**UNITED NATIONS**

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

Case No. IT-95-14/2-A

Date: 17 December 2004

Original: English

**IN THE APPEALS CHAMBER**

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

**Registrar:** **Hans Holthuis**

**Judgement of:** **17 December 2004**

**PROSECUTOR**

**v.**

**DARIO KORDIĆ**
**AND**
**MARIO ČERKEZ**

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# JUDGEMENT

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**The Office of the Prosecutor:**

Mr. Norman Farrell
Ms. Helen Brady
Ms. Marie-Ursula Kind and Ms. Michelle Jarvis

**Counsel for Dario Kordić:**

Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr. and Mr. Stephen M. Sayers

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**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 26 February 2001 in the case *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T ("Trial Judgement"), its English text being authoritative.

Having considered the written and oral submissions of the parties, the Appeals Chamber

**HEREBY RENDERS ITS JUDGEMENT.**

# I. INTRODUCTION

1. The events giving rise to this appeal took place during the conflict between the Croatian Defence Council ("HVO") and the Bosnian Muslim Army ("ABiH") in the Lašva Valley region of Central Bosnia from 1992 until 1993. The International Tribunal is in particular seized of the massacre undisputedly committed in Ahmići in mid-April 1993.

## A. **The Accused**

### 1. Dario Kordić

2. Dario Kordić was born on 14 December 1960 in Busovača, Bosnia and Herzegovina. He is married and has three children born in 1987, 1992 and 1995. He is a former journalist and was employed at the *Vatrostalna* company in Busovača from 1985 onwards.

3. In 1991, Kordić became the President of the Croatian Democratic Union of Bosnia and Herzegovina ("HDZ-BiH") in the Municipality of Busovača. In the same year, he became the Vice-President of the Presidency of the Croatian Community of Herceg-Bosna ("HZ H-B") after its foundation on 18 November 1991. When the HZ H-B turned itself into the Croatian Republic of Herceg-Bosna ("HR H-B") in August 1993, Kordić continued to serve as Vice-President.

### 2. Mario Čerkez

4. Mario Čerkez was born on 27 March 1959 in Vitez, Bosnia and Herzegovina. He is married and has three children born in 1981, 1983 and 1995. Before the outbreak of the armed conflict, he was employed in the *Slobodan Princip Seljo* factory near Vitez.

5. Čerkez was one of the founders of the HVO in Vitez, his first duty being Assistant Commander of the Vitez Staff, followed by Commander of the Vitez Brigade. When the Vitez and

Novi Travnik Brigades were united under the name of *Stjepan Tomašević*, Čerkez became Assistant Commander of that Brigade. In March 1993, Čerkez became the Commander of the Viteška Brigade.

## B. **The Trial Judgement**

6. The Trial Chamber convicted Kordić pursuant to Article 7(1) of the Statute for planning, instigating and ordering crimes committed in the Travnik, Vitez, Busovača, and Kiseljak municipalities, including persecutions, unlawful attack on civilians and civilian objects, murder, inhumane acts, imprisonment, wanton destruction not justified by military necessity, plunder, and destruction or wilful damage to institutions dedicated to religion or education. The Trial Chamber found that Kordić played an instrumental part in particular in the ordering of the attack on Ahmići in April 1993, an attack in which more than 100 Bosnian Muslim civilians were massacred. The Trial Chamber sentenced Kordić to 25 years of imprisonment.

7. In respect of crimes occurring in Vitez, Stari Vitez and Večeriska, Čerkez was convicted under Article 7(1) of the Statute for committing persecutions, and pursuant to both Article 7(1) and 7(3) of the Statute for crimes including unlawful attack on civilians and civilian objects, murder, inhumane acts, imprisonment, taking civilians as hostages, wanton destruction not justified by military necessity, plunder, and destruction or wilful damage to institutions dedicated to religion or education. For these crimes, the Trial Chamber imposed a single sentence of 15 years of imprisonment. The Trial Chamber acquitted Čerkez, however, of the charges in respect to the crimes allegedly committed by him in Ahmići.

## C. **The Appeals**

8. The appeals of Kordić and Čerkez are directed against all convictions.

9. Kordić mainly submits that

(i) he was denied "equality of arms" and did not receive a fair trial;

(ii) the Trial Chamber erred in relying on uncorroborated hearsay evidence;

(iii) the Trial Chamber erred in finding that the Muslim-Croat conflict in Central Bosnia was a unilateral Bosnian–Croat campaign of persecutions;

(iv) he did not have responsibility for the events in Ahmići and elsewhere;

(v) no (international) armed conflict existed prior to mid-April 1993; and

(vi) the sentence was excessive.[1]

10. Čerkez mainly submits that

(i) no international armed conflict existed at the relevant time;

(ii) the Trial Chamber erroneously convicted him on the basis of Article 7(3) of the Statute;

(iii) he did not receive a fair trial;

(iv) the Trial Chamber erred in the application of material law as a result of erroneous factual findings; and

(v) the sentence was excessive.

11. In addition to the above, a number of other individual and detailed grounds of appeal have been presented by both Accused.

