial. Finally, Naletilić fails to offer any arguments challenging the Trial Chamber's reliance on the "strongly corroborated, credible and reliable evidence" of seven other witnesses in finding Naletilić responsible for abuses at MUP station.[663]

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[658] Naletilić Revised Appeal Brief, para. 197.
[659] Naletilić Revised Appeal Brief, para. 197.
[660] Naletilić Revised Appeal Brief, para. 197.
[661] Trial Judgement, para. 396.
[662] Trial Judgement, para. 396.
[663] Trial Judgement, para. 396.

2. Tobacco station in Široki Brijeg

327. In paragraph 412 of the Trial Judgement, the Trial Chamber found that Naletilić bore command responsibility for the cruel treatment and great suffering of Witnesses VV and L at the Tobacco station in Široki Brijeg pursuant to Articles 2(c), 3 and 7(3) of the Statute.[664] Naletilić offers a bare assertion that this finding was in error, but gives no details or substantiation. In light of the obvious insufficiency of his submissions,[665] the Appeals Chamber will not consider this argument.

3. Conclusion

328. On the basis of the foregoing, Naletilić's 23rd ground of appeal is dismissed in its entirety.

M. Unlawful labour for the use of detainees to dig a trench (24th ground of appeal)

329. Under Count 5, the Trial Chamber found Naletilić responsible for unlawful labour pursuant to Articles 3 and 7(3) of the Statute for the use of detainees to dig a trench in very arduous conditions.[666] Naletilić submits under his 24th ground of appeal that the evidence was insufficient to support this finding.[667]

1. No evidence that Naletilić ordered

330. Naletilić submits that the Prosecution "did not present any evidence that [Naletilić] ordered the prisoners to work on the canal project in Široki Brijeg".[668]

331. The Appeals Chamber notes that the Trial Chamber considered in paragraph 326 of the Trial Judgement that it had "not received sufficient evidence to establish Mladen Naletilić's direct involvement under Article 7(1)" but was satisfied that his responsibility had been "established under Article 7(3) of the Statute". Article 7(3) of the Statute requires that the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof". There is no requirement that the superior "order" the commission of the act.

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[664] The Appeals Chamber notes that, in para. 407 of the Trial Judgement, the Trial Chamber rejected the Defence evidence that prisoners were not mistreated at the Tobacco station "as lacking credibility".

[665] *See Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, para. 43; *Kordić and Čerkez* Appeal Judgement, para. 22.

[666] Trial Judgement, para. 333.

[667] Naletilić Revised Appeal Brief, para. 198. *See* also Naletilić Notice of Appeal, p. 8.

[668] Naletilić Revised Appeal Brief, para. 198.

2. Authority over and knowledge of the conditions in which the prisoners worked

332. Naletilić submits that the Trial Chamber convicted him "due to his mere presence in and around the work site" and the fact that his house was located close to the canal.[669] Naletilić notes that the canal was not on his property, and argues that "[t]he record is devoid of evidence that [he] had any duty or ability or authority to change the conditions of the prisoner's [*sic*] work".[670] Naletilić argues that the record also lacks evidence that he was ever put on notice of the conditions in which the prisoners worked.[671]

333. The Prosecution responds that there was sufficient evidence for the Trial Chamber to find Naletilić responsible under Article 7(3) of the Statute, arguing that the evidence was unequivocal.[672] The Prosecution points out that Naletilić "was in command of the unit that was in charge of the prisoners working in that area"; that approximately twenty-five workers worked at the canal over a period of two to three months; that Naletilić's villa was about 500 metres from where the canal started; and that the same group of prisoners together with another group of prisoners also worked on a swimming pool, a site which was visited by Naletilić "on a number of occasions".[673]

334. The Trial Chamber was satisfied that from July 1993 and for at least two months onwards prisoners had been taken to dig a trench in the vicinity of Naletilić's villa.[674] Although finding that the forced labour had no military character or purpose, the Trial Chamber nonetheless found that it constituted a grave breach of the Geneva Conventions because of its harsh conditions and long duration.[675] As evidence showed that Naletilić "visited the construction site on several occasions and was seen talking with the guards while the prisoners were working", the Trial Chamber was satisfied that he knew or had reason to know "that the detainees were subjected to conditions susceptible to render the labour unlawful".[676] The Trial Chamber cited the testimony of Witness CC that Naletilić "came on several occasions while he was working on the canal" and that of Witness DD that he saw Naletilić "once at the scene, talking with a guard".[677] It also inferred that in spite of Naletilić's knowledge, he did not take any ameliorative measures.[678] As a result, the Trial Chamber found Naletilić responsible under Article 7(3) of the Statute.[679] The Appeals Chamber finds that it

[669] Naletilić Revised Appeal Brief, para. 198.
[670] Naletilić Revised Appeal Brief, para. 198.
[671] Appeals Hearing, T. 117.
[672] Prosecution Response to Naletilić Revised Appeal Brief, para. 7.4.
[673] Prosecution Response to Naletilić Revised Appeal Brief, para. 7.4.
[674] Trial Judgement, paras 320, 325.
[675] Trial Judgement, paras 322, 325.
[676] Trial Judgement, para. 326.
[677] Trial Judgement, fn. 879.
[678] Trial Judgement, para. 326.
[679] Trial Judgement, para. 326.

was reasonable for the Trial Chamber to conclude, on the basis of this evidence, that Naletilić was put on notice of the conditions the detainees worked in.

335. Naletilić argues that the record is devoid of evidence that he had any duty, ability or authority to change the prisoners' conditions of work. The Trial Chamber relied on the evidence of Witnesses CC and DD to find that some of the prisoners working on the site were held at the Tobacco station in Široki Brijeg, where the KB which Naletilić commanded had its headquarters.[680] The Appeals Chamber notes that there was also evidence in the Trial Record that KB members guarded the prisoners at the work site.[681] The evidence stems from Witness BB, whom the Trial Chamber found credible and reliable, as shown by the fact that it relied on this witness' evidence for a number of findings.[682] In addition, the same portion of the evidence of Witness BB that goes to show that KB members guarded prisoners at the canal site was relied on by the Trial Chamber for a different finding.[683] Even if the Trial Chamber did not explicitly refer to this evidence for the finding that the offence of unlawful labour was committed by soldiers subordinated to Naletilić, the Appeals Chamber is of the view that Naletilić has failed to demonstrate that no reasonable trier of fact could have come to the conclusion, based on the evidence in the Trial Record, including the aforementioned evidence of Witnesses CC and DD, that Naletilić had superior authority over the perpetrators of the crime.

336. Lastly, the Appeals Chamber notes that the fact that Naletilić's house was close to the canal was never used to support the Trial Chamber's conclusion of responsibility, but was only cited as a factual reference made by the witnesses.[684] Naletilić's argument that the canal was not on his property is similarly irrelevant.

3. Evidence of Witness NH

337. Naletilić further argues that Witness NH gave evidence that the prisoners "were under the jurisdiction of the Office of Defence, Široki Brijeg, and were accommodated in the Tobacco station".[685] Based on this evidence, Naletilić considers it clear that he was not responsible for the

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[680] Trial Judgement, para. 326. *See* also Trial Judgement, para. 94.
[681] Witness BB, T. 4268-4269: "[a]nd on subsequent days, we stepped -- we would step off the bus 300 metres before the house, and the guards, who were members of the Convicts' Battalion and those who guarded us were home guards, they told us that that was Tuta's house".
[682] *See e.g.* Trial Judgement, paras 320, 323, 324.
[683] Trial Judgement, fn. 864.
[684] Trial Judgement, para. 320 mentions the proximity of Naletilić's house. In para. 322, however, the Trial Chamber stated that as a result of contradicting evidence, it could not infer that the digging of the trench was for a private purpose; in any event, had the trench been dug in order to supply Naletilić's house with water, the Trial Chamber would have reached the same finding: *see* Trial Judgement, para. 322, fn. 872.
[685] Naletilić Revised Appeal Brief, para. 199; Naletilić Reply Brief, para. 47.

accommodation of the prisoners, for guarding them, for their work and working conditions.[686] He therefore submits that no reasonable Trial Chamber could find him responsible based on the evidence presented.[687]

338. The Appeals Chamber observes that Naletilić's argument that he was not responsible for the accommodation of the prisoners is only supported by the testimony of Defence Witness NH, who testified that the Defence Department of Široki Brijeg was responsible for the accommodation of the prisoners.[688] Naletilić has not presented any arguments as to why the Trial Chamber should have relied on this testimony and disregarded the other evidence establishing Naletilić's responsibility. Furthermore, the Appeals Chamber notes the Trial Chamber's finding that "*some* of the detainees working on the canal were held at the Tobacco station in Široki Brijeg, where Mladen Naletilić had his headquarters and office".[689] Witness NH himself gave evidence that the Tobacco station housed both prisoners and the headquarters of the KB.[690] The Appeals Chamber finds that it has not been demonstrated how the Trial Chamber abused its discretion in weighing the evidence the way it did. Naletilić has failed to show that no reasonable trier of fact, based on the evidence presented at trial, could have found him responsible pursuant to Article 7(3) of the Statute for this incident.

4. Conclusion

339. On the basis of the foregoing, Naletilić's 24th ground of appeal is dismissed in its entirety.

N. Unlawful transfer of civilians (19th, 25th and 26th grounds of appeal)

340. Under Count 18, the Trial Chamber found Naletilić responsible for unlawful transfer of civilians as a grave breach of the Geneva Conventions of 1949, pursuant to Articles 2(g) and 7(1) of the Statute, for the transfer of approximately 400 BH Muslim civilians from Sovići on 4 May 1993 to a place close to Gornji Vakuf. It also found him responsible pursuant to Articles 2(g) and 7(3) of the Statute for the transfer of civilians on 13-14 June 1993 from the DUM area in Mostar and on 29 September 1993 from the Centar II area in Mostar. Naletilić challenges both of these findings under

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[686] Naletilić Revised Appeal Brief, para. 199.
[687] Naletilić Revised Appeal Brief, para. 199.
[688] Witness NH, T. 11994: "I know the office that was in charge of that, the Defence Department, came by the information that the military police had brought these people for some interrogation, for some interviews, and that these people were to be placed in some appropriate accommodation. My office, the Defence Department, did manage to find some rooms, very -- in the same building where the Defence Department was.[…] That was in the town, in Lištica,[…] where once upon a time there was a -- the tobacco station". The Appeals Chamber notes that the Trial Judgement did not refer to this part of the evidence given by Witness NH: fns 868 and 875 refer to Witness NH, T. 11995-11996.
[689] Trial Judgement, para. 326 (emphasis added).
[690] Witness NH, T. 11995: "And the only building which was used at the time was this house, this building here. And this building housed the 1st, the 2nd, and the 3rd Battalions, the civilian protection office and this is where the Convicts' Battalion also had its headquarters".

his 25th and 26th grounds of appeal, which will be considered in turn.[691] His 19th ground of appeal is connected to his 25th ground of appeal and therefore is also considered below.[692]

1. Unlawful transfer of civilians in Sovići and Doljani

341. Naletilić submits under his 25th ground of appeal that the Trial Chamber erred in finding him responsible for the unlawful transfer of civilians in Sovići and Doljani.

(a) Chain of command

342. Naletilić submits that the Trial Chamber did not establish who was a "Commander of Sector frontline as the next lower commander to the KB", since no evidence was provided by the Prosecution as to this issue.[693] Naletilić also submits that "a key part of the issue of the chain of command and responsibility was not correctly established" because the Trial Chamber, without valid explanation, "did not believe, nor did it give any weight to the evidence [he] presented […] as to the identity of the commander of the entire operation in Sovići".[694]

343. Naletilić claims that the Trial Judgement is contradictory. He argues that paragraph 132, in which the Trial Chamber found, in accordance with Exhibit PP 928, that "Miljenko Lasić and Željko Šiljeg were commanders of the operations, and only [Naletilić] brought a final decision as to how the action would proceed", contradicts its findings in paragraphs 82 and 84 concerning "the chain of command from the Main Staff downwards".[695] Naletilić further argues that the evidence presented by the Prosecution did not provide a foundation for the Trial Chamber's conclusion that he "was commander of all other units at the location of Sovići and Doljani".[696] Naletilić also contests the reliability of Exhibit PP 928 and contends that the Trial Judgement cannot in any way be based on such a document.[697]

344. Furthermore, Naletilić argues that he "could not, and was completely unable to, at the same time, be a commander of a professional unit, the KB, commander of the complete action in Sovići and Doljani and co-ordinator for *Herzeg Bosnia*".[698] Naletilić submits that the Trial Chamber

[691] Naletilić Notice of Appeal, p. 8; *see* Trial Judgement, paras 570-571.
[692] Naletilić Notice of Appeal, p.7; Naletilić Revised Appeal Brief, para. 169.
[693] Naletilić Revised Appeal Brief, para. 203.
[694] Naletilić Revised Appeal Brief, para. 203.
[695] Naletilić Revised Appeal Brief, para. 204.
[696] Naletilić Revised Appeal Brief, para. 204.
[697] Naletilić Revised Appeal Brief, para. 205.
[698] Naletilić Revised Appeal Brief, para. 206.

should have placed him in a specific position according to the Indictment, as he "has the right to know which position he was accused of holding".[699]

345. In paragraphs 82 and 84 of the Trial Judgement, the Trial Chamber specifically pointed out that there were two chains of command. The general chain of command consisted of a brigade commander, battalion commander, company commander and commander of a unit. Another chain of command related to the frontlines "where it was the HVO Main Staff, operative zone commander, commander of a particular area at the frontline and units that were subordinated to the area commander".[700] The Trial Chamber further established that the KB was one of the professional units that were outside the chain of command of the HVO regular units.[701] In paragraph 132 of the Trial Judgement, the Trial Chamber found that Miljenko Lasić, Željko Šiljeg and Naletilić were all direct subordinates of the HVO Main Staff, but that Lasić and Šiljeg were operative zone commanders while Naletilić was commander of a professional unit.[702] Based on documentary evidence, the Trial Chamber concluded that the three men were planning the Sovići/Doljani operation, but that it was only Naletilić "who took the final decisions as to how to carry it out".[703] The Trial Chamber was satisfied that Naletilić "played the central command role in the Sovići/Doljani operation, which was part of the larger operation to take Jablanica".[704]

346. The Appeals Chamber considers that Naletilić does not substantiate his argument that these findings of the Trial Chamber are contradictory. The findings made in paragraph 132 of the Trial Judgement are consistent with those made in paragraphs 82 and 84, since the Trial Chamber identified the respective positions of the three men in the chain of command previously described. The conclusion that it was only Naletilić who took the final decisions as to how the operations were carried out was based on documentary evidence such as Exhibit PP 928.

347. As to Naletilić's argument that the Trial Chamber disregarded without any explanation the evidence he presented as to the identity of the commander of the entire operation in Sovići, the Appeals Chamber notes that the Trial Chamber did provide reasons for rejecting the testimonies of Defence Witness NR and Željko Glasnović.[705] Naletilić does not even attempt to show an error in the Trial Chamber's evaluation of their evidence.

[699] Naletilić Revised Appeal Brief, para. 206.
[700] Trial Judgement, para. 82.
[701] Trial Judgement, para. 84.
[702] Trial Judgement, para. 132.
[703] Trial Judgement, para. 132.
[704] Trial Judgement, para. 132.
[705] Trial Judgement, fn. 385.

348. Finally, the Appeals Chamber considers that Naletilić has not substantiated his argument that he could not be commander of the KB, commander of the entire Sovići operation and coordinator for Herceg-Bosna at the same time. Mere assertion does not suffice. Since no error on the part of the Trial Chamber has been demonstrated, this argument requires no further consideration.

(b) Exchange of captured civilians

349. Naletilić submits that the Trial Chamber, "without reason or comment", did not give any weight to the evidence he presented allegedly establishing that the ABiH units first attacked the area of the municipalities of Konjic and Jablanica before 17 April 1993,[706] but "gave weight to the Prosecution evidence, which never mentioned the planned transfer of civilians" by him.[707] Furthermore, he argues that Exhibit PP 333, like the other exhibits mentioned in paragraph 529 of the Trial Judgement, does not prove his participation in the transfer of civilians but only "peripherally demonstrates an intention for the exchange of captured civilians".[708]

350. Exhibit PP 333 consists of "a report sent to Slobodan Božić, at the Defence Department of the HVO, asking for instructions of what to do with the 422 prisoners".[709] The Appeals Chamber observes that Naletilić misunderstands the use that the Trial Chamber made of Exhibit PP 333, since this Exhibit was not relied upon to establish that Naletilić directly drew up the plan to transfer the Muslim population. Rather, it was relied upon to establish generally that such a plan existed.[710] The Trial Chamber was further satisfied that:

> Evidence has been led to the fact that the plan was implemented. A report dated 7 May 1993 signed by Blaž Azinović, Herceg Stjepan Battalion, Mijat Tomić Brigade, states that the transfer was ordered by Vlado Ćurić referred to as "Tuta's Commissioner". Defence witness NW confirms that the transfer referred to in the report is the transfer of the civilians from the Junuzovići houses to Gornji Vakuf relevant to the Indictment.[711]

In addition, the Trial Chamber took into consideration the fact that the plan was drawn up with the intention of exchanging captured civilians, but, as stated in paragraph 523 of the Trial Judgement, such a plan cannot influence the conditions under which a transfer becomes lawful. This argument of Naletilić is therefore irrelevant. As to Naletilić's argument that the Trial Chamber disregarded without any reason his evidence allegedly establishing that the ABiH attacked the area before 17 April 1993, the Appeals Chamber is of the view that it does not need further consideration since it is

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[706] Naletilić Revised Appeal Brief, para. 209 (citing Defence Witnesses NJ, NE and Željko Glasnović, and Exhibit DD1/336).
[707] Naletilić Revised Appeal Brief, para. 209.
[708] Naletilić Revised Appeal Brief, para. 209.
[709] Trial Judgement, fn. 1369.
[710] Trial Judgement, para. 529.
[711] Trial Judgement, para. 529 (footnotes omitted).

not relevant to the issue of Naletilić's responsibility for the planning of the transfer of the Muslim population of Sovići.

351. Naletilić further argues that Exhibit PP 333 "is not signed by the person whose name appears thereon", and that Defence Exhibit DD1/439 demonstrates that Exhibit PP 333 was in fact signed by a different person.[712] However, Naletilić has failed to demonstrate any error in the exercise of the Trial Chamber's discretion to assess the evidence. Instead, he merely repeats arguments that did not succeed at trial.[713] Further, Naletilić has not demonstrated that the Trial Chamber's evaluation of the evidence was one that no reasonable trier of fact could have made, especially taking into consideration the fact that Exhibit PP 333 was provided to the Prosecution by both the governments of BiH and of Croatia and that it was consistent with other documentary evidence, such as Exhibit PP 368.

(c) Participation in plan to transfer civilians

352. Naletilić submits that Exhibit PP 368 does not prove his participation in, nor does it prove any plan to engage in, the transfer of civilians from Sovići and Doljani.[714] He contends that assuming *arguendo* that he participated in planning the attack, "the attack itself is not charged as any crime".[715] Naletilić further asks, if "the aim of the attack was the Muslim populations of Sovići and Doljani and their transfer, and it was planned previously, then why would there be a fifteen (15) day delay in the execution of the plan?"[716]

353. The Trial Chamber was satisfied that the "transfer of the civilian population from Sovići was part of a plan drawn up by, among others, Mladen Naletilić".[717] It relied on Exhibits PP 333 and PP 368 in order to establish the existence and implementation of such a plan.[718] Exhibit PP 368, a report dated 7 May 1993 signed by Blaž Azinović, Herceg Stjepan Battalion, Mijat Tomić Brigade, reads as follows:

> By order from Mr. Vlado /?Ćurić/ (Mr. Tuta's Commissioner), the transport of prisoners to Sovićka vrata, together with civilians (women and children), began around 1600 hours, on 5 May 1993. From there, in the presence of Mr. Vlado, they were taken to Gornji Vakuf under guard, by buses which had been waiting for them there.

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[712] Naletilić Revised Appeal Brief, paras 209-210.
[713] *See e.g.* T. 12936-12939 (where Naletilić was raising concerns about the authenticity of Ex. PP 333); T. 16489-16490 (where Naletilić was using Ex. D1/439).
[714] Naletilić Revised Appeal Brief, para. 211.
[715] Naletilić Revised Appeal Brief, para. 211.
[716] Naletilić Revised Appeal Brief, para. 211.
[717] Trial Judgement, para. 531.
[718] *See* Trial Judgement, para. 529, fns 1373, 1374.

The exhibit clearly states that a direct subordinate of Naletilić ordered the transfer to be implemented. The Trial Chamber only used Exhibit PP 368 to establish that the plan to transfer civilians from Sovići was implemented, and particularly that Naletilić gave orders to that effect. For its conclusion that Naletilić had, among others, planned the transfer, the Trial Chamber relied on its previous finding that Naletilić, together with Željko Šiljeg and Miljenko Lasić, planned the Doljani/Sovići attack.[719] The Appeals Chamber finds that Naletilić has failed to demonstrate that it was unreasonable for the Trial Chamber to conclude, in light of all the evidence before it, including Exhibit PP 368, that Naletilić among others planned the transfer. As to his argument that the attack itself was not charged as a crime, the Appeals Chamber notes that it is irrelevant and does not need further consideration.

(d) Contradictions between exhibits and the findings of the Trial Chamber

(i) Exhibit PP 333

354. Naletilić submits that the contents of Exhibit PP 333 are contrary to the Trial Chamber's findings that he "planned and executed the transfer of civilians" from Sovići.[720] He states that this document was sent to the HVO Department of Defence and not to him, and that the document "requested directions about proceeding with 422 prisoners from Sovići and Doljani".[721]

355. The Trial Chamber rejected Naletilić's argument that "the civilians gathered spontaneously in the houses of Junuzovići, and in the school in Sovići for safety reasons" and found that "[t]he HVO themselves considered the civilians to be detained from 23 April 1993".[722] In reaching this conclusion, the Trial Chamber relied on Exhibit PP 333. The Appeals Chamber finds that Naletilić has not shown any inconsistency between the Trial Chamber's findings that he planned and executed the unlawful transfer of civilians and its reliance on Exhibit PP 333, which would render the findings of the Trial Chamber unreasonable.

(ii) Exhibits DD1/426 and PP 362

356. Naletilić notes that Exhibit DD1/426, "an Order dated 4 May 1993 at 22:00 hours, sent from HVO Main Staff, signed by Milivoj Petkovic to the commander of the III Mijat Tomic Battalion, Brigade Herceg Stjepan, personally to Stipe Pole, acknowledges all captured civilians in Sovići and Doljani, and keeping all capable for military services".[723] He submits that it is apparent from

[719] Trial Judgement, para. 531, fn. 1379 (citing Trial Judgement, paras 89-94, 117-132). *See* Trial Judgement, para. 132.
[720] Naletilić Revised Appeal Brief, para. 215.
[721] Naletilić Revised Appeal Brief, para. 215.
[722] Trial Judgement, para. 524.
[723] Naletilić Revised Appeal Brief, para. 216.

Exhibit DD1/426 that the command was carried out by Stipe Pole, the commander of the Miljat Tomić III Battalion, and that it is clear that Naletilić "was not involved in any way with anything related to civilians or prisoners in Sovići/Doljani."[724] Furthermore, Naletilić argues that it follows from Exhibit PP 362 that it was the Main Staff that was in charge of the action concerning the civilians in Sovići/Doljani.[725]

357. The Appeals Chamber considers that Naletilić has failed to demonstrate that the Trial Chamber's conclusion that Naletilić was responsible for the unlawful transfer of civilians from Sovići was unreasonable on the basis of its alleged contradictions with Exhibit DD1/426 and Exhibit PP 362. The Trial Chamber found that the battalion of Stipe Pole was acting under the command of Naletilić specifically for the Sovići operation. Indeed, the Trial Chamber found that Naletilić planned and conducted the attack on Sovići/Doljani as commander of all troops deployed, which included, *inter alia*, the 3rd Mijat Tomić Battalion of the HVO Brigade Herceg Stjepan, commanded by Stipe Pole.[726] Moreover, Exhibit PP 362, which is an official document from the HVO Main Staff dealing with the evacuation of the Muslim population of Sovići, does not contradict the Trial Chamber's finding that the KB was under the direct command of the HVO Main Staff.[727] Accordingly, no error has been demonstrated by Naletilić.

(iii) Exhibit PP 928

358. Naletilić submits that the Trial Judgement is inconsistent with regard to the transfer or evacuation of the civilians.[728] According to him, the finding of the Trial Chamber that the transfer was accomplished by members of the KB[729] is contrary to Exhibit PP 928 which shows "that there was a problem with security for the escort of the buses to carry the civilians, and finally it was accomplished using platoon Jablanica-Brabovica J. Azinovic".[730] Naletilić notes that the Trial Chamber had rejected his objections to Exhibit PP 928, and argues that the Trial Chamber erred in selectively utilising portions of the Radoš Diary.[731]

359. The Appeals Chamber notes that the Trial Chamber found that there was "evidence of involvement of the KB in the transfer", relying on the testimony of two witnesses, seen "in the

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724 Naletilić Revised Appeal Brief, para. 216.
725 Naletilić Revised Appeal Brief, para. 216 (citing also T. 14966-14967 (private session)).
726 Trial Judgement, para. 127.
727 The Appeals Chamber observes that Exhibit PP 362 was not used by the Trial Chamber in the Trial Judgement, but it can be found on the Trial Record.
728 Naletilić Revised Appeal Brief, para. 219.
729 Naletilić Revised Appeal Brief, para. 219 (citing Trial Judgement, para. 530).
730 Naletilić Revised Appeal Brief, para. 219.
731 Naletilić Revised Appeal Brief, para. 219.

context of documentary evidence".[732] Even if the Trial Chamber did not find it necessary to explicitly refer to the Radoš Diary on this issue, the Appeals Chamber finds that Naletilić has failed to demonstrate that the Trial Chamber's finding was unreasonable because it is inconsistent with the part of Exhibit PP 928 quoted by Naletilić. The Trial Chamber only found evidence of the involvement of the KB in the transfer, but did not state that the transfer was exclusively conducted by the KB. Other units, such as "platoon Jablanica-Brabovica J. Azinovic" may also have been involved in the transfer, but this was not a matter before the Trial Chamber. No inconsistency has been shown.

(e) Agreement between the HVO and the ABiH

360. Naletilić notes that at "footnote 1366, the Trial Chamber mentions that [he] brought forth a document which demonstrated that the destiny of the civilians was resolved by agreement between Milivoj Petkovic for the HVO and Sefer Halilović for the ABiH".[733] Naletilić submits that his name is not mentioned in this document, "nor was any evidence presented, that he participated in any fashion in the negotiations which resulted in the decision concerning the eventual transfer of the civilians".[734] He further argues that he did not order the "transfer or evacuation of the civilians to the area under ABiH control, as set forth in [Exhibit] PP 360, nor was any evidence presented to confirm he acted in any such fashion".[735] In the course of the Appeals Hearing, Naletilić clarified that Exhibit PP 360 was identical to Exhibit DD 1/426, where according to him it is stated that there were "negotiations between General Petković and General Halilović of the ABiH [regarding] what to do with the civilians that were in Sovići".[736]

361. Footnote 1366 of the Trial Judgement reads:

> The Naletilić Defence stated that such an agreement would be submitted for admission into evidence with the identification number D1/360. However, no such document was ever presented. The evidence presented by Defence Witness NW was not credible in this regard. Further, the international observers present reported nothing about an agreed transfer.

[732] Trial Judgement, para. 530.
[733] Naletilić Revised Appeal Brief, para. 218.
[734] Naletilić Revised Appeal Brief, para. 218.
[735] Naletilić Revised Appeal Brief, para. 218 (citing Witnesses Ivan Bagarić, T. 12372-12376; NN, T. 12896-12899; Safet Idrizović). The Prosecution submits that Ex. PP 360 does not exist on the record: Prosecution Response to Naletilić Revised Appeal Brief, para. 7.34. The Prosecution also states that it believes Naletilić is referring to Ex. DD 360, which in any event does not exist in the Trial Record either.
[736] Appeals Hearing, T. 168.

The Appeals Chamber has carefully reviewed Exhibit DD 1/426. Contrary to Naletilić's contention, it does not refer to any such agreement.[737]

(f) Knowledge of the transfer of civilians

362. Naletilić argues that the Trial Chamber relied on hearsay evidence when it determined that he had participated in the planning of, and therefore knew about, the transfer of the civilians, and that his soldiers participated in arresting, guarding and transporting these civilians.[738] Naletilić notes that "establishment of these very important facts was based on witnesses who testified they were arrested and guarded by soldiers who introduced themselves as 'Tuta's army'".[739] He further submits that "the quality of this hearsay evidence falls well below the standards required to convict [him] beyond a reasonable doubt".[740]

363. The Appeals Chamber notes that the Trial Chamber relied on the testimony of Witnesses X and C for its finding on the involvement of the KB in the transfer.[741] The Trial Chamber noted that:

> One witness stated that a group of soldiers wearing camouflage uniforms with insignia of the HVO arrived at the Junuzovići hamlets in a blue and white van stating that they were "Tuta's army". Another witness testified that following a change among the guards outside the Junuzovići hamlets, "Tuta's soldiers" guarded them and that the soldiers on the bus transporting them to Gornji Vakuf had identified themselves as "Tuta's army". This evidence seen in the context of documentary evidence satisfies the Chamber that the KB was involved in the transfer of the BH Muslim civilians.[742]

The Trial Chamber also relied on this testimony of Witnesses X and C in the section dealing with unlawful confinement and detention, when it recalled that it had been established that the KB was present in Sovići.[743] The Appeals Chamber observes that Naletilić's argument remains a bare assertion, neither showing why the testimonies of Witnesses X and C are unreliable on this point, nor how the Trial Chamber erred in its evaluation of the evidence.

(g) The "guarding" of civilians

364. Naletilić argues that a professional unit, such as the KB, was not normally used for guarding civilians.[744] He contends that "[p]rofessional units were used for resolving the most complex

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[737] Ex. DD 1/426 is a note to the Commander of the Herceg Stjepan Brigade with the dates 2 May 1993 and 4 May 1993 to "[r]elease all civilian prisoners in Doljani and Sovići, keep men of military age", with the signature block of the Chief of the HVO Main Staff Major General Milivoj Petković.
[738] Naletilić Revised Appeal Brief, para. 212 (citing Trial Judgement, paras 647, 648, 530).
[739] Naletilić Revised Appeal Brief, para. 212.
[740] Naletilić Revised Appeal Brief, para. 212.
[741] Trial Judgement, para. 530.
[742] Trial Judgement, para. 530 (footnotes omitted).
[743] Trial Judgement, para. 647.
[744] Naletilić Revised Appeal Brief, para. 213.

military tasks, as they were normally the best trained and equipped units of the military force, which do not engage in planning or guarding civilians".[745]

365. The Appeals Chamber assumes, in the absence of a specific reference to a part of the Trial Judgement, that Naletilić is referring to paragraph 530 of the Trial Judgement when challenging the "finding of 'guarding' civilians".[746] In this paragraph, the Trial Chamber relied on the testimony of Witness C which established that "Tuta's soldiers guarded" the civilians in Sovići. The Appeals Chamber finds that Naletilić has failed to demonstrate that the Trial Chamber's reliance upon this evidence was unreasonable beyond the bare assertion that professional units do not "normally" guard civilians. No error has been shown in the Trial Chamber's findings.

(h) Arguments based on purported additional evidence

366. A number of Naletilić's submissions relate to evidence sought to be admitted in his Consolidated Rule 115 Motion to present additional evidence.[747] The Naletilić Consolidated Rule 115 Motion was dismissed in its entirety by the Appeals Chamber in its decision dated 20 October 2004, and as a result the arguments that relate to the purported additional evidence are not addressed.[748]

(i) Articles 7(1) and 7(3) of the Statute

367. Naletilić submits that the Trial Chamber committed an error of law in finding him responsible of unlawful transfer of civilians under both Articles 7(1) and 7(3) of the Statute.[749] He submits that he can "only and exclusively be responsible under Article 7(1) of the Statute" if he planned and executed the transfer of civilians.[750] According to Naletilić, it appears unreasonable for the Trial Chamber to find him responsible for the planning and execution of a criminal act "and then [to] conclud[e] he was guilty for not preventing and punishing […] the same criminal act".[751] Naletilić further disagrees with the Trial Chamber's conclusion that his command position was an aggravating factor.[752]

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[745] Naletilić Revised Appeal Brief, para. 213.
[746] Naletilić Revised Appeal Brief, para. 213.
[747] Naletilić Revised Appeal Brief, paras 214, 217, 220, 221. *See* Naletilić Consolidated Rule 115 Motion (Confidential).
[748] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004 ("Decision on Naletilić Consolidated Rule 115 Motion"): *see* paras 55-57, stating the reasons why the Appeals Chamber denied Naletilić's request for admission of Exhibit I (the minutes of the meetings of the 3rd Mijat Tomić Battalion).
[749] Naletilić Revised Appeal Brief, paras 222, 223 (citing Trial Judgement, para. 532).
[750] Naletilić Revised Appeal Brief, para. 223.
[751] Naletilić Revised Appeal Brief, para. 223.
[752] Naletilić Revised Appeal Brief, para. 223.

368. In paragraphs 78 to 81 of the Trial Judgement, the Trial Chamber explained its approach to the concurrent application of Articles 7(1) and 7(3) of the Statute. The relevant paragraphs read as follows:

> 78. The *Kordić* Trial Chamber […] held that when a superior not only knew or had reason to know about the crimes of his subordinates but also planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of these crimes, the application of Article 7(1) of the Statute is more appropriate to characterise his responsibility.
>
> 79. The *Krnojelac* Trial Chamber stated that as it is inappropriate to convict under both heads of responsibility for the same conduct, the Trial Chamber has the discretion to choose which is the most appropriate one. […]
>
> 81. The Chamber follows the findings of the *Krnojelac* Trial Chamber by choosing between Article 7(1) and Article 7(3) of the Statute the most appropriate form of responsibility.

Since the Trial Chamber issued its Trial Judgement in this case, the Appeals Chamber has held, in the *Blaškić* case, that "in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute" and that "[w]here both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing".[753] The Trial Chamber's approach was consistent with this rule.

369. The Trial Chamber was satisfied that Naletilić was involved in the planning of the transfer of the civilian population from Sovići, and thus found him responsible under Article 7(1) of the Statute.[754] It further found him criminally responsible under Article 7(3) of the Statute, as the transfer "was conducted by soldiers under [his] command" and he had "knowledge of the transfer as he was involved in the planning of it and did nothing to prevent or to punish" it.[755] The Trial Chamber correctly concluded that the responsibility of Naletilić was "most accurately described under Article 7(1) of the Statute as that of a commander who planned the operation in Sovići and Doljani".[756] Contrary to Naletilić's submission, he was not convicted for the planning and execution of the unlawful transfer and then for failing to prevent or punish the same unlawful transfer. The Appeals Chamber notes that he was only convicted under Article 7(1) of the Statute, even though both forms of responsibility were established. Naletilić has failed to show that the Trial Chamber committed an error of law in doing so. The Appeals Chamber refers to the section on sentencing to the extent that his argument relates to his command position being considered as an aggravating factor.

[753] *Blaškić* Appeal Judgement, para. 91; *see also Kordić and Čerkez* Appeal Judgement, para. 34.
[754] Trial Judgement, para. 531.
[755] Trial Judgement, para. 532.
[756] Trial Judgement, para. 532.

(j) Estimation of evidence

370. Naletilić reiterates under this ground of appeal his contentions that the HVO action in Sovići/Doljani was provoked by an ABiH attack.[757] The Appeals Chamber has already dismissed those arguments under his thirteenth ground of appeal.

2. Unlawful transfer of civilians from Mostar

371. Naletilić submits as his 26th ground of appeal that the Trial Chamber erred in finding him responsible for the unlawful transfer of civilians from Mostar on 13-14 June 1993 and on 29 September 1993.[758] The Appeals Chamber has identified a number of points of contention which will be addressed in turn below. Naletilić's argument under his 12th ground of appeal that the Indictment did not put him on notice of conduct in Mostar on 13-14 June 1993 and 29 September 1993,[759] has already been dealt with above.[760]

(a) Trial Chamber's reliance on Witness AC's hearsay testimony

372. The Trial Chamber cited, *inter alia*, the testimony of Witness AC to establish that Naletilić gave instructions to the commander of the Benko Penavić ATG to carry out transfers.[761] Naletilić argues that this evidence was unreliable because it was hearsay.[762]

373. Naletilić does not attempt to demonstrate why it was unreasonable for the Trial Chamber to rely on Witness AC's hearsay evidence to find that Naletilić gave instructions about evictions and expulsions. The Appeals Chamber recalls that "Trial Chambers have a wide discretion in admitting hearsay evidence",[763] and that "it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence".[764]

374. Witness AC's hearsay evidence on this point was consistent with other evidence that showed that Naletilić was the commander of Baja,[765] and with the findings of the Trial Chamber (1) that a parallel chain of command existed apart from the HVO regular one due partly to the special

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[757] Naletilić Notice of Appeal, p. 7; Naletilić Revised Appeal Brief, para. 169.
[758] Naletilić Notice of Appeal, p. 8.
[759] Naletilić Revised Appeal Brief, para. 225 (citing his 12th ground of appeal).
[760] *See supra*, paras 67-70.
[761] Trial Judgement, para. 557.
[762] Naletilić Revised Appeal Brief, para. 227.
[763] *Kordić and Čerkez* Appeal Judgement, para. 281.
[764] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision on Admissibility of Evidence"), para. 15.
[765] Trial Judgement, fn. 309 (citing Witness S, T.2546-2548).

status the KB held and (2) that Naletilić had effective control over the Benko Penavić ATG during the Mostar operations.[766] Furthermore, the Trial Chamber did not rely on this hearsay evidence to conclude that Naletilić ordered the transfer and bore individual responsibility pursuant to Article 7(1) of the Statute, but rather to confirm that a "parallel command structure existed"[767] and to demonstrate, together with Military Police reports, that Naletilić chose to do nothing to prevent or to punish the unlawful transfers but "rather communicated to his subordinates that he endorsed the behaviour."[768] Naletilić has failed to show that the Trial Chamber erred in its evaluation of the evidence.