12. The Prosecution appeals

(i) Čerkez's acquittal for the crimes occurring in Ahmići, and

(ii) the sentences of both Kordić and Čerkez as being too lenient.[2]

[1] Kordić withdrew his amended grounds of appeal 3-D, 3-E, 3-G, Notice of Withdrawal of Certain of Dario Kordić's Amended Grounds of Appeal, 31 March 2004; ground of appeal 3-F and the argument made in footnote 226 of Kordić Appeal Brief, asserting that an international armed conflict is necessary for the imposition of criminal liability under Article 3 of the Statute, Notice of Withdrawal of Amended Grounds of Appeal No. 3-F, 6 May 2004.

[2] The Prosecution withdrew its first ground of appeal in which it had argued that proof of discriminatory policy is not required under Article 5(h) of the Statute, as "it is now settled jurisprudence that the additional subjective element of discriminatory policy is not required", Withdrawal of Prosecution's First Ground of Appeal in "Prosecution's Appeal Brief" of 9 August 2001, 16 February 2004, para. 3.

## II. THE LAW GOVERNING APPELLATE PROCEEDINGS

13. Article 25 of the Statute provides for appeals on grounds of an error of law that invalidates the decision or an error of fact which has occasioned a miscarriage of justice. Article 25 of the Statute states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers 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.

As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases; it does not involve a trial *de novo*. On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute.[3]

14. The Statute and settled jurisprudence of the International Tribunal provide different standards of review with respect to errors of law and errors of fact. The standards to be applied in both cases are well established in the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda ("ICTR").[4]

### A. **Errors of law**

15. Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the International Tribunal, must determine whether an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law "invalidating the decision". Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.[5]

16. 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

[3] See *Blaškić* Appeal Judgement, para. 13. See also *Kupreškić et al.* Appeal Judgement, para. 22: "The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule" (footnotes omitted).
[4] *Blaškić* Appeal Judgement, para. 12 (with further references).
[5] *Krnojelac* Appeal Judgement, para. 10.

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.[6]

17. If the Appeals Chamber finds that an alleged error of law arises from the application of a wrong legal standard by a Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record, in the absence of additional evidence, and must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence, before that finding is confirmed on appeal.[7]

## B. **Errors of fact**

18. As to errors of fact, the standard applied by the Appeals Chamber has been that of reasonableness, namely, whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached.[8]

19. Only errors of fact which have "occasioned a miscarriage of justice" will result in the Appeals Chamber overturning the Trial Chamber's decision. The appealing party alleging an error of fact must, therefore, demonstrate precisely not only the alleged error of fact but also that the error caused a miscarriage of justice,[9] which has been defined as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[10] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber.[11]

20. The Appeals Chamber considers that there are no reasons to depart from the standard set out above, in relation to grounds of appeal alleging only errors of fact and when no additional evidence

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[6] *Vasiljević* Appeal Judgement, para. 6.
[7] *Blaškić* Appeal Judgement, para. 15.
[8] *Blaškić* Appeal Judgement, para. 16.
[9] *Kupreškić et al.* Appeal Judgement, para. 29.
[10] *Furundžija* Appeal Judgement, para. 37, quoting Black's Law Dictionary.
[11] "Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence", *Kupreškić et al.* Appeal Judgement, para. 30. The *Kupreškić et al.* Appeals Chamber further held: "The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points", *ibid*., para. 32.

has been admitted on appeal. That standard shall be applied where appropriate in the present Judgement.

## C. General principles

21. The Appeals Chamber reiterates that an appeal is not a trial *de novo*. In making its assessment, the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.[12] A party cannot 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 which 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. Thus, in principle, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions which are evidently unfounded.[13]

22. As set out in Article 25 of the Statute, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[14] In a primarily adversarial system,[15] like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. The parties have to present their case clearly, logically and exhaustively so that the Appeals Chamber can fulfil its mandate in an efficient and expeditious manner. Furthermore, "the Appeals Chamber cannot be expected to consider a party's submissions

[12] To hold otherwise would mean to hold a trial *de novo* before the Appeals Chamber merely based on documentary evidence including transcripts. It is only the impugned judgement and the submissions of the parties, both including references to the trial record, that is before an Appeals Chamber. The Appeals Chamber notes that it is not obliged by Rule 109 of the Rules to review *proprio motu* the entire trial record. Otherwise, the Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, would become meaningless when ordering the parties in its para. 13: "Where filings of the parties refer to passages in a judgement, decision, transcripts, exhibits or other authorities, they shall indicate precisely the date, exhibit number, page number and paragraph number of the text or exhibit referred to". This Practice Direction can only confirm and concretize existing law under Article 25 of the Statute. See already *Vasiljević* Appeal Judgement, para. 11, footnote 13, to be read together with footnotes 11-12 and 15. Furthermore, it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness. The Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record.

[13] *Blaškić* Appeal Judgement, para. 13.

[14] See *Kupreškić et al.* Appeal Judgement, para. 27.

[15] This is also true in continental legal systems, see, *e.g.*, § 344 II of the German Code of Criminal Procedure (*Strafprozessordnung*) containing a strict obligation on appellants to demonstrate the alleged miscarriage of justice. Under German law, a procedural objection is inadmissible if it cannot be understood from the appellant's briefs alone. This has been established jurisprudence of the BGH since 1952. See BGHSt 3, pp 213-214.

in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[16]

23. In order for the Appeals Chamber to assess the parties' arguments, the parties are expected to provide precise references to relevant transcript pages or paragraphs in the judgement to which the challenge is being made.[17] The parties must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must also be given references to exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made.

24. In light of the foregoing, the Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged by the parties.

(a) Whenever the Appeals Chamber is confronted with an alleged error of fact and the Appeals Chamber has found no error in the legal standard applied in relation to the factual finding, it will proceed as follows:

– When considering an alleged error of fact raised by the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the verdict of guilt.

– When considering an alleged error of fact raised by the Prosecution, the Appeals Chamber will determine whether no reasonable trier of fact could have come to the conclusion of acquittal.

(b) Whenever the Appeals Chamber is confronted with an error in the legal standard applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding, it will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the verdict of guilt.

[16] See *Vasiljević* Appeal Judgement, para. 12.
[17] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4(b).

# III. APPLICABLE LAW

## A. Planning, instigating and ordering pursuant to Article 7(1) of the Statute

25. The Appeals Chamber notes that the Trial Chamber convicted Kordić for planning, instigating, and ordering crimes pursuant to Article 7(1) of the Statute.[18] The Trial Chamber's legal definitions of these modes of responsibility have not been appealed by any of the Parties. However, the Appeals Chamber deems it necessary to set out and clarify the applicable law in relation to these modes of responsibility insofar as it is necessary for its own decision.

26. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[19] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.

27. The *actus reus* of "instigating" means to prompt another person to commit an offence.[20] While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[21]

28. The *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offence.[22] A formal superior-subordinate relationship between the accused and the perpetrator is not required.[23]

29. The *mens rea* for these modes of responsibility is established if the perpetrator acted with direct intent in relation to his own planning, instigating, or ordering.

30. In addition, the Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[24]

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[18] Trial Judgement, paras 829, 834.
[19] See Trial Judgement, para. 386.
[20] See Trial Judgement, para. 387.
[21] *Cf.* Trial Judgement, para. 387.
[22] Trial Judgement, para. 388.
[23] Trial Judgement, para. 388.
[24] *Blaškić* Appeal Judgement, para. 42.

31. The Appeals Chamber similarly holds that in relation to "planning", a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

32. With respect to "instigating", a person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to instigating. Instigating with such awareness has to be regarded as accepting that crime.

### B. **The responsibility under Article 7(1) and Article 7(3) of the Statute**

33. In the *Aleksovski* Appeal Judgement, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences"[25] in relation to those offences of which he was convicted for his direct participation.[26] While the finding of superior responsibility in that case resulted in an aggravation of sentence, there was no entry of conviction under both heads of responsibility in relation to the count in question. In the *Čelebići* Appeal Judgement, the Appeals Chamber stated:

> Where criminal responsibility for an offence is alleged *under one count* pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[27]

34. The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers 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.[28] Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber

[25] *Blaškić* Appeal Judgement, para. 90, referring to *Aleksovski* Appeal Judgement, para. 183.
[26] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745.
[27] *Blaškić* Appeal Judgement, para. 90, referring to *Čelebići* Appeal Judgement, para. 745 (emphasis added).
[28] *Blaškić* Appeal Judgement, para. 91, referring to the *Blaškić* Trial Judgement, para. 337.

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.[29]

35. The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard.[30]

## C. War crimes under Article 2 (grave breaches) and Article 3 (violations of the laws and customs of war) of the Statute

### 1. Wilful killing (Article 2) and murder (Article 3)

36. The Appeals Chamber recalls that the elements of wilful killing under Article 2 of the Statute are the death of the victim as the result of the action(s) of the accused, who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death, and which he committed against a protected person.[31]

37. The Appeals Chamber has further held that the elements of murder under Article 3 of the Statute are the death of the victim as a result of an act of the accused, committed with the intention to cause death and against a person taking no active part in the hostilities.[32]

38. The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities.[33]

[29] *Blaškić* Appeal Judgement, para. 91, referring to *Aleksovski* Appeal Judgement, para. 183; *Čelebići* Appeal Judgement, para. 745.
[30] *Blaškić* Appeal Judgement, para. 92.
[31] *Čelebići* Appeal Judgement, para. 422.
[32] *Čelebići* Appeal Judgement, para. 423.
[33] *Čelebići* Appeal Judgement, para. 423.

2. Inhuman treatment

39. The Appeals Chamber recalls that inhuman treatment under Article 2 of the Statute is an intentional act or omission committed against a protected person, causing serious mental harm, physical suffering, injury or constitutes a serious attack on human dignity.[34]

3. Unlawful attack on civilians and civilian objects

40. The Trial Chamber stated that unlawful attack on civilians (Count 3) and civilians objects (Count 4) under Article 3 of the Statute are

> those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.[35]

41. The Appeals Chamber notes that the Trial Chamber considered that Article 3 of the Statute covers not only violations which are based in customary international law but also those based on treaties. It found that Additional Protocol I constituted applicable treaty law in the present case,[36] and found that "whether [Additional Protocol I] reflected customary law at the relevant time in this case is beside the point."[37]

42. The Appeals Chamber holds that the Trial Chamber's approach is correct.

43. This approach is consistent with the language of Article 1 of the Statute granting the International Tribunal "competence to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia". It is also consistent with Security Council Resolution 827 (1993) in which the Security Council expressed its determination "to take effective measures to bring to justice the persons who are responsible for [violations of international humanitarian law]".[38] These instruments do not impose any restriction to customary international law, which is in line with the statements made in the Security Council at the time the Statute was adopted.[39]