(b) Naletilić's knowledge of the acts of the Benko Penavić and the Vinko Škrobo ATG units and effective control over these units

375. Naletilić alleges that there was no evidence for the Trial Chamber's finding at paragraph 558 of the Trial Judgement that he knew about the frequent movements of civilians and did nothing about them.[769] He also argues that the Prosecution presented no evidence that he had knowledge or had reason to know of the events of 29 September 1993 and failed to take steps to prevent those acts or punish the perpetrators thereof.[770] He further argues that the Trial Chamber's conclusion regarding his superior responsibility and his effective control over the ATG units contradicts paragraph 154 of the Trial Judgement, where the Trial Chamber found that "all units situated in Mostar were under the command of […] the Defence Sector of Mostar", which Naletilić did not command.[771] Lastly, Naletilić alleges that the Trial Chamber erred in ignoring Defence Witness NO's evidence about the chain of command of the HVO in 1993, and submits that Martinović was not commanded by him.[772]

376. At paragraph 558 of the Trial Judgement, the Trial Chamber relied on various Military Police reports – corroborated by Witness AC's testimony about the regularity of such operations – to reach this finding.[773] These reports established that soldiers subordinated to Naletilić were involved in the transfers and that they claimed to have been acting on his orders.[774] Naletilić's argument that there was no evidence to this effect is obviously unfounded. Furthermore, Naletilić fails to demonstrate that it was unreasonable for the Trial Chamber to reach this finding on the basis

[766] Trial Judgement, paras 151-159, 557.
[767] Trial Judgement, para. 557.
[768] Trial Judgement, para. 558 (citing Ex. PP 455.1, Ex. PP 456.1, Ex. PP 456.2).
[769] Naletilić Revised Appeal Brief, para. 229.
[770] Naletilić Revised Appeal Brief, para. 232.
[771] Naletilić Revised Appeal Brief, paras 229-230.
[772] Naletilić Revised Appeal Brief, para. 231 (citing Witness NO, T. 12951, 12953-12954 (private session), 12961).
[773] Trial Judgement, fn. 1421 (citing Ex. PP 455.1, Ex. PP 456.1, Ex. PP 456.2).
[774] Ex. PP 456.1; Ex. PP 456.2.

of insufficiency of the evidence or on the basis that the Trial Chamber erred in its evaluation of the evidence.

377. As to the alleged lack of evidence of Naletilić's superior responsibility for the events of 29 September 1993, the relevant findings of the Trial Chamber read as follows:

> The [Trial] Chamber found that Vinko Martinović and the Vinko Škrobo ATG participated in unlawful transfer on 29 September 1993. Mladen Naletilić was in command of this unit. The Chamber is further satisfied that Mladen Naletilić knew or had reasons to know. [He] was put on notice by the regularity of such transfers, as discussed above, his deputy Ivan And[a]bak was informed about this specific event and did nothing to prevent or to punish. The Trial Chamber finds that such conduct was condoned by the leadership of KB.[775]

The Appeals Chamber notes that there was "further documentary evidence of involvement of KB members or units in transfers on several occasions during the month leading up to this incident",[776] which show that the transfers, about which Naletilić was on notice already by June 1993, did not stop but continued on a regular basis. Moreover, concerning the events of 29 September 1993, a Military Police report established that Naletilić's deputy was himself informed of the transfer.[777] The Trial Chamber relied on various pieces of evidence for its finding that Naletilić knew or had reason to know about the transfer of 29 September 1993. The argument that no evidence was provided is obviously unfounded.

378. Naletilić also argues that the Trial Chamber's findings regarding his effective control over the Benko Penavić ATG contradict paragraph 154 of the Trial Judgement. The Appeals Chamber acknowledges that in this paragraph, the Trial Chamber found that "the Vinko Škrobo ATG and the Benko Penavić ATG as all units deployed in the city of Mostar were under the command of the Southeast Herzegovina operative zone, which was the Sector Mostar Town Defence from July 1993". This notwithstanding, the Trial Chamber went on to find that:

> the command structure set out by the HVO Main Staff cannot be considered as the only reliable source regarding the actual command structure. The Chamber has therefore to assess the entire factual evidence to find the actual command.[778]

Relying on both documentary and witnesses' evidence,[779] the Trial Chamber was satisfied that "Mladen Naletilić had effective control over the ATG units in Mostar during the operations relevant to the Indictment".[780] Naletilić has failed to show that the findings of the Trial Chamber in the section dealing with unlawful transfer were unreasonable or contradictory.

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775 Trial Judgement, para. 566 (footnotes omitted).
776 Trial Judgement, para. 562, fn. 1430 (citing Ex. PP 558, Ex. PP 707, Ex. PP 556).
777 Trial Judgement, para. 562, fn. 1429 (citing Ex. PP 620.1).
778 Trial Judgement, para. 155.
779 Trial Judgement, paras 156-158.
780 Trial Judgement, para. 159.

379. The Appeals Chamber notes that, in arguing that Martinović was not under his command, Naletilić is merely repeating an argument that did not succeed at trial.[781] For this reason the Appeals Chamber need not consider the argument. As for the argument that the Trial Chamber ignored without any valid explanation the testimony of Defence Witness NO, the Appeals Chamber notes that the Trial Chamber did in fact rely on his testimony in order to establish the command structure of the HVO in Mostar.[782] Naletilić has not shown that the Trial Chamber gave insufficient weight to this testimony.

3. Conclusion

380. On the basis of the foregoing, the Appeals Chamber dismisses Naletilić's 19th, 25th and 26th grounds of appeal in their entirety.

O. Wanton destruction of property in Doljani (27th ground of appeal)

381. Naletilić submits under his 27th ground of appeal that the Trial Chamber erred in finding him individually responsible pursuant to Article 7(1) of the Statute for ordering wanton destruction of property not justified by military necessity in Doljani between 21 and 22 April 1993 as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute (Count 20).[783] Most of his arguments consist of reiterated challenges to the testimony of Wittness Falk Simang and to the Radoš Diary, which have been considered by the Appeals Chamber elsewhere.

382. Naletilić also claims that the testimony of Witness Falk Simang and the Radoš Diary are contradictory "and do not confirm each other as is mentioned in Paragraph 596 of the [Trial] Judgment".[784] Naletilić contends that Witness Falk Simang referred to two military actions in Doljani, but the Radoš Diary does not mention a second action and Witness Falk Simang testified that houses were burnt in Doljani during the second action.[785] Naletilić further notes that the Radoš Diary states that the houses in Doljani were set on fire on 21 or 22 April 1993.[786] According to Naletilić, this is contradictory to the testimony of Witness Falk Simang and the Radoš Diary itself,

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[781] Trial Judgement, para. 153 (citing sections of Naletilić Final Trial Brief).
[782] *See* Trial Judgement, para. 133, fn. 386; *ibid.*, para. 137, fn. 402; *ibid.*, para. 154, fns 440-441.
[783] Naletilić Notice of Appeal, p. 8; Naletilić's Revised Appeal Brief, paras 233-237. *See also* Trial Judgement, paras 585, 596-597. The Appeals Chamber notes that the title of Naletilić's ground of appeal XXVII alleges that the Trial Chamber erred in finding him guilty as a superior for wanton destruction in Doljani pursuant to Article 7(3) of the Statute. However, Naletilić only makes arguments under this ground with regard to the Trial Chamber's finding of his guilt pursuant to Article 7(1) of the Statute after he correctly observes that the Trial Chamber ultimately held him individually responsible pursuant to Article 7(1) and not Article 7(3) of the Statute. *See* Naletilić Revised Appeal Brief, para. 233; Trial Judgement, para. 597.
[784] Naletilić Revised Appeal Brief, para. 236.
[785] Naletilić Revised Appeal Brief, para. 236 (citing Ex. PP 928, pp. 78-79; Witness Falk Simang, T. 3809-3810, 3893-3894; Trial Judgement, fns 1456, 1462-1463).
[786] Naletilić Revised Appeal Brief, para. 236 (citing Trial Judgement, fns 1456, 1462-1463).

which provide evidence that *all* members of the KB and the ATG Baja Kraljevic withdrew from Doljani to Široki Brijeg immediately after Čikota was killed on 20 April 1993.[787] Naletilić therefore contends that "[i]t is absurd for the Trial Chamber to find members of the KB destroyed property, when they were, according to the Prosecution [W]itness [Falk] Simang, and Prosecution Exhibit PP 928, not in Doljani when the houses were burnt".[788]

383. The Trial Chamber found:

> With regard to the destruction in Doljani, [W]itness Falk Simang, a former member of the KB, testified that the KB set fire to all BH Muslim houses in Doljani after 20 April 1993. [. . .] His testimony is corroborated by the Radoš Diary, which holds for 21 April 1993 that "Tuta [Mladen Naletilić] ordered all Muslim houses in Doljani to be burnt down." The Chamber is satisfied that Mladen Naletilić ordered the destruction of the houses in Doljani and that he is responsible under Article 7(1) of the Statute. The Chamber is further satisfied that the destruction was carried out by KB soldiers under the command of Mladen Naletilić. Mladen Naletilić knew about the destruction, since he himself had ordered it; he did not prevent it and, therefore, he is also responsible under Article 7(3) of the Statute.
>
> The Chamber finds Mladen Naletilić guilty of wanton destruction not justified by military necessity under Article 3(b) of the Statute in Doljani between 21 and 22 April 1993. He is responsible both under Articles 7(1) and 7(3) of the Statute. The Chamber finds the responsibility of Mladen Naletilić most appropriately described under Article 7(1) of the Statute (Count 20).[789]

The first military operation in Doljani referred to by Witness Falk Simang was the operation where Čikota was killed.[790] The second operation mentioned by Witness Falk Simang was the military operation that took place on 21 and 22 April 1993 when the KB soldiers returned to Doljani after Čikota's funeral.[791] The Radoš Diary states that fighting took place in Doljani on 20 April 1993, the same day that Čikota was killed,[792] and that Naletilić ordered Muslim houses in Doljani to be burned on 21 April 1993.[793] Naletilić has failed to demonstrate that it was unreasonable for the Trial Chamber to find that this military action on 20 April 1993 referred to in the Radoš Diary corresponds with the first military action mentioned by Witness Falk Simang. Whether or not the Radoš Diary explicitly refers to a second operation after the death of Čikota on 21 and 22 April 1993 is irrelevant, since it is clear that the Radoš Diary refers to the "first" military action and to Naletilić's subsequent order the next day that all Muslim houses in Doljani be burned. At footnote 1456, the Trial Chamber stated that "Witness Falk Simang testified that [the] KB set to fire all BH Muslim houses in Doljani after the death of Mario Hrkač (Čikota), witness Falk Simang, T 3809-3810. *See* also Radoš Diary, exhibit PP 928, pp 78-79, where it is stated that after the death of Čikota on 20 April 1993, Tuta (Mladen Naletilić) ordered all Muslim houses in Doljani to be

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[787] Naletilić Revised Appeal Brief, para. 236 (citing Trial Judgement, fns 1456, 1470).
[788] Naletilić Revised Appeal Brief, para. 236.
[789] Trial Judgement, paras 596-597 (footnotes omitted).
[790] Witness Falk Simang, T. 3794-3799.
[791] Witness Falk Simang, T. 3799-3813.
[792] Ex. PP 928, pp. 76-77.

burnt down and that this continued at least until 22 April 1993". Naletilić has failed to show that it was unreasonable for the Trial Chamber to find that the deliberate destruction of houses in Doljani occurred on 21 and 22 April 1993.

384. Finally, Naletilić has failed to support his argument that the Trial Chamber erred in concluding that the KB soldiers carried out his order to completely destroy Doljani between 21 and 22 April 1993 following the funeral of Čikota. He fails to point to any evidence establishing, as he argues, that it would not have been possible for the KB soldiers to have been evacuated from Doljani for Čikota's funeral and then return to Doljani the next day in a second military operation to carry out Naletilić's order to destroy Doljani. Therefore, the Appeals Chamber finds that Naletilić has failed to demonstrate that no reasonable trier of fact could have concluded, based on the totality of the evidence before the Trial Chamber with regard to the events in Doljani, that there was an attack on Doljani on 20 April 1993 during which Čikota was killed; that following the attack, the KB withdrew to Široki Brijeg for Čikota's funeral; and that, between 21 and 22 April 1993, pursuant to Naletilić's order, there was wanton destruction of property in violation of Article 3(b) of the Statute. A reasonable trier of fact could still reach that conclusion even after considering Witness Falk Simang's testimony that the KB returned to Doljani a few days after Čikota's funeral, because Witness Falk Simang made clear in his testimony that he was not able to give exact lengths of time.

385. On the basis of the foregoing, Naletilić's 27th ground of appeal is dismissed in its entirety.

P. Article 7(3) responsibility for plunder (28th ground of appeal)

386. The Trial Chamber found Naletilić responsible for plunder committed in Mostar by the KB pursuant to Articles 3(e) and 7(3) of the Statute.[794] Naletilić challenges this finding. Most of his arguments amount to a reiteration of his previous contentions concerning Witness Falk Simang, and the Appeals Chamber will not address them here. In addition, he contends that the Trial Chamber's finding at paragraph 631 that he was present in "some instances of plunder" makes too much of Witness Falk Simang's testimony, which stated only that he was present in one instance. He further contends that his presence during one instance of plunder is insufficient to support a conviction under Article 7(3).[795]

387. The Appeals Chamber notes that the testimony of Witness Falk Simang did not specify whether Naletilić was present on one or more occasions when the witness and other soldiers under

[793] Ex. PP 928, p. 78.
[794] Trial Judgement, para. 631.
[795] Naletilić Revised Appeal Brief, para. 239.

Naletilić's authority loaded looted goods onto the Bofors and their cars. However, even if Naletilić is correct in arguing that the Trial Chamber was unreasonable because it "ma[de] too much of [Witness Falk] Simang's actual testimony" when it found that Naletilić "was present in *some instances* of plunder"[796] carried out by soldiers under his authority, the Appeal Chamber is of the view that he has not shown that this error led to a miscarriage of justice. Under the circumstances, Naletilić's personal observation of even one instance of his subordinates' looting was sufficient to put him on notice and obligate him to take action to punish the perpetrators and prevent further plunder.

388. On the basis of the foregoing, Naletilić's 28th ground of appeal is dismissed in its entirety.

Q. Alleged error relating to persecutions (18th ground of appeal)

389. Under this ground of appeal, Naletilić alleges that the Trial Chamber erred in finding him guilty of persecutions based on the evidence presented at trial.[797] Naletilić incorporates the arguments raised under his 12th, 25th, 26th, 27th and 28th grounds of appeal.[798] He argues that, since he has demonstrated under the aforementioned grounds of appeal that the evidence was insufficient to establish his involvement in (1) the unlawful transfer of civilians from Sovići, Doljani and Mostar (25th and 26th grounds of appeal);[799] (2) wanton destruction of property (27th ground of appeal);[800] and (3) plunder in Mostar after 9 May 1993 (28th ground of appeal)[801] which, he submits, provided the basis for his conviction for persecutions, the Trial Chamber's findings related to his alleged involvement in these respective crimes should not have been used to support his conviction for persecutions.[802]

390. The Appeals Chamber has dismissed Naletilić's 12th, 25th, 26th, 27th and 28th grounds of appeal in their entirety, and, accordingly, dismisses his 18th ground of appeal.

R. Mistreatment of Witnesses Salko Osmić, TT, B and RR (29th ground of appeal)

391. Under this ground of appeal, Naletilić submits that the Trial Chamber erred in finding him responsible for torture and severe mistreatment of Witnesses TT, B and Salko Osmić at the fishfarm

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796 Naletilić Revised Appeal Brief, para. 239 (emphasis added).
797 Naletilić Notice of Appeal, p. 7.
798 Naletilić Revised Appeal Brief, para. 164.
799 Naletilić Revised Appeal Brief, para. 165.
800 Naletilić Revised Appeal Brief, para. 166.
801 Naletilić Revised Appeal Brief, para. 167.
802 Naletilić Revised Appeal Brief, paras 165-167.

in Doljani on 20 April 1993.[803] To the extent his arguments repeat those raised elsewhere, the Appeals Chamber will not address them.

392. Naletilić challenges first the reliability of Witness Salko Osmić's testimony, who testified that he was beaten by Čikota while according to him all the evidence points to the fact that "Čikota was killed that day [on] the hills outside Doljani."[804] This contention is a mere repetition of an argument raised at trial.[805] The Trial Chamber expressly considered that "the fact that Čikota [...] was killed later the same day on a rock below Doljani [does not] exclude the reasonable finding that he was present at the fishfarm in Doljani at the time when the beatings occurred".[806] Naletilić does not establish that the Trial Chamber erred in its assessment of the reliability of the testimony of Witness Salko Osmić.

393. Naletilić argues next that Witness NR testified that he [Naletilić] was in Doljani "only a short time to pick up the bodies of fallen soldiers and he then returned to [Š]iroki Brijeg".[807] The Appeals Chamber notes that the Trial Chamber considered the testimony of Witness NR that he met Naletilić in the afternoon of 19 April 1993 on the road in Doljani and that he went together with him in the direction of Široki Brijeg after he heard that Boro Barbarić had been killed.[808] It further concluded that the witness did not testify "as to the whereabouts of Mladen Naletilić on 20 April 1993".[809] Naletilić has failed to demonstrate any error in the Trial Chamber's finding.

394. Naletilić argues next that Witness TT's testimony was hearsay.[810] In light of the testimony of Witness TT, the Appeals Chamber understands Naletilić to be arguing that Witness TT's evidence of identification was hearsay since he did not find out until later and from somebody else that the individual who hit him in the face and who threatened him was Mladen Naletilić.[811] Naletilić does not explain why it was unreasonable for the Trial Chamber to rely on this evidence.

395. For the foregoing reasons, Naletilić's 29th ground of appeal is dismissed in its entirety.

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[803] Naletilić Notice of Appeal, p. 9. Although the relevant heading in the Naletilić Notice of Appeal mentions Witness RR, Naletilić does not refer to that witness in his Revised Appeal Brief, and in fact he was not found guilty of mistreating that witness.
[804] Naletilić Revised Appeal Brief, para. 241a.
[805] Trial Judgement, para. 360, fn. 959. Fn. 156 of the Naletilić Revised Appeal Brief refers to Trial Judgement, fn. 1470. The latter does not show any error, since in it the Trial Chamber is satisfied that Čikota's death occurred on 20 April 1993, which is not contested: *see* Trial Judgement, fn. 1470.
[806] Trial Judgement, para. 365.
[807] Naletilić Revised Appeal Brief, para. 241a.
[808] Trial Judgement, para. 364.
[809] Trial Judgement, para. 364.
[810] Naletilić Revised Appeal Brief, para. 241a.
[811] *See* Trial Judgement, paras 354-355, fn. 946 (citing Witness TT, T. 6643, 6645).

S. Mostar "lost files" (30th ground of appeal)

396. Under this ground of appeal, Naletilić submits that the Trial Chamber erred and abused its discretion in failing to (1) order the Prosecution to disclose what he refers to as the Mostar "lost file"[812] and (2) take steps *sua sponte* to obtain the entire file and/or to issue a subpoena *duces tecum* upon his request for the files.[813] He acknowledges that, after several months, the Prosecution finally delivered two binders of documents associated with the "lost file" to him, but submits that the pertinent information, witness statements and records of trial testimony of witnesses were not included, and that the Prosecution was unable to explain the reason for this omission.[814] He alleges that at least one witness who testified in the Mostar case was a witness against Naletilić in the present case, and claims that the file would have been valuable in cross-examining the witnesses.[815] He reiterates the argument he raised at trial that the "lost file" would have been extremely valuable to cross-examine the witnesses who testified on Sovići and Doljani.[816]

397. On 8 March 2002, Naletilić filed a "Request for Order for Disclosure by the Prosecution", in which he sought disclosure by the Prosecution of "the entire file from the High Court of Mostar, Left Bank, Case No. 14/96, dated 29th May 1996" which, he submitted, was the same case as Case No. 5/96 and was given that Case number when the two Courts in Mostar combined in 1996.[817] A series of exchanges between the Parties and the Tribunal ensued.[818] On 22 April 2002, Naletilić filed a translated Indictment in Case No. KT 10/94, which he asserted concerned the war crimes

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[812] *See* Trial Judgement, Annex II, Procedural Background, para. 24, where the Trial Chamber refers to the files in question as "Missing files" and summarises the related procedure.
[813] Naletilić Notice of Appeal, p. 9; Naletilić Revised Appeal Brief, paras 243, 246.
[814] Naletilić Revised Appeal Brief, para. 244.
[815] Naletilić Revised Appeal Brief, para. 245.
[816] Naletilić Revised Appeal Brief, para. 245.
[817] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Naletilić Request for Order for Disclosure by the Prosecution, 8 March 2002, p. 2. Naletilić argued that these files concerned alleged war crimes in the area of Sovići, on or about 17 April 1993, that they were in the possession of the Prosecution and that they were expected to contain exculpatory evidence.
[818] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution Response to Accused Naletilić's Request for Order for Disclosure by the Prosecution, 21 March 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Naletilić Reply to Response of Prosecution to Naletilić Motion for Disclosure of "Lost Files" Concerning Sovići Conflict, 22 March 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Motion of Accused Naletilić for an Order to Institute an Investigation into the Matter of the "Missing Files", 22 March 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Order to the Prosecution to Provide Definite Information on their Alleged Possession of the Mostar Court Files, 27 March 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution's Response Concerning So-called "Missing Files", 4 April 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Order for Additional Information, 5 April 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Reply to Prosecution Response Concerning So-called "Missing Files", 8 April 2002; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission of Letter of Honorable Častimir Mandarić Concerning the "Missing Files", 10 April 2002 ("Naletilić Submission of Letter Concerning 'Missing Files'").

alleged to have occurred in Sovići on 17 April 1993 and the days which followed.[819] On 29 May 2002, the Prosecution disclosed a copy of Mostar High Court File K-5/96 to Naletilić.[820] On 23 September 2002, Naletilić filed a further motion requesting an order to the President of the County Court of Konjic to produce materials from the Case No. KT 10/94.[821] The Trial Chamber denied Naletilić's motion on the basis that he had not provided any information as to the steps taken in order to obtain the requested material directly from the County Court of Konjic.[822]

398. With regard to the first alleged error – refusal to order disclosure by the Prosecution – the Appeals Chamber notes that it is still unclear whether the case No. KT-10/94 of the County Court of Konjic comprises Cases Nos. 5/96 and 14/96, which Naletilić had earlier requested and which the Prosecution had disclosed to him on 29 May 2002. Naletilić never gave any details or explanation as to the change in the case number of the case he was looking for. In any case, to the extent that Naletilić was seeking disclosure of documents not already disclosed by the Prosecution, the Appeals Chamber is not convinced that Naletilić has shown that the documents he sought were in the possession of the Prosecution, and therefore that the Trial Chamber erred in refusing to order the Prosecution to disclose the materials he was seeking.[823]

399. With regard to the Trial Chamber's second decision refusing to subpoena the President of the Konjic County Court, Naletilić does not show how the Trial Chamber erred in its reasoning. "Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[824] The Trial Chamber acted reasonably in denying the subpoena because Naletilić provided no information about the steps he had taken in order to obtain the files directly from the Konjic County Court.[825]

400. For these reasons, Naletilić's 30th ground of appeal is dismissed in its entirety.

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[819] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission of High Court of Mostar Indictment Concerning Sovići, or the "Lost Files" (Confidential), 22 April 2002, p. 2, read together with Naletilić Submission of Letter Concerning "Missing Files", p. 2.

[820] *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Prosecution's Submission Regarding the Mostar High Court File (Confidential), 29 May 2002.

[821] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Request for Issuance of Subpoena *Duces Tecum* per Rule 54 (Confidential), 23 September 2002, p. 2.

[822] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Decision on the Accused Naletilić's Request for Issuance of Subpoena *Duces Tecum* per Rule 54 (Confidential), 15 October 2002 ("15 October 2002 Decision on 'Lost Files'"), p. 2.

[823] *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, 268. *See* also *Kajelijel*i Appeal Judgement, para. 262.

[824] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6; *Prosecutor v. Radoslav Brđanin and Momir Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

[825] 15 October 2002 Decision on "Lost Files", p. 2.

T. Trial Chamber's decisions on the admission of evidence (31st ground of appeal)

401. Under this ground of appeal, Naletilić challenges all the decisions of the Trial Chamber admitting documents tendered by the Prosecution into evidence during the course of the trial as denying his right to a fair trial.[826] The Appeals Chamber recalls that throughout the trial, 38 written decisions and 50 oral decisions were issued by the Trial Chamber on evidentiary matters.[827] The Trial Judgement refers to the standard applied by the Trial Chamber, namely that, "[i]n accordance with the Tribunal's jurisprudence and Rule 89(C)", it admitted evidence "that presented 'sufficient *indicia* of reliability' and which it deemed to be relevant and probative".[828]

402. Naletilić first challenges all Trial Chamber's decisions on admission of documentary evidence. As to his specific argument that where the tendering party has not proven the authenticity of a document then that document is necessarily irrelevant, the Appeals Chamber finds the argument devoid of merit. Pursuant to Rule 89(C), a Chamber may admit any relevant evidence which it deems to have probative value. The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – "is a factor in the assessment of its relevance and probative value".[829] There is no separate threshold requirement for the admissibility of documentary evidence.

403. As to his further general submission incorporating by reference all objections lodged during trial and alleging broadly that the Trial Chamber made erroneous rulings on evidentiary matters, the Appeals Chamber considers that Naletilić does not meet his burden on appeal. He does not even attempt to show how the Trial Chamber erred in admitting the evidence. Therefore the Appeals Chamber need not discuss the merit of these allegations.

404. Accordingly, Naletilić's 31st ground of appeal is dismissed in its entirety.

U. Evaluation of conflicting evidence (32nd ground of appeal)

405. Under this ground of appeal, Naletilić alleges that the Trial Chamber erred and abused its discretion in not considering conflicting evidence in a light more favourable to him, thus violating his right to a fair trial.[830] He specifically refers to paragraphs 107 and 143 of the Trial Judgement.[831]

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[826] Naletilić Notice of Appeal, p. 9; Naletilić Revised Appeal Brief, para. 251.
[827] *See* Trial Judgement, Annex II -Procedural Background, para. 19.
[828] Trial Judgement, Annex II - Procedural Background, para. 19.
[829] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998, paras 17, 20, 25. *See* also *Aleksovski* Decision on Admissibility of Evidence; *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000.
[830] Naletilić Notice of Appeal, p. 9.

Naletilić argues that, when presented with conflicting evidence, the Trial Chamber routinely resolved these conflicts in favour of guilt, without offering any explanations.[832]

406. Paragraph 107 of the Trial Judgement is inserted in the General Findings section, in a subsection dealing with the units of the KB. In this paragraph, the Trial Chamber concluded that the "Baja Kraljević ATG was part of the KB". That conclusion was "based on both documents and reliable witness testimonies".[833] The only reference to conflicting evidence is found in footnote 299, which reads as follows:

> The Chamber does not find the testimonies of Defence Witness NM, T 12750, 12801 [private session], 1288; and Defence [W]itness NR, T 13318 [private session] credible, according to which the Baja Kraljević ATG was not part of the KB, as they are inconsistent with other evidence. *See* [E]xhibits PP 759.1 (confidential), PP 804.1 (confidential).

The Appeals Chamber notes that the Trial Chamber provided its reasoning for choosing to rely on the Prosecution exhibits and not on the conflicting testimonies of Defence Witnesses NM and NR. Naletilić fails to demonstrate that the Trial Chamber's reliance upon the Prosecution exhibits was unreasonable.

407. Paragraph 143 is inserted in the General Findings section, in a subsection dealing with Naletilić's command position in the operations in Mostar on 9 May 1993. It summarises the testimonies of Witnesses F, WW and GG who gave evidence that Martinović and "Tuta's men", amongst others, were expelling Muslims from their flats. No conflicting evidence is found in paragraph 143. To the extent that this paragraph is concerned, Naletilić's argument is therefore irrelevant.[834]

408. On the basis of the foregoing, this ground of appeal is dismissed in its entirety.

V. Non-combatant status of Witness FF (33rd ground of appeal) and unlawful detention of Witness O (34th ground of appeal)

409. Under his 33rd ground of appeal, Naletilić argues that the Trial Chamber's description of Witness FF as a non-combatant in paragraph 656 of the Trial Judgement contradicts its own findings at paragraphs 435 and 445 that the witness was an ABiH member. Under his 34th ground of

[831] Naletilić Notice of Appeal, p. 9.
[832] Naletilić Revised Appeal Brief, para. 252.
[833] Trial Judgement, para. 107 (footnote omitted).
[834] The Appeals Chamber will not consider Naletilić's further claim that the Trial Chamber ignored the testimony of certain other specific witnesses, because he raises it for the first time in his Reply Brief and fails to relate it to the arguments made in his appeal brief. *See* Naletilić Reply Brief, para. 44.

appeal, he challenges the sufficiency of the evidence and reasoning supporting the Trial Chamber's finding, also at paragraph 656, that Witness O was a non-combatant.[835]

410. The Appeals Chamber notes that the Trial Judgement does not appear to provide any explanation as to why the Trial Chamber found at paragraph 656 of the Trial Judgement that Witness FF was one of the non-combatants detained in Ljubuški prison while it had found earlier at paragraphs 435 and 445 of the Trial Judgement, related to the mistreatment of Witness FF at the Heliodrom, that the same person was an ABiH member from Mostar. Even assuming that the Trial Chamber erred when it found that Witness FF was a non-combatant, the error in question did not lead to a miscarriage of justice since the Trial Chamber ultimately found at paragraph 659 of the Trial Judgement that the Prosecution had failed to establish that Naletilić bore criminal responsibility for the detention of BH Muslim civilians at Ljubuški prison. For this same reason, the Appeals Chamber does not need to consider the merit of Naletilić's arguments under his 34th ground of appeal because even if it were established that the Trial Chamber erred in finding that Witness O was a Muslim civilian imprisoned with the excuse of a mock trial, no miscarriage of justice would result in light of the Trial Chamber's conclusion at paragraph 659 of the Trial Judgement.

411. Naletilić's second argument under his 33rd ground of appeal is that another contradiction exists between paragraph 681 of the Trial Judgement, where the Trial Chamber found that the evidence is not clear as to the ground on which the beatings of Witnesses Z, Y and H were administered and that for this reason it had not been established that they constituted underlying acts of persecutions, and paragraph 679, where the Trial Chamber found that the mistreatment of Witness Z, a prominent SDA member, was carried out by Naletilić on the basis of political discrimination.[836]

412. The Appeals Chamber notes that the heading of Naletilić's 33rd ground of appeal is clearly limited to the disputed non-combatant status of Witness FF. Although it refers to paragraph 681 of the Trial Judgement, which concerns both Witnesses FF and Z, Naletilić's sub-ground of appeal on the alleged contradiction in the Trial Chamber's findings concerning Witness Z goes beyond the scope of the Naletilić Notice of Appeal, and he has failed to seek leave to amend his Notice of Appeal as required under Rule 108. The Appeals Chamber further notes that the Prosecution has objected to this argument as being outside of the scope of Naletilić's appeal and has not fully

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[835] Naletilić Notice of Appeal, p. 10; Naletilić Revised Appeal Brief, paras 254, 257, 262.
[836] Naletilić Revised Appeal Brief, paras 258-259; Confidential Naletilić Revised Appeal Brief, para. 258.

addressed it in its brief.[837] Consequently, the Appeals Chamber dismisses Naletilić's argument in this regard and declines to address it.

413. For the foregoing reasons, Naletilić's 33rd and 34th grounds of appeal are dismissed in their entirety.

W. Rudolf Jozelić (35th ground of appeal)

414. Naletilić alleges that the Trial Chamber erred in finding that Rudolf Jozelić was beaten by two of Naletilić's subordinates.[838] In light of the Appeals Chamber's finding, under Naletilić's 21st ground of appeal, that Naletilić could not have been held responsible pursuant to Article 7(3) of the Statute for the cruel treatment and wilfully causing great suffering inflicted upon prisoners at Ljubuški prison, and for persecutions by these underlying acts, there is no need for the Appeals Chamber to address Naletilić's 35th ground of appeal.

X. Credibility of Witness Ekrem Lulić (36th ground of appeal)

415. Under this ground of appeal Naletilić alleges that the Trial Chamber erred in finding Witness Ekrem Lulić, among others, to be a credible witness in light of the evidence presented.[839] Naletilić argues that the Trial Chamber repeatedly gave credit to Prosecution witnesses as to the alleged events in Sovići while ignoring Defence witnesses and exhibits on the same subject.

416. Since Naletilić raises no specific argument in relation to other Prosecution witnesses, the Appeals Chamber has limited its consideration of Naletilić's 36th ground of appeal to Witness Ekrem Lulić. Naletilić has failed to demonstrate that the Trial Chamber erred in holding that this witness' account of the events in Sovići was credible.[840] Naletilić has not demonstrated that its explanation was unreasonable.[841] Naletilić fails to establish how the Trial Chamber's reliance upon Witness Ekrem Lulić and its conclusion with regard to the testimony of Defence Witness NL were unreasonable. This ground of appeal is dismissed in its entirety.

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[837] Prosecution Response to Naletilić Revised Appeal Brief, para. 8.2, fn. 485.
[838] Naletilić Notice of Appeal, p. 10.
[839] Naletilić Notice of Appeal, p. 10; Naletilić Revised Appeal Brief, p. 88.
[840] Trial Judgement, fn. 344.
[841] The Appeals Chamber notes that footnote 344, supporting the Trial Chamber's finding at paragraph 123 of the Trial Judgement that "[s]everal witnesses testified that they saw Mladen Naletilić at the Sovići school on 18 April 1993", refers to *inter alia* the testimony of "Witness Ekrem Lulić, whom the [Trial] Chamber finds credible regarding his description of the events in Sovići, [and who] stated that Mladen Naletilić lined up the prisoners in the schoolyard and blamed them for having organised an armed rebellion against the legal Croatian authorities, [W]itness Ekrem Lulić, T 647-648, T 650-651." Further, footnote 345 supporting the Trial Chamber's finding in the same paragraph that "[Mladen Naletilić's] men were among the soldiers who took the prisoners from the school to buses and escorted them to Ljubuški" also refers *inter alia* to the testimony of "Witness Ekrem Lulić, T 649." The Appeals Chamber notes further that, contrary to Naletilić's assertion, the Trial Chamber explained at paragraphs 119, 121 and 122 of the Trial

Y. Cumulative effect of alleged abuses of discretion (39th ground of appeal)

417. Naletilić alleges under this ground of appeal that the Trial Chamber erred and abused its discretion during the course of the trial, and that under the circumstances the cumulative effect of these abuses was to deny him a fair trial.[842] Naletilić submits that the Trial Chamber committed numerous minor and major errors during the course of the trial, and that "[m]ost of these errors have been pointed out above", although he also lists a number of specific orders and decisions of the Trial Chamber.[843]

418. To the extent that Naletilić refers to alleged errors he has raised elsewhere in the Naletilić Revised Appeal Brief, the Appeals Chamber has already dealt with these. Those errors in question which the Appeals Chamber has found to be established under the respective grounds of appeal do not cumulatively warrant a new trial. Rather, the Appeals Chamber will consider their implications for Naletilić's sentence. To the extent that Naletilić refers to the Trial Chamber's orders and decisions which he has not otherwise challenged elsewhere in his Revised Appeal Brief, he has provided no arguments as to why the Trial Chamber erred. His 39th ground of appeal is dismissed in its entirety.

Judgement the reasons why it did not find that the testimony of Defence Witness NL excluded that Mladen Naletilić was, at least for some time, in Sovići on 18 April 1993.

[842] Naletilić Notice of Appeal, p. 11.

[843] Naletilić Notice of Appeal, p. 11; Naletilić Revised Appeal Brief, para. 278.

VII. SECOND GROUND OF APPEAL OF MARTINOVIĆ

419. In his second ground of appeal Martinović alleges that the Trial Chamber erred in its evaluation of the evidence presented at trial in relation to all the Counts for which Martinović was found guilty.[844]

A. Unlawful labour and human shields

420. The Trial Chamber found Martinović responsible for inhuman treatment, cruel treatment, unlawful labour and inhumane acts under Articles 2(b), 3, 5(i) and 7(1) of the Statute for ordering prisoners of war to work in dangerous conditions in his area of responsibility,[845] as well as for ordering four prisoners of war to walk across the front line with wooden rifles in his area of responsibility on 17 September 1993 (Counts 2, 3, 4 and 5).[846] The Trial Chamber further found Martinović responsible for unlawful labour under Articles 3 and 7(1) of the Statute for ordering prisoners to turn a private property into the headquarters of the Vinko Škrobo ATG (Count 5).[847] Finally, for the use of detainees to assist in the looting of private property, the Trial Chamber found Martinović responsible for unlawful labour under Articles 3 and 7(3) of the Statute (Count 5).[848]

1. Unlawful labour in the area of responsibility of the Vinko Škrobo ATG[849]

421. Martinović submits that the Trial Chamber erred in fact by finding that he ordered prisoners of war to work in dangerous conditions in the area of responsibility of the Vinko Škrobo ATG.[850] Martinović brings five arguments in support of his challenge, which will be considered in turn.

(a) Jurisdiction over prisoners of war at work for the Vinko Škrobo ATG

422. In the first place, Martinović argues that the Trial Chamber erred in holding that prisoners of war were sent at the request of individual units and for the needs that the units expressed at their

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[844] Martinović Notice of Appeal, p. 4; Martinović Appeal Brief, para. 16.
[845] Trial Judgement, paras 271-272.
[846] Trial Judgement, paras 289-290. As a result of cumulative convictions coming into play, no conviction was entered for cruel treatment under Count 4: Trial Judgement, paras 733, 767, 768.
[847] Trial Judgement, paras 311, 313. For these incidents, the Trial Chamber was also satisfied that Martinović's responsibility had been established under Article 7(3) of the Statute, but found that his responsibility was most appropriately described under Article 7(1): Trial Judgement, paras 272, 290, 313.
[848] Trial Judgement, paras 310, 334.
[849] *See* Martinović Notice of Appeal, pp. 5-6.
[850] The Appeals Chamber notes that the Trial Chamber interpreted the Prosecution as having admitted in its Final Trial Brief that it had failed to establish whether the victims were civilians or prisoners of war: Trial Judgement, para. 252. The Trial Chamber found the application of the regime laid out in Geneva Convention III in relation to unlawful labour to be more favourable to the accused than the protection afforded to civilian detainees under Geneva Convention IV, and therefore applied only "the lower standard laid out in Geneva Convention III relating to the labour of prisoners of war": Trial Judgement, para. 252.

own discretion.[851] According to Martinović, the prisoners' assignment to work and their stay were within the sole discretion of the Military Police.[852] As a result, he contends, the Trial Chamber erroneously concluded that the prisoners of war at work for the Vinko Škrobo ATG were under his exclusive jurisdiction.[853]

423. Contrary to Martinović's argument, the Trial Chamber did not find that the detainees were under the Vinko Škrobo ATG's "exclusive jurisdiction". The Trial Chamber found that prisoners of war "were sent on the request and for the discretionary needs of the individual units", and that "the responsibility to treat the detainees in accordance with the Geneva Conventions rested on the member of the unit who came to pick them up, which Defence Witness NO also confirmed".[854] For its findings, the Trial Chamber relied on the same evidence that Martinović relies on appeal.

424. Martinović relies on Exhibits PP 505, PP 512, PP 515, PP 554 and the testimony of Defence Witness NO for his assertion that the Trial Chamber's aforementioned findings are erroneous.[855] However, a review of these exhibits shows that the requests to take out prisoners were made on behalf of the Vinko Škrobo ATG, that the persons picking up the prisoners were members of the Vinko Škrobo ATG and that the orders all explicitly require the person who picked up the prisoners to treat them in accordance with the Geneva Conventions. The Appeals Chamber further notes that the evidence given by Defence Witness NO and invoked by Martinović supports the Trial Chamber's conclusion that the individual removing prisoners from the Heliodrom was entrusted with their safety.[856]

425. Martinović further argues that the individual cases mentioned in the Trial Judgement where he asked for prisoners to work in his unit in order to protect them do not represent proof of his power or authority,[857] but does not explain how and why that is so.[858]

426. In light of the foregoing, Martinović has not demonstrated that the Trial Chamber's findings were unreasonable.

[851] Martinović Appeal Brief, para. 24.
[852] Martinović Appeal Brief, paras 26-28 (citing, *inter alia*, Defence Witness NO, T. 12967).
[853] Martinović Appeal Brief, para. 33.
[854] Trial Judgement, paras 264, 265 (citing Defence Witness NO, T. 12967).
[855] Martinović Appeal Brief, paras 26-28 (citing, *inter alia*, Defence Witness NO, T. 12967).
[856] Defence Witness NO, T. 12967-12969.
[857] Martinović Appeal Brief, para. 34.
[858] The Trial Chamber found that in some cases Martinović himself picked up detainees to work for his unit: Trial Judgement, para. 265 (citing Ex. PP 597.1; Witness HH, T. 4822-4823; Ex. PP 434, pp. 11-13 [confidential]).

(b) Treatment of prisoners of war

427. In the second place, Martinović submits that the evidence does not support the Trial Chamber's conclusion in paragraphs 267 to 269 of the Trial Judgement that there were "privileged" prisoners who did not suffer treatment in contravention of the Geneva Conventions in contrast to the majority of prisoners, who did suffer such violations.[859]

428. The Trial Chamber heard several Defence witnesses who gave evidence that Martinović treated prisoners well.[860] However, it was

> […] not persuaded by this version of the facts. While it has no doubt that some of the prisoners enjoyed a privileged treatment and a certain protection from Vinko Martinović, either because they were friends or family acquaintances before the war or because they had special skills, it is satisfied that this was not the case for the vast majority of the Heliodrom detainees who were taken to work to the Vinko Škrobo ATG.[861]

429. The Trial Chamber then went on to find, in paragraph 268 of the Trial Judgement, that numerous prisoners of war were forced to perform military support tasks in extremely dangerous conditions, such as digging trenches near the frontline, sealing exposed areas with sandbags, carrying explosives over the frontline and retrieving bodies of wounded and killed HVO soldiers.[862] The prisoners were often directly exposed to fire from the other side of the front-line, as a result of which some were injured.[863]

430. Martinović's argument does not demonstrate that no reasonable trier of fact could have reached the findings set out above. He has merely offered an alternative assessment of the evidence without indicating in what respect the Trial Chamber's assessment of the evidence was erroneous. The Appeals Chamber therefore dismisses the arguments without addressing their merits.[864]

(c) Nature of the labour performed in the Vinko Škrobo ATG

431. Martinović also challenges the findings in paragraph 268 and footnotes 722-729 of the Trial Judgment and submits that there was no factual basis to conclude that the nature of the work performed by the prisoners of war was unlawful.[865]

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[859] Martinović Appeal Brief, paras 36-38, 63, 65 (citing Witness ME, T. 14102-14103; Witness MI, T. 14321), 66, 70, 74.
[860] Trial Judgement, para. 266, fn. 718 (citing, *inter alia*, Witness ME, T. 14100-14102, 14133-14134 (private session), 14104-14105; Witness MI, T. 14318-14327).
[861] Trial Judgement, para. 267 (footnotes omitted).
[862] Trial Judgement, para. 268.
[863] Trial Judgement, para. 268.
[864] *See Vasiljević* Appeal Judgement, para. 12.
[865] Martinović Appeal Brief, paras 36-38.

432. First, Martinović argues that the evidence of his Defence Witnesses MM, MN, MO, MP and MQ demonstrates that sandbag fortifications already existed on the 200 metres of front line held by his unit and that none of these witnesses refuted that nothing changed with regard to fortifications since the beginning of the conflict.[866] He further argues that in the part of the frontline held by the Vinko Škrobo ATG there was objectively no need for the kind of work described by the Trial Chamber.[867] Martinović has not provided the Appeals Chamber with specific references to the parts of the Trial Record he is using to support these allegations.[868] The Appeals Chamber therefore will not consider these arguments.[869]

433. Secondly, Martinović contends that the evidence given by the Prosecution Witnesses AF, PP, YY, II, EE, KK, OO and others did not relate to his area of responsibility.[870] The Trial Chamber took this fact into account in the context of Martinović's responsibility under Article 7(3) of the Statute.[871] It relied in this regard on numerous witnesses who gave evidence that prisoners were used for work at or in the immediate vicinity of the Health Centre.[872] The Appeals Chamber finds that it was open to a reasonable trier of fact to conclude from this evidence that prisoners were used for work in Martinović's area of responsibility, even given that it only comprised about 200 metres along the Health Centre. Furthermore, Martinović does not otherwise substantiate his challenges to the aforementioned Prosecution witnesses.

(d) Injuries sustained by prisoners of war at work for the Vinko Škrobo ATG

434. Martinović challenges the Trial Chamber's finding at paragraph 271 of the Trial Judgement that, since the injuries sustained by some of the prisoners in the course of their work caused them serious mental harm or physical suffering or injury, the charges of inhumane acts, inhuman treatment and cruel treatment had been established (Counts 2 to 4).[873] He argues that the Trial Chamber did not include the incident with wooden rifles in this finding, and therefore that the persons and events to which this finding pertains remain unclear.[874]

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[866] Martinović Appeal Brief, paras 39-40.
[867] Martinović Appeal Brief, paras 42-46.
[868] Martinović was asked to clarify this point in the course of the Appeals Hearing but did not do so: Scheduling Order for Appeals Hearing, p. 3. *See* also Practice Direction on Formal Requirements for Appeals from Judgement of 7 March 2002, (IT/201), paras 4 (b) (ii), 13, 17.
[869] *Kvočka et al.* Appeal Judgement, para. 15; *Kunarac et al.* Appeal Judgement, para. 43-44; *Krnojelac* Appeal Judgement, para. 16; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, paras 21-23.
[870] Martinović Appeal Brief, paras 44, 45, 47, 48.
[871] Trial Judgement, para. 272.
[872] *See, inter alia,* Trial Judgement, fn. 722 (citing Witness AF, T. 15940; Witness YY, T. 7269); *ibid.,* fn. 723 (citing Witness F, T. 1105 (the Appeals Chamber notes that this reference should instead be to T. 1106); Witness H, T. 1313); *ibid.,* fn. 724 (citing Witness KK, T. 5191; Witness OO, T. 5939); *ibid.,* fn. 726 (citing Witness I, T. 1423-1424); *ibid.,* fn. 727 (citing Witness Allan Knudsen, T. 5608; Witness II, T. 4970).
[873] Martinović Appeal Brief, para. 49.
[874] Martinović Appeal Brief, para. 49.

435. The Appeals Chamber emphasises that the Trial Judgement must be read as a whole. In paragraph 268 of the Trial Judgement, the Trial Chamber found that prisoners were injured in the course of their work in the area of responsibility of the Vinko Škrobo ATG as they were often directly exposed to fire from the other side of the frontline.[875] In paragraph 271 of the Trial Judgement, the Trial Chamber was satisfied that "some of the prisoners in the course of their work" sustained injuries and that therefore the charges of inhumane acts, inhuman treatment and cruel treatment had been established. Although the conclusion in paragraph 271 does not reiterate or explicitly refer to the findings in paragraph 268 of the Trial Judgement, it is understood that it is based on those findings.

(e) Martinović's individual criminal responsibility

436. Lastly, Martinović challenges, as insufficiently supported by the evidence, the Trial Chamber's findings at paragraph 272 of the Trial Judgement that he sometimes ordered prisoners to perform labour and thus directly exposed them to great risk and that he knew that prisoners were used in his area of command to perform unlawful labour and did not take any measures to prevent such practice or punish those responsible for it.[876]

437. The Trial Chamber based its findings that sometimes Martinović himself ordered prisoners to perform work on the testimonies of Witnesses K and YY.[877] The Trial Chamber also found that, as commander of the Vinko Škrobo ATG, Martinović knew that prisoners were used in his area of command to perform unlawful labour.[878] The bases for these findings are set out in paragraphs 102 (command position) and 264-270 (unlawful labour in his area of command) of the Trial Judgement.[879] Martinović has not explained how this evidence was "insufficient" or how the "testimonies of all witnesses" show that no reasonable trier of fact could have reached the conclusion of the Trial Chamber.[880]

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[875] Trial Judgement, fn. 728.
[876] Martinović Appeal Brief, paras 50-54, 56, 58, 59, 72.
[877] Trial Judgement, para. 272, fn. 738 (Witness K); *ibid*., para. 266, fn. 715 (Witness YY).
[878] Trial Judgement, para. 272.
[879] Martinović's challenges to the Trial Chamber's finding that he bore responsibility for the prisoners that were sent to work in his unit have been dismissed above. Martinović does not challenge the Trial Chamber's finding that he was the commander of the Vinko Škrobo ATG: Trial Judgement, para. 102. The Trial Chamber based its conclusion that in Martinović's unit numerous prisoners were forced to perform unlawful labour *inter alia* on the testimonies of the following: Witnesses AF (T. 15940, 16086); J (T. 1501-02, 1504); PP (T. 6077, 6134); YY (T. 7269); F (T. 1105-1106); H (T. 1313); SS (T. 6557-59); NN (T. 5896, 5906 (private session), 5907 (private session)); A (T. 518, 592); Salko Osmić (T. 3145); KK (T. 5191); OO (T. 5939); MG (T. 14228); EE (T. 4520-23); I (T. 1423-24, 1427-29); Allan Knudsen (T. 5608); Q (T. 2438); II (T. 4970); and ME (T. 14096).
[880] Martinović Appeal Brief, paras 51, 58.

438. Martinović specifically challenges only the evidence given by Defence Witness ML that all orders to prisoners were subject to his approval.[881] Martinović contends that he issued this order with the purpose of protecting the prisoners but he does not bring any support for this allegation or explain how the Trial Chamber's assessment of this evidence was erroneous.[882] Martinović's argument therefore does not meet the formal requirements for review on appeal. The same holds true for his assertion that he did not issue any orders that would harm prisoners.[883] In any event, Martinović does not dispute the fact that all orders to prisoners were subject to his approval and the Trial Chamber's findings on the work that the prisoners were ordered to perform in his unit remain undisturbed.

439. For the foregoing reasons, Martinović's appeal from the Trial Chamber's findings on his responsibility for ordering prisoners of war to work in dangerous conditions in the area of responsibility of the Vinko Škrobo ATG is dismissed.

2. Wooden rifles incident

440. Martinović submits that the Trial Chamber erred in fact by finding that he ordered four prisoners of war to walk across the frontline with wooden rifles on 17 September 1993 in his area of responsibility.[884]

(a) Evaluation of evidence

441. Martinović challenges the fact that the Trial Chamber relied on partly inconsistent evidence.[885] As a general remark, the Appeals Chamber notes that the presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable.[886] Furthermore, the jurisprudence of the International Tribunal confirms that it is not unreasonable for a trier of fact to accept some, but reject other, parts of a witness' testimony[887] and that it is clearly possible for a witness to be correct in his or her assessment of certain facts and incorrect in others.[888] However, the Trial Chamber should consider discrepancies as it assesses and weighs the evidence.[889]

[881] Trial Judgement, fns 715, 738.
[882] Martinović Appeal Brief, paras 52-53.
[883] Martinović Appeal Brief, para. 72.
[884] Martinović Notice of Appeal, p. 6; Martinović Appeal Brief, paras 78-79; Trial Judgement, para. 334.
[885] Martinović Appeal Brief, paras 82-89.
[886] *See Kupreškić et al.* Appeal Judgement, para. 31; *Čelebići* Appeal Judgement, paras 485, 496-498.
[887] *See Kupreškić et al.* Appeal Judgement, para. 333; *Tadić* Trial Judgement, paras 296-302.
[888] *Kupreškić et al.* Appeal Judgment, para. 332.
[889] *Kupreškić et al.* Appeal Judgment, para. 31.

442. In the present case, Martinović has only identified those inconsistencies in the evidence of the relevant Prosecution witnesses which the Trial Chamber had already observed in the Trial Judgement.[890]

443. First, the Trial Chamber observed the inconsistencies in the evidence of Witnesses J, OO and PP relating to their stay together in the basement at the relevant time,[891] their testimonies on the exchange of the detainee who lost consciousness[892] and their description of the wooden rifles.[893] However, the Trial Chamber stated that it

> takes note that the testimonies of the three prisoners involved present some inconsistencies, in particular in relation to the sequence of events before the witnesses were made to cross over. Nevertheless, it does not find those discrepancies to be determinative. In particular, it notes that the testimony of witness OO and witness J are largely consistent, while witness PP had only a vague recollection of the details of the events. However, in relation to the allegation made by the Martinović Defence that totally different descriptions were given of the wooden rifles, the Chamber notes that both witness OO and witness PP testified that the rifles had been painted in black and were bearing a green strap.[894]

It was within the discretion of the Trial Chamber, which provided a reasoned opinion for its finding, to weigh the evidence the way it did and reach this conclusion.

444. Secondly, the Trial Chamber found that the recollections of two former soldiers, Allan Knudsen and Witness Q, of an event involving prisoners with wooden rifles coincided.[895] However, it appears from the Trial Judgement that the different descriptions of the wooden rifles provided by Witnesses OO and PP on the one hand, and by Allan Knudsen and Witness Q on the other, led the Trial Chamber to find that more than one incident involving wooden rifles had taken place:

> [T]he description of the wooden rifles as given by the former soldiers differs from that given by the prisoners involved in the action. While witness OO and witness PP remembered the rifles to be painted black, both witness Allan Knudsen and witness Q testified that the rifles were in natural brown wood. Furthermore, witness Allan Knudsen asserted that he saw those same prisoners used as human shields on 17 September 1993 making the wooden rifles the day before the attack. This is inconsistent with the testimony of the three prisoners who have testified. In light of these discrepancies, the Chamber is not satisfied beyond reasonable doubt that the prisoners and the two former members of the unit were referring to the same incident. It finds that the testimony of the three prisoners is related to the incident alleged in the Indictment.[896]

445. It was not unreasonable for the Trial Chamber to conclude, on the basis of the evidence before it, that it was not satisfied beyond reasonable doubt that Witnesses PP, OO and J on the one

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[890] *Cf. Kupreškić et al.* Appeal Judgement, paras 224-225, 331.
[891] Trial Judgement, para. 279, fn. 764.
[892] Trial Judgement, para. 279, fn. 762.
[893] Trial Judgement, para. 281, fn. 774.
[894] Trial Judgement, para. 281 (footnote omitted). The Trial Chamber further noted that Witness OO recalled having seen a detainee called Hušković painting the last rifle: Trial Judgement, fn. 774, and that Witness J also testified that the wooden rifle had been painted the day before in a dark brown paint by a man called Semir Edić: Trial Judgement, fn. 774.
[895] Trial Judgement, paras 283, 284.
[896] Trial Judgement, para. 286 (footnotes omitted).

hand and Witnesses Allan Knudsen and Q on the other were referring to the same incident.[897] In addition, the Appeals Chamber fails to see how the Trial Chamber's finding that there must have been at least more than one incident involving wooden rifles led to a miscarriage of justice, given that Martinović was not found responsible for any other incident than the one in the Indictment. He was not found responsible for the incident that the soldiers referred to in their evidence, nor was their evidence taken into consideration by the Trial Chamber when it found that the incident alleged in the Indictment took place.[898]

446. Thirdly, with respect to the determination by Witness Q of the date when the incident took place, the Trial Chamber stated in paragraph 282 of the Trial Judgement that

> As corroborative evidence, the Prosecution introduced the testimonies of two former members of the Vinko Škrobo ATG, witness Q and witness Allan Knudsen, who appear to have been related to a similar event involving prisoners using wooden rifles on the same day.[899]

Martinović claims that this conclusion is inconsistent with the evidence, which did not suggest that there was more than one wooden rifles incident on the same day.[900]

447. As stated earlier, the Trial Chamber did not consider the evidence of Witnesses Q and Allan Knudsen when it found that it was the evidence of the three prisoners that corresponded to the incident involving wooden rifles charged in the Indictment. The Trial Chamber relied on the evidence of Witnesses Q and Allan Knudsen for the purposes of refuting the allegation by the Defence that the incident did not take place in Martinović's unit, and to show that Martinović was in command on the frontline in the area of the Health Centre on 17 September 1993.[901] The Trial Chamber was satisfied that Witness Q referred to the attack of 17 September 1993 because Allan Knudsen confirmed that he participated in it together with Witness Q and was certain that it took place on 17 September 1993.[902] Since Allan Knudsen was certain about the date, whereas Witness Q did not remember exactly when it took place,[903] the Appeals Chamber finds that this was an assessment of the evidence of these two witnesses that was not unreasonable.

448. In the second place, Martinović argues that the Trial Chamber accepted those sections of the evidence brought by the Prosecution that were in agreement with the Indictment and ignored or randomly interpreted contradictory sections.[904] He further argues that, in contrast, the Trial

[897] Trial Judgement, para. 286.
[898] Trial Judgement, paras 277-281, 287-288.
[899] Trial Judgement, para. 282.
[900] Martinović Appeal Brief, paras 84-85.
[901] Trial Judgement, para. 290.
[902] Trial Judgement, fn. 775. The Appeals Chamber notes that no specific reference is made in the Trial Judgement to the page in the trial transcript (T. 5637) where Allan Knudsen places the event on 17 September 1993.
[903] Witness Q, T. 2363.
[904] Martinović Appeal Brief, para. 97.

Chamber rejected the contrary testimony of the Defence witnesses without providing a reasoned explanation.[905]

449. It follows from the discussion in the preceding paragraphs that the contradictions invoked by Martinović were neither ignored nor randomly interpreted by the Trial Chamber in reaching its findings. Furthermore, the Appeals Chamber reiterates that a Trial Chamber is not obliged to articulate every step of its reasoning in determining which witness' evidence to prefer.[906] In the present case, the Trial Chamber clearly set out its evaluation of the merits of all the evidence presented to it with regard to the wooden rifles incident.[907] The Trial Chamber thereby provided a reasoned opinion for its conclusion in paragraph 285 of the Trial Judgement that there was "overwhelming evidence" contrary to that presented by Martinović.

(b) Logic of using human shields in the attack

450. Martinović submits that it is not logical that human shields were used alongside a tank for the purpose of ascertaining enemy positions, since both warring parties knew where the other party's positions were, as the positions had not changed for months.[908]

451. Martinović makes specific reference to the evidence of Witness MQ to support his submission. In the invoked passage of Witness MQ's testimony, the witness gives evidence on the features of a T-55 tank and states that there were no sandbags along the tank's way down Liska Street because the tank went through the sandbags.[909] The Appeals Chamber fails to see how this passage supports Martinović's claim that the positions of the warring parties were mutually known or that they had not changed for months. In the absence of reference to any other evidence in support of Martinović's argument,[910] it remains a bare assertion and does not identify any error on behalf of the Trial Chamber.

(c) Credibility of witnesses

452. Next, Martinović submits that the Trial Chamber did not take into consideration his objections to the credibility of a number of witnesses.[911] First, he submits that the Trial Chamber failed to take into consideration that two of the three Prosecution witnesses directly involved in the wooden rifles incident were active officers in the ABiH and that the way they testified had a "direct

[905] Martinović Appeal Brief, paras 98-99 (citing Trial Judgement, para. 285).
[906] *See Kupreškić et al.* Appeal Judgement, para. 32.
[907] Trial Judgement, paras 275-281.
[908] Martinović Appeal Brief, paras 100-102 (citing Witness MQ, T. 15190).
[909] Witness MQ, T. 15189-15191.
[910] Martinović was asked to clarify this point in the course of the Appeals Hearing but did not do so: Scheduling Order for Appeals Hearing, p. 3.

impact" on their position in the army.[912] Martinović also argues that Allan Knudsen was a foreign mercenary who joined the war for dubious reasons.[913]

453. Martinović has not sought to explain how the fact that Allan Knudsen was a mercenary would affect his credibility as a witness. As for the alleged "direct impact" that the way in which the two ABiH officers testified had on their position in the army, Martinović has not shown what this "direct impact" consisted of or how it would have affected their credibility as witnesses. Martinović does not identify any error in the Trial Chamber's evaluation of the evidence of these three witnesses.

454. Secondly, Martinović contends that the "Muslim Secret Police AID" controlled and contacted the witnesses throughout the trial and prepared evidence for the Prosecution, a fact which was highlighted by Prosecution investigator Apolonia Bos in her testimony.[914] He further argues that the Prosecution struck deals with its witnesses that gave them an incentive to testify in support of the Indictment.[915]

455. The Appeals Chamber notes that the relevant part of the passage in the Trial Record invoked in support of the alleged role of AID in the production of Prosecution evidence refers to the Prosecution's manner of obtaining the wooden rifle that was eventually produced at trial as Exhibit PP 962.[916] It cannot be inferred from the passage invoked by Martinović that AID "controlled and contacted the witnesses throughout the trial", nor that it "prepared evidence for the Prosecution" in the general manner claimed by Martinović. Furthermore, the Trial Chamber found that it had not been established beyond reasonable doubt that this wooden rifle was used on 17 September 1993.[917] However, this conclusion did not affect its finding, based on the witnesses' evidence, that the incident involving wooden rifles charged in the Indictment had indeed taken place.[918] Martinović's submission that the role of AID should have been dealt with "[i]n the context of discussing the wooden ri[f]les incident"[919] is thus irrelevant on appeal, since its role in this regard is limited to allegedly procuring evidence that the Trial Chamber did not take into consideration when it found Martinović responsible for this incident. Martinović has not shown any error by the Trial Chamber.

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[911] Martinović Appeal Brief, paras 104, 107, 115.
[912] Martinović Appeal Brief, para. 105.
[913] Martinović Appeal Brief, para. 106.
[914] Martinović Appeal Brief, para. 108 (citing Witness Apolonia Bos, T. 16170 (private session)).
[915] Martinović Appeal Brief, paras 110-113 (citing Witness Apolonia Bos, T. 16209-16215 and Ex. PP 962).
[916] Witness Apolonia Bos, T. 16169-16170 (private session).
[917] Trial Judgement, para. 287.
[918] Trial Judgement, para. 287.
[919] Martinović Appeal Brief, para. 108.

456. Regarding Martinović's allegation that it is the Prosecution's practice to cut deals with its witnesses in order to give them an incentive to testify in support of the indictment, the Appeals Chamber notes that, in the invoked passages of the testimony of Witness Apolonia Bos, the question was put to the witness whether persons asked for money in exchange for giving evidence. She conceded that the person who possessed the wooden rifle had asked for money for it, but was told by the witness that the Prosecution would not pay for it. The wooden rifle was obtained by the Prosecution without paying for it. Witness Apolonia Bos stated that, apart from this instance, witnesses had never asked for money. She further testified that a person asked for relocation in return for testimony, but that she told that person that relocation was "highly unlikely to happen".[920]

457. In light of this testimony and Martinović's failure to cite contrary evidence, the Appeals Chamber concludes that there is no reason to believe that any improper deals were entered into. Martinović has shown no error by the Trial Chamber.

(d) Martinović's individual criminal responsibility

458. Martinović challenges the Trial Chamber's finding in paragraph 290 of the Trial Judgement that his responsibility for the incident of 17 September 1993 was established under both Article 7(1) and 7(3) of the Statute. He argues that this finding is incorrect and contradictory to evidence presented at trial.[921] He argues that the evidence shows that the wooden rifles incident did happen, but that he did not order it.[922] With respect to Article 7(3), he contends that the incident was not in his area of command, and that another commander was responsible for operations on the entire frontline on that day.[923]

459. The Trial Chamber relied on the testimonies of Witnesses J, OO and PP to establish Martinović's responsibility under Article 7(1) of the Statute for the wooden rifles incident.[924] These witnesses gave evidence that they were involved in the wooden rifles incident and that Martinović himself issued the instructions to them.[925] Martinović's challenges to the testimonies of these witnesses have been dismissed above.[926]

460. As to his responsibility pursuant to Article 7(3) of the Statute, Martinović has not made any reference to the Trial Record to support his claim that the wooden rifles incident did not take place

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[920] Witness Apolonia Bos, T. 16211-16212.
[921] Martinović Appeal Brief, paras 116-117 (citing Trial Judgement, para. 290).
[922] Martinović Appeal Brief, para. 123; Appeals Hearing, T. 189.
[923] Martinović Appeal Brief, paras 80, 89, 90, 122.
[924] Trial Judgement, para. 290.
[925] Trial Judgement, para. 290 (citing Witness PP, T. 6086, 6088; Witness OO, T. 5976-5978; Witness J, T. 1547-1548).
[926] *Supra*, paras 433, 443, 445.

in his area of command. The argument is therefore insufficiently precise for the Appeals Chamber to consider on the merits.

461. Martinović has further failed to demonstrate that the Trial Chamber erred in refuting his argument that Exhibit PP 608 indicates that Baja Milićević took over the command along the whole of the frontline.[927] Basing its finding on the testimonies of Allan Knudsen, Defence Witness MM and Witness Q,[928] the Trial Chamber concluded that, even if it was not satisfied that Martinović was the overall commander of the operation, it was satisfied that Martinović was in charge of his specific area of responsibility on 17 September 1993. Martinović now suggests substituting the Trial Chamber's assessment of Exhibit PP 608 with his own. He does not, however, indicate how it was unreasonable for the Trial Chamber to rely on Witnesses MM, Q and Allan Knudsen in relation to Exhibit PP 608. Martinović's arguments relating to the testimonies and credibility of Witness Q and Allan Knudsen have been dismissed above, and he does not challenge the testimony of Defence Witness MM in the present regard. For these reasons, the Appeals Chamber finds no error in the Trial Chamber's findings on Martinović's individual criminal responsibility for this incident.

(e) Whether the prisoners taken out on 17 September 1993 were returned to the Heliodrom

462. Martinović challenges the Trial Judgement's finding that several prisoners were taken out of the Heliodrom on 17 September 1993 and not returned. Specifically, he argues that: (1) Exhibit PP 608 describes the details of the campaign on 17 September 1993 without indicating the presence of human shields or wooden rifles; (2) Exhibit PP 608 also contains data on the wounded and killed, amongst which not one prisoner appears; (3) this data in Exhibit PP 608 is corroborated by Exhibit PP 612.1, dated 28 September 1993, from which it is evident that, on 17 September 1993, 30 detainees from the Heliodrom were sent to the Vinko Škrobo ATG and that all these detainees were returned to the Heliodrom on 27 September 1993; and (4) Exhibit PP 612.1 is in turn corroborated by Exhibit PP 620.1, the Heliodrom Logbooks of 17 September 1993, which record the names of the prisoners that were sent to work to the Vinko Škrobo ATG on 17 September 1993 and the date of their return to the Heliodrom.[929]

463. The Appeals Chamber considers that the fact that Exhibit PP 608 does not mention any incident involving wooden rifles or human shields or that any detainees were wounded or killed does not detract from the Trial Chamber's assessment of other evidence (namely, the testimony of

[927] Trial Judgement, para. 290.
[928] Trial Judgement, fn. 803.
[929] Martinović Appeal Brief, para. 122.

Witnesses J, OO, PP, Q and Allan Knudsen), and, as a result, does not render the Trial Chamber's finding unreasonable.[930]

464. Exhibit PP 612.1 indicates that 30 detainees were taken to the Vinko Škrobo ATG to work on 17 September 1993 and that 18 of them returned on 20 September 1993 and the remaining 12 on 27 September 1993.[931] This exhibit does not indicate the identity of the detainees. Martinović submits that the names of the detainees taken out on 17 September 1993 and subsequently returned are indicated in Exhibit PP 601.1, the Heliodrom Logbooks.[932] The Appeals Chamber has reviewed the relevant parts of Exhibit PP 601.1 and concludes that, read together with Exhibits PP 829 and PP 849, it was open to a reasonable trier of fact to find that Exhibit PP 601.1 does not indicate that Witnesses J, OO and PP were returned to the Heliodrom.[933]

465. For the foregoing reasons, Martinović's appeal from the Trial Chamber's findings on his responsibility for this incident is dismissed.

3. Turning a private property into the headquarters of Vinko Škrobo ATG[934]

466. Martinović contends[935] that the Trial Chamber erred in fact when it found him responsible for unlawful labour under Articles 3 and 7(1) of the Statute for ordering prisoners to turn a private property into the headquarters of Vinko Škrobo ATG (Count 5).[936] The Appeals Chamber recalls that, in considering Martinović's first ground of appeal, it has already found that Martinović was not put on notice of this incident and that, as a result, he could not have been found responsible for it.[937] It is therefore unnecessary for the Appeals Chamber to deal with this sub-ground of appeal of Martinović.

4. Use of detainees in looting private property[938]

467. Under Count 5, the Trial Chamber found Martinović responsible for unlawful labour pursuant to Articles 3 and 7(3) of the Statute for the use of detainees to assist in the looting of

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[930] The Trial Chamber based those findings on the evidence of Witnesses J, OO, PP, Q and Allan Knudsen, and it was not unreasonable for the Trial Chamber to prefer this evidence to that which, in effect, does not appear in Exhibit PP 608.
[931] Ex. PP 612.1 (Under Seal).
[932] Appeals Hearing, T. 190 (citing Ex. PP 601.1, p. 01535273).
[933] The Appeals Chamber notes that the Trial Chamber did not explicitly make a finding to this effect, but that it is apparent from the Trial Judgement that the Trial Chamber did not accept that Witness J, OO and PP were returned to the Heliodrom as it accepted that all three managed to escape to the ABiH side of the frontline in the course of the wooden rifles incident: Trial Judgement, paras 277, 278, 279, 290, fn. 805.
[934] *See* Martinović Notice of Appeal, p. 6.
[935] Martinović Appeal Brief, paras 141-142.
[936] *See* Trial Judgement, paras 311-313, 334.
[937] *Supra*, para. 35.
[938] *See* Martinović Notice of Appeal, p. 6.

private property.[939] The Trial Chamber stated that several witnesses testified that they were forced to participate in the looting of abandoned houses throughout West Mostar.[940] It found these testimonies to be consistent as they describe how prisoners were made to carry all sorts of goods out of apartments and load them onto a truck.[941] With regard to Martinović's responsibility, the Trial Chamber held that it

> accepts the testimonies of witnesses who stated that it was Štela's soldiers who forced them to assist in looting the houses of BH Muslims. Witness F testified that he was working for Štela's men and in particular for one of his subordinates, a man called Zubac. Witness YY stated that he was selected by Ernest Takač to assist in looting apartments that had been pre-selected. The Chamber is satisfied that Vinko Martinović knew or had reasons to know that his soldiers were forcing prisoners to perform unlawful labour. Witness AB testified that he once saw Vinko Martinović standing outside the apartment with soldiers while he was carrying goods out and loading them, but he did not hear him communicating to the soldiers. The Chamber is satisfied that the responsibility of Vinko Martinović has been established under Article 7(3) of the Statute.[942]

468. Martinović submits that the Trial Chamber erred in fact by making these findings and argues, in the first place, that there is no evidence that he forced the witnesses to participate in the looting.[943] The Appeals Chamber notes that this argument is irrelevant because the Trial Chamber did not find that his responsibility for these incidents had been established pursuant to Article 7(1) of the Statute.[944]

469. Secondly, in relation to his command responsibility, Martinović challenges the testimony of Witness F that he received orders from the man called "Zubac", since the name of that man is absent from Exhibit PP 704.[945] Exhibit PP 704 is a salary list for November 1993 for members of the KB including the ATG units. The Trial Chamber did not rely on this exhibit for its finding that Zubac was one of Martinović's subordinates.[946] Instead, the Trial Chamber relied on Witness F's assertion that the witness was working for "Štela's" men and in particular for one of his subordinates called Zubac.[947] And given that the incident of unlawful labour to which Witness F gave evidence took place between 1 July 1993 and 13 August 1993, it cannot be inferred from Exhibit PP 704, the KB's salary list of November 1993, whether or not "Zubac" was a subordinate of Martinović at the time of the incident in question.

470. Thirdly, Martinović submits that the evidence of Witnesses YY and AB does not show that these witnesses were forced by his subordinates to assist in the looting or that he knew or had

[939] Trial Judgement, para. 334.
[940] Trial Judgement, para. 307.
[941] Trial Judgement, para. 307.
[942] Trial Judgement, para. 310 (footnotes omitted).
[943] Martinović Appeal Brief, para. 135.
[944] Trial Judgement, para. 309.
[945] Martinović Appeal Brief, paras 130-132 (citing ordinal number 50 of the list of members of the Vinko Škrobo ATG in Ex. PP 704).
[946] Trial Judgement, paras 310, 621.

reason to know that his subordinates were forcing them to assist in the looting.[948] He contends that Witnesses YY and AB had no reason to oppose removing furniture from houses because they did not know whose houses they were. Martinović argues that the houses did not belong to absent BH Muslims, but rather that they were abandoned, without owners.[949]

471. Martinović has not explained how no reasonable trier of fact could, on the evidence before the Trial Chamber, have reached the conclusion that the looted houses belonged to BH Muslims. Moreover, the Appeals Chamber notes in this context that all three witnesses testified to having assisted looting in West Mostar,[950] and that the Trial Chamber found that BH Muslim civilians were forced out of their homes in West Mostar to be detained or expelled into East Mostar.[951] Martinović's assertion that the witnesses did not know whose homes they were looting is unsubstantiated.

472. With respect to Martinović's argument that the witnesses' evidence does not show that they were forced to assist in looting, the Appeals Chamber notes that the Trial Chamber did not make individual findings with respect to each of the three witnesses upon which it relied (Witnesses F, YY and AB), but simply entered a finding that all three were forced to assist in the looting without giving reasons for that finding.[952] The Appeals Chamber will therefore consider whether no reasonable trier of fact could, on the evidence before the Trial Chamber, have found that Witnesses F, YY and AB were forced to assist in the looting by Martinović's subordinates and that Martinović knew or had reason to know about that activity.

473. Witness F stated that he was "ordered" and that he "had to" loot the apartments.[953] Furthermore, Witness F stated that the prisoners were ordered to perform the looting while doing fortification work at the frontline.[954] The Trial Chamber found that the prisoners were under constant guard and were regularly mistreated while at the Vinko Škrobo ATG and that the atmosphere in and around the frontline was one of fear and threats.[955] These findings have not been shown to be unreasonable.[956] Given the circumstances in which the prisoners were made to assist in the looting, the Appeals Chamber does not find that it was unreasonable for the Trial Chamber to infer that Witness F was forced to do so.

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947 Trial Judgement, para. 310 (citing Witness F, T. 1105-1107); *ibid.,* para. 621 (citing Witness F, T. 1106-1108).
948 Martinović Appeal Brief, para. 135.
949 Martinović Appeal Brief, paras 137-138.
950 Witness F, T. 1106-1107; Witness YY, T. 7276; Witness AB, T. 7880; Ex. 11.18/10.
951 Trial Judgement, paras 535, 539, 540.
952 Trial Judgement, para. 310.
953 Witness F, T. 1106-1107.
954 Witness F, T. 1106-1107.
955 Trial Judgement, para. 270.
956 *Supra*, para. 439.

474. Regarding whether it was in fact Martinović's subordinates who forced Witness F to assist in the looting, Witness F gave evidence that Štela's soldiers were present on the spot, but that he only recognised one of them who was a commander, namely "Zubac".[957] On cross-examination, the witness gave evidence that he did not know with certainty which unit "Zubac" belonged to.[958] In light of this concession, the Appeals Chamber finds that it was not open to a reasonable trier of fact to conclude on the basis of Witness F's testimony that "Zubac" was Martinović's subordinate. Neither the Trial Judgement nor the Prosecution point to any other evidence showing that "Zubac" was Martinović's subordinate.[959] The Trial Chamber therefore erred in finding that Witness F was forced to loot by Martinović's soldiers.

475. Witness YY's testimony shows that he was forced to perform the looting. The witness stated that he was "ordered" what to do and that prisoners were occasionally hit by Martinović's men while performing work for the Vinko Škrobo ATG.[960] Witness YY mentioned two members of Vinko Škrobo ATG, Ernest Takač and Zdena Ilicić, who ordered this work.[961] The Trial Chamber found that Ernest Takač was Martinović's subordinate and a group leader of the Vinko Škrobo ATG.[962] Martinović has not demonstrated that this finding was in error, nor that the Trial Chamber was wrong to credit Witness YY's testimony. Therefore, the Trial Chamber did not err in relying on the testimony of Witness YY to establish Martinović's responsibility for the looting.

476. Witness AB stated that the prisoners did not know what labour was to be performed until they arrived at the spot and that they were "forced" to loot.[963] Witness AB further stated that he "[had] no idea [which] group of soldiers" took him to perform this activity, and that he did not know whether they were under the command of Martinović or not.[964]

477. In light of the testimony of Witness AB that he did not know whether it was Martinović's soldiers that forced him to loot, it was not open to a reasonable trier of fact to conclude that Witness AB was forced by Martinović's subordinates to assist in looting. The Appeals Chamber notes, however, that this error did not lead to a miscarriage of justice because the Trial Chamber was still presented with evidence that Witness YY was forced to loot by Martinović's subordinates.

478. The second question before the Appeals Chamber is whether it was open to a reasonable trier of fact to conclude that Martinović knew or had reason to know that his soldiers forced

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[957] Witness F, T. 1106-1107.
[958] Witness F, T. 1159-1160.
[959] *See* Prosecution Response to Martinović Appeal Brief, paras 3.30, 7.7, 7.14.
[960] Witness YY, T. 7277.
[961] Witness YY, T. 7274-7275.
[962] Trial Judgement, para. 103.
[963] Witness AB, T. 7879-7881.

Witness YY to assist in looting. This question must be considered in the context of the Trial Chamber's findings on plunder.[965] The Trial Chamber found in that respect that, on 13 June 1993, Martinović robbed apartments with 40 armed soldiers in the course of expelling BH Muslims from their apartments in the DUM area in Mostar.[966] It further found that Witness OO was repeatedly forced by the Vinko Škrobo ATG to carry looted household appliances in areas of Mostar and that Witness II was frequently ordered by soldiers of the Vinko Škrobo ATG to loot abandoned apartments.[967] Finally, the Appeals Chamber notes the testimony of Defence Witness ML that there was an explicit order by Martinović that orders to the prisoners were subject to his approval.[968] These findings all remain undisturbed on appeal.[969] The Appeals Chamber therefore finds that a reasonable trier of fact could have reached the conclusion of the Trial Chamber that Martinović knew or had reason to know that his subordinates forced prisoners of war to assist in looting.

479. For the foregoing reasons, Martinović's appeal from the Trial Chamber's findings on his responsibility for the use of detainees to assist in the looting of private property is dismissed.

5. Conclusion

480. Apart from his arguments regarding the alleged vagueness of the Indictment, which have been dealt with elsewhere, the remaining arguments under Martinović's sub-ground of appeal against his convictions under Counts 2 to 8 of the Indictment are dismissed.