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[34] *Čelebići* Appeal Judgement, para. 426. Trench-digging may under certain circumstances amount to cruel treatment, see *Blaškić* Appeal Judgement, para. 597. The Appeals Chamber in this case considers that the same applies for inhuman treatment.
[35] Trial Judgement, para. 328 (footnotes omitted).
[36] Trial Judgement, para. 167.
[37] Trial Judgement, para. 167.
[38] S/Res/827 (1993).
[39] See in particular the position expressed by the representatives of France: "Article 3 of the Statute covers specifically […] all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia"; United States: "'laws or customs of war' referred to in Article 3 include all obligations under

44. The Trial Chamber's approach is also in line with the Report of the Secretary-General in which he stated that:

> the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.[40]

The maxim of *nullum crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law.[41]

The Trial Chamber's approach corresponds with the Appeals Chamber's early decision on jurisdiction in the *Tadić* case where, considering whether the International Tribunal may apply international agreements binding upon the conflicting parties, the Appeals Chamber held that :

> the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.[42]

Later, in *Čelebići,* the Appeals Chamber relied upon *Tadić* in its finding that Bosnia and Herzegovina was bound by the 1949 Geneva Conventions *qua* treaty obligations at the time of the alleged offences in that case. The *Čelebići* Appeals Chamber held that, as of the date of its independence from the former Yugoslavia, Bosnia and Herzegovina was automatically bound by the provisions of those conventions under customary law "irrespective of any findings as to formal succession" because "[i]t may now be considered in international law that there is automatic State

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humanitarian law agreements in force in the territory of the former Yugoslavia"; United Kingdom: "The Statute does not, of course, create new law, but reflects existing international law in this field. In this connection, it would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions and that Article 5 covers acts committed in time of armed conflict"; Hungary: "the jurisdiction of the Tribunal covers the whole range of international humanitarian law"; Spain: "jurisdiction limited […] materially, in that it will be circumscribed to applying the international law in force"; Russian Federation: "Those guilty of mass crimes covered by the Geneva Protocols [*sic*], violations of the laws and customs of war, crimes of genocide and crimes against humanity must be duly punished" (Provisional Verbatim Record of the UN SCOR, 3217th Meeting, at 11, 15, 19, 20, 41, 44 U.N. Doc. S/PV.3217 (25 May 1993)). See also the position expressed by the representative of the Netherlands: "the Netherlands favours a system whereby the ad hoc tribunal would prosecute suspects on the basis of violations of substantive norms under international law," (Note Verbale, dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General, U.N. Doc. S/25716 (4 May 1993)).

[40] Report of the Secretary-General, para. 34.

[41] The Appeals Chamber notes that Additional Protocol I and Additional Protocol II were ratified by the SFRY on 11 June 1979. Bosnia and Herzegovina deposited its Declaration of Succession on 31 December 1992, declaring it became party to the Geneva Conventions and the Additional Protocols as of the date of its independence, 6 March 1992. Croatia deposited its Declaration of Succession on 11 May 1992 and declared to be a party to the conventions to which the SFRY was a party as of 8 October 1991.

[42] *Tadić* Appeal Decision on Jurisdiction, para. 143.

succession to multilateral humanitarian treaties in the broad sense, *i.e*., treaties of universal character which express fundamental human rights."[43]

45. The Appeals Chamber wishes to avoid any ambiguity on this issue that may arise from language it used in *Ojdanić*, *Hadžihasanović* and the *Blaškić* Appeal Judgement which, read out of context, could be misunderstood as vesting jurisdiction in this International Tribunal only for crimes based on customary international law at the time of its commission, but not for treaty-based crimes, however listed in the Statute of this International Tribunal:

> The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[44]
>
> The obligation of the Tribunal to rely on customary international law excludes any necessity to cite conventional law where customary international law is relied on. Contrary to the arguments of the Appellants, there is nothing in the Secretary-General's Report, to which the Statute of the Tribunal was attached in draft, which requires both a customary basis and a conventional one for incrimination.[45]
>
> The Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred. In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.[46]
>
> The Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission.[47]

46. The Appeals Chamber stresses that none of these decisions departs from its approach in *Tadić*. As decided on that occasion,

> the only reason behind the stated purpose of the drafters [of the Statute] that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty.[48]

In each of the three decisions, the legal issues at stake were solved by applying provisions of international customary law. In the present case, however, reference will have to be made to applicable treaty law that established a crime at the time of its commission, provided that this crime is encompassed in the Statute.

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[43] *Čelebići* Appeal Judgement, para. 111.
[44] *Ojdanić* Appeal Decision on Joint Criminal Enterprise, para. 9.
[45] *Hadžihasanović* Appeal Decision on Jurisdiction in Relation to Command Responsibility, para. 35.
[46] *Ibid.,* para. 51.
[47] *Blaškić* Appeal Judgement, para. 141.
[48] See *Tadić* Appeal Decision on Jurisdiction, para. 143.