B. Wilfully causing great suffering and cruel treatment

481. The Trial Chamber found that Martinović participated in the following three incidents of beatings which took place in his area of command: an incident in July or August 1993 involving several prisoners; another incident with a prisoner known as the "Professor"; and a third incident involving a prisoner called Tsotsa. On the basis of these three incidents, Martinović was found responsible under Counts 11 and 12 for wilfully causing great suffering and for cruel treatment pursuant to Articles 2(c), 3 and 7(1) of the Statute.[970] The Appeals Chamber has already set aside the Trial Chamber's findings that Martinović was responsible for the first and third of these incidents, and will consider here his arguments regarding the incident involving the "Professor".

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[964] Witness AB, T. 7879-7881.
[965] These findings include the incidents described by Witnesses F and AB: Trial Judgement, para. 310 (citing Witness F, T. 1105-1107; Witness AB, T. 7880-7881), *ibid.*, para. 621-622 (citing Witness F, T. 1106-1108; Witness AB, T. 7880-7881); *ibid.,* para. 628.
[966] Trial Judgement, para. 620; Ex. PP 456.1, Ex. PP 456.2.
[967] Trial Judgement, para. 622, fn. 1536.
[968] Trial Judgement, fns 715, 738.
[969] *Supra*, para. 438 and *infra*, para. 557.
[970] Trial Judgement, paras 385, 386, 388, 389, 455. As a result of cumulative convictions coming into play, only a conviction for wilfully causing great suffering under Count 12 was entered: Trial Judgement, paras 734, 767, 768.

482. The Trial Chamber found that Witness OO was present when Martinović beat a prisoner known as the "Professor" and then allowed the soldiers present to take the "Professor" behind a building and dump him in a garbage container.[971] As corroborative evidence, the Trial Chamber relied on the testimony of Witness II, who the Trial Chamber found referred to the same incident.[972] The Trial Chamber also heard the testimony of Witness BB concerning the injuries suffered by a man known as the "Professor", but found that Witness BB could not have been referring to the same person as Witnesses OO and II.[973]

483. Martinović first submits that the Trial Chamber did not establish the identity of the "Professor", the date and place of this beating and whether the "Professor" sustained any injuries.[974] Secondly, Martinović challenges the Trial Chamber's finding that Witnesses OO and II were referring to the same incident, because according to him they describe the incident in completely different ways.[975] He also contends that the Trial Chamber held that Witness BB probably spoke of some other person called the "Professor".[976] In light of the different descriptions of the event and the uncertainty surrounding whether there was more than one person nicknamed "Professor", Martinović argues that the evidence was not credible.[977] Finally, Martinović submits that the evidence of Witnesses OO, II and BB constitutes hearsay.[978]

484. The Prosecution responds that Martinović does not specify any error, nor does he elaborate on the alleged differences in Witnesses OO and II's evidence.[979] It argues that the "fundamental features" of their evidence demonstrate that the Trial Chamber was entitled to find that both witnesses referred to the same incident and that it was not unreasonable for it to do so.[980] Secondly, the Prosecution submits that Witness BB's evidence is irrelevant and that Martinović has not shown why it was unreasonable for the Trial Chamber to have preferred the evidence of Witnesses OO and II over that of Witness BB.[981]

485. Witnesses OO and II provided direct evidence of the incident they described. The Trial Chamber took into account the discrepancies in their evidence concerning the details surrounding

[971] Trial Judgement, para. 386.
[972] Trial Judgement, para. 386, fn. 1010.
[973] Trial Judgement, fn. 1010.
[974] Martinović Appeal Brief, para. 171.
[975] Martinović Appeal Brief, para. 172.
[976] Martinović Appeal Brief, para. 173.
[977] Martinović Appeal Brief, paras 174-177.
[978] Martinović Appeal Brief, para. 171.
[979] Prosecution Response to Martinović Appeal Brief, para. 4.9.
[980] Prosecution Response to Martinović Appeal Brief, para. 4.10.
[981] Prosecution Response to Martinović Appeal Brief, para. 4.11. Although the Prosecution refers to Witness "B" it is apparent that it intended to refer instead to Witness "BB".

this incident.[982] It was within the discretion of the Trial Chamber to evaluate these inconsistencies, to consider whether the evidence taken as a whole was reliable and credible and to accept or reject the "fundamental features" of the evidence given by Witnesses OO and II.[983] The Appeals Chamber does not find that the "fundamental features" of the testimonies of Witnesses OO and II differ to the extent that no reasonable trier of fact could have found that they referred to the same incident. Both witnesses gave evidence that the beating was carried out by Martinović, that it involved a person nicknamed the "Professor" and that it occurred near Martinović's headquarters.[984] The Trial Chamber's finding that "it is impossible that Witness BB testified about the same person described by Witness OO and testified to by Witness II" does not detract from the finding that Witnesses OO and II were giving evidence about the same person.[985] There is thus no merit in Martinović's argument that the Trial Chamber "synchronised" the evidence to find him responsible.[986]

486. Martinović also argues that he could not have been found responsible for the incident involving the "Professor" because the Trial Chamber did not establish the identity of the victim, the date and place where the beating took place and whether the "Professor" suffered any injuries as a result of it.[987] The Appeals Chamber notes that it is correct that the Trial Chamber did not enter a finding on the exact identity of the "Professor" or the date when the beating took place.[988]

487. The Appeals Chamber re-emphasises that it is only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is "wholly erroneous" that the Appeals Chamber may substitute its own findings for those of the Trial Chamber.[989] The task of assessing the reliability of the evidence is left primarily to the Trial Chamber.[990] In the present case, the Trial Chamber found the evidence of Witness OO that Martinović beat the "Professor" reliable, the fundamental features of which were corroborated by the testimony of Witness II. Martinović does not specifically challenge the credibility of these witnesses. The Appeals Chamber finds that it was open to a reasonable trier of fact to find that the incident occurred on the basis of the evidence given by Witnesses OO and II.

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[982] Whereas, according to Witness OO, the "Professor" was beaten after having asked about Martinović's father, Witness II stated that it was because he did not want to let go of his bag when boarding the truck back to the Heliodrom; whereas Witness OO gave evidence that the "Professor" was taken behind the building and dumped in a garbage container, Witness II testified that the victim was pushed into a garage from where he re-emerged completely soaked: Trial Judgement, fn. 1010.

[983] *Kupreškić et al.* Appeal Judgement, para. 31.

[984] Trial Judgement, fn. 1010 (citing Witness OO, T. 5956; Witness II, T. 4973-4974).

[985] Trial Judgement, fn. 1010.

[986] Martinović Appeal Brief, para. 175.

[987] Martinović Appeal Brief, paras 158, 171, 189.

[988] Trial Judgement, fn. 1010 (citing Witness OO, T. 5956; Witness II, T. 4973-4974).

[989] *Kupreškić et al.* Appeal Judgement, para. 30.

[990] *Kupreškić et al.* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, paras 17-18; *Kordić and Čerkez* Appeal Judgement, para. 19, fn. 11; *Kvočka et al.* Appeal Judgement, para. 19.

488. Apart from Martinović's arguments on the alleged vagueness of the Indictment, which have been dealt with elsewhere, the remaining arguments under this sub-ground of appeal are dismissed.

C. Murder of Nenad Harmandžić

1. Trial Chamber's findings

489. For the murder of Nenad Harmandžić, the Trial Chamber found Martinović responsible pursuant to Article 7(1) of the Statute for aiding and abetting murder as a crime against humanity under Article 5(a) of the Statute (Count 13), wilful killing as a grave breach of the Geneva Conventions of 1949 under Article 2(a) of the Statute (Count 14) and murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 15).[991] As a result of cumulative convictions coming into play, only convictions for murder under Count 13 and for wilful killing under Count 14 were entered.[992]

490. The Trial Chamber found that it had not been established who shot Nenad Harmandžić, but found that Martinović at least participated in the murder.[993] It concluded that:

> […] the sum of all evidence adduced excludes any reasonable possibility that Vinko Martinović could *not* have participated in the murder. The Chamber finds that he aided and abetted the murder by various means and at various stages: First, he encouraged his soldiers to mistreat Nenad Harmandžić in the most brutal way at his base. He designated him as "game" that could be mistreated and humiliated by his soldiers at random. He then practically assisted the murder by preventing Nenad Harmandžić from returning to the Heliodrom in the group of prisoners. He further practically assisted the murder when he instructed the co-detainees of Nenad Harmandžić to not tell anybody about what they had witnessed at the base and, in particular, when he instructed the driver to give false information about the whereabouts of Nenad Harmandžić to the Heliodrom administration. By doing so, Vinko Martinović made sure that nobody would interfere with his personal plans for Nenad Harmandžić and that, in particular, the Heliodrom administration would not start wondering about a missing prisoner. Vinko Martinović also rendered a substantial contribution to the murder when it came to the disposition of the corpse. He gave direct orders with regard to the burial of the body, thereby initiating and substantially contributing to the covering up of the murder of Nenad Harmandžić.[994]

491. The Trial Chamber found that the Prosecution did not establish in detail the fate of Nenad Harmandžić after he was last seen at Martinović's base.[995] However, it found that the chain of circumstantial evidence established by the Prosecution allowed only one reasonable conclusion, namely, that Nenad Harmandžić was killed by a gunshot wound through his cheek at or near Martinović's base, which murder Martinović aided and abetted at various stages.[996]

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[991] Trial Judgement, paras 508, 511.
[992] Trial Judgement, paras 735, 767.
[993] Trial Judgement, para. 500.
[994] Trial Judgement, para. 507 (emphasis in original).
[995] Trial Judgement, paras 467, 500.
[996] Trial Judgement, paras 497, 500, 504, 507.

492. The chain of circumstantial evidence on which the Trial Chamber relied was generally composed of the following:[997]

(1) Witness Y gave evidence that he was taken in a group of prisoners from the Heliodrom to work in the area of the Health Centre. Two prisoners were directed by Martinović to collect the body of a co-prisoner that he said had been killed in the process of trying to escape. These two men later told the group that they took the body to Liska Street to be buried.[998]

(2) Under the supervision of Martinović's subordinate Ernest Takač, Witness AF participated in the burial of a body that two prisoners had been selected to pick up from the "medical centre".[999] The gravesite first chosen was abandoned and the body was instead buried in Liska Park.[1000] At the first spot, Martinović arrived and instructed that it be cleaned up.[1001] Witness AF noted the exact location of the grave in Liska Park on a piece of paper, which he later handed over to an exhumation team.[1002]

(3) This exhumation team exhumed a body in Liska Park on 30 March 1998 which was identified as that of Nenad Harmandžić.[1003] The autopsy report was submitted as Exhibit PP 877.1.[1004] It stated that the cause of death was a bullet but that prior to death the victim had been severely beaten with several fractures and injuries as a result.[1005] It stated that the injuries to the body were of such scale and seriousness that, in the absence of a fatal bullet injury to the head, they could lead to a traumatic shock, which might eventually lead to death.[1006] The living height of the body was estimated to be 182 to 185 centimetres.[1007] Prosecution Expert Witness Dr. Hamza Zujo gave evidence that in his opinion, the

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[997] The Appeals Chamber notes that the Trial Judgement does not refer explicitly to every piece of circumstantial evidence in the section entitled "The Findings" but that the whole chain of circumstantial evidence is set out in detail in the section entitled "The Facts". The former section nevertheless refers to the "chain of circumstantial evidence" described in the latter section: Trial Judgement, paras 500, 467. It is therefore evident that the Trial Chamber relied on the evidence as described below.
[998] Trial Judgement, paras 475 (citing Witness Y, T. 3399, 3460, 3401, 3461, 3476), 498, 505; *ibid*., fns 1342, 1345.
[999] Trial Judgement, paras 472 (citing Witness AF, T. 15938, 15942-15944; Ex. PP 11.1), 489, 505; *ibid*., fns 1342, 1345.
[1000] Trial Judgement, para. 472 (citing Witness AF, T. 15946, 15948-15950; Ex. PP 11.8).
[1001] Trial Judgement, para. 472 (citing Witness AF, T. 15947).
[1002] Trial Judgement, para. 472 (citing Witness AF, T. 15950).
[1003] Trial Judgement, paras 476 (citing Expert Witness Dr. Hamza Zujo, T. 7624, 7629-7631, 7775-7776; Ex. PP 877.1), 498.
[1004] Trial Judgement, para. 476.
[1005] Trial Judgement, para. 479 (citing Expert Witness Dr. Hamza Zujo, T. 7634, 7640).
[1006] Trial Judgement, para. 479 (citing Expert Witness Dr. Hamza Zujo, T. 7771-7772).
[1007] Trial Judgement, para. 481 (citing Ex. PP 877.1 (Confidential); Expert Witness Dr. Hamza Zujo, T. 7631; Expert Witness Professor Josip Skavić, T. 14873).

identification of the body was reliable.[1008] The exhumation team told Witness AF that the body was the one they suspected it to be and that it had been identified by a relative.[1009]

(4) Witness AF was not present during the exhumation,[1010] but he gave evidence that he had met with Witness AE and told the latter the location of the grave where he had buried the body.[1011] Witness AE, who was present during the exhumation, gave evidence that the location of the body exhumed was consistent with the description of its location that he had been given by Witness AF.[1012]

(5) Witness AE further gave evidence that sometime after 30 June 1993 he saw Martinović and his subordinates Nino Pehar, Dobravko Pehar and Ernest Takač talk to the owner of the house he was staying in and overheard one of them saying that they had killed Nenad Harmandžić.[1013] Witnesses AE also gave evidence that he and Witness AD had a conversation with Novica Knezević, a cook at the Heliodrom, who told them that Nenad Harmandžić had been killed at Martinović's headquarters but that the people in charge at the Heliodrom were told that he had tried to escape.[1014] Witness AE and Witness AD were moreover approached by a soldier called Dinko who told them that he came from Martinović's unit[1015] and that Nenad Harmandžić had been killed and who, when asked about the circumstances of his death, mentioned he might have met somebody who had a grudge against him.[1016]

(6) Witnesses AE and AD also gave evidence that Nenad Harmandžić repeatedly received threats from Martinović prior to and after the outbreak of the war in Mostar.[1017] Witness AD gave evidence that Nenad Harmandžić, following a chance meeting with Martinović before 30 June 1993, expressed his fear that Martinović may intend to kill him.[1018] The Trial Chamber concluded that Nenad Harmandžić, a police officer before the war, was specifically targeted by Martinović and that Martinović brought him to his base in order to take revenge on him.[1019]

[1008] Trial Judgement, fn. 1291 (citing Expert Witness Dr. Hamza Zujo, T. 7629, 7775-7776).
[1009] Trial Judgement, para. 476 (citing Witness AF, T. 16138).
[1010] Trial Judgement, para. 476 (citing Witness AF, T. 15957, 16137).
[1011] Trial Judgement, para. 471 (citing Witness AF, T. 16082 (private session)).
[1012] Trial Judgement, para. 476 (citing Witness AE, T. 8269 (closed session)).
[1013] Trial Judgement, para. 468 (citing Witness AE, T. 8248-8249 (closed session)).
[1014] Trial Judgement, para. 469 (citing Witness AE, T. 8251, 8292 (closed session); Ex. PP 704, p. 12).
[1015] Trial Judgement, para. 469 (citing Witness AE, T. 8252 (closed session); Witness AD, T. 8198; Ex. PP 704, p. 30).
[1016] Trial Judgement, para. 469 (citing Witness AD, T. 8198).
[1017] Trial Judgement, paras 460 (citing Witness AD, T. 8186; Witness AE, T. 8233 (closed session)), 496.
[1018] Trial Judgement, para. 460 (citing Witness AD, T. 8186).
[1019] Trial Judgement, paras 496, 501.

493. At trial, Martinović presented a different theory of the fate of Nenad Harmandžić. He maintained that Nenad Harmandžić was taken to his unit on 12 July 1993 and returned unharmed to the Heliodrom the same day.[1020]

2. Arguments of the Parties

494. Martinović restates his theory of the fate of Nenad Harmandžić that he alleged at trial.[1021] In support of his contentions, Martinović submits that the Trial Chamber based the findings he challenges[1022] on an "inaccurate evaluation"[1023] of the following: (1) the autopsy report (Exhibit PP 877.1) and the testimonies of the Expert Witnesses Dr. Hamza Zujo and Professor Josip Skavić;[1024] (2) the testimony of Witnesses Halil Ajanić, AE, AD, AF and Y; and (3) Exhibits PP 434, PP 520 and PP 774.[1025]

3. Evaluation of the autopsy report and the evidence of Expert Witnesses Dr. Hamza Zujo and Professor Josip Skavić

495. Martinović submits that the Trial Chamber erred in finding that the corpse exhumed in Liska Park in Mostar was the body of Nenad Harmandžić.[1026]

496. Martinović first argues that the body was in a state of decomposition.[1027] The Trial Chamber found that a completely skeletonised body was exhumed in Liska Park,[1028] but that the identification of it

> was conducted following usual medical procedure, taking account of a calculation of the body height and age, state of the teeth, injuries sustained earlier and scar tissue, the clothes and personal items found on the body and all other information received by the family of the victim […].[1029]

The Appeals Chamber finds that Martinović has failed to show that the fact that the body was decomposed demonstrates that the Trial Chamber's findings on the identification of the body as that of Nenad Harmandžić were unreasonable.

497. Martinović's main argument challenging the said identification goes to the height of the exhumed body.[1030] The Trial Chamber accepted that both Expert Witnesses Dr. Hamza Zujo and

[1020] Trial Judgement, para. 486 (citing *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Final Trial Brief in the Defence of Vinko Martinović (Public Redacted Version), 19 November 2002 ("Martinović Final Trial Brief"), pp. 94, 95).
[1021] Martinović Appeal Brief, paras 210-214.
[1022] Martinović Appeal Brief, paras 203-207. *See* Martinović Notice of Appeal, pp. 7-8.
[1023] Martinović Appeal Brief, para. 203.
[1024] Martinović Appeal Brief, paras 195, 203, 232-233, 373.
[1025] Martinović Appeal Brief, paras 208-209, 373.
[1026] Martinović Appeal Brief, paras 203, 217.
[1027] Martinović Appeal Brief, para. 226.
[1028] Trial Judgement, para. 476.

Professor Josip Skavić arrived at an estimated living height of the body of approximately 182 to 185 centimetres, while according to information from Nenad Harmandžić's family and others who knew him he was approximately 196 centimetres tall.[1031] With respect to this discrepancy the Trial Chamber held that:

> Prosecution expert Dr. Zujo testified that margins of error in the calculation of the height of a body may be as high as 10 centimetres. Defence expert Professor Skavić held the opinion that such a height difference could not be explained by any margins of error and thus made the identification, despite other acknowledged positive factors, unreliable.[1032]

498. The Trial Chamber noted that Defence Expert Witness Professor Josip Skavić:

> generally shared the opinion of Dr. Hamza Zujo that the age of the body, the identification of the belt buckle and the shoe, the fact that the shoe was the shoe size of the late Nenad Harmandžić and the fact that he had once shot himself [in] the leg and that a bullet was found with the body were all valid indicators to be considered collectively for a positive identification. Professor Skavić concluded that, excluding the issue of the body height, to which he attributed great importance, all of the other elements suggest that the body belonged to Nenad Harmandžić.[1033]

499. The Trial Chamber further noted that the Defence Expert Witness "agreed that the formula used to estimate the living height of a skeleton was not an absolute".[1034] The Trial Chamber accepted the opinion of the Prosecution Expert Witness Dr. Hamza Zujo that the height margin may amount to 7 to 10 centimetres.[1035] It found that the exhumation report, the testimonies of Expert Witness Dr. Hamza Zujo and Witnesses AE, AF and Y left no reasonable doubt that the body exhumed in Liska Park was that of Nenad Harmandžić.[1036]

500. Martinović argues that the Trial Chamber erred in relying on the expert opinion of the Prosecution Expert Witness instead of that of the Defence Expert Witness because the Trial Chamber thereby ventured into the evaluation of scientific matters which he claims is beyond its competency.[1037] Martinović argues that the scientific disagreement between the two experts could only have been resolved by a third expert or possibly by DNA analysis.[1038]

501. As the primary trier of fact, it is the Trial Chamber that has the main responsibility of resolving any inconsistencies that may arise within and/or amongst witnesses' testimonies.[1039] Only where no reasonable trier of fact could have resolved such inconsistencies in the way the Trial

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[1029] Trial Judgement, para. 477 (footnote omitted).
[1030] Martinović Appeal Brief, paras 228-230, 233-236.
[1031] Trial Judgement, para. 481.
[1032] Trial Judgement, para. 481 (footnotes omitted).
[1033] Trial Judgement, para. 480 (footnotes omitted).
[1034] Trial Judgement, fn. 1314.
[1035] Trial Judgement, fn. 1342.
[1036] Trial Judgement, para. 498.
[1037] Martinović Appeal Brief, paras 232-233.
[1038] Martinović Appeal Brief, para. 234.
[1039] *See Kupreškić et al.* Appeal Judgement, para. 31.

Chamber did may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[1040] The jurisprudence of the International Tribunal makes no exception to these rules where the evidence tendered is expert evidence nor does it require a reasonable trier of fact to corroborate its acceptance of one expert testimony over another with the evidence of a third expert witness.[1041] Martinović has not explained how it was unreasonable for the Trial Chamber to accept the testimony of the Prosecution Expert Witness instead of that of the Defence Expert Witness, but merely suggests that the Trial Chamber's evaluation of this evidence should be replaced by his own. The Appeals Chamber further notes that at trial Martinović did not seek the admission into evidence of a third expert or of DNA analysis,[1042] nor has he made a request to do so on appeal.[1043]

502. Martinović has not otherwise challenged the reliability of the evidence of Expert Witness Dr. Hamza Zujo or her credibility. Martinović has not shown that the Trial Chamber erred in relying on the evidence of Expert Witness Dr. Hamza Zujo for its finding that the body exhumed in Liska Park was that of Nenad Harmandžić.

4. Evaluation of the evidence of Witness Halil Ajanić

503. Martinović submits that the Trial Chamber erred in relying on the testimony of Witness Halil Ajanić.[1044]

504. In the first place, Martinović argues that the Trial Chamber, being presented with the expert opinion of Defence Expert Witness Dr. Dražen Begić that Witness Halil Ajanić was not a reliable witness due to mental health problems, exceeded its discretion in deviating from that opinion in its own assessment of whether Witness Halil Ajanić was a reliable witness.[1045] The Appeals Chamber cannot agree.[1046] It was within the discretion of the Trial Chamber to weigh and assess the evidence of Defence Expert Witness Dr. Dražen Begić in evaluating whether Witness Halil Ajanić was a reliable witness.

[1040] *See Kvočka et al.* Appeal Judgement, para. 19 (citing *Kupreškić et al.* Appeal Judgement, para. 30).
[1041] Similar arguments were raised by the appellant regarding contradictory expert evidence in the *Kunarac et al.* Appeal Judgement, para. 328. These arguments were implicitly rejected by the Appeals Chamber in para. 333 where it found that the conclusions of the Trial Chamber (which had preferred one expert over another) were reasonable. Additionally, in the *Furundžija* Appeal Judgement, paras 122-123 the Appeals Chamber applied the general principles outlined above to expert evidence on post-traumatic stress disorder.
[1042] *See* Martinović Final Trial Brief, paras 397-409.
[1043] *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Request for Presentation of Additional Evidence, 31 July 2003 (Confidential) ("Martinović First Rule 115 Motion").
[1044] Martinović Appeal Brief, paras 318-319.
[1045] Martinović Appeal Brief, paras 304-308.
[1046] *Furundžija* Appeal Judgement, paras 122-123. The Appeals Chamber in that case, applying the "no reasonable trier of fact" standard, did not disturb the Trial Chamber's assessment of the reliability of a witness who may have suffered from post-traumatic stress disorder in spite of expert testimony on its effect on memory.

505. The Trial Chamber took note of the fact that this Defence Expert Witness conceded that (1) the basis for his opinion was very limited; (2) he was not in a position to opine that Witness Halil Ajanić suffered from any current mental disorder; (3) nothing indicated that Witness Halil Ajanić suffered from any chronic psychosis; and (4) Witness Halil Ajanić's prior psychotic behaviour could have been a unique episode which does not automatically exclude reliability as a witness.[1047] Martinović has not explained how the Trial Chamber erred in taking these factors into consideration in evaluating the evidence of the Defence Expert Witness.

506. The Trial Chamber further noted that Defence Expert Witness Dr. Dražen Begić did not examine Witness Halil Ajanić himself.[1048] Martinović argues that the Defence Expert Witness could not personally examine Halil Ajanić due to the fact that the latter was a protected witness with whom no contact was allowed.[1049] The Appeals Chamber notes that at trial Martinović did not request to have Witness Halil Ajanić personally examined by a qualified psychiatrist.[1050] The Trial Record does not suggest that Martinović brought to the attention of the Trial Chamber any obstacles to this option.[1051] When asked by Judge Diarra at trial what had prevented him from communicating with Witness Halil Ajanić directly, Defence Expert Dr. Dražen Begić answered that "[n]othing prevented me from communicating with that patient, but my task was to consider, to analyse documents. Had [the Defence] asked me to do something else, then as a witness, I would have acted accordingly".[1052] It is apparent from the foregoing that, although he could reasonably have done so, Martinović did not raise at trial the issue of whether it was possible for Defence Expert Witness Dr. Dražen Begić to examine Witness Halil Ajanić. The Appeals Chamber therefore finds that Martinović has waived his right to bring this issue as a valid ground of appeal.[1053]

507. For the foregoing reasons, Martinović has failed to demonstrate that no reasonable trier of fact could have found that the testimony of Defence Expert Witness Dr. Dražen Begić "d[id] not raise any doubts on [Witness Halil Ajanić's] reliability".[1054]

508. Secondly, Martinović argues that the Trial Chamber randomly and outside the context of Witness Halil Ajanić's ailments concluded that Witness Halil Ajanić's occasionally emotive and

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[1047] Trial Judgement, paras 483, 484, 494.
[1048] Trial Judgement, paras 483, 494.
[1049] Martinović Appeal Brief, paras 309-310.
[1050] *See Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Decision on the Request for Presentation of Additional Evidence, 18 November 2003 ("18 November Rule 115 Decision on Martinović Request"), para. 11.
[1051] 18 November Rule 115 Decision on Martinović Request, para. 9.
[1052] 18 November Rule 115 Decision on Martinović Request, para. 10 (citing Defence Expert Witness Dr. Damir Begić, T. 15485).
[1053] *Blaškić* Appeal Judgement, para. 222; *Furundžija* Appeal Judgement, para. 174. *See* also *Tadić* Appeal Judgement, para. 55, cited in *Kambanda* Appeal Judgement, para. 25, and in *Akayesu* Appeal Judgement, para. 361.
[1054] Trial Judgement, para. 494.

excited behaviour was the result of the destructive effect of the war.[1055] He also notes that the Trial Chamber could not understand Witness Halil Ajanić in his native tongue.[1056]

509. The Appeals Chamber first notes that it is apparent from the Trial Judgement's detailed reasoning on the reliability of Witness Halil Ajanić's evidence that the Trial Chamber did not "randomly" find Witness Halil Ajanić to be a reliable witness, nor did it arbitrarily attribute his health concerns to his experiences during the war.[1057] It took into account the witness' medical history as well as the fact that he showed no sign of thought or memory disorientation and that his behaviour did not indicate a mental disorder that would render his testimony unreliable.[1058] The Trial Chamber was better positioned than the Appeals Chamber to assess the reliability of this witness' evidence because it observed the witness in person.[1059] Martinović has not pointed to any errors in the translation of Witness Halil Ajanić's testimony which may have affected the Trial Chamber's assessment of the reliability of this witness' evidence. For these reasons, Martinović's arguments do not disclose an error on behalf of the Trial Chamber and they are accordingly rejected.

510. Thirdly, Martinović submits that Witness Halil Ajanić had personal motives for testifying against him (Martinović) because Witness Halil Ajanić accused him of "the tragedy that befell [the witness'] son".[1060] The Trial Chamber explicitly acknowledged the testimony of defence witnesses on this point, but found that it did not discredit Halil Ajanić's testimony.[1061] Martinović has not shown that the Trial Chamber acted unreasonably in the exercise of its discretion in weighing this evidence.

511. Martinović further contends that Witness Halil Ajanić was used by the "Muslim Secret Police AID" to testify against him and that Witness Halil Ajanić received compensation for his testimony.[1062] Martinović has not pointed to any evidence supporting these claims. His arguments remain a bare assertion which the Appeals Chamber will not consider.

512. In light of the foregoing, the Appeals Chamber finds that Martinović has failed to show that no reasonable trier of fact could have found the evidence of Witness Halil Ajanić reliable.

[1055] Martinović Appeal Brief, para. 313.
[1056] Martinović Appeal Brief, para. 314.
[1057] Trial Judgement, para. 494.
[1058] Trial Judgement, paras 483-484, 494.
[1059] *See Kupreškić et al.* Appeal Judgement, para. 32 (citing *Furundžija* Appeal Judgement, para. 37).
[1060] Martinović Appeal Brief, para. 317.
[1061] Trial Judgement, para. 482 (citing Witness MN, T. 14600-14601; Witness Jadranko Martinović, T. 13806).
[1062] Martinović Appeal Brief, paras 316, 317.

513. Finally, Martinović submits that Witness Halil Ajanić, as the only witness brought by the Prosecution to testify on Nenad Harmandžić's stay in his unit, did not state that Nenad Harmandžić was killed there.[1063] However, the Appeals Chamber finds that the mere fact that Witness Halil Ajanić did not explicitly state that Nenad Harmandžić was killed in Martinović's unit did not make it unreasonable for the Trial Chamber to rely on Witness Halil Ajanić's testimony as part of the circumstantial evidence in support of its finding that Nenad Harmandžić "met his death while in [Martinović's] custody".[1064] Nor does Martinović demonstrate that the conclusion that Nenad Harmandžić was killed there is otherwise inconsistent with the totality of the evidence.

5. Evaluation of the evidence of Witness AE

514. Martinović first challenges the reliability of the testimony of Witness AE as a whole, on the ground that it constitutes hearsay and is based on "unverified rumours" and "assumptions".[1065]

515. Witness AE gave evidence that, while hiding in his girlfriend's house, he saw Vinko Martinović, Nino Pehar, Dobravko Pehar and Ernest Takač talk to the owner of the house and overheard one of them saying that they had already killed Nenad Harmandžić and that they would kill Witness AE too.[1066] Witness AE also gave evidence that he and Witness AD were approached by a soldier called Dinko who told them that he came from Martinović's unit and that Nenad Harmandžić had been killed.[1067] Witness AE further stated that a cook at the Heliodrom told him and Witness AD that Nenad Harmandžić had been killed at Martinović's headquarters but that the people in charge at the Heliodrom had been told that Nenad Harmandžić had tried to escape.[1068] The Trial Chamber noted that while most of this evidence was hearsay, "it provide[d] strong links in a chain of circumstantial evidence".[1069]

516. Trial Chambers have a wide discretion in admitting hearsay evidence.[1070] Since hearsay is admitted as substantive evidence in order to prove the truth of its contents, it is important that its reliability be established.[1071] It is apparent from the Trial Judgement that the Trial Chamber in this

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1063 Martinović Appeal Brief, paras 289-291.
1064 Trial Judgement, paras 502-503.
1065 Martinović Appeal Brief, paras 275, 281.
1066 Trial Judgement, para. 468 (citing Witness AE, T. 8248-8249 (closed session)).
1067 Trial Judgement, para. 469 (citing Witness AE, T. 8252 (closed session); Witness AD, T. 8198).
1068 Trial Judgement, para. 469 (citing Witness AE, T. 8251 (closed session), 8292 (closed session)).
1069 Trial Judgement, para. 504.
1070 *Kordić and Čerkez* Appeal Judgement, para. 281; *Blaškić* Appeal Judgement, fn. 1374; *Aleksovski* Decision on Admissibility of Evidence, para. 15; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 ("*Tadić* Decision on Hearsay Evidence"), paras 7, 15-19.
1071 *Kordić and Čerkez* Appeal Judgement, para. 281; *Aleksovski* Decision on Admissibility of Evidence, para. 15; *Tadić* Decision on Hearsay Evidence, para. 16.

case generally observed due caution in this regard.[1072] The Appeals Chamber finds that Martinović has not shown that the Trial Chamber acted unreasonably in the exercise of its discretion to admit this evidence or in giving it the weight it did.

517. Martinović also challenges Witness AE's testimony that he had a conversation with Witness AF, who told him about the location of Nenad Harmandžić's grave, in Jablanica in September or October 1993.[1073] Witness AF gave evidence that he could not recall a conversation with Witness AE in Jablanica in September or October 1993 but that he met him once at a later date.[1074] Witness AF confirmed that he told Witness AE where the grave of Nenad Harmandžić was located but could not recall when this conversation took place.[1075] The Appeals Chamber recalls that it is within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the "fundamental features" of the evidence.[1076] The Appeals Chamber finds that a reasonable trier of fact could have accepted the "fundamental features" of the evidence given by Witnesses AE and AF regarding the content of their conversation on the location of Nenad Harmandžić's grave and the fact that such conversation took place, notwithstanding discrepancies in their testimonies as to the date and place of that conversation.[1077]

518. Secondly, Martinović submits that Witness AE never stated that Nenad Harmandžić was killed in his unit.[1078] The mere fact that Witness AE did not explicitly state that Nenad Harmandžić was killed in Martinović's unit did not make it unreasonable for the Trial Chamber to rely on Witness AE's testimony as circumstantial evidence in support of a finding to that effect.[1079]

6. Evaluation of the evidence of Witness AF and Witness Y

519. Martinović submits that the Trial Chamber erred in concluding that Witness AF and Witness Y were involved in the burial of Nenad Harmandžić, and that they then saw Martinović.[1080] Martinović argues that Witness AF and Witness Y did not state that either they or Martinović were involved in the burial of Nenad Harmandžić.[1081] Martinović submits that the Trial Chamber

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[1072] The Trial Chamber held that it had "taken into account that the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined": Trial Judgement, para. 11 (footnote omitted).
[1073] Martinović Appeal Brief, paras 272-273 (citing Trial Judgement, para. 470; Witness AE, T. 8258-8260; Witness AF, T. 16081); Trial Judgement, para. 470 (citing Witness AE, T. 8259 (closed session)).
[1074] Trial Judgement, para. 471 (citing Witness AF, T. 16081 (private session)).
[1075] Trial Judgement, para. 471 (citing Witness AF, T. 16082 (private session)).
[1076] *Kupreškić et al.* Appeal Judgement, para. 31.
[1077] Witness AE, T. 8259 (closed session); Witness AF, T. 16081-16082 (private session).
[1078] Martinović Appeal Brief, paras 262-263.
[1079] Trial Judgement, para. 504.
[1080] Martinović Appeal Brief, para. 276.
[1081] Martinović Appeal Brief, paras 277-279.

erroneously reached these conclusions by "connecting" the testimonies of Witnesses AF and Y with the disputed testimony of Witness AE, "aware that [Witness] AF's and [Witness] Y's testimonies become irrelevant without [Witness] AE's testimony".[1082]

520. Witness AF gave evidence that he and two other detainees were instructed by Ernest Takač to dig a hole in a garden within fifteen minutes.[1083] After some time, two other co-detainees selected by Ernest Takač returned from the medical centre carrying a corpse in a black-blue blanket.[1084] A soldier appeared and told them that the body could not be buried there as it would be an obstacle to people passing through.[1085] Then Vinko Martinović arrived and instructed Ernest Takač to clean everything up in the area.[1086] The detainees then had to transport the body to Liska Park where they buried it in a grave in row number 1, which Witness AF noted on a piece of paper that he later handed over to the exhumation team.[1087] Upon his return to the Heliodrom that evening, Witness AF described the body to his co-detainees who were locals from Mostar and they told him that this person was a former police employee from Mostar.[1088]

521. Witness Y gave evidence that he was taken from the Heliodrom to work in the area of the Health Centre and that two detainees were then elected and told that they had a job to do.[1089] According to Witness Y, a person who at a later time introduced himself as Štela told them that one of the prisoners had been killed trying to escape and Štela then directed the prisoners to go and pick up the body.[1090] The two detainees later told the group that they brought the corpse to Liska Street to be buried.[1091] Witness Y did not know whose body it was or how he had been killed nor did he see the body himself.[1092]

522. Martinović is correct in that Witnesses AF and Y did not give evidence that it was the body of Nenad Harmandžić that was buried.[1093] However, Martinović's submission that the Trial Chamber "independently" reached this conclusion is inapposite.[1094] Witness AF gave evidence that he handed over the note with the location of the body he had buried to the exhumation team.[1095]

[1082] Martinović Appeal Brief, paras 280, 282.
[1083] Trial Judgement, para. 472 (citing Witness AF, T. 15942-15943).
[1084] Trial Judgement, para. 472 (citing Witness AF, T. 15943-15944).
[1085] Trial Judgement, para. 472 (citing Witness AF, T. 15946).
[1086] Trial Judgement, para. 472 (citing Witness AF, T. 15947).
[1087] Trial Judgement, para. 472 (citing Witness AF, T. 15948-15950; Ex. PP 11.8).
[1088] Trial Judgement, para. 472 (citing Witness AF, T. 15949).
[1089] Trial Judgement, para. 475 (citing Witness Y, T. 3399, 3460, 3476).
[1090] Trial Judgement, para. 475 (citing Witness Y, T. 3399, 3460, 3476). *See* also Witness Y, T. 3475.
[1091] Trial Judgement, para. 475 (citing Witness Y, T. 3461).
[1092] Trial Judgement, para. 475 (citing Witness Y, T. 3461).
[1093] Martinović Appeal Brief, para. 277.
[1094] Martinović Appeal Brief, para. 278.
[1095] Trial Judgement, paras 472 (citing Witness AF, T. 15948-15950; Ex. PP 11.8), 476 (citing Witness AF, T. 15957, 16137).

Witness AE gave evidence that the location of the body that this team exhumed was consistent with the description of the location given by Witness AF.[1096] The exhumation team concluded in its autopsy report that the body was that of Nenad Harmandžić, and this conclusion was confirmed by Expert Witness Dr. Hamza Zujo.[1097] The Trial Chamber found that "the corroborating evidence of [W]itnesses AE, AF and Y exclude the reasonable possibility that the body exhumed in Liska [P]ark could have been anyone other than Nenad Harmandžić".[1098] Martinović does not explain how no reasonable trier of fact could have reached this finding.

523. On the basis of the testimonies of Witnesses AF and Y, the Trial Chamber also found that Martinović was involved in the burial of the body.[1099] Martinović challenges this finding on the ground that these witnesses did not give any evidence that he was involved in the burial.[1100] While neither Witness AF nor Witness Y gave evidence that Martinović was present and participated in the burial at Liska Park, Witness AF stated that Martinović gave instructions to Ernest Takač to clean up the spot first chosen as the gravesite.[1101] Witness AF also gave evidence that Ernest Takač supervised the burial of Nenad Harmandžić's body.[1102] Witness Y gave evidence that Štela directed the prisoners to go and pick up the body.[1103] The Appeals Chamber finds that it was open to a reasonable trier of fact to find that Martinović was involved in the burial of Nenad Harmandžić on the basis of this evidence.