### 4. Elements of the crimes of unlawful attack against civilians and civilian objects under treaty law

#### (a) Attack

47. The term attack is defined in Article 49 of Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence".[49] Therefore, in determining whether an unlawful attack on civilians occurred, the issue of who first made use of force is irrelevant.

#### (b) Prohibited attacks

48. The civilian population as such shall not be the object of attack.[50] This fundamental principle of international customary law is specified in Articles 51(2), and 51(3) of Additional Protocol I. Article 50(1) of Additional Protocol I states that

> [a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.[51]

49. Article 4A(1), (2), (3) and (6) of Geneva Convention III reads:

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

50. Article 43 of Additional Protocol I sets out a definition of armed forces covering the different categories of the above-mentioned Article 4 of Geneva Convention III.[52] Read together,

[49] This definition applies to the crime of unlawful attacks against civilian objects as well.
[50] See in particular, G.A. Res. 2444 and 2675.

Articles 43 and 50 of Additional Protocol I and Article 4A of Geneva Convention III establish that members of armed forces (other than medical personnel and chaplains) and members of militias or volunteer corps forming part of such armed forces are "combatants" and cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. Furthermore, according to Article 51(3) of Additional Protocol I, civilians are protected against attacks, unless and for the time they take part directly in hostilities. The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

51. Particular attention has to be paid to the situation of members of a Territorial Defence (TO) and as to whether they are to be considered as combatants at all times during the conflict or only when they directly take part in hostilities, that is, when they participate in acts of war which by nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy's armed forces. The Commentary on the Additional Protocols is instructive on this point and states:

> The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the two above-mentioned exceptions [medical and religious personnel]) can participate directly in hostilities, i.e., attack and be attacked. The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).[53]

In light of the above the Appeals Chamber considers that members of the armed forces resting in their homes in the area of the conflict, as well as members of the TO residing in their homes, remain combatants whether or not they are in combat, or for the time being armed.

[51] See *Blaškić* Appeal Judgement, para. 111.
[52] Commentary on the Additional Protocols, para. 1916.
[53] Commentary on the Additional Protocols, p. 515, para. 1677.

52. It is, however, accepted that attacks aimed at military objectives, including objects and combatants, may cause "collateral civilian damage". International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population and provides that

- the civilian populations as such shall not be the object of military operations, and

- every effort be made to spare the civilian populations from the ravages of war, and

- all necessary precautions should be taken to avoid injury, loss or damage to the civilian population.[54]

Nevertheless, international customary law recognises that this does not imply that collateral damage is unlawful *per se*.

53. Article 52(1) of Additional Protocol I prohibits explicitly attacks or reprisals on civilian objects. It defines civilian objects as "all objects which are not military objectives". Further, Article 52(1) defines military objectives as "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Moreover, Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution.

54. The Appeals Chamber clarifies that the prohibition against attacking civilians and civilian objects would not be a crime when justified by military necessity. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives. Article 48 of Additional Protocol I enunciates the principle of distinction as a basic rule. In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice ("ICJ") described the principle of distinction, along with the principle of protection of the civilian population, as "the cardinal principles contained in

the texts constituting the fabric of humanitarian law" and stated that "States must never make civilians the object of attack."[55] As the ICJ held: "These fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[56]

(c) Is a particular result of the attack required?

55. The Trial Chamber stated that an element of the conviction for the crime of unlawful attack directed against civilians or civilian objects under Article 3 of the Statute is that the attacks must be shown to have caused deaths and/or serious bodily injuries or extensive damage to civilian objects.[57]

56. The Appeals Chamber notes that some uncertainty has arisen in the jurisprudence of the International Tribunal as to whether a perpetrator incurs criminal responsibility under the Statute for such unlawful attack prohibited under Articles 51 and 52 of Additional Protocol I, if the attacks result in non-serious civilian casualties or damage, or none at all.[58]

57. The Appeals Chamber finds that the Trial Chamber was correct to state that, at the times the acts of unlawful attack were committed in this case, they must be shown to have resulted in serious injury to body or health to incur criminal responsibility, for the reasons that follow.

(i) Preliminary considerations

58. The plain language of Article 51(2) of Additional Protocol I states that "the civilian population as such, as well as individual civilians, shall not be the object of attack" and makes no reference to any requirement of a demonstration of actual injury for a finding of a breach under Article 51(2) of Additional Protocol I. Likewise, Article 52(1) of Additional Protocol I merely provides without elaboration that "civilian objects shall not be the object of attack […]." However, under Article 85(3) of Additional Protocol I, "making the civilian population or individual civilians the object of attack" becomes a grave breach if it results in death or serious injury to body or health.

(ii) State of customary international law during the Indictment period

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[54] See in particular G.A. Res. 2675.
[55] *Nuclear Weapons* Case, para. 78. The International Court of Justice further asserted that "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".
[56] *Nuclear Weapons* Case, para. 78.
[57] Trial Judgement, para. 328.
[58] *Cf. Galić* Trial Judgement, para. 43; *Blaškić* Trial Judgement, para. 180. In the *Jokić* Sentencing Judgement, the Trial Chamber held that attacks directed against cultural property are as such, regardless of the result, prohibited under Additional Protocols I and II, para. 50.