7. Evaluation of the evidence of Witness AD

524. Martinović contends that the Trial Chamber erred in disregarding Witness AD's evidence supporting his defence case that Nenad Harmandžić was brought to Martinović's unit on 12 July 1993, in the condition of being beaten, and that he was returned to the Heliodrom on that day.[1104]

525. Martinović refers to Witness AD's testimony that Nenad Harmandžić was beaten while detained at the Heliodrom between 11 and 21 May 1993.[1105] The Trial Chamber noted this evidence and considered that as a result of these beatings Nenad Harmandžić suffered from broken ribs, wounds on his knee and haematoma around his eyes.[1106] The Appeals Chamber does not find that the evidence given by Witness AD that Nenad Harmandžić had suffered injuries from beatings

[1096] Trial Judgement, para. 476 (citing Witness AE, T. 8269 (closed session)).
[1097] Trial Judgement, para. 476 (citing Ex. PP 877.1 (Confidential); Expert Witness Dr. Žujo, T. 7629, 7775-7776).
[1098] Trial Judgement, para. 498.
[1099] Trial Judgement, paras 472, 475, 505.
[1100] Martinović Appeal Brief, paras 277, 279.
[1101] Trial Judgement, paras 472 (citing Witness AF, T. 15947), 505.
[1102] Trial Judgement, paras 472, 505.
[1103] Trial Judgement, para. 475 (citing Witness Y, T. 3399, 3476).
[1104] Martinović Appeal Brief, paras 284-286.
[1105] Martinović Appeal Brief, paras 284 (citing Witness AD, T. 8179), 285.
[1106] Trial Judgement, para. 460 (citing Witness AD, T. 8185).

approximately two months prior to his arrival at Martinović's unit precluded a reasonable trier of fact, on all the evidence before the Trial Chamber, from finding that he was "seriously beaten and mistreated" in Martinović's unit.[1107]

526. Next, Martinović argues that the Trial Chamber erred in disregarding Witness AD's testimony that she saw Nenad Harmandžić at Martinović's base on 12 July 1993 and that she heard that Nenad Harmandžić had been returned to the Heliodrom on the same day.[1108] Contrary to Martinović's submission, there is no indication that the Trial Chamber "completely ingnore[d]" this evidence.[1109] Indeed, it specifically mentioned Witness AD's encounter with this person when it examined the identity of the latter.[1110] It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[1111] In addition, Witness Halil Ajanić as well as Witness U, both prisoners at the Heliodrom, gave direct evidence that Nenad Harmandžić did not return to the Heliodrom after he was taken to the Vinko Škrobo ATG.[1112] The fact that the direct evidence of Witnesses Halil Ajanić and U was contradicted by hearsay evidence given by Witness AD did not preclude a reasonable trier of fact from relying on the former instead of on the latter.

8. Evaluation of Exhibits PP 434, PP 520 and PP 774

527. Martinović submits that the Trial Chamber erred in its evaluation of Exhibits PP 434, PP 520 and PP 774, which, he argues, demonstrate that Nenad Harmandžić was not killed in his unit.[1113] He argues that Nenad Harmandžić was taken from the Heliodrom on 13 July 1993 by Milenko Čule to the 1st Light Assault Battalion.[1114] Martinović submits that: (1) Exhibit PP 434 shows that on 13 July 1993, a person named Milenko Čule of the 1st Light Assault Battalion of the military police was responsible for prisoners discharged to work;[1115] (2) Exhibit PP 520 shows that Nenad Harmandžić was taken by Milenko Čule to the 1st Light Assault Battalion on 13 July 1993;[1116] and (3) Exhibit PP 774, a report issued by the Military Police, indicates that Nenad Harmandžić had escaped.[1117]

1107 Trial Judgement, para. 487.
1108 Martinović Appeal Brief, paras 283 (citing Witness AD, T. 8196 (partly private session)), 285.
1109 Martinović Appeal Brief, para. 285.
1110 Trial Judgement, fn. 1257 (citing Witness AD, T. 8194, 8205 (private session)).
1111 *Kvočka et al.* Appeal Judgement, para. 23.
1112 Trial Judgement, paras 467 (citing Witness Halil Ajanić, T. 7418), 468 (citing Witness U, T. 2962-2965 (private session)).
1113 Martinović Appeal Brief, paras 322-323, 326 (citing Trial Judgement, paras 489, 490, 492), 338.
1114 Martinović Appeal Brief, paras 331, 337.
1115 Martinović Appeal Brief, paras 328-329.
1116 Martinović Appeal Brief, para. 330.
1117 Martinović Appeal Brief, paras 332-333.

528. The Trial Chamber observed that there was no clear record of the date on which Nenad Harmandžić was taken from the Heliodrom to the Vinko Škrobo ATG.[1118] It stated that the event could not be more specifically dated than having occurred on 12 or 13 July 1993.[1119] Nonetheless, after having rejected Martinović's submission that Exhibits PP 434, PP 520 and PP 774 indicated that Nenad Harmandžić was taken to the 1st Light Assault Battalion instead of to the Vinko Škrobo ATG,[1120] the Trial Chamber held that it was "satisfied that Nenad Harmandžić was taken to [the] Vinko Škrobo ATG on 13 July 1993 as described by [Witness] Halil Ajanić, he was also seen by Defence [W]itness MT and [W]itness AD".[1121]

529. With respect to Exhibit PP 774, the Trial Chamber took into account the fact that Nenad Harmandžić was not entered into Exhibit PP 774 as escaped but as "at large", and that the date of record was 6 September 1993.[1122] On this basis, it found that Exhibit PP 774 only allowed for the reasonable conclusion that, in September 1993, the Military Police had no information on Nenad Harmandžić's whereabouts, and rejected Martinović's argument as a result.[1123] Martinović challenges this finding on the sole basis that the Trial Chamber's reading of Exhibit PP 774 to the effect that Nenad Harmandžić was "at large" was the result of an inaccurate translation of this exhibit.[1124] This allegation is unsubstantiated and is accordingly dismissed.

530. It was only after it had rejected the argument that Exhibit PP 774 supported Martinović's theory of Nenad Harmandžić's fate that the Trial Chamber concluded that this exhibit corroborated other evidence that showed that Martinović gave false information regarding Nenad Harmandžić's fate.[1125] The latter conclusion, therefore, did not affect the Trial Chamber's reading of Exhibit PP 774 as such or its finding that Exhibit PP 774 did not support Martinović's version of Nenad Harmandžić's disappearance. Martinović's argument challenging the Trial Chamber's finding that he disseminated false information is thus irrelevant to the Trial Chamber's assessment of Exhibit PP 774.[1126] The Trial Chamber was presented with the evidence of Witnesses Halil Ajanić and AE that Martinović transmitted false information to the administration of the Heliodrom that Nenad Harmandžić had escaped.[1127] Since Exhibit PP 774 merely confirmed that Nenad

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[1118] Trial Judgement, para. 488.
[1119] Trial Judgement, fn. 1335.
[1120] Trial Judgement, para. 491.
[1121] Trial Judgement, para. 493 (footnote omitted) (citing Witness Halil Ajanić, T. 7418, 7609-7613; and, as corroborative evidence, Witness U, T. 2963-2966 (private session)).
[1122] Trial Judgement, para. 492, fn. 1340.
[1123] Trial Judgement, para. 492, fn. 1340.
[1124] Martinović Appeal Brief, para. 354.
[1125] Trial Judgement, para. 492. *See ibid.*, paras 466 (citing Witness Halil Ajanić, T. 7418), 469 (citing Witness AE, T. 8251 (closed session), 8292 (closed session)).
[1126] Martinović Appeal Brief, paras 344-346, 350.
[1127] Trial Judgement, para. 503; *ibid.,* 466 (citing Witness Halil Ajanić, T. 7418); *ibid.*, para. 469 (citing Witness AE, T. 8251 (closed session), 8292 (closed session)).

Harmandžić was "at large", it was not unreasonable for the Trial Chamber to conclude that Exhibit PP 774 reflected the false information regarding Nenad Harmandžić's disappearance.

531. Martinović further submits that the Trial Chamber erred in concluding that Exhibit PP 434 did not show where the prisoners were taken or that Milenko Čule took prisoners to the 1st Light Assault Battalion on 13 July 1993.[1128] The Appeals Chamber notes that the Trial Chamber simply found that, although Exhibit PP 434 indicated that prisoners were released to work as argued by Martinović, it did not record the names of the prisoners who were released.[1129] Martinović does not challenge this finding. Martinović's argument in relation to Exhibit PP 434 is therefore dismissed.

532. Martinović also argues that the Trial Chamber had to require "concrete evidence" that Milenko Čule did in fact take Nenad Harmandžić to the Vinko Škrobo ATG.[1130] This argument is misconceived because the Trial Chamber did not find that Milenko Čule took Nenad Harmandžić to the Vinko Škrobo ATG. The Trial Chamber found that the documents analysed indicated that Milenko Čule, who belonged to the 1st Light Assault Battalion, signed Nenad Harmandžić out of the Heliodrom, based on an order of Zlatan Mijo Jelić.[1131]

533. Apart from his argument in relation to Exhibit PP 434, which has been dismissed above, Martinović does not dispute the Trial Chamber's finding that soldiers from various units were involved in the transportation of prisoners from the Heliodrom to different working sites or that soldiers who were not members of the KB or the Vinko Škrobo ATG were involved in the transport of prisoners to working sites which were under the authority of the KB or the Vinko Škrobo ATG.[1132] Moreover, Martinović does not substantiate his challenge[1133] to the Trial Chamber's finding that Exhibit PP 520 did not likely represent prisoners taken from the Heliodrom on 13 July 1993.[1134]

534. Finally, Martinović submits that the Trial Chamber erred in not considering document D2/14, a Special Report from the HVO SIS, which he claims he received from the Prosecution.[1135] Martinović submits that under ordinal number 15, this Report states: "soldier of the 1st [L]ight [A]ssault [B]attalion Milenko Čule took Nenad Harmandžić to work and he escaped".[1136] He further argues that this document also shows how prisoners' escapes were organised; HVO soldiers would

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[1128] Martinović Appeal Brief, paras 361-366.
[1129] Trial Judgement, para. 488.
[1130] Martinović Appeal Brief, para. 356.
[1131] Trial Judgement, para. 491.
[1132] Trial Judgement, para. 491, fn. 1339.
[1133] Martinović Appeal Brief, para. 326 (citing Trial Judgement, paras 489, 490, 492).
[1134] Trial Judgement, fn. 1337.
[1135] Martinović Appeal Brief, paras 334, 369.
[1136] Martinović Appeal Brief, para. 334.

take prisoners to work who they knew had money and would then enable them to escape.[1137] The Prosecution responds that there appears to be a discrepancy as to which document Martinović perceives to have been admitted as exhibit D2/14 and that which is listed on the Registry Defence Exhibit list as "DD2/14: Statement of Witness HH dated 1 May 1994".[1138]

535. The Appeals Chamber notes that there was no Special Report from the HVO SIS admitted as Exhibit D2/14 at trial. In the course of the Appeals Hearing, despite having been asked to clarify which document he was referring to as Exhibit "D2/14", Martinović failed to do so.[1139] Martinović's argument thus remains unsubstantiated.

536. It follows from the Appeals Chamber's reasoning above that the Trial Chamber did not, as argued by Martinović, reject the information in Exhibits PP 434, PP 520 and PP 774 merely because it may have supported his case.[1140] The Trial Chamber carefully considered these exhibits and Martinović's arguments in relation thereto. Martinović has failed to demonstrate that the Trial Chamber erred in its evaluation of this evidence.

537. Finally, the Appeals Chamber notes that the Trial Chamber rejected Martinović's arguments that these exhibits supported his case on a reading of them as such, and not because they were outweighed by other evidence. Martinović's argument that these exhibits corroborate the evidence of Witness AD that Nenad Harmandžić returned to the Heliodrom on 12 July 1993 is therefore dismissed.[1141]

9. Conclusion

538. For the foregoing reasons, the Appeals Chamber dismisses Martinović's sub-ground of appeal in its entirety.

D. Unlawful transfer

539. Under Count 18, the Trial Chamber found Martinović guilty of committing unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 pursuant to Articles 2(g) and 7(1) of the Statute on 13-14 June 1993 from the DUM area in Mostar and on 29 September 1993 from the Centar II area in Mostar.[1142] For these incidents, the Trial Chamber also found

[1137] Martinović Appeal Brief, paras 335, 369.
[1138] Prosecution Response to Martinović Appeal Brief, para. 5.62.
[1139] Appeals Hearing, T. 191.
[1140] Martinović Appeal Brief, paras 370-371.
[1141] Martinović Appeal Brief, para. 287.
[1142] Trial Judgement, para. 569. The Trial Chamber also found that Martinović's responsibility pursuant to Article 7(3) of the Statute had been established for these incidents, but found that his responsibility was most appropriately described under Article 7(1) of the Statute: Trial Judgement, para. 569.

Martinović guilty of persecutions pursuant to Articles 5(h) and 7(1) of the Statute under Count 1.[1143] Martinović challenges these convictions on the basis of insufficiency of the evidence.[1144]

1. 13-14 June 1993

540. The Trial Chamber found that Martinović was identified by witnesses as the person in charge of the operation of 13-14 June 1993.[1145] For this finding, the Trial Chamber relied on the testimony of Witness WW, as corroborated by the testimonies of Witness GG and Witness van der Grinten.[1146] It also found corroboration in three internal Military Police reports, admitted as Exhibits PP 455.1, PP 456.1 and 456.2, which identified Martinović as being in charge of the operation.[1147] The Trial Chamber found that Martinović committed unlawful transfer by participating in the operation, which led to the unlawful transfer of between 88 to 100 civilians from the DUM area in Mostar.[1148]

541. Martinović submits that the Trial Chamber was not presented with sufficient reliable evidence to find that he participated in this incident.[1149] He first argues that Witnesses WW and GG erroneously identified him during the evictions and gave hearsay evidence of his identity.[1150]

542. Martinović fails to substantiate his challenge to the evidence of Witness GG.[1151] As to the evidence of Witness WW, Martinović has failed to show that the Trial Chamber erred by relying on the evidence of this witness. Although Witness WW only learned Vinko Martinović's full name on her way to the Heliodrom once she had been evicted from her apartment, it was reasonable for the Trial Chamber, for the reasons that follow, to rely on her hearsay evidence to find that Martinović participated in the operation.[1152] Her identification evidence was corroborated by the testimonies of Witnesses GG and van der Grinten as well as by Exhibit PP 452.1; other than the unsubstantiated challenge to Witness GG, Martinović does not challenge this evidence.[1153] Specifically,

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[1143] Trial Judgement, para. 672.

[1144] Martinović Notice of Appeal, pp. 4-5, 9; Martinović Appeal Brief, paras 375-376 (citing Trial Judgement, para. 569), 398-399, 412, 415. The Appeals Chamber has elsewhere disposed of Martinović's further contentions concerning the sufficiency of the Indictment and his conviction for persecutions regarding these incidents: *supra*, para. 66; *infra*, paras 570-571.

[1145] Trial Judgement, para. 552.

[1146] Trial Judgement, fn. 1410 (citing Witness WW, T. 7016-7020, 7018, 7036, 7048, 7049, 7062; Witness GG, T. 4757-4758; Witness van der Grinten, T. 7360).

[1147] Trial Judgement, para. 552.

[1148] Trial Judgement, para. 553.

[1149] Martinović's Appeal Brief, paras 380, 388, 398.

[1150] Martinović Appeal Brief, paras 378-379 (citing Witness WW, T. 7018; Witness GG, T. 4746), 392 (citing Witness WW, T. 7048; Witness MM, T. 5877), 397.

[1151] The Appeals Chamber notes that Witness GG gave direct evidence to having been evicted and to the fact that Martinović, whom he knew by sight, was present during the evictions: Witness GG, T. 4744-4746.

[1152] Trial Judgement, fn. 1410 (citing Witness WW, T. 7018).

[1153] Trial Judgement, fn. 1410 (citing Witness GG, T. 4757-4758; Witness van der Grinten, T. 7360; Ex. PP 452.1).

Witness WW's evidence that Martinović was "kind of bald […] not balding, but had his hair cropped"[1154] is consistent with other witnesses' description of him as having "his hair cut short or receding".[1155] Witness WW further gave evidence that Martinović had an earring.[1156] Martinović argues that no one could have seen him wearing an earring, but fails to substantiate this assertion.[1157] In addition, the fact that another witness testified that a soldier called Dinko had an earring does not in itself demonstrate that the Trial Chamber's reliance on Witness WW's evidence of identification of Martinović was unreliable.[1158] Finally, Witness WW gave evidence that she knew Martinović from before because he was the chief man of the HOS when the JNA attacked Mostar and also that Pehar, called "Dolma", participated in her eviction.[1159] Martinović does not dispute that a soldier named Nino Pehar, known as "Dolma", was one of his subordinates.[1160]

543. Martinović also challenges the evidence purporting to identify him because in his submission evictions and plunder were carried out by impostors claiming to be part of his unit.[1161] At trial, Martinović raised this argument generally, to challenge the existence of a superior-subordinate relationship between him and the perpetrators of the crimes, and not in relation to any specific count.[1162] The Trial Chamber considered this argument in the context of the charges of plunder. It found that the fact that impostors played a role in the looting did not exclude that Martinović was involved in it as well,[1163] a finding which Martinović does not challenge as such.[1164] Martinović fails to show how his argument, which failed at trial with respect to the charges of plunder against him, would have succeeded with respect to the charges of unlawful transfer, nor does he show that the Trial Chamber was unreasonable in its decision to reject it. This conclusion is

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[1154] Witness WW, T. 7048.
[1155] Trial Judgement, fns 1003 (citing Witness SS, T. 6552; Witness K, T. 1583 [private session]), 1018 (citing Witness Y, T. 3400, 3401, 3402, 3404).
[1156] Trial Judgement, fn. 1410 (citing Witness WW, T. 7048).
[1157] Martinović Appeal Brief, para. 392.
[1158] Martinović alleges that Witness MM's description of Dinko resembles Witness WW's description of "Martinović" because Witness WW described the latter as "bald" with an earring: Martinović Appeal Brief, para. 392 (citing Witness MM, T. 5877). The Appeals Chamber notes in this regard that Witness MM could not see Dinko's hair: Witness MM, T. 5855 (closed session).
[1159] Trial Judgement, fn. 1410 (citing Witness WW, T. 7016-7020, 7049).
[1160] Trial Judgement, para. 103 (citing Witness KK, T. 5188; Witness BB, T. 4281-4283; Ex. PP 704, p. 31 (nr. 53)).
[1161] Martinović Appeal Brief, paras 380-385 (citing Ex. PP 626; Defence Witnesses MD, MG, MH, MI, and ML), 387-389 (citing Witness NO, T. 12970, 13038-13041).
[1162] Martinović Final Trial Brief, pp. 36, 42-44 (citing *inter alia* Ex. PP 626), para. 121. The Appeals Chamber notes that Ex. PP 626 is relevant to the charges of both plunder and unlawful transfer which are intertwined: Ex. PP 626, p. 1.
[1163] Trial Judgement, para. 626 (citing Defence Witness MM, T. 14560). The Trial Chamber referred to Martinović Final Trial Brief, pp. 42-44, wherein Martinović invoked Ex. PP 626 at p. 43: Trial Judgement, fn. 1546.
[1164] Martinović Appeal Brief, paras 421-456. In addition, Naletilić does not dispute the Trial Chamber's finding refuting the "impostors" argument: Naletilić Revised Appeal Brief, paras 238-240.

supported further by the fact that the charges of plunder and unlawful transfer were closely intertwined.[1165]

544. Moreover, Witness NO challenged the reliability of Exhibits PP 456.1 and PP 456.2, but not, as argued by Martinović, also of Exhibit PP 455.1.[1166] Martinović does not bring forth any other support for his challenge to Exhibit PP 455.1.[1167] The Trial Chamber rejected Witness NO's challenge to Exhibits PP 456.1 and PP 456.2 because the witness was not the author of the "report"[1168] at the scene, but only arrived there later on, and because the facts reported therein were corroborated by Witnesses WW and GG.[1169] Martinović has failed to demonstrate any error in the exercise of the Trial Chamber's discretion when assessing this evidence.

545. Finally, Martinović argues on the basis of the evidence of Defence Witness MM that it was objectively impossible for his unit to leave its positions on the frontline lest those positions be broken through.[1170] The Trial Chamber also considered this argument at trial, but rejected it because no evidence was led that Martinović was at another location on 13-14 June 1993 and, further, because Exhibit PP 456.1 showed that military policemen were taken off their regular duties in order to be deployed on the frontline.[1171] Martinović does not explain how the Trial Chamber erred in its evaluation of Defence Witness MM's testimony.

2. 29 September 1993

546. The Trial Chamber found that on 29 September 1993, Witness MM was evicted from her apartment by soldiers designating themselves as "Štelići" and taken to the Health Centre. There, soldiers opened fire upon which Witness MM fled over to the Eastern side of Mostar. The Trial Chamber found that two SIS reports, admitted as Exhibits PP 620.1 and PP 707, corroborated that Martinović and his unit were involved in the transfer of civilians on 29 September 1993. The Trial Chamber referred, *inter alia*, to the information in Exhibit PP 620.1 that Martinović met with Ivića Ćavar on 29 September 1993 to draw up detailed plans for the operation. The Trial Chamber found

[1165] *See* Indictment, para. 54. *See* also Trial Judgement, paras 549-566. Furthermore, the Trial Chamber found that the plunder in the DUM area on 13 June 1993 was carried out "in connection with evictions": Trial Judgement, para. 627.
[1166] Witness NO, T. 12970, 13036-13040, 13054-13059; Martinović Appeal Brief, paras 388, 391.
[1167] Martinović Appeal Brief, paras 388, 391, 396.
[1168] It is undisputed that Ex. PP 456.1 and Ex. PP 456.2 were considered and referred to as one report: Trial Judgement, fn. 1412; Martinović Appeal Brief, para. 388.
[1169] Trial Judgement, fn. 1412. The Trial Chamber also considered that Witness NO did not challenge the authenticity of "the document": Trial Judgement, fn. 1412 (citing Witness NO, T. 13037-13040, 13055-13059). The Appeals Chamber notes that it is clear from Witness NO's testimony that he did not challenge that either Ex. PP 456.1 or Ex. PP 456.2 were signed by a duty officer: Witness NO, T. 13037, 13057-13058.
[1170] Martinović Appeal Brief, paras 394, 395 (citing Trial Judgement, para. 552, fn. 1412).
[1171] Trial Judgement, fn. 1412 (citing Witness MM, T. 14560; Ex. PP 456.1).

that Martinović committed unlawful transfer by participating in the operation, which led to the unlawful transfer of civilians from the Centar II area on 29 September 1993.[1172]

547. Martinović challenges these findings of the Trial Chamber and first argues that impostors generally carried out the unlawful transfer.[1173] This argument has already been considered and dismissed above.[1174]

548. Next, Martinović argues that there is "no evidence" to show that Witness MM was taken to the Health Centre in his area of responsibility, especially since there is another hospital in West Mostar by which the Bulevar and the other side of the city can be reached.[1175] Martinović does not point to any evidence to support this contention nor does he otherwise explain how the Trial Chamber erred by finding that Witness MM was taken to the Health Centre in his area of responsibility.[1176]

549. Martinović finally submits that Exhibits PP 620.1 and PP 707 do not "meet the legal standards for evidence" because they were neither verified nor contained concrete data that could have been verified.[1177] The Appeals Chamber notes the Prosecution's argument that Martinović has waived his right to object on appeal to the admissibility of Exhibit PP 620.1 on the ground that it was not authentic,[1178] but does not consider it necessary to decide this issue as his challenges to Exhibits PP 620.1 and PP 707 are without merit. A Trial Chamber is not obliged to request verification of the authenticity of evidence obtained out of court before admitting it.[1179] Martinović does not explain why these exhibits are not relevant or have no probative value, or how their probative value is outweighed by the need to ensure him a fair trial. He also does not substantiate his claim that the exhibits were unauthentic or could not have been verified. Martinović does not otherwise attempt to explain why no reasonable trier of fact could have relied upon them to corroborate the evidence of Witness MM on his involvement in the unlawful transfers on 29 September 1993. These arguments of Martinović are dismissed.

3. Conclusion

550. For the foregoing reasons, Martinović's sub-ground of appeal is dismissed in its entirety.

[1172] Trial Judgement, paras 560-563.
[1173] Martinović Appeal Brief, para. 403 (citing Ex. PP 626; Trial Judgement, para. 561).
[1174] *Supra*, para. 543.
[1175] Martinović Appeal Brief, paras 404-407 (citing Trial Judgement, para. 560, fn. 1425).
[1176] Trial Judgement, fn. 1425.
[1177] Martinović Appeal Brief, paras 401, 413-414.
[1178] Prosecution Response to Martinović Appeal Brief, para. 6.20.
[1179] Rule 89(E) reads: "A Chamber *may* request verification of the authenticity of evidence obtained out of court" (emphasis added).

E. Plunder

551. Under Count 21, the Trial Chamber found Martinović guilty of plunder pursuant to Articles 3(e), 7(1) and 7(3) of the Statute.[1180]

552. The Trial Chamber found that 9 May 1993 was the starting date for the looting of a high number of BH Muslim apartments and houses, which lasted at least until July 1993.[1181] Witness WW gave evidence that on 9 May 1993, she was evicted from her apartment in the DUM area, and that Vinko Martinović ordered a soldier to drive away a car belonging to one of her neighbours.[1182] Relying, *inter alia*, on Exhibits PP 456.1 and PP 456.2, two reports of the Military Police in Mostar, the Trial Chamber found Martinović responsible for incidents of plunder in the DUM area in Mostar on 13 June 1993 pursuant to Articles 3(e) and 7(1) of the Statute.[1183]

553. For incidents of plunder other than those taking place in the DUM area on 13 June 1993, at paragraph 628 of the Trial Judgement, the Trial Chamber found Martinović responsible pursuant to Articles 3(e) and 7(3) of the Statute. Relying on the testimonies of Witnesses AB and OO, the Trial Chamber stated that Martinović was present on some occasions when his soldiers committed acts of looting, sometimes explicitly organising how plunder should take place.[1184] Further, relying on the testimonies of Witnesses F, II and OO, the Trial Chamber stated that, on other occasions, even if Martinović was not present at the spot, apartments were looted by soldiers in areas under his responsibility and by soldiers subordinate to him.[1185] The Trial Chamber found that the evidence showed that Martinović knew that plunder was occurring in several instances during this period and failed to take the necessary and reasonable measures to prevent it or to punish the perpetrators.[1186] For this conclusion, the Trial Chamber relied on the testimonies of Witnesses AB, Falk Simang and Sulejman Hadžisalihović and on Exhibit PP 456.1.[1187]

[1180] Trial Judgement, paras 627, 628.
[1181] Trial Judgement, paras 618 (citing *inter alia* Witness GG, T. 4756; Witness II, T. 4962), 619 (citing, *inter alia*, Witness U, T. 2927, 2928).
[1182] Trial Judgement, para. 619.
[1183] Trial Judgement, paras 620, 627.
[1184] Trial Judgement, para. 628.
[1185] Trial Judgement, para. 628.
[1186] Trial Judgement, para. 628.
[1187] Trial Judgement, fn. 1553.

1. Plunder on 13 June 1993 in the DUM area in Mostar

554. Martinović's challenges to the finding that he was responsible for the plunder incidents in the DUM area on 13 June 1993 consist of challenges to the testimony of Witness WW and to Exhibit PP 456.1.[1188] These have already been rejected by the Appeals Chamber.[1189]

2. Other incidents of plunder

555. Martinović submits that the Trial Chamber erred in fact by finding him responsible for incidents of plunder perpetrated at various locations in Mostar other than the DUM area.[1190] Martinović challenges the reliability of the testimonies of Witnesses OO, II and F.[1191] The Appeals Chamber has already found that the Trial Chamber erred in finding that Witness F was forced to loot by Martinović's subordinates.[1192]

556. Martinović claims that Witnesses OO and II did not provide "even basic information about the said instances of plunder".[1193] This assertion is false: the witnesses did testify as to the date and location of the plunder incidents, who ordered them, and how the plunder was carried out.[1194] Although the victims were not identified specifically, Witness OO further specified that they stole from "Muslim-owned flats".[1195] The Trial Chamber's decision to credit this testimony was reasonable. The Trial Chamber further relied on the evidence of Witness OO that Martinović explicitly organised how plunder should take place[1196] and on the evidence of Witnesses OO and II that plunder was carried out by Martinović's subordinates.[1197] Martinović has not demonstrated that it was unreasonable for the Trial Chamber to rely on this evidence to find him responsible for plunder pursuant to Article 7(3) of the Statute.

3. Conclusion

557. For the foregoing reasons, Martinović's sub-ground of appeal is dismissed in its entirety.

[1188] Martinović Appeal Brief, paras 422, 424, 427, 428. *See* also Martinović Notice of Appeal, pp. 9-10.
[1189] *Supra*, paras 542, 544.
[1190] Martinović Appeal Brief, paras 450, 456. *See* also Martinović Notice of Appeal, p. 9-10.
[1191] The Appeals Chamber has disposed of Martinović's further contentions concerning the sufficiency of the Indictment elsewhere: *supra*, para. 84.
[1192] *Supra*, para. 474.
[1193] Martinović Appeal Brief, para. 434.
[1194] Trial Judgement, paras 621, 622, 628; Witness OO, T. 5942, 5943, Witness II, T. 4955, 4957, 4962, 4964.
[1195] Witness OO, T. 5939.
[1196] Trial Judgement, para. 628, fn. 1550 (citing Witness OO, T. 5943).
[1197] Trial Judgement, para. 628, fn. 1552 (citing Witness II, T. 4962; Witness OO, T. 5943).

F. Persecutions

558. The Trial Chamber found Martinović guilty of persecutions pursuant to Articles 5(h) and 7(1) of the Statute on the basis of the underlying acts of the unlawful arrest and detention of civilians in Mostar,[1198] the forcible transfers in Mostar,[1199] the beatings of BH Muslim civilians in the course of their evictions,[1200] and the plunder committed in Mostar after the attack on 9 May 1993.[1201]

559. Under his second ground of appeal, Martinović alleges an error of law and an error of fact as regards the general findings of the Trial Chamber. He also puts forward several arguments challenging specific findings of the Trial Chamber.[1202]

1. General errors alleged

560. Martinović considers the Trial Chamber to have erred in law by charging him cumulatively, thus putting him in a position where he may be held "multiply responsible for a single act."[1203] According to Martinović, the "offences of unlawful transfer and plunder of public and private property are consumed in the legal qualification of persecutions, since, in this particular case, a qualification of persecutions could not be established without these criminal offences."[1204]

561. The Appeals Chamber considers Martinović to be mistaken as regards the alleged error of law. Martinović was charged with unlawful transfer and plunder of public and private property as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war, respectively.[1205] The conduct underlying these offences also formed part of the basis of the charge of persecutions as a crime against humanity.[1206] Contrary to the argument of Martinović, the offences of unlawful transfer and plunder cannot be said to be consumed within persecutions since the unlawful transfer and plunder were charged as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war while persecutions was charged as a crime against humanity.

[1198] Trial Judgement, paras 652, 710.
[1199] Trial Judgement, paras 672, 711.
[1200] Trial Judgement, paras 683, 712.
[1201] Trial Judgement, paras 702, 713.
[1202] *See* Martinović Notice of Appeal, pp. 1, 4-5.
[1203] Martinović Appeal Brief, paras 460, 461.
[1204] Martinović Appeal Brief, para. 462.
[1205] Indictment, Counts 18 and 21, respectively.
[1206] Indictment, Count 1; *see* also para. 34(a), (d).

562. In so far as Martinović's argument goes to challenging the permissibility of cumulative charging, the Appeals Chamber notes that his argument has been considered elsewhere.[1207] In as much as his argument challenges his cumulative convictions, the Appeals Chamber recalls that the *Čelibići* Appeal Judgement states that the test for permissible cumulative convictions for the same underlying conduct is whether "each applicable provision contains a materially distinct legal element not present in the other, bearing in mind that an element is materially distinct from another if it requires proof of a fact not required by the other."[1208] The Appeals Chamber reiterates that crimes against humanity under Article 5 of the Statute and grave breaches under Article 2 of the Statute contain different elements: "[w]hile Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population, Article 2 requires proof of a nexus between the acts of the accused and the existence of an international armed conflict as well as the protected persons status of the victims under the Geneva Conventions."[1209] As such, cumulative convictions may be entered under Articles 2 and 5 of the Statute for the same conduct.[1210] The same is true of crimes against humanity under Article 5 of the Statute and violations of the laws or customs of war under Article 3 of the Statute.[1211]

563. Martinović also challenges the Trial Chamber's reliance on the testimony of Witness WW.[1212] He contends that this testimony is uncorroborated and conflicts with that of two other witnesses, and that Witness WW identified him merely on the basis of stories the witness heard from other detainees.[1213] Martinović further submits that the Trial Chamber failed to consider the fact that "in the course of evictions, the perpetrators used false names, they falsely presented themselves by the names of Vinko Martinović and the names of members of his unit",[1214] failed to take into account that several Muslim witnesses testified that Martinović had protected and helped them, and failed to realise that Martinović's unit did not leave the frontline and could not have done so if the frontline was not to fall.[1215]

564. First, the Appeals Chamber notes that as to all but one instance, Witness WW's testimony was corroborated by that of numerous other witnesses cited by the Trial Chamber.[1216] Although the

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[1207] *Supra*, para. 103.
[1208] *Čelibići* Appeal Judgement, para. 421.
[1209] *Kordić and Čerkez* Appeal Judgement, para. 1037.
[1210] *Kordić and Čerkez* Appeal Judgement, para. 1037.
[1211] *Kordić and Čerkez* Appeal Judgement, para. 1036.
[1212] Martinović Appeal Brief, paras 464, 468, 476.
[1213] Martinović Appeal Brief, paras 466-467, 469-471 (citing Witness WW, T. 7034, 7048; Witness MM, T. 5877; Witness GG, T. 4759).
[1214] Martinović Appeal Brief, paras 476, 562-564.
[1215] Martinović Appeal Brief, para. 476.
[1216] *See e.g.* Witness GG (Trial Judgement, fn. 1617); Witness AB (Trial Judgement, fns 1549, 1553); Witness OO (Trial Judgement, fns 1550, 1552); Witness F (Trial Judgement, fns 1551, 1552); Witness II (Trial Judgement, fn. 1552); Witness Falk Simang (Trial Judgement, fns 1553, 1554); Witness Sulejman Hadžisalihović (fn. 1553).

Trial Chamber did rely solely on Witness WW's testimony as to an incident involving the witness' own mistreatment and that of her neighbours,[1217] it is well settled that the testimony of a single witness on a material fact does not require corroboration.[1218] Thus, although Witness WW was the sole witness upon whom the Trial Chamber relied for its conclusions on one incident, it does not follow from this alone that there was an error on the part of the Trial Chamber.

565. As to the alleged inconsistency with the testimony of Witness GG, Martinović's claim that Witness GG never mentioned seeing Martinović in her account of the same incident is mistaken. She in fact testified that the persons she saw were "mainly the same persons" as were involved in a previous incident on 9 May, whom she had previously identified as including Martinović.[1219] Her testimony thus does not conflict with that of Witness WW.

566. The Appeals Chamber notes that the remaining arguments of Martinović have been considered, and dismissed, elsewhere.[1220]

2. Alleged errors in the findings on unlawful confinement and detention as underlying acts of persecutions

567. Martinović asserts that he did not participate in the eviction of citizens from the DUM area on 9 May 1993 and did not unlawfully confine civilians on discriminatory grounds.[1221] He asserts that since the DUM area was situated in the zone of the conflict, Muslims were evacuated from their flats for military and safety reasons and after a while were returned to their homes.[1222] Therefore, he argues, the Trial Chamber erred in law by finding discriminatory intent.[1223] Referring to his arguments relating to the unlawful transfers on 13-14 June 1993, Martinović also argues that he was erroneously identified by Witnesses WW and GG.[1224]

568. The Trial Chamber found that Martinović was the person in charge of the operation based on the evidence of Witnesses WW and GG.[1225] As regards Martinović's argument that these witnesses erroneously identified him, the Appeals Chamber refers to its earlier discussion.[1226] Given the rejection of his challenge to the evidence of Witnesses WW and GG, the argument of

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[1217] Trial Judgement, para. 380, fn. 996; *ibid.*, para. 676.
[1218] *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, paras 62-63; *Čelibići* Appeal Judgement, paras 492, 506.
[1219] Witness GG, T. 4744, 4758-4760.
[1220] As to the use of false names *see supra*, para. 543; the help to Muslims *see supra*, para. 430; the frontline *see supra*, para. 545; the inconsistency with Witness MM's testimony regarding the identification of Martinović *see supra*, paras 542, 549, fn. 1158.
[1221] Martinović Appeal Brief, para. 481.
[1222] Martinović Appeal Brief, paras 482-485.
[1223] Martinović Appeal Brief, paras 485-486.
[1224] Martinović Appeal Brief, para. 489.
[1225] Trial Judgement, para. 652.

Martinović becomes a bare assertion. As such, and given that Martinović has not shown that no reasonable trier of fact could have arrived at the conclusion of the Trial Chamber, Martinović's arguments on this point are dismissed.

569. The Trial Chamber held that[1227] "[f]rom about five o'clock in the morning, armed HVO units surrounded apartment buildings and houses and collected and rounded up BH Muslim civilians. In certain apartment-blocks where both BH Muslims and BH Croats lived, only the BH Muslims were forced to leave. Women, children, men and elderly were forced out of their homes";[1228] a deadline was set "for people who had taken refuge in Mostar following upheavals in Eastern Bosnia and Herzegovina in abandoned apartments (*i.e.* BH Muslims) to vacate them, without being given an alternative place to live";[1229] individuals were "arrested without being given a reason and did not know why they were detained";[1230] "[f]ollowing international pressure, the detained women and children were released after a few days";[1231] "[t]he harassment of BH Muslims by forcing them out of their apartments and detaining them became common and widespread from 9 May throughout the autumn of 1993. Many of the BH Muslims, who were taken to the Heliodrom on 9 May 1993 and subsequently released, returned and found that their apartments had been emptied of valuables and movable property".[1232] The Trial Chamber explicitly noted that "[t]he position of the BH Croatian authorities was that people had been moved there for their own security."[1233] Given the findings of the Trial Chamber just noted, it must be assumed that this position was rejected by the Trial Chamber. Accordingly, Martinović has not shown that, in light of his contention that the BH Muslims were moved for security reasons, the Trial Chamber was unreasonable in finding the presence of discriminatory intent. As such, his argument is dismissed.

3. <u>Alleged errors in the findings on forcible transfer and deportation as underlying acts of persecutions</u>

570. Martinović contends that the Trial Chamber committed an error of law since Muslim citizens were not evacuated and transferred to the Heliodrom on 9 May 1993 with the requisite discriminatory intent.[1234] Martinović refers to his submissions on unlawful confinement and

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[1226] *See supra*, paras 542, 548-549.
[1227] In order to consider Martinović's arguments that Muslims were evacuated from the DUM area for military and safety reasons and thus the Trial Chamber erred in finding discriminatory intent on the part of Martinović, it is useful to consider the Trial Chamber's particular findings on the context within which the evictions from the DUM area were carried out.
[1228] Trial Judgement, para. 42 (footnotes omitted).
[1229] Trial Judgement, para. 43.
[1230] Trial Judgement, para. 46.
[1231] Trial Judgement, para. 47.
[1232] Trial Judgement, para. 48 (footnotes omitted).
[1233] Trial Judgement, para. 46.
[1234] Martinović Appeal Brief, para. 492.

detention as underlying acts of persecutions in this regard.[1235] In addition, Martinović refers to the unreliable testimony of Witness WW and the issue of cumulative charging.[1236] Finally, by reference to his submissions on unlawful transfer, Martinović considers the testimony of Witness MM to be unreliable.[1237]

571. The Appeals Chamber observes that these arguments have been disposed of elsewhere.[1238]

4. Alleged errors in the findings on torture, cruel treatment and wilfully causing great suffering as underlying acts of persecutions

572. Martinović challenges his conviction for persecutions through various acts of mistreatment, including beatings.[1239] Most of his arguments have been considered elsewhere.[1240] The Appeals Chamber recalls that it upheld the finding of the Trial Chamber that the evictions of BH Muslims on 9 May 1993 were committed with discriminatory intent.[1241] As to the question of whether the beatings were committed with discriminatory intent, the Appeals Chamber recalls that, if out of a group of persons selected on the basis of racial, religious or political grounds, only certain persons are singled out and beaten, a reasonable trier of fact may infer that the beatings were carried out on discriminatory grounds.[1242]

573. Martinović's second argument relates to the finding of the Trial Chamber that the beatings in question did not "possess the requisite seriousness to amount to cruel treatment or wilfully causing great suffering under Articles 2(c) and 3 of the Statute",[1243] but that "they are sufficiently serious to amount to acts of persecutions as a crime against humanity pursuant to Article 5(h) of the Statute".[1244] In essence, Martinović is arguing that the threshold of seriousness should be the same throughout.[1245]

574. The Appeals Chamber recalls that the acts underlying the crime of persecutions, either considered in isolation or in conjunction with other acts, must be of gravity equal to the crimes

[1235] Martinović Appeal Brief, para. 493.
[1236] Martinović Appeal Brief. paras 500-502.
[1237] Martinović Appeal Brief. paras 503-505.
[1238] As to the discriminatory intent, *see supra*, para. 569; the reliability of the evidence of Witness WW, *see supra*, para. 542; cumulative charging and cumulative convictions, *see supra*, para. 103 and *infra*, para. 586; the reliability of Witness MM, *see supra*, paras 548-549, fn. 1158. The Appeals Chamber has also disposed of Martinović's further contentions concerning the sufficiency of the Indictment elsewhere: *see supra*, para. 66.
[1239] Martinović Appeal Brief, paras 508-513, 519, 520-522.
[1240] As to his challenge to the sole use and unreliable testimony of Witness WW (Martinović Appeal Brief, paras 520-522), *see supra*, paras 542, 564, 565.
[1241] *See supra*, para. 569.
[1242] *See supra*, paras 130, 142, 144.
[1243] Trial Judgement, para. 380; Martinović Appeal Brief, paras 514-518.
[1244] Trial Judgement, para. 676.
[1245] Martinović Appeal Brief, para. 519.

listed under Article 5 of the Statute.[1246] Thus, an act that falls short of constituting another Article 5 crime may yet constitute an underlying act of persecutions under Article 5(h) since "acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect".[1247]

575. In its findings for Counts 9 to 12, the Trial Chamber found that it was established that Martinović maltreated one of Witness WW's neighbours and kicked Witness WW in the back in the course of their forcible eviction on 13 June 1993.[1248] While the Trial Chamber found that "maltreatment in the context of terrifying evictions conducted by armed soldiers is serious", it was not satisfied that "the Prosecution established that the concrete incidents *as such* possess the requisite seriousness to amount to cruel treatment or wilfully causing great suffering under Articles 2(c) and 3 of the Statute."[1249] However, in its findings for Count 1 (persecutions), the Trial Chamber found that the same acts, "by virtue of the context in which they occurred", were of sufficient gravity to constitute underlying acts of persecutions.[1250] The Trial Chamber took into consideration that "the mistreatment of [W]itness WW and her neighbour by Vinko Martinović was conducted while the victims were forcibly thrown out of their homes, in an atmosphere of terror, fear and uncertainty of what to expect next."[1251] In light of the context in which they occurred, Martinović has not demonstrated that no reasonable trier of fact could have found that these acts meet the requisite threshold of gravity under Article 5 of the Statute.

5. <u>Alleged errors in the findings on plunder as an underlying act of persecutions</u>

576. The Appeals Chamber notes that a number of Martinović's arguments challenging his conviction for plunder as an underlying act of persecutions are addressed elsewhere.[1252] Only those not considered previously by the Appeals Chamber will be considered below.

[1246] *Krnojelac* Appeal Judgement, para. 199.
[1247] *Brđanin* Trial Judgement, para. 995; *Kupreškić et al.* Trial Judgement, paras 615(e), 622; *Krnojelac* Trial Judgement, para. 434.
[1248] Trial Judgement, fn. 996.
[1249] Trial Judgement, para. 380 (emphasis added). *See* also *ibid.*, para. 676.
[1250] Trial Judgement, para. 676. The Trial Chamber also found that "the mental harm was inflicted on the victims on discriminatory grounds, since only the BH Muslim population of Mostar was forcibly evicted and mistreated": Trial Judgement, para. 676. The Appeals Chamber has not interpreted this last statement as going to show the gravity of the underlying acts, but, rather, to ascertain that they were committed on discriminatory grounds for the purposes of establishing whether they amounted to persecution.
[1251] Trial Judgement, para. 676.
[1252] As to Martinović's challenges to the reliability of Witnesses WW, OO, F, GG, MM and Ex. PP 456.1 (Martinović Appeal Brief, paras 540-541, 561, 566), *see supra*, paras 473-474, 542, 544, 548-549, 556, 564-565, fn. 1158; Martinović's argument that he protected Muslim citizens (Martinović Appeal Brief, paras 555-559), *see supra*, para. 430; his submission that there is no evidence that he participated in the plunder in Mostar after 9 May 1993 (Martinović Appeal Brief, paras 543-544, 560), *see supra*, paras 554-557; and his argument that impostors used his name and that of his unit (Martinović Appeal Brief, paras 562-565), *see supra*, para. 543.

577. First, Martinović challenges the conclusion of the Trial Chamber that the plunder was carried out with discriminatory intent. He claims that the evidence for this finding is insufficient,[1253] and that the Trial Chamber failed to consider the fact that the Muslims who were expelled from Western Mostar were mostly refugees from other parts of BiH who moved into abandoned houses and flats.[1254]

578. The Appeals Chamber notes that the Trial Chamber found that:

> [s]tarting on 9 May 1993, as a consequence of the large offensive by the HVO on Mostar, the city experienced a period of lawlessness and violence. According to a number of witnesses, in fact, that day also marked the beginning of the looting of a high number of BH Muslim apartments and houses, which lasted at least until July 1993.[1255]

It is clear from this and other findings of the Trial Chamber that it was the BH Muslim population that was targeted. For example, the Trial Judgement notes that "the evidence presented at trial explicitly refers to the planning of large-scale operations including plunder against BH Muslims. Other evidence points to systematic plunder due to the choice of BH Muslim apartments among possible targets as well as the means employed during the plunder."[1256] Instances of the plunder of property of specific individuals are also mentioned in the Trial Judgement.[1257] Martinović has not shown that the evidence relied upon in support of this finding was insufficient to permit a reasonable Trial Chamber to come to the conclusion the Trial Chamber did. His general argument that the Trial Chamber ignored the testimony of defence witnesses[1258] likewise does not demonstrate that the Trial Chamber erred in exercising its discretion to balance the competing accounts of different witnesses.[1259] As such, Martinović's arguments relating to the discriminatory intent are dismissed.

579. Finally, Martinović contends that "systematic persecutions could only be carried out from the highest military and political level" and that he was prosecuted for all the events in Mostar because he was the only accused from Mostar before this International Tribunal.[1260]

580. The Appeals Chamber notes that persecutions may be undertaken by individuals at all levels of a hierarchy; there is no requirement that the individual be a senior figure. Martinović's assertion concerning the reason he was prosecuted is unsubstantiated and specious, and moreover irrelevant to his guilt.

[1253] Martinović Appeal Brief, paras 527-537.
[1254] Martinović Appeal Brief, para. 537.
[1255] Trial Judgement, para. 618 (footnotes omitted).
[1256] Trial Judgement, para. 625 (footnotes omitted).
[1257] *See e.g.* Trial Judgement, paras 618-622, 624.
[1258] Martinović Appeal Brief, paras 572-575.
[1259] *Kupreškić et al.* Appeal Judgement, paras 31-32.
[1260] Martinović Appeal Brief, para. 569.

6. Conclusion

581. Martinović's arguments under this sub-ground of appeal are dismissed.

VIII. CUMULATIVE CONVICTIONS

582. Martinović and the Prosecution challenge the discussion on cumulative convictions contained in the Trial Judgement. Their contentions will be considered in turn.

A. Martinović's subground of appeal: the Trial Chamber erred in law in entering cumulative convictions against him

583. Martinović has not identified for which counts the Trial Chamber allegedly erred by cumulatively entering a conviction against him. He claims that the mere fact that multiple convictions were entered against him constitutes an error of law. Martinović is therefore challenging cumulative convictions as such.[1261]

584. The permissibility of cumulative convictions as well as the principles governing their application is well-established in the practice of the International Tribunal. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[1262] An element is materially distinct from another if it requires proof of a fact not required by the other.[1263]

585. Martinović argues that cumulative convictions based on the same conduct cause him prejudice because the same act is given multiple and aggravating characterisations. He also submits that the cumulative convictions entered against him fail to reflect his role and knowledge of the events of which he has been convicted. Quite contrary to these assertions, the Appeals Chamber's jurisprudence recognises that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[1264]

586. Martinović has not presented the Appeals Chamber with any cogent reasons in the interests of justice for departing from its jurisprudence on cumulative convictions.[1265] The Appeals Chamber finds no reasons to do so on its own. For these reasons, his sub-ground of appeal is dismissed.

[1261] Martinović was asked to clarify in the course of the Appeals Hearing his statement that the Trial Chamber failed to consider his intent before convicting him of multiple offences based on the same facts: SLO Letter, p. 2; *see* Appeals Hearing, T. 210-212. In the view of the Appeals Chamber, this statement does not constitute an argument additional to Martinović's submissions considered under this section.

[1262] *See Čelebići* Appeal Judgement, para. 412; *Jelisić* Appeal Judgement, para. 78; *Kupreškić et al.* Appeal Judgement, para. 387; *Kunarac et al.* Appeal Judgement, para. 168.

[1263] *See Čelebići* Appeal Judgement, para. 412.

B. Prosecution's fourth ground of appeal: alleged error in applying cumulative convictions to persecutions and another Article 5 crime

587. The Prosecution submits that because an underlying act of persecutions need not amount to a crime under Article 5 of the Statute, persecutions is necessarily legally distinct from other Article 5 crimes.[1266] Specifically, the Prosecution argues that torture and persecutions each contain elements that are materially distinct from those of the other.[1267] Moreover, it contends that convictions for both offenses would accord with the interests of justice because each prohibition protects distinct legal values: group identity on the one hand, and individual dignity on the other.[1268] In response, Naletilić claims that to convict him concurrently for torture and persecutions based on the same conduct would violate the principle of cumulative convictions.[1269]

588. The Appeals Chamber notes that the Trial Chamber found Naletilić responsible for "persecutions under Article 5(h) of the Statute, torture under Article 5(f) of the Statute and torture under Article 2(b) of the Statute, for his treatment of [W]itnesses FF and Z."[1270] However, citing the *Krstić* Trial Judgement as authority, it held that "[w]hen there are positive findings in relation to both persecutions and another crime against humanity, the conviction that is upheld is that of persecutions".[1271] For that reason, upon a comparison of multiple convictions based on the same acts, the Trial Chamber entered convictions only under Article 5(h) and Article 2(b) of the Statute in relation to the mistreatment of Witnesses FF and Z.[1272] It therefore entered no conviction under Article 5(f) of the Statute for this incident.

589. The Appeals Chamber recalls that it held in the *Kordić and Čerkez* Appeal Judgement that *intra*-Article 5 convictions under the Statute for persecutions as a crime against humanity with other crimes against humanity may be permissibly cumulative under the *Čelebići* test.[1273] The Appeals Chamber stated that this holding is consistent with the reasoning and proper application of the *Čelebići* test by the Appeals Chamber in four previous cases and noted that:

[1264] *Kunarac et al.* Appeal Judgement, para. 169 (citing the Partial Dissenting Opinion of Judge Shahabuddeen in the *Jelisić* Appeal Judgement, para. 34).
[1265] *Aleksovski* Appeal Judgement, para. 107.
[1266] Prosecution Appeal Brief, paras 5.7-5.12.
[1267] Prosecution Appeal Brief, paras 5.12-5.16.
[1268] Prosecution Appeal Brief, para. 5.28. *See* also *ibid.*, paras 5.20-5.27.
[1269] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Response to the Prosecution's Appeal Brief, 26 September 2003 ("Naletilić Response to Prosecution Appeal Brief"), paras 9-11.
[1270] Trial Judgement, para. 723 (footnotes omitted).
[1271] Trial Judgement, para. 724 (citing *Krstić* Trial Judgement, para. 675).
[1272] Trial Judgement, para. 728.
[1273] *Kordić and Čerkez* Appeal Judgement, para. 1040.

> the Appeals Chamber in *Čelebići* expressly rejected an approach that takes into account the actual conduct of the accused as determinative of whether multiple convictions for that conduct are permissible. Rather, what is required is an examination, as a matter of law, of the elements of each offence in the Statute that pertain to that conduct for which the accused has been convicted. It must be considered whether each offence charged has a materially distinct element not contained in the other; that is, whether each offence has an element that requires proof of a fact not required by the other offence.[1274]

Specifically, the Appeals Chamber found that cumulative convictions on the basis of the same acts are permissible in relation to persecutions as a crime against humanity under Article 5(h) of the Statute and murder as a crime against humanity under Article 5(a) of the Statute; persecutions as a crime against humanity under Article 5(h) of the Statute and other inhumane acts as a crime against humanity under Article 5(i) of the Statute; and persecutions as a crime against humanity under Article 5(h) of the Statute and imprisonment as a crime against humanity under Article 5(e) of the Statute.[1275] Subsequently, the Appeals Chamber has applied the holding in the *Kordić and Čerkez* Appeal Judgement to find that cumulative convictions on the basis of the same acts are permissible with regard to persecutions as a crime against humanity under Article 5(h) of the Statute and deportation as a crime against humanity under Article 5(d) of the Statute; persecutions as a crime against humanity under Article 5(h) of the Statute and other inhumane acts (forcible transfer) as a crime against humanity under Article 5(i) of the Statute; and persecutions as a crime against humanity under Article 5(h) of the Statute and extermination as a crime against humanity under Article 5(b) of the Statute.[1276]

590. The Appeals Chamber considers that the same is true where the conviction is for torture under Article 5(f) of the Statute and persecutions under Article 5(h) of the Statute where torture constitutes an underlying act of persecutions. The underlying act is not the determining factor. The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of torture under Article 5 of the Statute: the requirements of proof that an act or omission discriminates in fact and proof that the act or omission was committed with specific intent to discriminate. Torture, by contrast, requires proof that the accused caused the severe pain or suffering of an individual, regardless of whether the act or omission causing the harm discriminates in fact or was specifically intended as discriminatory. Thus, cumulative convictions on the basis of the same acts are permissible in relation to these crimes under Article 5 of the Statute.[1277] The Trial Chamber's conclusion was erroneous.

[1274] *Kordić and Čerkez* Appeal Judgement, para. 1040.
[1275] *Kordić and Čerkez* Appeal Judgement, paras 1041-1043.
[1276] *Stakić* Appeal Judgement, paras 360-363.
[1277] *See Kordić and Čerkez* Appeal Judgement, paras 1041-1043.

591. As a result, the Appeals Chamber, Judge Güney and Judge Schomburg dissenting, resolves that the Trial Chamber incorrectly disallowed the conviction against Naletilić for Count 9 (torture as a crime against humanity pursuant to Article 5(f) of the Statute) in relation to the mistreatment of Witnesses FF and Z.[1278] Accordingly, the Appeals Chamber allows this ground of appeal of the Prosecution.

[1278] Trial Judgement, paras 723-724, 728.

IX. APPEALS FROM SENTENCE

A. General considerations

592. The general guidelines regarding sentencing are contained in Articles 23 and 24 of the Statute and Rules 100 to 106. The Appeals Chamber recalls that:

> The combined effect of Article 24 of the Statute and Rule 101 of the Rules is that, in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offences or totality of the conduct; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal; and (v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[1279]

While aggravating factors must be proven beyond reasonable doubt, mitigating factors need only be proven on the balance of probabilities.[1280]

593. With regard to sentencing, Trial Chambers are vested with broad discretion in determining the appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[1281] As a general rule, the Appeals Chamber will not substitute its own sentence for that of a Trial Chamber unless it can be shown that the Trial Chamber committed a discernible error in exercising its discretion or failed to follow the applicable law.[1282]

B. Martinović's appeal against sentence

594. The Trial Chamber imposed a single sentence of 18 years imprisonment on Martinović.[1283] Martinović challenges this sentence under his third ground of appeal on four bases, which will be considered in turn.[1284]

1. Alleged error regarding voluntary surrender

595. The Trial Chamber found that Martinović was transferred from the Republic of Croatia to the International Tribunal by virtue of a decision of the Zagreb County Court of 8 June 1999, which was later upheld by the Supreme Court of the Republic of Croatia upon appeal by the Zagreb Public

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[1279] *Blaškić* Appeal Judgement, para. 679 (footnotes omitted).
[1280] *Blaškić* Appeal Judgement, paras 686, 697; *Čelebići* Appeal Judgement, para. 763.
[1281] *Čelebići* Appeal Judgement, para. 717.
[1282] *Kvočka et al*. Appeal Judgement, para. 669; *Blaškić* Appeal Judgement, para. 680; *Čelebići* Appeal Judgement, para. 725; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Judgement in Sentencing Appeals, para. 22.
[1283] Trial Judgement, para. 769.
[1284] Martinović Notice of Appeal, pp. 10-12.

Prosecutor.[1285] At the time of these decisions, Martinović was in detention in the Republic of Croatia. The Trial Chamber held that "though there was no impediment raised by Vinko Martinović to his transfer to the Tribunal, it cannot be said that he surrendered voluntarily".[1286] As such, the Trial Chamber concluded that "the circumstances of his transfer to the Tribunal cannot be considered in mitigation of sentence".[1287]

596. Martinović argues that the Trial Chamber failed to consider his Submission on Sentencing Considerations,[1288] which gave "a full account of the circumstances of [his] transfer from prison in Zagreb to The Hague".[1289] Martinović effectively submits that he took two actions in the context of his transfer which should have been considered in mitigation of sentence. First, upon learning of the Indictment against him, he personally requested his own extradition to The Hague.[1290] Second, after the decision on his transfer was rendered, he filed a submission expressly waiving his right to appeal that decision and requesting his prompt extradition.[1291] He cites two Croatian court decisions in support of his contentions.[1292]

597. The Prosecution acknowledges that actions taken by an indicted person that facilitate their appearance before the International Tribunal could be taken into account in mitigation of sentence,[1293] but argues that in the present case the Trial Chamber was entitled to give this factor little or no weight.[1294] The Prosecution also submits that the Trial Chamber's decision not to consider Martinović's transfer and appearance as mitigating factors results in the same legal outcome as if the Trial Chamber had acknowledged that some aspects of his transfer and appearance may be mitigating, but in the exercise of its discretion, gave them negligible or no weight as mitigating factors.[1295] Accordingly, the Prosecution concludes that no error has been established.[1296]

[1285] Trial Judgement, para. 761.
[1286] Trial Judgement, para. 761.
[1287] Trial Judgement, para. 761.
[1288] Martinović Appeal Brief, para. 581 (citing *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Submission on Sentencing Considerations, 20 February 2003 (Confidential).
[1289] Martinović Appeal Brief, para. 582.
[1290] Martinović Appeal Brief, paras 582, 584.
[1291] Martinović Appeal Brief, paras 583, 584.
[1292] Decision of the Zagreb County Court, 8 June 1999, filed before the Trial Chamber on 11 August 1999, folio number D425-D416, domestic reference number KV-I 200/99 ("Decision of the Zagreb County Court"); Decision of the Supreme Court of the Republic of Croatia, 8 July 1999, filed before the Trial Chamber on 11 August 1999, folio number D411-D399, domestic reference number I Kž-488/1999-3 ("Decision of the Supreme Court of the Republic of Croatia of 8 July 1999").
[1293] Prosecution Response to Martinović Appeal Brief, para. 9.10.
[1294] Prosecution Response to Martinović Appeal Brief, paras 9.6-9.7; 9.11-9.13.
[1295] Prosecution Response to Martinović Appeal Brief, para. 9.14.
[1296] Prosecution Response to Martinović Appeal Brief, para. 9.14.

598. The Appeals Chamber notes that contrary to Martinović's suggestion, the Trial Chamber did not ignore his submissions on this point; it directly addressed them.[1297] The Appeals Chamber observes that, on the balance of probabilities, it has been proven that Martinović waived his right to appeal the Decision of the Zagreb County Court. It has not, however, been shown on the balance of probabilities that on two occasions Martinović personally requested his own extradition. The Decision of the Zagreb County Court does not mention whether Martinović had previously requested his own extradition to the International Tribunal. It merely acknowledges that Martinović stated before the Zagreb County Court that, considering the current state of affairs in Croatia and in particular Croatia's relationship with the International Tribunal, "let it be decided that he be handed over and he would not appeal against such a decision".[1298] The Decision of the Supreme Court of the Republic of Croatia of 8 July 1999 offers no information on these issues.

599. The question for the Appeals Chamber is whether this act of waiving a right to an appeal constitutes voluntary surrender and therefore a mitigating circumstance.[1299] Voluntary surrender consists of the physical act of surrendering voluntarily or the initiation of the process leading to the transfer of the individual to the International Tribunal.[1300]

600. Mere facilitation of the transfer process cannot be considered voluntary surrender. Nevertheless, such facilitation may be considered in mitigation of sentence. The underlying rationale for treating voluntary surrender as a mitigating factor can be illustrated in the following reasons: the voluntary surrender of one individual may encourage others to surrender,[1301] and voluntary surrender presents considerable benefits to the international community.[1302] These underlying reasons for treating voluntary surrender as a mitigating circumstance also apply to an indictee's facilitation of the transfer process.

601. In light of the specific circumstances in this case, the Appeals Chamber considers Martinović to have facilitated his transfer to the International Tribunal. The Appeals Chamber therefore observes that this factor should have been considered in mitigation by the Trial Chamber. Accordingly, the Trial Chamber erred in stating that "the circumstances of [Martinović's] transfer

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[1297] Trial Judgement, paras 757, 761, fns 1793-1794, 1796, 1798-1799.
[1298] Decision of the Zagreb County Court, p. 3.
[1299] The Appeals Chamber notes that it is well settled in the jurisprudence of the International Tribunal that voluntary surrender may constitute a mitigating circumstance: *Kvočka et al.* Appeal Judgement, paras 710, 712-713; *Blaškić* Appeal Judgement, para. 702; *Kupreškić et al.* Appeal Judgement, para. 430; *Plavšić* Sentencing Judgement, para. 84; *M. Simić* Sentencing Judgement, para. 107; *Kunarac et al.* Trial Judgement, para. 868; *Kupreškić et al.* Trial Judgement, paras 853, 860, 863.
[1300] *See Kvočka et al.* Appeal Judgement, paras 709-713.
[1301] *See M. Simić* Sentencing Judgement, para. 107; *Plavšić* Sentencing Judgement, para. 83.
[1302] *See M. Simić* Sentencing Judgement, para. 107.

to the Tribunal *cannot* be considered in mitigation of sentence."[1303] However, given that Martinović was involved in criminal proceedings at the time of his transfer,[1304] and that there is some indication that the time saved by facilitating transfer would have been approximately one month,[1305] the Appeals Chamber does not consider that this mitigating circumstance would have been given significant weight. The Trial Chamber thus did not commit an error affecting the judgement.

2. Alleged error regarding assistance and general attitude to others

602. Martinović submits that despite noting his claims that he helped his BH Muslim neighbours, that his general attitude is the same towards BH Muslims and BH Croats, and that BH Muslim detainees were helped by him and wanted to stay with him rather than in other units, the Trial Chamber failed to address them in mitigation when determining his sentence.[1306] Martinović refers to the right of an accused to a reasoned opinion under Article 23 of the Statute as an aspect of the fair trial requirement in Articles 20 and 21 of the Statute and argues that the Trial Chamber cannot simply ignore his submissions.[1307]

603. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98 *ter*(C).[1308] This right is one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[1309] It makes it possible for an individual to exercise their right of appeal[1310] and allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of the evidence.[1311] The Appeals Chamber further recalls that the requirement of a reasoned opinion relates to a Trial Chamber's judgement; a Trial Chamber is under no obligation to justify its findings in relation to each and every submission made during trial.[1312]

604. The Appeals Chamber notes that in an earlier section of the Trial Judgement before the Trial Chamber made its findings on sentencing, the Trial Chamber accepted that Martinović rendered assistance to some, but not the vast majority of BH Muslim prisoners.[1313] This finding has been

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[1303] Trial Judgement, para. 761 (emphasis added).
[1304] Trial Judgement, para. 762.
[1305] The Decision of the Zagreb County Court was handed down on 8 June 1999. The Decision of the Supreme Court of the Republic of Croatia was delivered on 8 July 1999 upon appeal by the Public Prosecutor.
[1306] Martinović Appeal Brief, paras 588-589.
[1307] Martinović Appeal Brief, para. 592.
[1308] *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41.
[1309] *Kunarac et al.* Appeal Judgement, para. 41.
[1310] *See Hadjianastassiou v. Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR Ser. A., No. 252, Judgement of 16 December 1992, para. 33.
[1311] *Kunarac et al.* Appeal Judgement, para. 41.
[1312] *Kvočka et al.* Appeal Judgement, para. 23.
[1313] Trial Judgement, paras 267, 384.

upheld on appeal.[1314] However, when turning to sentencing, the Trial Chamber did not state whether it took this assistance into account and, if so, how this assistance affected his sentence.[1315] It merely referred to Martinović's written submissions on sentencing regarding that assistance.[1316]

605. The Appeals Chamber finds that the Trial Chamber's failure to do so violated the reasoned opinion requirement. Rule 101(B)(ii) requires the Trial Chamber to take into account mitigating factors at sentencing; however, it is impossible for Martinović or the Appeals Chamber to determine whether the Trial Chamber did in fact do so with regard to his assistance to BH Muslim prisoners and, if it did, what were its findings as to that factor's impact on Martinović's sentence. It may not be inferred in this case that, simply because the Trial Chamber considered that assistance earlier in the Trial Judgement, it must have subsequently taken it into account at sentencing.

606. Nevertheless, the Appeals Chamber considers that certain findings of the Trial Chamber – that the assistance was given because particular prisoners were "friends or family acquaintances before the war or because they had special skills"[1317] and not to the "vast majority of Heliodrom detainees who were taken to work to the Vinko Škrobo ATG";[1318] that prisoners who personally knew Martinović before the war were not taken out to work for the Vinko Škrobo ATG on 17 September 1993 (the date of the "wooden rifles" incident);[1319] and that assistance was provided "to a handful of Muslims"[1320] and on the basis of a prior "personal relationship" with Martinović or his family, because the prisoners "may have bought his protection"[1321] – indicate that the assistance, in the context of sentencing, would be given little or no weight.

607. The Appeals Chamber therefore finds that although the Trial Chamber erred in failing to provide a reasoned opinion with regard to Martinović's submissions at sentencing as to his assistance to BH Muslims, this is not an error capable of affecting the judgement. Whether or not Martinović's assistance was actually taken into account by the Trial Chamber at sentencing, it is entitled to little weight and would have no impact on Martinović's resulting sentence.

[1314] *Supra*, para. 430.
[1315] Trial Judgement, paras 758-762.
[1316] Trial Judgement, para. 757, fns 1793, 1794, 1796, 1798-1799.
[1317] Trial Judgement, para. 267 (footnotes omitted).
[1318] Trial Judgement, para. 267 (footnotes omitted).
[1319] Trial Judgement, fn. 719.
[1320] Trial Judgement, para. 384.
[1321] Trial Judgement, para. 384.

3. Alleged error regarding command role as an aggravating factor

608. Martinović submits that the Trial Chamber erred in holding that his command role is an aggravating factor in sentencing.[1322] He also submits that the Trial Chamber "failed to take into account the actual scope and extent" of his command role.[1323] Martinović argues that a "correct assessment and analysis" of his role shows that "he was not a commander either by rank or by military training but rather by virtue of the circumstances in which he found himself at the time of the conflicts which developed first with the Serbs and later with the Muslims".[1324]

609. The Appeals Chamber disagrees. The Trial Chamber carefully considered the scope of Martinović's position of authority, including his background, experience, rank, the size of his unit, and his tasks.[1325] Martinović has provided no reason to set aside the Trial Chamber's findings on these matters. Moreover, it is irrelevant whether his position of authority had been recently acquired at the time of the offences, so long as he possessed the position and abused it.

610. The Appeals Chamber considers, however, that the Trial Chamber erred in another respect: with regard to his convictions under Article 7(3) of the Statute, it double-counted his position of authority as both an element of the offence and an aggravating factor. In the section pertaining to the law on sentencing, the Trial Chamber stated that the gravity of the offence is a consideration of primary importance in the imposition of sentence, and that, in determining it, "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'" is required.[1326] In addition, it stated as follows:

> It has been held that the sentence imposed should reflect the relative significance of the role of the accused in the context of the conflict in the former Yugoslavia. However, this has been interpreted to mean that even if the position of an accused in the overall hierarchy in the conflict in the former Yugoslavia was low, it does not follow that a low sentence is to be automatically imposed. The requirement that the inherent gravity of the crime be reflected in the sentence was again reiterated in this context.[1327]

611. Paragraph 758 of the Trial Judgement reads as follows:

> The Chamber has found Vinko Martinović guilty of the most heinous crimes, which include murder. The gravity of these offences is of primary consideration in determining a sentence that reflects the criminal conduct of the accused. [Although] Vinko Martinović did not have a significant role in the context of the wider conflict in the former Yugoslavia, his criminal conduct, and the nature of the crimes he participated in, are of grave significance. Vinko Martinović was the commander of the Vinko Škrobo ATG. He was respected by his subordinates and set an

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[1322] Martinović Appeal Brief, para. 593.
[1323] Martinović Appeal Brief, para. 595.
[1324] Martinović Appeal Brief, para. 596.
[1325] The scope of Martinović's command responsibility was considered at paras 98, 100-103, 163; his background and experience at para. 3; the size of his unit at fn. 279; and the tasks of his unit at paras 98, 102 of the Trial Judgement.
[1326] Trial Judgement, para. 740, citing *inter alia Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101.
[1327] Trial Judgement, para. 744 (footnotes omitted).

> example by his behaviour. The Chamber finds that he was in a position to exert influence on the behaviour of his unit and could have played a significant role in the prevention of crime. Instead of doing so, Vinko Martinović permitted the commission of atrocities and was often a direct participant. The Chamber therefore finds his command role an aggravating factor.

612. In the view of the Appeals Chamber, in this passage the Trial Chamber embarked upon a determination of the following in the context of sentencing: the gravity of Martinović's offences, the form and degree of his participation and his "relative significant role" in the context of the conflict in the former Yugoslavia. The Trial Chamber found that Martinović's role was not significant, but that the nature of the crimes and his conduct were grave. The Trial Chamber also concluded that Martinović's command role constituted an aggravating factor. The choice of wording ("aggravating factor") suggests that the Trial Chamber's consideration of Martinović's command role did not pertain to its evaluation of the form and degree of Martinović's participation in the crimes, but went further. It is with this in mind that the Appeals Chamber finds as follows.

613. The Appeals Chamber recalls that a Trial Chamber is "required to take into account and weigh the totality of an accused's culpability".[1328] In the present case, for all Counts of which Martinović was convicted, his responsibility was established pursuant to Article 7(1) of the Statute, with the exception of Counts 5 and 21, under which Martinović was found responsible pursuant to Articles 7(1) and 7(3) for different acts. Under no Count was he convicted solely under Article 7(3) of the Statute.[1329] In addition, the Trial Chamber found that he was a commander.[1330] The Appeals Chamber has on several occasions confirmed that a Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator's position of authority.[1331] The Trial Chamber found that Martinović's position as a commander rendered his role more serious. In so far as this relates to Martinović's convictions under Article 7(1) of the Statute, the Appeals Chamber finds no error. In as much as this relates to his convictions under Article 7(3) of the Statute, the Appeals Chamber considers there to be an error. Given that the Trial Judgement is unclear as to exactly which Counts this factor was considered to aggravate, in favour of Martinović, the Appeals Chamber finds that the Trial Chamber erred. However, since the error relates only to two counts and even then only to parts thereof, the Appeals Chamber considers that it has no impact on the sentence.

[1328] *Kupreškić et al.* Appeal Judgement, para. 451.

[1329] *See* Introduction, *supra*, para. 6.

[1330] Trial Judgement, para. 98.

[1331] *Kupreškić et al.* Appeal Judgement, para. 451; *Čelebići* Appeal Judgement, para. 745; *Aleksovksi* Appeal Judgement, para. 183; *Blaškić* Appeal Judgement, paras 89, 91.

4. Alleged error regarding unduly severe sentence

614. Martinović submits that his sentence is out of proportion with the sentences imposed by the International Tribunal on other convicted persons "whose command position was greater regarding their rank, units of subordinates, and relevant activities and offences".[1332] Martinović submits that a Trial Chamber is obliged to impose a sentence that is "both individualized and within the range of sentences imposed in other cases where circumstances are generally similar as to both offences and offenders".[1333] Specifically, he argues that his sentence is the same or greater than those imposed on Tihomir Blaškić, Mario Čerkez, Vidoje Blagojević and Dragan Jokić, even though, he claims, each of these individuals held more elevated command roles than he did and committed at least equally serious crimes.[1334]

615. The Appeals Chamber considers the law in this area to be clear. As a general rule,

> the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but "also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence." The reasons for this are clearly set out in the case law of the International Tribunal: (1) such comparison can only be undertaken where the offences are the same and committed in substantially similar circumstances; and (2) a Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.[1335]

Only where an appellant demonstrates that his or her sentence is "out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences", the Appeals Chamber may find that the Trial Chamber abused its discretion by handing down a sentence against the appellant that was capricious or excessive.[1336]

616. Martinović has compared his sentence with those of Mario Čerkez, Tihomir Blaškić, Vidoje Blagojević, and Dragan Jokić to demonstrate that he has been given an unduly severe sentence. These cases differ significantly with respect to crimes, mitigating factors, and – in sum – the criminal responsibility of the convicted persons. Furthermore, a comparison with the cases of Vidoje Blagojević and Dragan Jokić cannot be conducted as no final sentence has been delivered in these cases, which are currently under appeal.

617. Thus, Martinović has failed to show that the sentences in the foregoing line of cases were rendered for the same offences and as a result of substantially similar circumstances. The Trial

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[1332] Martinović Appeal Brief, para. 598.
[1333] Martinović Appeal Brief, para. 598.
[1334] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Supplemental Memorandum to Martinović Appeal Brief, 3 February 2005 ("Martinović Supplemental Appeal Brief"), para. 20; Martinović Appeal Brief, para. 598
[1335] *Babić* Appeal Judgement, para. 32 (footnotes omitted).
[1336] *Babić* Appeal Judgement, para. 33 (citing *Jelisić* Appeal Judgement, para. 96).

Chamber did not abuse its discretion by imposing a sentence against him that was capricious or excessive.

618. Accordingly, this ground of appeal is dismissed.

5. Implications of the findings of the Appeals Chamber

619. The Trial Chamber imposed a prison sentence of eighteen years on Martinović. The Appeals Chamber has set aside his conviction pursuant to Article 7(1) of the Statute under Count 5 (unlawful labour as a violation of the laws or customs of war) in so far as this conviction relates to the incident of turning a private property into the headquarters of the Vinko Škrobo ATG[1337] and his conviction pursuant to Article 7(1) of the Statute under Count 12 (wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949) in so far as this conviction relates to the incidents of beatings of detainees in July or August 1993 and of a detainee called Tsotsa.[1338] However, taking into account the particular circumstances of this case as well as the form and degree of the participation of Martinović in the crimes, and the seriousness of the crimes, including murder, the Appeals Chamber finds that the sentence imposed by the Trial Chamber against Martinović is within the range that a reasonable Trial Chamber could have ordered. Therefore, the Appeals Chamber affirms Martinović's sentence of 18 years.

C. Naletilić's appeal against sentence

620. The Trial Chamber imposed a single sentence of 20 years imprisonment on Naletilić.[1339] Naletilić submits that the Trial Chamber erred and abused its discretion in sentencing him to 20 years imprisonment, which he asserts is excessive and should amount to no more than eight years.[1340] Naletilić raises three principal bases for his contention found in his 25th and 40th grounds of appeal.[1341]

1. Relationship with other grounds of appeal

621. Naletilić submits that the arguments presented in his other grounds of appeal "at a minimum, undermine confidence in the appropriateness of the sentence" and that the evidence against him "was not as strong or as clear as one would be led to believe upon reading the [Trial]

[1337] Trial Judgement, paras 311-313 and 334.
[1338] Trial Judgement, paras 385, 388, 389.
[1339] Trial Judgement, para. 765.
[1340] Naletilić Notice of Appeal, p. 11; Naletilić Revised Appeal Brief, 40th ground of appeal, paras 279-280; Appeals Hearing, T. 83.
[1341] Naletilić Notice of Appeal, pp. 8, 11.

Judgement".[1342] As such, in the view of Naletilić, even if his convictions are not set aside the Appeals Chamber "should take the true nature of the evidence into account and substantially reduce [his] sentence".[1343]

622. The Appeals Chamber reiterates that appellate proceedings do not constitute a trial *de novo* and recalls the standard of review on appeals relating to sentence.[1344] As such, to the extent that Naletilić is seeking a *de novo* weighing of the evidence in his statement that the Appeals Chamber should "take the true nature of the evidence into account and substantially reduce [his] sentence",[1345] his argument must be rejected.

2. Alleged error regarding command role as an aggravating factor

623. Naletilić submits that the Trial Chamber erred in holding that his command role is an aggravating factor in sentencing.[1346] Although Naletilić brings this argument under his 25th ground of appeal, it is more appropriate to consider it under his appeal from sentence.