59. It is well-established that when promulgated, the prohibition in Articles 51 and 52 of Additional Protocol I of attacks on civilians and civilian objects reflected the current status of customary international law[59] embodying the customary international law principle of protection of civilians in situations of conflict.[60] That principle is rooted in Article 25 of the Hague Regulations, which states that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[61] In Resolution 2444 (1968), the General Assembly unanimously stated that "it is prohibited to launch attacks against the civilian populations as such" and that all governmental and other authorities responsible for action in armed conflicts are to observe this rule.[62] In 1970, the General Assembly re-affirmed this fundamental principle stating that "civilian populations as such should not be the object of military operations."[63] The Appeals Chamber notes that in none of these declarations of customary international law reflected in Articles 51 and 52 of Additional Protocol I is the prohibition of attacks on civilians and civilian objects explicitly combined with statements regarding a finding of actual injury to civilians or damage to civilian objects.

60. Similarly, an examination of international instruments prior to Additional Protocol I, shows that neither the Nuremberg Charter (1945),[64] the Tokyo Charter (1946),[65] the Control Council Law No. 10 (1945),[66] nor the Nuremberg Principles (1950)[67] explicitly referred to unlawful attack on civilians or civilian objects as war crimes, let alone made any reference to a result requirement; instead, they generally referred to violations of the laws or customs of war as found in the Hague Conventions as a punishable war crime.

61. Furthermore, the ILC's Draft Code of Offences against the Peace and Security of Mankind (1954) referred generally to acts in violation of the laws or customs of war.[68] Its successor, the Draft Code of Crimes against the Peace and Security of Mankind (1991)[69] was slightly more explicit, noting that "exceptionally serious war crimes" include wilful attacks on property of exceptional religious, historical or cultural value without making reference to a result requirement.[70]

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[59] *Blaškić* Appeal Judgement, para. 157, referring to *Strugar et al.* Appeal Decision, para. 10; *Martić* Decision, para. 10.
[60] *Blaškić* Appeal Judgement, para. 157, referring to *Tadić* Appeal Decision on Jurisdiction, para. 127; *Kupreškić et al.* Trial Judgement, para. 521.
[61] *Cf. Blaškić* Appeal Judgement, para. 158.
[62] G.A. Res. 2444, UNGAOR, 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).
[63] G.A. Res. 2675, UNGAOR, 25th Session, Supp. No. 28 U.N. Doc. A/8028 (1970).
[64] Article 6(a).
[65] Article 5(b).
[66] Article II(1)(a).
[67] Principle 6(b).
[68] Article 2(12).
[69] Report of the International Law Commission, 43rd Session, UNGAOR, 46th Session, Supp. No. 10, U.N. Doc. A/46/10 (1991).
[70] Article 22(2)(f).

However, nothing was said with regard to unlawful attack on civilians or other civilian objects or, for that matter, a result requirement.

62. Thus, it could be argued that the drafters of Articles 51 and 52 of Additional Protocol I intended that one did not have to show a particular result in order for a breach (not a grave breach) to be found, when considered in the context of other separate offences proscribed under Additional Protocol I such as wilful killing, causing serious bodily injury, and wanton destruction. Such reading of Articles 51 and 52 of Additional Protocol I could no doubt be reconciled with the underlying humanitarian purpose of Geneva Convention IV, which is to ensure the protection of civilians when and wherever possible. In that case, punishment of an unlawful attack on civilians or civilian objects itself, regardless of the result, would be based on the concrete endangerment of civilian life and/or property, as the perpetrator can no longer control the result of an unlawful attack once launched; thus the mere undertaking of such an *in concreto* or *in abstracto* extremely dangerous attack would be penalized for good reasons.

63. However, the Appeals Chamber notes that the omission of a result element for a violation of Articles 51 and 52 of Additional Protocol I appears to be deliberate in light of the language later found in Article 85 of Additional Protocol I, which highlights the elements required where a breach of Article 51(2) of Additional Protocol I amounts to another category of breach labelled a "grave breach". Article 85(3)(a) of Additional Protocol I states in relevant part, that "acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: making the civilian population or individual civilians the object of attack." Thus, under Article 85(3)(a) of Additional Protocol I, the drafters expressly included the requirement of a showing of actual injury as an element of the crime of "making the civilian population or individual civilians the object of attack" when considering it to be a grave breach and not merely "a breach" of Additional Protocol I. Similarly, under Article 85(4)(d) of Additional Protocol I, deliberate attacks on civilian objects such as historic monuments, works of art and places of worship are considered to be grave breaches of the Additional Protocol only insofar as the attack results in extensive destruction.

64. The Appeals Chamber also takes into consideration Article 85(1) of Additional Protocol I which refers to Article 146 of Geneva Convention IV, the provision that distinguishes breaches from grave breaches, requiring that grave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches.[71] For other than grave breaches of Geneva Convention IV or Additional Protocol I, the Contracting

Parties merely undertake to "suppress" them, meaning that "such conduct can and should lead to administrative, disciplinary or even penal sanctions – in accordance with the general principle that every punishment should be proportional to the severity of the breach".[72] In light of the option given to Contracting Parties as to the means for suppressing "other" breaches of Additional Protocol I, the Appeals Chamber finds that it is not clear from the plain language of Additional Protocol I whether violations of Articles 51 and 52 would constitute crimes under international humanitarian law.

65. For the reasons set out above, the Appeals Chamber finds that attacks in violation of Articles 51 and 52 of Additional Protocol I are clearly unlawful even without causing serious harm as provided for in Article 85 of Additional Protocol I. Under the language of these articles, their criminalisation as a matter of international law depends on the practice of the Contracting States under Article 85 of Additional Protocol I.

66. The Appeals Chamber finds that at the time the unlawful attack occurred in this case, there was no basis for finding that, as a matter of customary international law, State practice or *opinio iuris* translated the prohibitions under Articles 51 and 52 of Additional Protocol I into international crimes, such that unlawful attacks were largely penalized regardless of the showing of a serious result. State practice was not settled as some required the showing of serious injury, death or damage as a result under their national penal legislation, while others did not.[73]

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[71] For a general view on the repression system see Commentary on the Additional Protocols, pp 974-75, paras 3400-04, and p. 1010, para. 3538.

[72] *Ibid.,* p. 975, para. 3402.

[73] See, *e.g.*, (national legislation requiring a result or only punishing grave breaches under international humanitarian law, partly adopted after the period relevant for this case): Geneva Conventions Act No. 103 of 1957 of Australia, Part II(2)(e) (as amended by the Geneva Conventions Amendment Act No. 27 of 1991); Geneva Conventions Act, R.S.C. 1985, c. G-3, s. 3; Act IV of 1978 of the Criminal Code of the Republic of Hungary, Section 160; Russian Federation - Soviet Minister of Defence Order No. 75 of 16 February 1990 on the publication of the Geneva Conventions of 12 August 1949 relative to the protection of victims of war and their Additional Protocols, Chap. VII, Section 14; The Basic Penal Code of the Republic of Croatia (consolidated text), Narodne novine (Official Gazette), no. 53/1991, Art. 120; Criminal Code of the People's Republic of China (as revised on 14 March, 1997), Arts. 446, 451; Geneva Conventions Act 1957 (c.52) (as amended by the Geneva Conventions (Amendment) Act 1995 (c.27)) of the United Kingdom of Great Britain and Northern Ireland, Section 1; United States Code, Title 18, Chap. 118, Section 2441 (War Crimes Act of 1996, 18 U.S.C. Section 2441 (2004)).
See also (national legislation penalizing attacks on civilians or civilian objects without an explicit result requirement): the Military Penal Code of Norway, 1902, Section 108 (as amended by Act of 12 June 1981); the Criminal Military Code of War of Italy (C.P.M.G.), 1941, Book III, Title IV, Section 2, Art. 185; the Military Penal Code of Spain, Law (Ley Orgánica) 13/1985 of 9 December 1985, Art. 78; Swedish Penal Code, 1990, Chap. 22, Section 6; the Wartime Offences Act of The Netherlands, Art. 8 (adopted on 10 July 1952, Staatsblad (Stb.) 408, as amended by acts dated 2 July 1964, 243; 8 April 1971, Stb. 210; 10 March 1984, Stb. 91; 27 March 1986, Stb. 139; 29 September 1988, Stb. 478; 14 June 1990, Stb. 369 and 372); Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire de Belgique, Chapitre Premier, Art. 1ter, alinéas 8*bis et* 11.
National case law sentencing persons for unlawful attacks on civilians and civilian objects under the national penal legislation indicates that under the facts, serious injury, death, or destruction as a result of the unlawful attacks was often at issue. See, *e.g.*, Decision of Zadar District Court of Croatia, 24 April 1997, K. 74/96 (unpublished) (sentencing 19 soldiers and commanders in absentia under Art. 120 of the Basic Penal Code to 15-20 years imprisonment for massive attacks on civilians and civilian and cultural property resulting in destruction and death); Decision of Split

(iii) Conclusion

67. For the above-mentioned reasons, the Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional Protocol I incurred individual criminal responsibility under Article 3 of the Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity. Therefore, the Appeals Chamber will consider in the Judgement that criminal responsibility for unlawful attack on civilians or civilian objects does require the proof of such a result emanating from an unlawful attack.

68. For this reason, the Appeals Chamber will adequately consider whether the attacks on civilians and civilian objects caused death, serious injury, or any other criminal act listed in Article 3 of the Statute, or any consequence being of the same gravity, to civilians.

5. Unlawful confinement of civilians

69. As the Appeals Chamber noted in *Čelebići*, the offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute, is not further defined in the Statute, but clear guidance can be found in the provisions of Geneva Convention IV.[74] The confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

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District Court of Croatia, 26 May 1997, K. 15/95 (unpublished) (sentencing 39 soldiers and commanders, 27 of whom were sentenced *in absentia* to 5-20 years imprisonment under Art. 120 of the Basic Penal Code for unlawful attacks on civilians and civilian objects resulting in *inter alia* ill-treatment, killing, and destruction). See also the *Kappler* case, Military Court of Rome, 20 July 1948, Il Foro Italiano, 1949 (11), pp 160-168, aff'd by the Supreme Military Court, 25 October 1952 (available at <<http://www.difesa.it/NR/exeres/8A30B849-DBEF-4C29-820D-33ABBFD9B12D.htm>>, last visited in December 2004), and the *Haas and Priebke* case, Military Court of Appeal of Rome, 7 March 1998, (available at << http://www.difesa.it/NR/exeres/3F2713E5-EF43-494E-B294-EAD39B317AA2.htm>> , last visited in December 2004), aff'd by Court of Cassation, First Criminal Section, 16 November 1998 (available at <<http://www.difesa.it/NR/exeres/B3D0BAC9-9D01-4679-8BCF-A6CE37AF4E48.htm>>, last visited in December 2004).