624. Paragraphs 750 and 751 of the Trial Judgement read as follows:

> The Chamber holds that the role of Mladen Naletilić and the gravity of the crimes he has been found guilty of are of primary consideration in determining the sentence to be imposed. The circumstances of the crimes that Mladen Naletilić has been found guilty of have been discussed in detail above. The Chamber has examined in detail the grave nature of the crimes and the criminal conduct of the accused. The Chamber has also considered the sentencing practice of the former Yugoslavia as an aid in determining the appropriate sentence for the accused.
>
> Though the role of Mladen Naletilić in the context of the conflict in the former Yugoslavia was relatively small, and his actions were restricted to the municipalities of and around Mostar, this does not automatically entitle the accused to a lesser sentence. Mladen Naletilić was a man of considerable influence in the Mostar region. He was born in Široki Brijeg, and though he later lived in Germany, retained close ties with the region and events there. Mladen Naletilić was a founding member of the KB. He was the commander of this unit, and was greatly respected and admired by his peers as well as his subordinates. The role of Mladen Naletilić in the conflict against the Serbs in Mostar earned him accolades and enhanced his stature. He was something of a legend in the region, and was in a position of great influence. As a consequence, the Chamber finds that the command role of Mladen Naletilić is an aggravating factor.

625. In the view of the Appeals Chamber, the choice of wording ("aggravating factor") suggests that the Trial Chamber's consideration of Naletilić's command role did not pertain to its evaluation of the form and degree of his participation in the crimes and of his role in the conflict, but went further. It is with this in mind that the Appeals Chamber finds as follows.

[1342] Naletilić Revised Appeal Brief, para. 279.
[1343] Naletilić Revised Appeal Brief, para. 279.
[1344] *Supra,* paras 592-593; *Kvočka et al.* Appeal Judgement, para. 669; *Kupreškić et al.* Appeal Judgement, para. 408.
[1345] Naletilić Revised Appeal Brief, para. 279.
[1346] Naletilić Revised Appeal Brief, para. 223.

626. The Appeals Chamber recalls that a Trial Chamber is "required to take into account and weigh the totality of an accused's culpability".[1347] In the present case, Naletilić's responsibility was established pursuant to Article 7(1) for Count 20 and pursuant to Article 7(3) of the Statute for Counts 5 and 21. Under Counts 1, 9, 10, 12 and 18 Naletilić was found responsible pursuant to Articles 7(1) and 7(3) for different acts.[1348] In addition, the Trial Chamber found that he was a commander.[1349] The Appeals Chamber has on several occasions confirmed that a Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator's position of authority.[1350] The Trial Chamber found that Naletilić's position as a commander rendered his role more serious. In so far as this relates to Naletilić's conviction under Article 7(1) of the Statute, the Appeals Chamber finds no error. In as much as this relates to his convictions under Article 7(3) of the Statute, the Appeals Chamber considers there to be an error. Given that the Trial Judgement is unclear as to exactly which Counts this factor was considered to aggravate, in favour of Naletilić, the Appeals Chamber finds that the Trial Chamber erred. However, in light of the gravity of the crimes for which Naletilić was convicted and the circumstances of the case, the Appeals Chamber considers that this error has no impact on the sentence.

3. Comparison with other sentences

627. Naletilić argues that even if the Trial Chamber's findings remain unmodified, if the conduct attributed to him is compared with that of individuals in other cases, his sentence proves to be disproportionately severe.[1351] Naletilić highlights that he was "acquitted of all conduct involving the loss of life", that there was "neither an allegation of, nor evidence regarding rape", that he "did not hinder trial, as was his right, by demanding recesses in the proceedings when he repeatedly fell ill" and yet he was "sentenced to the maximum possible term of incarceration permitted in his mother country".[1352] Naletilić therefore requests that the Appeals Chamber reduce his sentence.[1353]

628. The Appeals Chamber observes that the principles regarding the assistance that can be obtained from a comparison of sentences imposed by the International Tribunal has been considered above.[1354] Naletilić merely submits that his sentence was disproportionately severe without attempting to compare his case with one or more cases comprising substantially similar

[1347] *Kupreškić et al.* Appeal Judgement, para. 451.
[1348] *See* Introduction, *supra*, para. 4.
[1349] Trial Judgement, para. 94.
[1350] *Kupreškić et al.* Appeal Judgement, para. 451; *Čelebići* Appeal Judgement, para. 745; *Aleksovksi* Appeal Judgement, para. 183; *Blaškić* Appeal Judgement, paras 89, 91.
[1351] Naletilić Revised Appeal Brief, para. 280.
[1352] Naletilić Revised Appeal Brief, para. 280.
[1353] Naletilić Revised Appeal Brief, para. 280.
[1354] *See supra*, para. 615.

circumstances.[1355] As such, the Appeals Chamber finds that this argument provides no basis for revising Naletilić's sentence.

629. The Appeals Chamber is further of the view that Naletilić has not demonstrated any discernible error on the part of the Trial Chamber. There is nothing to suggest that the Trial Chamber did not appreciate the fact that Naletilić was not convicted for any offences involving loss of life or rape.

630. As regards Naletilić's argument that the Trial Chamber erred in failing to give weight to the fact that he did not hinder the trial when he fell ill, the Appeals Chamber agrees with him that although Naletilić raised this point in his sentencing submissions,[1356] which were considered by the Trial Chamber generally, the Trial Chamber did not indicate whether it specifically considered this argument. The Appeals Chamber considers that in failing to do so, the Trial Chamber violated the reasoned opinion requirement.[1357] However, this error had no impact on the judgement, because even had it considered it, the Trial Chamber should not have taken this factor into account. Not every incidental act that facilitates the Tribunal's process, such as an accused's mere non-hindrance of his trial, entitles him to mitigation. To the extent Naletilić had health concerns that merited recesses, he was free to raise them, but the fact that he did not do so is not a factor mitigating his sentence, particularly in light of the serious crimes for which he was convicted.

631. Accordingly, save for the error relating to Naletilić's role as a commander, this ground of appeal is dismissed.

4. Implications of the findings of the Appeals Chamber

632. The Trial Chamber imposed a prison sentence of twenty years on Naletilić. The Appeals Chamber has set aside his conviction pursuant to Article 7(3) of the Statute under Count 12 (wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949) in so far as this conviction relates to the beating of prisoners at the Heliodrom administered by Miro Marjanović[1358] and his convictions pursuant to Article 7(3) of the Statute under Count 1 (persecutions on political, racial and religious grounds as a crime against humanity)

[1355] In the course of the Appeals Hearing, Naletilić submitted that as of February 2005, there had been some 53 individuals sentenced before the International Tribunal and, of those, no more than 10 received a sentence higher than Naletilić's sentence, whilst only five or six received an equivalent sentence: Appeals Hearing, T. 106.

[1356] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Additional Submission on Sentencing Considerations for the Accused Mladen Naletilić *a.k.a.* "Tuta", 24 February 2003 (Confidential), p. 9: "Naletilić did not insist on trial adjournment when he did not feel well, he did not make use of the possibilities laid down in the Rules of Procedure and Evidence, appraising that it was primary to have the trial carried out, and that it was important to attend all presentation of evidence, particularly those against him".

[1357] *See supra*, para. 603.

[1358] Trial Judgement, paras 431, 436, 453.

and Count 12 (wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949) in so far as these convictions relate to the incidents of mistreatment of prisoners in Ljubuški prison.[1359] Taking into account the particular circumstances of this case as well as the form and degree of the participation of Naletilić in the crimes, and the seriousness of the crimes, the Appeals Chamber finds that the sentence imposed by the Trial Chamber against Naletilić is within the range that a reasonable Trial Chamber could have ordered. Therefore, the Appeals Chamber affirms Naletilić's sentence of 20 years.

[1359] Trial Judgement, paras 453, 682.

X. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 17 and 18 October 2005;

SITTING in open session;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL:

NOTES that the Prosecution's second ground of appeal has been withdrawn;

ALLOWS, Judge Güney and Judge Schomburg dissenting, the Prosecution's fourth ground of appeal, **AFFIRMS** Naletilić's conviction for torture as a crime against humanity under Count 9 of the Indictment and **HOLDS** that the conduct underlying this conviction encompasses, *inter alia*, the mistreatment of Witnesses FF and Z;

DISMISSES, Judge Schomburg dissenting in part, the Prosecution's remaining grounds of appeal;

WITH RESPECT TO NALETILIĆ'S GROUNDS OF APPEAL:

ALLOWS, in part, Naletilić's first and third grounds of appeal in so far as they relate to Naletilić's superior responsibility for the beatings administered by Miro Marjanović to prisoners at the Heliodrom, **ALLOWS**, in part, Naletilić's 21st ground of appeal in so far as it relates to Naletilić's superior responsibility for the mistreatment of prisoners in Ljubuški prison, **SETS ASIDE** his conviction for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Count 12 of the Indictment in so far as the conduct underlying this conviction encompasses the beating of prisoners at the Heliodrom administered by Miro Marjanović, **SETS ASIDE** his convictions for persecutions on political, racial and religious grounds as a crime against humanity under Count 1 of the Indictment and for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Count 12 of the Indictment in so far as the conduct underlying these convictions encompasses the incidents of mistreatment of prisoners in Ljubuški prison;

DISMISSES Naletilić's remaining grounds of appeal against convictions and sentence in all other respects; and

AFFIRMS Naletilić's sentence of 20 years of imprisonment, subject to credit being given under Rule 101(C) for the period already spent in detention;

WITH RESPECT TO MARTINOVIĆ'S GROUNDS OF APPEAL:

ALLOWS, in part, Martinović's second ground of appeal in so far as it relates to the defects in the Indictment regarding the pleading of turning a private property into the headquarters of the Vinko Škrobo ATG, the incident of beating in July or August 1993 involving several prisoners and the incident of beating involving a prisoner called Tsotsa, and **SETS ASIDE** his conviction for unlawful labour as a violation of the laws or customs of war under Count 5 of the Indictment in so far as the conduct underlying this conviction encompasses the incident of turning a private property into the headquarters of the Vinko Škrobo ATG and his conviction for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Count 12 in so far as the conduct underlying this conviction encompasses the incidents of beating of detainees in July or August 1993 and of a detainee called Tsotsa;

DISMISSES Martinović's remaining grounds of appeal against convictions and sentence in all other respects; and

AFFIRMS Martinović's sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) for the period already spent in detention;

and finally,

RULES that this Judgement shall be enforced immediately pursuant to Rule 118;

ORDERS, in accordance with Rule 103(C) and Rule 107, that Naletilić and Martinović are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

Done in English and French, the English text being authoritative.

Judge Fausto Pocar, Presiding	Judge Mohamed Shahabuddeen

Judge Mehmet Güney	Judge Andrésia Vaz	Judge Wolfgang Schomburg

Judge Mohamed Shahabuddeen appends a declaration.

Judge Mehmet Güney and Judge Wolfgang Schomburg append a joint dissenting opinion.

Judge Wolfgang Schomburg appends a separate and partly dissenting opinion.

Dated this third day of May 2006,

At The Hague,

The Netherlands

[Seal of the International Tribunal]

XI. DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the outcome of today's judgement subject to the following remarks on deportation.

2. There is a question as to whether this issue arises, regard being had to the circumstance that the charge is not one of deportation under article 5(d) of the Statute, but one of persecutions under article 5(h). In the light of that circumstance, the Appeals Chamber was not called upon to say anything on the subject; if it had not, I should not have thought it fitting to say anything.

3. However, in its judgement in this case, the Appeals Chamber has not restricted itself in that way; it has positively affirmed that "the issue has been settled in the *Stakić* Appeal Judgement."[1360] I therefore feel obliged to note my support for the different position taken by Judge Schomburg in the opinion which he appends to the judgement in this case: in substance, his views on the point coincide with my dissent in *Stakić,*[1361] to which I adhere.

4. The Appeals Chamber *could* have acceded to the request by the Prosecutor for it "to consider the issue nonetheless as a matter of general significance to the International Tribunal's jurisprudence." [1362] However, I recognize that the Appeals Chamber was entitled to say that it "sees no need to do so as the issue has been settled in the *Stakić* Appeal Judgement."[1363] That one majority judgement, without further discussion, considers an issue "settled" by another majority judgement may disappoint expectations but does not defeat the authority of the Appeals Chamber.

Done in English and in French, the English text being authoritative.

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Judge Mohamed Shahabuddeen

Dated 3 May 2006

At The Hague, The Netherlands

[Seal of the International Tribunal]

[1360] Judgement of the Appeals Chamber, para. 152.
[1361] IT-97-24-A, 22 March 2006.
[1362] Judgement of the Appeals Chamber, para. 152.
[1363] *Ibid*.

XII. OPINION DISSIDENTE CONJOINTE DES JUGES GÜNEY ET SCHOMBURG SUR LE CUMUL DE DÉCLARATIONS DE CULPABILITÉ

Nous maintenons la position que nous défendions dans l'Arrêt *Kordić et Čerkez* s'agissant de la question du cumul de déclarations de culpabilité prononcées pour persécutions constitutives de crime contre l'humanité – crime sanctionné en vertu de l'article 5 du Statut – et pour d'autres crimes sanctionnés sur la base du même article à raison des mêmes faits. Sans vouloir répéter ici les raisons qui motivent notre position, nous renvoyons à notre opinion dissidente conjointe annexée à l'Arrêt *Kordić et Čerkez*[1364]. Le Juge Güney réitère également les arguments qu'il a pu développer dans le cadre de son opinion dissidente dans l'Arrêt *Stakić,* rendu le 22 mars 2006[1365]. Le silence que nous pourrions opposer sur cette question spécifique dans les futures affaires ne devra en aucune façon être interprété comme valant approbation du revirement de jurisprudence opéré par la majorité des juges de la Chambre d'appel.

Fait en anglais et français, la version en français faisant foi.

Le 3 mai 2006, à La Haye, Pays-Bas

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Juge Mehmet Güney	Juge Wolfgang Schomburg

[Sceau du Tribunal international]

[1364] Arrêt *Kordić et Čerkez*, Chapitre XIII : « *Joint Dissenting Opinion of Judge Schomburg and Judge Güney on cumulative convictions* ».

[1365] Arrêt *Stakić*, Chapitre XIV : «Opinion dissidente du Juge Güney sur le cumul de déclarations de culpabilité ».

XIII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE SCHOMBURG

1. The crime of ethnic cleansing by uprooting specific parts of a population needs to be called by the name it deserves: Deportation.

2. In reply to the Prosecution's submission that the Trial Chamber had erred in law in holding that deportation requires the transfer of persons across State borders, the Appeals Chamber chooses the approach already taken in the *Krnojelac* Appeal Judgement. Accordingly, the majority is of the opinion that

> the question whether "deportation" encompasses a border element is irrelevant for the purposes of liability under Article 5(h) of the Statute, because acts of forcible displacement are equally punishable as underlying acts of persecutions whether or not a border is crossed. It is moreover not necessary, for the purposes of a persecutions conviction, to distinguish between the underlying acts of "deportation" and "forcible transfer"; the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement.[1366]

With all due respect, I have to dissent again.[1367]

<u>The Obligation of the Appeals Chamber to Define Deportation in the Instant Case</u>

3. The Indictment charges both Appellants with deportation as an underlying act of persecutions pursuant to Article 5(h) of the Statute. The elements of deportation, specifically, the question whether it requires transfer across (State) borders, is part of the Prosecution's third ground of appeal and was discussed at length during the Appeals Hearing. The Prosecution contends that deportation as a crime against humanity under Article 5 of the Statute is not limited to unlawful displacement across a national border, but also encompasses unlawful displacement within a State's national boundaries.[1368]

4. In contrast, the majority of Trial Chambers in the past has found that deportation, both as a crime pursuant to Article 5(d) of the Statute and as an underlying act of persecutions pursuant to Article 5(h) of the Statute, requires displacement of persons across internationally recognized State borders, in order to distinguish it from forcible transfer, which may take place within State borders.[1369]

[1366] Appeal Judgement, para. 154.
[1367] *See* already my dissenting opinion in the *Krnojelac* Appeal Judgement, 17 September 2003.
[1368] Prosecution Appeal Brief, para. 4.5.
[1369] *See Krstić* Trial Judgement, 2 August 2001, paras 521, 532; *Krnojelac* Trial Judgement, 15 March 2002, para. 474; *Naletilić and Martinović* Trial Judgement, 31 March 2003, para. 670; *Brđanin* Trial Judgement, 1 September 2004, paras 540, 544. *See also Blagojević and Jokić* Trial Judgement, 15 January 2005, para. 595.

5. Such a narrow interpretation of the "cross-border" transfer requirement was recently overturned in part by the Appeals Chamber in relation to deportation as a crime pursuant to Article 5(d) of the Statute. The Appeals Chamber held that

> the crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country . . .. Customary international law also recognizes that displacement from 'occupied territory' . . . is also sufficient to amount to deportation. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.[1370]

6. In the instant case, the Appeals Chamber decides for the purposes of Article 5(h) of the Statute (persecutions by way of deportation) not to define deportation. Instead, the Appeals Chamber defers the Prosecution to the just mentioned recent Appeal Judgement, in which, according to the Appeals Chamber, "the issue has been settled" for the purposes of Article 5(d) of the Statute.[1371] This approach is not only unfortunate, but also legally questionable. First of all, it is impossible to advise a party that a problem which it has raised before the Appeals Chamber will be solved in another case without taking into account the individual submissions of both parties and the special circumstances of the case at hand. Quite to the contrary, the Bench has an obligation to answer each individual question properly presented to it on the merits of the individual case before it.

7. Furthermore, instead of precisely distinguishing deportation from forcible transfer, the Appeals Chamber opts for a third category named "forcible displacement", which is meant to serve as an "umbrella term" for unlawful transfers of individuals within and across State borders. With this, the Appeals Chamber only blurs the distinction between the separate crimes of deportation and forcible transfer and adds to the already existing confusion.[1372] The same conduct now has to be charged, defended and discussed as "deportation" for the purposes of Article 5(d) of the Statute, "forcible displacement" for the purposes of Article 5(h) of the Statute, and "unlawful transfer" for the purposes of Article 5(i) of the Statute. Also, accepting by reference in this case to another case "that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation" gives no guidance for other chambers and parties as these circumstances are not defined at all. Seen together, all this unnecessarily creates legal uncertainty.

[1370] *Stakić* Appeal Judgement, 22 March 2006, para. 300 (footnotes omitted). In his partly dissenting opinion, Judge Shahabuddeen considers that deportation pursuant to Article 5(d) of the Statute also applies to displacement across a constantly changing front line (demarcation line).

[1371] Appeal Judgement, para. 152, referring to *Stakić* Appeal Judgement, 22 March 2006, paras 274-308.

[1372] In the past, a multitude of terms has been used in order to describe a similar set of facts; *see*, for example, the references in fn. 21.

8. A more systematic approach to Article 5(h) of the Statute would have been preferable. In accordance with the principle "*lex specialis derogat legi generali*", it should first have to be considered whether one of the offences listed under Article 5 of the Statute was committed. Consequently, deportation would need to be discussed and defined before turning to offences not expressly listed in Article 5 of the Statute. Recourse to the latter would only be necessary and admissible if the facts did not support a conviction for persecutions by means of deportation. It would then have to be decided whether an offence of the same gravity was committed.

9. Deportation as a crime against humanity under Article 5(d) of the Statute cannot be distinct from deportation as an underlying act of persecutions pursuant to Article 5(h) of the Statute. From the outset, the crime of persecutions must be seen as an "empty hull", *i.e.*, a residual category designed to cover underlying offences committed with a discriminatory intent. Therefore, the *actus reus* of the crime of persecutions necessitates proof of all the elements of the underlying offence, which in the case of deportation would include examination of the "cross-border" transfer requirement.

The "Cross-Border" Transfer Requirement of Deportation in the Tribunal's Jurisprudence and in Customary International Law

10. Earlier judgements of the Tribunal frequently (and sometimes exclusively) referred to the jurisprudence of the Tribunal itself[1373] or relied on the Nuremberg Judgement against the major war criminals,[1374] Nuremberg successor trials,[1375] and the ILC commentary to Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind of 1996[1376] in order to conclude that deportation requires cross- (State) border transfer of victims. However, with all due respect, I am inclined to state that none of these authorities ultimately carry such an assumption.

11. Nuremberg jurisprudence dealt with very specific forms of deportation committed during World War II. Except maybe for the deportation of foreigners to Germany for the purposes of slave labour,[1377] deportation carried out by the Nazis did not necessarily involve the crossing of a State border. When adjudicating the Nazi policy of "driving out" all persons (believed to be) of "non-Aryan race" from territories under German rule as well as the "gathering" of Europe's Jewish

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[1373] *See Simić et al.* Trial Judgement, 17 October 2003, paras 121-123; *Brđanin* Trial Judgement, 1 September 2004, paras 540-542; *Blagojević and Jokić* Trial Judgement, 17 January 2005, para. 595.
[1374] *See Krnojelac* Trial Judgement, 15 March 2002, para. 474, fn. 1429.
[1375] *See Krnojelac* Trial Judgement, 15 March 2002, 474, fn. 1429.
[1376] *See Krnojelac* Trial Judgement, 15 March 2002, para. 474, fn. 1429. The relevant comment reads: "Whereas deportation implies expulsion from the national territory, the forcible transfer of population would occur wholly within the frontiers of one and the same state."
[1377] *See*, for example, International Military Tribunal, *Trial of the Major War Criminals*, Vol. I (1947) (Nuremberg Judgement), pp 243-247.

population and other "undesirable" groups in concentration and extermination camps, Nuremberg concentrated not so much on where the victims had been taken, but on their having been forced to leave their homes and prevented from ever returning. In this sense, deportation was not considered a strict *terminus technicus*, but was often used interchangeably with "transfer", "evacuation", or "expulsion".[1378]

12. The Nuremberg Judgement did not preoccupy itself with a meticulous analysis of borderlines and especially refrained from discussing the legal status of territories which had been annexed, occupied, or had in any other way succumbed to German rule in relation to "Germany proper". It thus speaks about the "deportation" of Alsatians to France without commenting on the nature of the border between Alsace and France during Nazi occupation[1379] and refers to "deportation" without mentioning whether or not a border was crossed.[1380] In the *RuSHA* Case, repeated mention is made of "deportation" of persons from that part of Poland which had been incorporated into Germany in 1939 to the remainder of Poland (the so-called General Government), which was then under Nazi occupation.[1381] Transfers from the incorporated part of Poland to "Germany proper" were also considered to be "deportation".[1382] Similarly, the Supreme National Tribunal of Poland tried *Artur Greiser* (former Gauleiter of the incorporated part of Poland) for,

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[1378] *See* Nuremberg Judgement, p. 238 ("expulsion" of the intelligentsia of Czechoslovakia; "evacuation" of the inhabitants of the Crimea; "deportation" of Alsatians); p. 271 ("evacuation of the Jews from occupied territory"); p. 300 ("transfer" of Jews from the Terezin Ghetto in Czechoslovakia to Auschwitz). *See also United States v. Ulrich Greifelt and others* ("*RuSHA* Case"), Judgement of 10 March 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 5, p. 127 ("deportation" to the General Government or to "Germany proper"); p. 136 ("mass *deportations* of Poles and Jews from the Incorporated Eastern Territories, as well as *forcible evacuations* by the tens of thousands from Yugoslavia and Luxembourg, Alsace and Lorraine"; emphasis added); *United States v. Ernst von Weizsäcker and others* ("*Ministries* Case"), Judgement of 11 April 1949, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 14, p. 491 ("forced evacuation" of the Jews from Baden and the Saar to Southern France); *United States v. Wilhelm von Leeb and others* ("*High Command* Case"), Judgement of 27 October 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 11, p. 617 ("illegal recruitment and transportation of civilian slave labourers to the Reich").
It is also worth mentioning that deportation as a war crime pursuant to Art. 6(b) of the IMT Statute is referred to as ". . . deportation to slave labour or for any other purpose of civilian population of or *in* occupied territory . . .." While the English version may leave room for interpretation as to whether "in" means "within" or "into", the official German version (reprinted in: *Der Nürnberger Prozeß gegen die Hauptkriegsverbrecher*, Band 1 (1947), p. 7) clearly reads: ". . . Deportation zur Sklavenarbeit oder für irgendeinen anderen Zweck, von Angehörigen der Zivilbevölkerung von oder *in besetzten Gebieten* . . ..", the emphasized part of the sentence meaning "within occupied territory".

[1379] Nuremberg Judgement, p. 238. Alsace was occupied by the German army in 1940, subdued to German administration and *de facto* joined to the "Reichsgebiet". However, there never was a formal annexation of Alsace by Germany or a cession by France.

[1380] Nuremberg Judgement, p. 270 ("The Race and Settlement Office of the SS together with the Volksdeutschemittelstelle were active in carrying out schemes for Germanization of occupied territories . . . and were involved in the deportation of Jews and other nationals."); p. 293 (". . . and special missions of the RSHA scoured the occupied territories and the various Axis satellites arranging for the deportation of Jews to these extermination institutions."); p. 301 ("deportation" of Jews in Czechoslovakia to the concentration camps for extermination). In the *Ministries* Case the accused were found guilty of deportation, even though the Indictment did not explain where the victims had been taken; *see Ministries* Case, Judgement of 11 April 1949, Vol. 14, p. 308; *Ibid*, Vol. 12, Indictment of 15 November 1947, Count Five, paras 40, 42. The Judgement adopts parts of the Indictment literally; *cf.*, in particular, p. 469.

[1381] *RuSHA* Case, Judgement of 10 March 1948, pp 89-97, 126, 127.

inter alia, imprisoning Polish Jewish citizens under his authority in the Łódż ghetto and finally deporting them to the Chełmno extermination camp (both located in Poland).[1383] Greiser was also convicted for deporting Polish civilians to the General Government and to forced labour camps in "Germany proper". The Supreme National Tribunal considered both acts to be "deportation".[1384]

13. Already these inconsistencies in language and in substance make it impossible to rely on Nuremberg jurisprudence as an authority for a *de jure* cross-border transfer requirement for the crime of deportation. The same holds true for the comment taken from the ILC commentary to Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind of 1996. Unlike others, this comment is not supported by any authority.

14. Common usage applies the term "deportation" to a broad range of displacement phenomena. For instance, "deportation" is used to denote the forced transfer of citizens from the Baltic countries to Siberia in the 1940s and 1950s after these countries had been annexed by the Soviet Union. Soviet participants in these deportations have been tried and convicted in Estonia and Latvia for crimes against humanity.[1385] In the context of World War II, "deportation" is often associated with the transfer of the Jewish population and other groups to concentration camps.[1386] The term has also been used for the forced relocation of undesirable inhabitants of the Soviet-controlled sector of Berlin to the inner part of the German Democratic Republic in 1952 and 1961.[1387]

15. State practice in relation to punishment of violations of international humanitarian law provides a rather unclear picture as to the definition of deportation. The recently published ICRC

[1382] *RuSHA* Case, p. 139.
[1383] Trial of Gauleiter Artur Greiser, Supreme National Tribunal of Poland, 21 June-7 July 1946; in *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, Case No. 74, Volume XIII (1949), p. 70 (86-98). See p. 72, Indictment, Count C (4) (iii) (2).
[1384] *Ibid*, p. 70 (87).
[1385] Internet news articles on the trial of Mikhail Neverovsky before Estonian criminal courts in 1998/99 are available at <http://www.guardian.co.uk/GWeekly/Story/0,,313625,00.html>;<http://www.themoscowtimes.com/stories/1999/07/31/003.html>. Internet news articles on the trial of Alfons Noviks and Mikhail Farbtuh before Latvian courts in 1995 and 1999, respectively, are available at <http://jamestown.org/email-to-friend.php?article_id=5491>; <http://www.balticsww.com/wkcrier/1199.htm>. See also H. Strods and M. Kott, *The File on Operation 'Priboi': A Reassessment of the Mass Deportations of 1949*, 33 Journal of Baltic Studies (2002), pp 1–31.
[1386] *See*, for example, the definition offered at a public exhibition on crimes against the German Jewish Population by the German fiscal authorities during 1933 and 1945 ("Legalisierter Raub. Der Fiskus und die Ausplünderung der Juden in Hessen und Berlin 1933-1945") at the German Historical Museum in Berlin (unofficial English translation): "Deportation is the forced transfer (displacement, expatriation, or relocation) of political opponents or whole groups of civilians to a place where, in the perpetrator's opinion, the persons concerned cannot disturb or present a danger any more. Originally, the term was used to denote the banishment of prisoners, for example, from Western Russia to Siberia. Under the Russian Tsar, however, 'deportation' more and more came to mean the banishment of 'enemies of the state', armed political activists, and revolutionaries. During the Third Reich, the term received yet another connotation: It was not only solitary individuals or small groups which were displaced, but millions of Jews from almost all over Europe, Sinti and Roma as well as political opponents were systematically transported to Ghettos and, soon afterwards, to concentration and extermination camps. After 1942, the Nazis tried to play down the conducted deportations by calling them 'evacuations' or 'relocations' in order to disguise their true goal of murdering millions of people." Accessible under <http://www.dhm.de/ausstellungen/legalisierter-raub/glossar.html>.

study on the status of customary international humanitarian law[1388] shows that even prior to 1993 many countries had penalized forced displacement of civilians in times of armed conflict. Although elements of specific crimes are not provided, some implications may be drawn from the national legislations analyzed in this study. The study lists various national military manuals and legislative acts which use the term "deportation" to describe (criminal) forced displacement within national borders[1389] or, conversely the term "transfer" to describe (criminal) displacement across State borders.[1390] Other States punish only "deportation".[1391]

<u>The Need for Development of a Suitable "Cross-Border" Transfer Requirement for Deportation in the Tribunal's Jurisprudence</u>

16. The foregoing analysis shows that there is no authoritative definition of deportation. Within the framework of customary international law and general principles of international criminal law (in particular the rule of specificity), the Tribunal is thus tasked to develop an adequate interpretation of this term.

17. Before going further into details, I should like to emphasize that the question of whether or to what extent deportation requires transfer across borders does not affect in any way the principle of *nullum crimen sine lege*. Forced displacement constitutes a crime under international law, be it within a State or across its borders. The labelling of such conduct either as "deportation" or "forcible transfer" (or any other term) has no impact on criminal liability. This is settled Tribunal

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[1387] For more details, *see* W. Hardt, *Aktion "Ungeziefer" - Zwangsdeportation am 5. Juni 1952 aus Bettenhausen/Kreis Meiningen* (1968).
[1388] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. I and II. (2005).
[1389] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. II Part 2 (2005), Ch. 38, for example: para. 71 (Bangladesh's International Crimes (Tribunal) Act of 1973, quoted as punishing ". . . deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh."); para. 105 (Israel's Nazi and Nazi Collaborators (Punishment) Law of 1950, quoted as punishing as a war crime "deportation to forced labour or for any other purpose of the civilian population of or in occupied territories.").
[1390] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. II Part 2 (2005), Ch. 38, for example: para. 39 (Argentina's Law of War Manual of 1969); para. 43 (Canada's Law of Armed Conflict Manual of 1999); para. 54 (New Zealand's Military Manual of 1992). See also para. 66 (Armenia's Penal Code of 2003, quoted as prohibiting "'unlawful deportation or transfer' during an armed conflict and the transfer within or outside an occupied territory of its population"); para. 107 (Jordan's Draft Military Criminal Code of 2000, quoted as punishing 'the displacement or transfer of the whole or part of the inhabitants of occupied territories, within as well as outside the occupied territories.").
[1391] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. II Part 2 (2005), Ch. 38, for example: para. 46 (Ecuador's Naval Manual of 1989, quoted as to punish as war crimes ". . . Offences against civilian inhabitants of occupied territories, including . . . deportation."); para. 67 (Australia's War Crimes Act of 1945, quoted as to punish as a (serious) crime "the deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or a slave labour camp."); para. 77 (Bulgaria's Penal Code of 1968, quoted as punishing "unlawful deportations"); para. 82 (China's Law Governing the Trial of War Criminals of 1946, quoted as punishing as a war crime "mass deportations of non-combatants"); para. 98 (France's Penal Code of 1994, quoted as punishing "deportation as a crime against humanity"); para. 121 (War Crimes Decree of the Netherlands of 1946, quoted as punishing as a war crime the "deportation of civilians").

jurisprudence[1392] and is anchored in customary international law.[1393] It is also implied by the Appeals Chamber's finding in the instant case, which sums up conduct elsewhere distinguished as transfer across borders (= deportation) and within borders (= unlawful transfer) under the general heading of "forcible displacement".

18. Labelling alone does not suffice to establish or prove elements of a crime. However, it is equally clear that criminal law is not an abstract figure, but a (societal) reaction to specific threats to or violations of fundamental values. Exactly for this reason, this Tribunal was established to punish the crime of "ethnic cleansing" in the context of the armed conflicts in the former Yugoslavia, *inter alia*, by way of getting rid of other ethnic groups.[1394] Sticking to a formal definition of a "cross-border" transfer requirement for deportation does not mirror the events that took place in the former Yugoslavia. Moreover, this could result in no convictions at all being made for deportation, although "ethnic cleansing" included what was commonly perceived as large-scale deportation of civilians.

19. A definition of deportation to be employed by the Tribunal has therefore to take into account social developments in a globalized world and should not be based on a formalistic-historical understanding of jurisprudence, conventions, studies or the like, which have themselves not taken the stance that deportation requires transfer of persons across State borders to the exclusion of transfer within the territory of a State. Instead, at stake are the legal values protected by the crime of deportation: the right of every person to stay in his or her home place, to live and socialize in his or her community, and to receive protection. In modern times, such protection may be guaranteed and granted in return for duties which an individual has as being "part" not only of a "State", but also of another entity exercising authority over a certain territory.

20. While international law has traditionally recognized only "States" and expressed the bond between States and individuals in terms of national citizenship, modern international law and, in particular, international humanitarian law have gradually come to accept other subjects of international rights and duties. For the purposes of the international law on war crimes, it has been accepted by this Tribunal that the affiliation of a civilian to a party to the conflict cannot be assessed solely on the basis of nationality, but may also relate to ethnicity.[1395] Only with this

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[1392] *See* only *Krnojelac* Appeal Judgement, 17 September 2003, paras 218-223.

[1393] *See also* J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. I (2005), Ch. 38, p. 457.

[1394] *See* Security Council Resolution 827, S/RES/ 827 of 25 May 1993.

[1395] *See Tadić* Appeal Judgement, 15 July 1999, para. 166:

> While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put

adaptation of a traditional international law concept it is possible to grasp the realities of the armed conflicts in the former Yugoslavia where, irrespective of any formal recognition of (new) State borders by the international community, civilians were perceived by the belligerent parties as belonging either to "them" or to the "enemy". Civilians belonging to the latter group became subject to widespread "ethnic cleansing" and it was pivotal both to perpetrators and victims that the victims were expelled from the area under the perpetrators' control, and that the perpetrators' intent was directed at ensuring that the victims would not return.

21. In particular, the instant case unfortunately provides a vivid example of this. The events underlying the charges for deportation took place in and around Mostar, an area torn between HVO and ABiH forces at the relevant time. The town of Mostar was divided between the two parties: while the Western part was dominated by the HVO, the ABiH was largely concentrated in the Eastern part.[1396] The Trial Chamber found that "during the period [relevant to the case] unlawful transfers of BH Muslim civilians from West Mostar to East Mostar were regular and a common occurrence."[1397]

<u>The Suitable Definition of Deportation Within the Framework of Customary International Law and International Principles of Interpretation</u>

22. Based on what has been said above, the *actus reus* of deportation, both as a crime pursuant to Article 5(d) of the Statute and as an underlying act of persecutions pursuant to Article 5(h) of the Statute, is the forced displacement of an individual from the area in which this individual is lawfully present across a *de jure* border between two States, a *de facto* border, or across a demarcation line from an area under the actual control of one belligerent party to an area under the actual control of another *de jure* or *de facto* authority, without grounds permitted by internationally accepted law.

23. As will be displayed in the following, this definition results from an interpretation of deportation which is based on general modes of interpretation of international treaties as stipulated in Article 31(1) of the *Vienna Convention on the Law of Treaties* of 1969.[1398] Within the limits of the literal meaning of the term deportation, this interpretation observes, in particular, the object and

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> another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

[1396] *See Naletilić and Martinović* Trial Judgement, paras 37-51.
[1397] *See Naletilić and Martinović* Trial Judgement, para. 542.

purpose of Article 5 of the Statute. It can be reconciled with customary international law at the time relevant to the case at hand.

24. An attempt to define deportation[1399] must start with an analysis of the literal meaning of the word. Its linguistic roots derive from the Latin *deportare*: to carry off, to take away.[1400] Understood in this way, the term does not primarily aim to describe to which place the victims are brought. Rather, the emphasis lies on the removal, *i.e.*, uprooting, of the victims from a particular place and the intention that this be permanent. In this sense, deportation in ancient times included the dislocation of people from one area to another area under the control of the Roman Empire.[1401]

25. A systematic approach to Article 5 of the Statute shows that only deportation is explicitly listed as a crime against humanity (Article 5(d) of the Statute). It is hard to imagine that Article 5(d) of the Statute was originally intended to cover forced displacement of civilians only if it occurred via internationally recognized borders while any other conduct was to fall under the residual clauses of Article 5(h) and/or (i) of the Statute. In light of the realities of the armed conflicts in the former Yugoslavia, such a formalistic approach would miss the point.

26. As I have pointed out before, an adequate interpretation of deportation needs to concentrate on the legal values protected by the crime. A displaced person loses the ability to live and socialize in his or her community. Furthermore, the person has to leave property behind. Thereby, it creates an additional harm if the person is displaced across the border of an "area of protection" as this may go hand in hand with depriving the person of associated entitlements and protection. In light of the realities of modern armed conflicts as exemplified by the armed conflicts in the former Yugoslavia and, in particular, by the events underlying the charges for deportation in the instant case, an "area affording protection" to persons cannot be restricted to a "State". Rather, what is essential is whether there exists a stable authority over a certain territory which provides protection to persons living within that area.

27. For the purposes of Article 5 of the Statute, any person who is deprived of this protection by forced displacement must therefore be considered a victim of deportation if the displacement is part of a widespread or systematic attack against the civilian population. Consequently, a "border" may not only be a *de jure* border between two States, but must also be assumed to exist in relation to a

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[1398] *Vienna Convention on the Law of Treaties* of 23 May 1969, 155 U.N.T.S/ 331; 25 ILM 562 (1969). Although the Statute is not an international treaty within the meaning of the *Vienna Convention on the Law of Treaties*, the provisions of the Convention can be applied *mutatis mutandis* to the Statute.
[1399] English version of Article 5(d) of the Statute. The French Version uses the term "expulsion".
[1400] *See also Black's Law Dictionary*, 8th edn. (2004), p. 471.
[1401] For further details, *see* A. Berger, *Encyclopaedic Dictionary of Roman Law* (1953), p. 432, as quoted in *Black's Law Dictionary*, 8th edn. (2004), p. 471.

de facto border or a demarcation line between an area under the actual control of one belligerent party and an area under the actual control by another *de jure* or *de facto* authority.

28. Such an interpretation of deportation would not expand customary international law even if the latter had generally used the term to describe forced displacement across a State border. As one of my distinguished colleagues recently pointed out, this Tribunal

> has an undoubted duty to interpret a principle established by [international] law. . . . Further, it is accepted that in interpreting the law a chamber may "clarify" the law. . . . [T]he power to clarify the law may be used so long as the "essence" of what is done can be found in existing law.
>
> In appreciating the "essence" of a clarification, the question to be attended to is not whether a particular set of circumstances was ever concretely recognized by the existing law, but whether those circumstances reasonably fall within the scope of the existing law. This was the underlying approach of the Appeals Chamber to the issue of legality which was raised in *Čelebići*. More explicitly, the Appeals Chamber unanimously held in *Hadžihasanović* that "where a principle can be shown to have been … established [as customary international law] it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle". . . . In other words, the question is not whether the law, as it stands, was ever applied concretely to a particular set of circumstances, but whether the law, as it stands, was reasonably capable of applying to those circumstances.[1402]

Thus, a proper interpretation keeps the law alive without stepping into the shoes of the legislator.

29. Furthermore, an interpretation of deportation as proposed here fits in with the focus on human beings and their fundamental rights which this Tribunal has favoured from the beginning of its work rather than an approach focussed on traditional State sovereignty.[1403] The growing importance of human rights militates against an unjustifiably narrow interpretation of the crime of deportation in the sense of covering displacement across *de jure* borders only. As has been pointed out above, the Appeals Chamber recently accepted that "under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation". However, this declaration does not prove very helpful in the end, all the more so since the Appeals Chamber declined to specify its finding, but held that "the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law".[1404]

30. Uncertainties arise, in particular with regard to the meaning of "occupied territory" as used by the Appeals Chamber, when holding that "customary international law also recognizes that displacement from 'occupied territory' . . . is also sufficient to amount to deportation." [1405] In the case at hand the Trial Chamber held that under the law of occupation, "the forcible transfer (Count

[1402] *Stakić* Appeal Judgement, 22 March 2006, Partly Dissenting Opinion of Judge Shahabuddeen, paras 35-39 (footnotes omitted).
[1403] *See Tadić* Interlocutory Decision, 2 October 1995, para. 97.
[1404] *Stakić* Appeal Judgement, 22 March 2006, para. 300. *See also supra* para. 15.

18) . . . of civilians [was] prohibited from the moment they fell into the hands of the opposing power, regardless of the stage of the hostilities."[1406] Furthermore, the Trial Chamber was satisfied that "civilians were deliberately transferred[1407] to an *area outside the occupied territory*"[1408] and that civilians were transferred across the front line between the Western and the Eastern sides of Mostar.[1409] It would have been a noble obligation for the entire Appeals Chamber to decide that these findings were sufficient for a conviction for deportation as an underlying act of persecutions.

31. As mentioned before, issues in proving an element of a crime can, in principle, have no impact on the need for a proper interpretation. Nevertheless, I should like to note that proof of a "cross-border" transfer requirement as proposed here will not necessarily be more complicated than proof of a *de jure* (*e.g.*: Bosnia and Herzegovina/Serbia and Montenegro) or a partially accepted *de facto* border (*e.g.*: Moldova/Transnistria), a question which is often highly disputed. The Trial Chamber in the instant case had to determine the front lines between the belligerent parties in any event.[1410] In the same line, the Indictment emphasized that protected persons were displaced from territory under the control of one belligerent party to territory controlled by another.[1411]

32. Finally, I should like to add that, in view of the rule of specificity, a "cross-border" transfer requirement as proposed here would still serve to distinguish "deportation" from "forcible transfer". Forcible transfer, both as an underlying act of persecutions pursuant to Article 5(h) of the Statute and as "other inhumane act" pursuant to Article 5(i) of the Statute, covers the forced displacement of persons within an area under the actual control of a party to the conflict.

The *Mens Rea* of Deportation

33. The *mens rea* of deportation requires that the perpetrator intends to permanently displace an individual. This view is supported by the ICRC Commentary to the Geneva Convention IV, which states that "unlike deportation and forcible transfer, evacuation is a *provisional measure* [and is] moreover, often taken in the interests of the protected persons themselves".[1412] This approach was taken in various Judgements of the Tribunal.[1413] It is consistent in particular with the holding of the

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[1405] *Stakić* Appeal Judgement, 22 March 2006, para. 300.
[1406] *See Naletilić and Martinović* Trial Judgement, 31 March 2003, para. 222.
[1407] Note should be taken in this regard of the literal root of the term "transfer", lying in "trans" = across.
[1408] *See Naletilić and Martinović* Trial Judgement, 31 March 2003, para. 526.
[1409] *See Naletilić and Martinović* Trial Judgement, 31 March 2003, paras 538-566.
[1410] *See Naletilić and Martinović* Trial Judgement, 31 March 2003, paras 210-223 in general, and paras 517-571 in relation to charges of forced displacement.
[1411] *See Prosecutor v. Naletilić and Martinović*, Indictment, paras 53-54.
[1412] International Committee of the Red Cross, *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Commentary* (1958), p. 280 (emphasis added) .
[1413] *Naletilić and Martinović* Trial Judgement, 31 March 2003, para. 520; *Stakić* Trial Judgement, para. 687; *Simić et al.* Trial Judgement, para. 134; *Krnojelac* Appeals Judgement, 17 September 2003, Separate Opinion of Judge Schomburg, para. 16. *See also Blagojević and Jokić* Trial Judgement, 17 January 2005, para. 601.

Appeals Chamber in *Krnojelac* that "[t]he prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced *uprooting* of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent".[1414] It is in particular the term "uprooting" – "déracinement" in the authoritative French text – that indicates that the *mens rea* comprises the intent of the perpetrator that the victim will not return. If such intent is proven, the perpetrator must incur criminal responsibility even if the deported individual was later able to return.

Conclusion

34. For the reasons set out above, the crime of ethnic cleansing by uprooting specific parts of a population needs to be called by the name it deserves: Deportation.

Done in English and in French, the English text being authoritative.

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Judge Wolfgang Schomburg

Dated 3 May 2006
At The Hague
The Netherlands

[Seal of the International Tribunal]

[1414] *Krnojelac* Appeals Judgement, 17 September 2003, para. 218 (emphasis added).

XIV. ANNEX 1: PROCEDURAL BACKGROUND

A. History of the trial

1. Naletilić and Martinović were indicted on a joint indictment which was confirmed by Judge May on 21 December 1998.[1415] Warrants of arrest were issued the same day, addressed to the Republic of Croatia.[1416]

2. Martinović was transferred from the Republic of Croatia to the United Nations Detention Unit ("UNDU") in The Hague on 9 August 1999 and pleaded "not guilty" to all charges against him at his initial appearance on 12 August 1999.[1417] Naletilić was transferred from the Republic of Croatia on 21 March 2000 and pleaded "not guilty" to all charges against him at his initial appearance three days later.[1418] On 7 December 2000, Naletilić and Martinović pleaded "not guilty" to the new charges of unlawful labour and the use of detainees as human shields.[1419]

3. The Indictment contained a total of twenty-two counts. Both Naletilić and Martinović were charged with persecutions (Count 1), allegations of unlawful labour and the use of detainees as human shields (Counts 2 to 8), cruel treatment and wilfully causing great suffering (Counts 11 to 12), unlawful transfer of civilians (Count 18) and plunder (Count 21). Naletilić was also charged with torture, cruel treatment and wilfully causing great suffering (Counts 9 to 10) and destruction of properties (Counts 19 to 20 and 22). Martinović was also charged with murder, wilful killing and wilfully causing great suffering arising from the death of Nenad Harmandžić (Counts 13 to 17).[1420]

4. The trial commenced before Judge Liu, presiding, Judge Clark and Judge Diarra on 10 September 2001 and was concluded on 31 October 2002. The Trial Judgement was rendered on 31 March 2003.[1421]

5. Altogether 146 witnesses gave evidence: 84 for the Prosecution, 35 for the Naletilić Defence and 27 for the Martinović Defence. Approximately 2,751 exhibits were admitted in evidence: 2,305

[1415] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-I, Order Confirming Indictment, 21 December 1998.
[1416] *Prosecutor v. Mladen Naletilić,* Case No. IT-98-34-I, Warrant of Arrest Order for Surrender, 21 December 1998; *Prosecutor v. Vinko Martinović,* Case No. IT-98-34-I, Warrant of Arrest Order for Surrender, 21 December 1998.
[1417] T. 27-47.
[1418] T. 234-243.
[1419] T. 407.
[1420] *See* Trial Judgement, paras 4-5.
[1421] *See* Trial Judgement, para. 7.

for the Prosecution, 370 for the Naletilić Defence and 76 for the Martinović Defence.[1422] In total, the transcript of the trial amounted to 16,876 pages.[1423]

B. The appeal

1. Notices of appeal

6. Both Naletilić and Martinović filed their Notices of Appeal on 29 April 2003.[1424] The Prosecution first filed its notice of appeal on 1 May 2003.[1425] The next day it requested that it be vacated and substituted by the Notice of Appeal of 2 May 2003.[1426]

2. Assignment of Judges

7. On 10 April 2003 the President of the International Tribunal issued an Order assigning the following Judges to the Appeals Bench in this case: Judges Pocar, Jorda, Shahabuddeen, Hunt and Güney.[1427] On 25 April 2003 the Presiding Judge, Judge Pocar, designated himself as the Pre-Appeal Judge.[1428]

8. On 6 August 2003 the President of the International Tribunal issued an Order assigning Judge Schomburg and Judge Weinberg de Roca to replace Judge Jorda and Judge Hunt.[1429] On 15 July 2005, the President of the International Tribunal issued an Order assigning Judge Vaz to replace Judge Weinberg de Roca.[1430]

3. Counsel

9. Counsel for the Prosecution were Mr. Norman Farrell and Mr. Peter M. Kremer, Ms. Marie-Ursula Kind, Mr. Xavier Tracol and Mr. Steffen Wirth.

[1422] Trial Judgement, Annex II, para. 5.
[1423] Trial Judgement, Annex II, para. 5.
[1424] Naletilić Notice of Appeal; Martinović Notice of Appeal.
[1425] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution' s Notice of Appeal, 1 May 2003.
[1426] Prosecution Notice of Appeal.
[1427] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order Assigning Judges to a Case Before the Appeals Chamber, 10 April 2003.
[1428] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order Designating a Pre-Appeal Judge, 25 April 2003.
[1429] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order Replacing Two Judges in a Case Before the Appeals Chamber, 6 August 2003.
[1430] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order Replacing a Judge in a Case Before the Appeals Chamber, 15 July 2005.

10. Counsel for Naletilić were Mr. Matthew Hennesy and Mr. Christopher Meek. On 23 June 2003 the assignment of Mr. Krešimir Krsnik as lead counsel was withdrawn and Mr. Matthew Hennessy was assigned as lead counsel.[1431]

11. Counsel for Martinović were Mr. Želimir Par and Mr. Kurt Kerns. On 28 May 2003 the assignment of Mr. Branco Šerić as lead counsel was withdrawn and Mr. Želimir Par was assigned as lead counsel.[1432]

4. Filing of Appeal Briefs

12. On 29 August 2003 Martinović filed his Appeal Brief.[1433] By Order of 23 September 2003, the Pre-Appeal Judge ordered it be treated as a confidential filing.[1434] Martinović filed a public redacted version on 24 May 2005.[1435]

13. On 15 September 2003 Naletilić confidentially filed his Appeal Brief.[1436] On 25 September 2003 the Prosecution filed confidentially an urgent Motion regarding defects in the Naletilić Appeal Brief,[1437] to which Naletilić responded.[1438] On 3 October 2003 the Pre-Appeal Judge granted the Prosecution's Motion in part and ordered Naletilić to include the references which were missing and to rectify those which were imprecise.[1439] On 10 October 2003 Naletilić confidentially filed the Naletilić Revised Appeal Brief.[1440] Naletilić filed a public redacted version on 10 October 2005.[1441]

[1431] *Prosecutor v. Mladen Naletilić,* Case No. IT-98-34-A, Decision of the Registrar, 23 June 2003.
[1432] *Prosecutor v. Vinko Martinović,* Case No. IT-98-34-A, Corrigendum, 28 May 2003.
[1433] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of Mr. Vinko Martinović, 29 August 2003 (Confidential) ("Confidential Martinović Appeal Brief").
[1434] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order, 23 September 2003.
[1435] Martinović Appeal Brief.
[1436] Naletilić Appeal Brief (Confidential).
[1437] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Urgent Motion Regarding Defects in Mladen Naletilić's Brief on Appeal of 15 September 2003, 25 September 2003 (Confidential).
[1438] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić Response to the Prosecutions Urgent Motion Regarding Defects in Brief on Appeal of 15 September 2003, 29 September 2003.
[1439] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Prosecution's Urgent Motion Regarding Defects in Mladen Naletilić's Brief on Appeal of 15 September 2003, 3 October 2003.
[1440] Confidential Naletilić Revised Appeal Brief.
[1441] Naletilić Revised Appeal Brief.

14. The Prosecution filed its Appeal Brief on 14 July 2003.[1442] On 30 September 2005, the Prosecution notified the Appeals Chamber that it withdrew its second ground of appeal on unlawful labour contained in paragraphs 3.1-3.27 of the Prosecution Appeal Brief.[1443]

15. Both Naletilić and Martinović filed their Respondent's Briefs on 26 September 2003.[1444] On 13 October 2003 the Prosecution filed a single, consolidated reply Brief to the Respondent's Briefs of Naletilić and Martinović.[1445]

16. The Prosecution filed a confidential Respondent's Brief to the Confidential Martinović Appeal Brief on 8 October 2003.[1446] On 22 March 2005, the Prosecution filed a Corrigendum where it sought to make corrections to some of the pages of the transcript of the trial quoted in it.[1447] On 22 March 2005 the Prosecution filed a public redacted version of this Respondent's Brief.[1448]

17. Martinović filed a Supplemental Memorandum to his Appeal Brief on 3 February 2005.[1449] On the same day Martinović filed a Motion for Leave to file the Martinović Supplemental Appeal Brief,[1450] to which the Prosecution responded on 14 February 2005.[1451] With the agreement of the Prosecution, on 15 February 2005 Martinović filed his Addendum of References to his previously filed Martinović Supplemental Appeal Brief.[1452] The Appeals Chamber granted Martinović's Motion for Leave.[1453] The Prosecution responded to the Martinović Supplemental Appeal Brief on 4 March 2005.[1454]

18. The Prosecution filed confidentially its Respondent's Brief to the Naletilić Revised Appeal Brief on 30 October 2003.[1455] Naletilić replied to it confidentially on 17 November 2003, and filed

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[1442] Prosecution Appeal Brief; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Book of Authorities for the Appeal Brief of the Prosecution, 14 July 2003.
[1443] Prosecution Notice of Withdrawal, para. 1.
[1444] Naletilić Response to Prosecution Appeal Brief; Martinović Response to Prosecution Appeal Brief.
[1445] Prosecution Consolidated Reply Brief; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Book of Authorities for the Consolidated Reply Brief of the Prosecution, 13 October 2003.
[1446] Confidential Prosecution Response to Martinović Appeal Brief.
[1447] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Corrigendum to Prosecution's [Confidential] Respondent's Brief to Vinko Martinović's Appeal Brief, 22 March 2005.
[1448] Prosecution Response to Martinović Appeal Brief.
[1449] Martinović Supplemental Appeal Brief.
[1450] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Motion for Leave to File Supplemental Memorandum Instanter, 3 February 2005.
[1451] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Response to Appellant's Motion for Leave to File Supplemental Memorandum Instanter of 3 February 2005, 14 February 2005.
[1452] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Addendum of References to Previously Filed Supplemental Memorandum of 3 February 2005, 15 February 2005.
[1453] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Vinko Martinović's Motion to Supplement his Appeal Brief, 18 February 2005.
[1454] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Response to Vinko Martinović's Supplemental Appeal Brief, 4 March 2005.
[1455] Confidential Prosecution Response to Naletilić Revised Appeal Brief.

a public redacted version on 10 October 2005.[1456] On 22 March 2005 the Prosecution filed its Public Redacted Version of this Respondent's Brief.[1457]

19. Naletilić sought leave, on 2 September 2005, to submit a pre-submission brief on torture to assist the Appeals Chamber in considering his 17th ground of appeal.[1458] The Appeals Chamber denied leave on 13 October 2005 on the basis that the pre-submission brief did not relate or supplement the error alleged under his 17th ground in the Naletilić Notice of Appeal and the Naletilić Revised Appeal Brief, but rather raised a whole new ground of appeal which was outside the Naletilić Notice of Appeal, and that good cause did not exist for amending the latter.[1459]

5. Motions pursuant to Rule 115

(a) Naletilić

20. On 5 June 2003, Naletilić filed a request for extension of time to file a Motion for admission of additional evidence on appeal pursuant to Rule 115.[1460] The Pre-Appeal Judge, in a decision rendered on 25 June 2003, granted the request in part.[1461] On 30 July 2003, Naletilić filed his second request for extension of time to file his Rule 115 Motion,[1462] which the Pre-Appeal Judge denied on 18 August 2003.[1463]

21. On 15 August 2003 Naletilić filed his Motion for admission of additional evidence on appeal pursuant to Rule 115.[1464] On the same day he filed his confidential First Supplement thereto.[1465] On 19 August 2003 the Prosecution responded to both.[1466]

[1456] Confidential Naletilić Reply Brief; Naletilić Reply Brief.
[1457] Prosecution Response to Naletilić Revised Appeal Brief.
[1458] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Motion for Leave to File his Pre-Submission Brief on Torture, 2 September 2005.
[1459] Decision on Naletilić's Motion for Leave to File Pre-Submission Brief on Torture, pp. 2 *et seq.*
[1460] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Motion of Naletilić for Extension of Time for Filing of Rule 115 Evidence, 5 June 2003.
[1461] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Mladen Naletilić's Motions for Extension of Time, 25 June 2003.
[1462] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Naletilić's Motion for Enlargement of Time for Filing Rule 115 Motion, Appeal Brief, Response to Prosecutor's Appeal Brief, 30 July 2003.
[1463] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Martinović's Motion for Extension of Time for Filing the Respondent's Brief and on Naletilić Motion for Enlargement of Time for Filing Rule 115 Motion, Appeals Brief, and Response to Prosecutor's Appeal Brief, 18 August 2003.
[1464] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Motion to Present Additional Evidence Pursuant to Rule 115, 15 August 2003 (Confidential).
[1465] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić First Supplement to his Motion to Present Additional Evidence Pursuant to Rule 115, 18 August 2003 (Confidential).

22. On 29 August 2003, the Pre-Appeal Judge ordered Naletilić to file a consolidated Rule 115 Motion that was in compliance with the Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, of 7 March 2002.[1467] Pursuant to this Order, on 8 September 2003 Naletilić filed the Naletilić Consolidated Rule 115 Motion, incorporating his previously filed Motion and First Supplement thereto.[1468] The Prosecution responded to the Naletilić Consolidated Rule 115 Motion on 18 September 2003.[1469] The Appeals Chamber dismissed the Naletilić Consolidated Rule 115 Motion in its entirety on 20 October 2004.[1470]

23. On 26 July 2004 Naletilić filed his Second Motion for admission of additional evidence on appeal pursuant to Rule 115.[1471] On 8 September 2004 Naletilić filed a Motion for leave to file his Second Rule 115 Motion.[1472] On 16 September 2004 the Prosecution confidentially filed its response to it.[1473] On 27 January 2005 the Appeals Chamber denied Naletilić leave to file his Second Rule 115 Motion, but allowed him to file an amended version of it that complied with the requirements of Rule 115 and the practice directions on appeal proceedings before the International Tribunal.[1474] On 18 February 2005 Naletilić filed his Amendment to his Second Rule

[1466] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution Response to "Mladen Naletilić's Motion to Present Additional Evidence Pursuant Rule 115" Filed on 15 August 2003 and to Mladen Naletilić's First Supplement to Present Additional Evidence Pursuant Rule 115", 19 August 2003.

[1467] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Order, 29 August 2003.

[1468] Naletilić Consolidated Rule 115 Motion (Confidential).

[1469] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution Response to Mladen Naletilić's Rule 115 Motion, Filed on 15/08/03, the First Supplement to his 115 Motion, Filed on 18/08/03, and his Consolidated Motion, Filed on 08/09/03, 18 September 2003.

[1470] Decision on Naletilić Consolidated Rule 115 Motion.

[1471] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Second Motion to Present Additional Evidence Pursuant to Rule 115, 26 July 2004 (Confidential) ("Naletilić Second Rule 115 Motion"). On 29 July 2004 the Prosecution filed its Motion for clarification and if necessary for an extension of time to respond to the Naletilić Second Rule 115 Motion (Confidential): *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Motion for Clarification and if Necessary for an Extension of Time to Respond to Mladen Naletilić's Second Additional Evidence Motion, 29 July 2004.

[1472] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Motion for Leave to File his Second Motion to Present Additional Evidence pursuant to Rule 115, 8 September 2004.

[1473] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Response to Mladen Naletilić's Motion for Leave to File Second Additional Evidence Motion, 16 September 2004 (Confidential).

[1474] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Naletilić's Motion for Leave to File his Second Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005.

115 Motion.[1475] The Prosecution responded to it and to the Naletilić Second Rule 115 Motion on 28 February 2005.[1476] Naletilić did not file a reply.

24. Naletilić filed on 22 November 2004 his Third Motion for admission of additional evidence on appeal pursuant to Rule 115 and an incorporated Motion for leave to file the same.[1477] The Prosecution responded to the Naletilić Third Rule 115 Motion on 10 December 2004.[1478] The Appeals Chamber dismissed Naletilić's Amended Second Rule 115 Motion and his Third Rule 115 Motion in their entirety on 7 July 2005.[1479]

(b) Martinović

25. On 31 July 2003, Martinović filed a Motion for admission of additional evidence on appeal pursuant to Rule 115.[1480] The Prosecution responded to it on 11 August 2003.[1481] Martinović replied on 18 August 2003.[1482] The Appeals Chamber dismissed the Martinović First Rule 115 Motion on 18 November 2003.[1483] Martinović filed on 15 March 2004 a Second Motion for admission of additional evidence on appeal pursuant to Rule 115.[1484] The Prosecution responded to it on 25 March 2004.[1485] Martinović did not file a reply. The Appeals Chamber dismissed the Martinović Second Rule 115 Motion on 20 October 2004.[1486]

[1475] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Amendment to his Second Motion to Present Additional Evidence Pursuant to Rule 115, 18 February 2005.

[1476] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Response to Mladen Naletilić's Second Motion to Present Additional Evidence Pursuant to Rule 115 and Mladen Naletilić's Amendment thereto, 28 February 2005.

[1477] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Third Motion to Present Additional Evidence Pursuant to Rule 115 and Incorported Motion for Leave to File Same, 22 November 2004 ("Naletilić Third Rule 115 Motion") (Confidential).

[1478] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Response to Mladen Naletilić's Third Motion to Present Additional Evidence Pursuant to Rule 115, 10 December 2004 (Confidential).

[1479] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005.

[1480] Martinović First Rule 115 Motion (Confidential).

[1481] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution Response to Vinko Martinović's "Request for Presentation of Additional Evidence", 11 August 2003.

[1482] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Response to Prosecution Response to Vinko Martinović "Request for Presentation of Additional Evidence", 18 August 2003.

[1483] 18 November Rule 115 Decision on Martinović Request.

[1484] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Request for Presentation of Additional Evidence, 15 March 2004 ("Martinović Second Rule 115 Motion").

[1485] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Prosecution's Response to Vinko Martinović's Request for Presentation of Additional Evidence, 25 March 2004.

[1486] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Decision on Martinović's Request for Presentation of Additional Evidence, 20 October 2004.

(c) Prosecution

26. On 6 October 2005, the Prosecution confidentially filed a Motion for admission of additional evidence on appeal pursuant to Rule 115 "in favour of" Naletilić which the latter supported.[1487] The Appeals Chamber granted this Motion on 13 October 2005.[1488]

6. Status Conferences

27. At the appellate stage, Status Conferences in accordance with Rule 65 *bis* were held on 28 August 2003, 18 December 2003, 30 March 2004, 26 July 2004, 23 November 2004, 16 March 2005, 19 July 2005 and 14 February 2006.

7. Hearings on appeal

28. The hearings on appeal took place on 17 and 18 October 2005.[1489]

[1487] Prosecution Rule 115 Motion (Confidential), para. 1.
[1488] Confidential Decision on Prosecution Motions for Additional Evidence and for Protective Measures.
[1489] Scheduling Order for Appeals Hearing, pp. 1, 3-4.

XV. ANNEX 2: GLOSSARY OF TERMS

A. List of International Tribunal and other decisions

1. International Tribunal

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision on Admissibility of Evidence")

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Appeal Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement")

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić*, 16 May 2002

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BRĐANIN
Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001

Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001

Prosecutor v. Radoslav Brđanin and Momir Talić, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement)

"ČELEBIĆI" (A)
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* 92 *bis* Decision")

HALILOVIĆ
Prosecutor v. Sefer Halilović, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Motion to Suppress Evidence, signed 25 June 1999 and filed 28 June 1999 ("*Kordić* Decision Rejecting Motion to Suppress Evidence")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* 11 February 2000 Decision")

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement")

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC, KOVAČ AND VUKOVIĆ

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka et al.* Trial Judgement")

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

S. MILOŠEVIĆ

Prosecutor v. Slobodan Milošević, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Joinder Decision")

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, 30 September 2003 ("*Milošević* 92 *bis* Decision")

Prosecutor v. Slobodan Milosević, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000 ("15 February 2000 Decision")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision on Preliminary Motion of Mladen Naletilić, 11 May 2000 ("11 May 2000 Decision")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During Testimony of Certain Blaškić and Kordić Witnesses, 27 November 2000

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision on Prosecution Motion to Amend Count 5 of the Indictment, 28 November 2000 ("Decision to Amend Count 5")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-PT, Decision Regarding Prosecutor's Notice of Intent To Offer Transcripts Under Rule 92 *bis* (D), 9 July 2001

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on Prosecutor's Motion to Amend the Amended Indictment, 16 October 2001

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Order Relating to Request for All Documents Relating to Search Warrant Issued on the 18th September 1998 and Signed by the Honorable Judge May and Decision on Motions for Extension of Time to File Objections Concerning Admissibility of Evidence Seized Pursuant to Search Warrant", 1 November 2001 (Confidential) ("Access Decision")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on accused Naletilić's Reasons why Documents Seized per Search Warrant are Inadmissible, 14 November 2001

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-AR73.5, Decision on Application by Mladen Naletilić for Leave to Appeal the Order and Decision of Trial Chamber I Section A dated 1 November 2001", 18 January 2002 ("Decision Denying Leave to Appeal")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Order to the Prosecution to Provide Definite Information on their Alleged Possession of the Mostar Court Files, 27 March 2002

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Order for Additional Information, 5 April 2002

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Accused Naletilić's Reply to Prosecutor's Motion on Defence Witness Issues and Renewed and New Requests for Relief, and Request for Issuance of Subpoena Pursuant to Rule 54, 4 June 2002 (Confidential)

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered through Witnesses NE and NH, 28 June 2002 ("Decision on Witnesses NE and NH Exhibits")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Filing and Scheduling Order, 29 August 2002.

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Order for Additional Information, 4 September 2002

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Prosecution's Filing Concerning Rebuttal Case, 20 September 2002 (Confidential) ("Decision on Rebuttal Witnesses")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on Accused Naletilić's Submission Concerning Rejoinder, 27 September 2002 (Confidential)

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Prosecution's Supplemental Filing Concerning the Rebuttal Case, 9 October 2002 (Confidential) ("Confidential Decision of 9 October 2002")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on Accused Naletilić's Request for Additional Witness in Rejoinder, 9 October 2002 (Confidential)

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Accused Naletilić's Request for Issuance of *Subpoena Duces Tecum* per Rule 54, 15 October 2002 (Confidential) ("15 October 2002 Decision on 'Lost Files'")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered During the Rebuttal Case, 23 October 2002 (Confidential) ("Decision on Admission of Rebuttal Exhibits")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-T, Judgement, 31 March 2003 ("Trial Judgement")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on the Request for Presentation of Additional Evidence, 18 November 2003 ("18 November Rule 115 Decision on Martinović Request")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004 ("Decision on Naletilić Consolidated Rule 115 Motion")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Martinović's Request for Presentation of Additional Evidence, 20 October 2004

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Scheduling Order for Appeals Hearing, 16 September 2005 ("Scheduling Order for Appeals Hearing")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Prosecution's Motions for Additional Evidence in Favour of Mladen Naletilić and for Protective Measures, 13 October 2005 (Confidential) ("Confidential Decision on Prosecution Motions for Additional Evidence and for Protective Measures")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005 ("Decision on Naletilić's Motion for Leave to File Pre-Submission Brief on Torture")

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Decision on Naletilić's Urgent Motion for Production of Information Regarding the Radoš Diary, 19 October 2005 (Confidential)

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002

M. NIKOLIĆ
Momir Nikolić v. Prosecutor, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004 ("*M. Nikolić* Decision on Motion to Amend")

PLAVŠIC
Prosecutor v. Biljana Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003 ("*Plavšić* Sentencing Judgement")

B. SIMIĆ, M. TADIĆ, ZARIĆ
Prosecutor v. Blagoje Simić,Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004 ("*B. Simić* Decision on Motion to Amend")

M. SIMIĆ
Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002 ("*M. Simić* Sentencing Judgement")

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

D. TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction")

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 ("*Tadić* Decision on Hearsay Evidence")

Prosecutor v. Duško Tadić a/k/a/ "Dule", Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 ("*Tadić* Trial Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals")

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. <u>ICTR</u>

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

KAJELIJELI
The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement")

KAMBANDA
Jean Kambanda v. The Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

NIYITEGEKA
Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

NTAKIRUTIMANA
Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

RUTAGANDA
Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

SEMANZA
Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

3. <u>Other decisions</u>

HADJIANASTASSIOU V. GREECE
Hadjianastassiou v. Greece, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR Ser. A., No. 252, Judgement of 16 December 1992

CRAWFORD V. WASHINGTON
Crawford v. Washington, 541 U.S. 36, (U.S. Supreme Court, 8 March 2004)

B. <u>List of other legal authorities</u>

Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002

Report of the Preparatory Commission for the International Criminal Court – Addedum: Part II – Finalised Draft Text of the Elements of Crimes, 30 June 2000, PCNICC/2000/1/Add.2

Kai Ambos, "Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC Statute", in: Lal Chand Vohrah *et al*. (ed.), *Man's Inhumanity To Man, Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003)

Knut Dörmann, in: *International Review of the Red Cross No. 839*, 30 September 2000, pp. 771-795 (International Committee of the Red Cross)

Knut Dörmann with contributions by Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002)

Antonio Cassese *et al*. (ed.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1 (Oxford University Press, 2002)

Knut Dörmann, Eve La Haye, Herman von Hebel, "The Elements of War Crimes", in R.S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) ("Dörmann, La Haye, & Von Hebel")

C. List of abbreviations

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

ABiH	Army of Bosnia and Herzegovina
AID	Agency for Investigation and Documentation
Amended Indictment	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Amended Indictment, signed on 4 December 2000
Appeals Hearing, T.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited
ATG	Anti-terrorist Group
B/C/S	The Bosnian/Croatian/Serbian languages
Bosnia and Herzegovina, or BiH	Republic of Bosnia and Herzegovina (consisting of two entities: the Republika Srpska and the Federation of Bosnia and Herzegovina, and the Brčko District)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the UN General Assembly, in force as of 26 June 1986
Croatia	Republic of Croatia

Decision of the Supreme Court of the Republic of Croatia of 8 July 1999	Decision of the Supreme Court of the Republic of Croatia, 8 July 1999, filed before the Trial Chamber on 11 August 1999, folio number D411-D399, domestic reference number I Kž-488/1999-3
Decision of the Zagreb County Court	Decision of the Zagreb County Court, 8 June 1999, filed before the Trial Chamber on 11 August 1999, folio number D425-D416, domestic reference number KV-I 200/99
Defence	The Accused and/or the Accused's Counsel
ECMM	European Community Monitoring Mission
Ex.	Exhibit
Federation of Bosnia and Herzegovina	Entity of Bosnia and Herzegovina
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
HOS	Croatian Defence Forces
HR H-B	Croatian Republic of Herceg-Bosna
HV	Army of the Republic of Croatia
HVO	Croatian Defence Council (army of the BH Croats)
HZ H-B	Croatian Community of Herceg-Bosna
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
Indictment	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Second Amended Indictment, 28 September 2001
Initial Indictment	*Prosecutor v. Mladen Naletilić, a.k.a "Tuta", and Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-1, Indictment, 18 December 1998
inter alia	Among other things
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
KB	Convicts' Battalion

Martinović	Appellant Vinko Martinović (*a.k.a* "Štela")
Martinović Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of Mr. Vinko Martinović (Public-Redacted Version), 24 May 2005
Confidential Martinović Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of Mr. Vinko Martinović, 29 August 2003 (Confidential)
Martinović Final Trial Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Final Trial Brief in the Defence of Vinko Martinović (Public Redacted Version), 19 November 2002
Martinović Notice of Appeal	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Notice of Appeal against Judgement No. IT-98-34-T of 31 March 2003 in the Case: Prosecutor vs. Vinko Martinović, 29 April 2003
Martinović Objection to the Initial Indictment	*Prosecutor v. Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-PT, Objection to the Indictment, 4 October 1999 (Confidential)
Martinović Response to Prosecution Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Response Brief of Vinko Martinović, 26 September 2003
Martinović First Rule 115 Motion	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Request for Presentation of Additional Evidence, 31 July 2003 (Confidential)
Martinović Second Rule 115 Motion	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Request for Presentation of Additional Evidence, 15 March 2004
Martinović Supplemental Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Supplemental Memorandum to Martinović Appeal Brief, 3 February 2005
MUP	Ministry of the Interior Police
Naletilić	Appellant Mladen Naletilić (*a.k.a* "Tuta")
Naletilić Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Brief on Appeal, 15 September 2003 (Confidential – Under Seal)
Naletilić Consolidated Rule 115 Motion	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Consolidated Motion to Present Additional Evidence Pursuant to Rule 115, Incorporating his Previously-filed Motion and Supplement, 8 September 2003 (Confidential)
Naletilić Second Rule 115 Motion	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Mladen Naletilić's Second Motion to Present Additional Evidence Pursuant to Rule 115, 26 July 2004 (Confidential)
Naletilić Final Trial Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Final Brief of the Accused Mladen Naletilić a.k.a Tuta, 4 November 2002

Naletilić Notice of Appeal	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Notice of Appeal of Mladen Naletilić a.k.a. Tuta, 29 April 2003
Naletilić Objection to the Initial Indictment	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-PT, Defence's Preliminary Motion, 20 April 2000
Confidential Naletilić Reply Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Reply to the Prosecution's Response to Naletilić's Appeal Brief, 17 November 2003 (Confidential)
Naletilić Reply Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Reply to the Prosecution's Response to Naletilić's Appeal Brief – Redacted, 10 October 2005
Naletilić Response to Prosecution Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Response to the Prosecution's Appeal Brief, 26 September 2003
Naletilić Revised Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Revised Appeal Brief Redacted, 10 October 2005
Confidential Naletilić Revised Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Mladen Naletilić's Revised Appeal Brief, 10 October 2003 (Confidential)
Naletilić Submission of Letter Concerning "Missing Files"	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-T, Accused Naletilić's Submission of Letter of Honorable Častimir Mandarić Concerning the "Missing Files", 10 April 2002
Prosecution	The Prosecutor or Counsel for the Prosecutor
Prosecution Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Appeal Brief of the Prosecution, 14 July 2003
Prosecution Chart of Witnesses and List of Facts	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-PT, Prosecutor's Chart of Witnesses and List of Facts Submitted Pursuant to the Trial Chamber's Scheduling Order of 16 June 2000, 18 July 2000 (Under Seal)
Prosecution Consolidated Reply Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Consolidated Reply Brief of the Prosecution, 13 October 2003
Prosecution Exhibits	Exhibits tendered by the Prosecutor and admitted into evidence by the Chamber
Prosecution Filing on Rebuttal Case	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Prosecution's Filing Concerning Rebuttal Case, 13 September 2002 (Confidential and Under Seal)
Prosecution Rule 115 Motion	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Motion for Additional Evidence in favour of Mladen Naletilić 6 October 2005 (Confidential)

Prosecution Notice of Appeal	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Notice of Appeal, 2 May 2003
Prosecution Notice of Withdrawal	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Notice of Withdrawal of its Second Ground of Appeal, 30 September 2005
Prosecution Pre-Trial Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's Pre-Trial Brief, 11 October 2000
Prosecution Response to Martinović Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Public Redacted Version of Prosecution's Respondent's Brief to Vinko Martinović's Appeal Brief, 21 March 2005
Confidential Prosecution Response to Martinović Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Respondent's Brief to Vinko Martinović's Appeal Brief, 8 October 2003 (Confidential)
Prosecution Response to Naletilić Revised Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Public Redacted Version of "Prosecution's Respondent's Brief to Mladen Naletilić's Appeal Brief" Filed on 30 October 2003, 21 March 2005
Confidential Prosecution Response to Naletilić Revised Appeal Brief	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Prosecution's Respondent's Brief to Mladen Naletilić's Appeal Brief, 30 October 2003 (Confidential)
Prosecution Rule 65 *ter* Exhibits' List	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-PT, Prosecutor's List of Exhibits pursuant to Rule 65 *ter* (E)(v), 11 October 2000 (Under Seal)
Prosecution Rule 65 *ter* Witnesses' List	*Prosecutor v. Mladen Naletilić, a.k.a "Tuta", and Vinko Martinović, a.k.a "Štela"*, Case No. IT-98-34-PT, Prosecutor's List of Witnesses pursuant to Rule 65 *ter* (E)(iv), 11 October 2000 (Under Seal)
Prosecution Submission of Witness NE Exhibits	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-T, Prosecutor's Submission of Cross-Examination Exhibits Concerning Witness NE, 3 June 2002 (Confidential and Under Seal)
Rules	Rules of Procedure and Evidence of the International Tribunal; unless reliance on earlier version is indicated in text: IT/32/Rev. 37, 6 April 2006.
Search Warrant	Case No. IT-98-31-Misc. 1, Order and Search Warrant, signed on 18 September 1998 and filed on 28 September 1998, pp D176-189
SFRY	*Former*: Socialist Federal Republic of Yugoslavia
SIS	HVO Security and Information Service
SLO Letter	*Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Letter from the Senior Legal Officer Regarding Preparation of the Appeals Hearing in the *Naletilić and Martinović* Case, 16 September 2005
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)

T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public.
UN	United Nations
UNDU	United Nations Detention Unit for persons awaiting trial or appeal before the International Tribunal
UNPROFOR	United Nations Protection Forces
Vance-Owen Peace Plan	Reproduced in pp. 13-44 of the Report of the Secretary-General on Activities of the International Conference on the former Yugoslavia, 2 February 1993, (S/23221)