Further evidence of the unsettled nature of State *opinio juris* and practice as to whether or not there is a result element required for the prosecution of the crimes of unlawful attack on civilians and civilian objects (at the time the crimes were committed in this case) is evidenced by the controversial negotiations as late as 1999 by State delegates to the Working Group on the Elements of Crimes for the Rome Statute for the International Criminal Court (see PCNICC/1999/DP.4/Add.2; PCNICC/1999/WGEC/DP.12; PCNICC/1999/DP.20; and PCNICC/1999/WGEC/DP.9). Initially, the United States and Japan proposed a result element for the crime of unlawful attack on civilians, while Switzerland and Spain proposed no such requirement. Following the ensuing debates, the State delegates eventually unanimously agreed that no result element is required for a finding of unlawful attack on civilians under Art. 8(2)(b)(i) of the Rome Statute. Similarly, with regard to the crime of unlawful attacks on civilian objects, the Japanese delegation initially proposed a requirement of resulting damage as an element. However, the United States and Switzerland did not propose such an element. In the end, the Working Group unanimously agreed that there should be no resulting damage requirement under Art. 8(2)(b)(ii) of the Rome Statute for the crime of unlawful attacks on civilian objects (see Lee, Roy S., ed., The International Criminal Court, (Transnational Publishers, 2001), pp 140-144). The Appeals Chamber considers that these unanimous agreements on the elements for the crimes of unlawful attack on civilians and civilian objects by the State delegates to the 1999 Preparatory Commission for the ICC may be indicative of a progressive development of international law on this issue.

[74] *Čelebići* Appeal Judgement, para. 320.

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
>
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

70. Thus, the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful.[75] Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[76] That article provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

71. The Appeals Chamber noted further in *Čelebići* that Article 5 of Geneva Convention IV imposes certain restrictions on the protections which may be enjoyed by certain individuals under the Convention.[77] It provides, in relevant part:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. […]
>
> In each case, such persons shall nevertheless be treated with humanity, and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

72. This provision reinforces the principle behind Article 42 of Geneva Convention IV, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.[78]

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[75] *Čelebići* Appeal Judgement, para. 320.
[76] *Čelebići* Appeal Judgement, para. 320.
[77] *Čelebići* Appeal Judgement, para. 321.
[78] *Čelebići* Appeal Judgement, para. 321.

73. Thus the detention or confinement of civilians will be unlawful in the following two circumstances:

> (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.*, they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary ; and
>
> (ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.[79]

### 6. Wanton destruction not justified by military necessity

74. Wanton destruction not justified by military necessity, a violation of the laws or customs of war, is recognised in Article 3(b) of the Statute. The Trial Chamber sets out the specific elements of the crime:

> The Trial Chamber considers that the elements for the crime of wanton destruction not justified by military necessity charged under Article 3(b) of the Statute are satisfied where:
>
> (i) the destruction of property occurs on a large scale;
>
> (ii) the destruction is not justified by military necessity; and
>
> (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[80]
>
> The Trial Chamber observes that, while property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of such property is criminalised under Article 3 of the Statute.[81]

75. Contrary to the crime of extensive destruction of property, which under the conditions described by the Trial Chamber at paragraph 341 of the Trial Judgement constitutes a grave breach of the Geneva Conventions and a crime *qua custom*, the Trial Chamber did not consider whether and under which conditions the wanton destruction not justified by military necessity also constituted a crime *qua custom* at the time it was allegedly committed.

76. The wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws and customs of war recognised by Article 3(b) of the Statute, is covered by Article 6(b) of the Nuremberg Charter. This provision is restated in Principle 6 of the

[79] *Čelebići* Appeal Judgement, para. 322.
[80] Trial Judgement, para. 346.
[81] Trial Judgement, para. 347 (footnotes omitted).

Nuremberg principles.[82] It refers to war crimes already covered in Articles 46, 50, 53 and 56 of the Hague Regulations, which are applicable to cases of occupation.[83] However, the violation in question is more narrowly defined than Article 23(g) of the Hague Regulations, which states that it is especially forbidden "to destroy […] the enemy's property, unless such destruction […] is imperatively demanded by the necessities of war." The Report of the Secretary-General states that the above instrument and the Regulations annexed thereto has beyond doubt become part of international customary law.[84] *A fortiori*, there is no doubt that the crime envisaged by Article 3(b) of the Statute was part of international customary law at the time it was allegedly committed.

### 7. Plunder of public or private property

77. Acts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law.[85] Both Article 6(b) of the Nuremberg Charter and Article 2(1)(b) of Control Council Law No. 10, as Article 3(e) of the Statute, punish the war crime of "plunder of public and private property." Pillage has been proscribed in Articles 28 and 47 of the Hague Regulations and Article 7 of Hague Convention IX. Protection against pillage is provided for the military wounded and sick by Article 15 of Geneva Convention I, and for the civilian wounded and sick by Article 16 of Geneva Convention IV. Article 33 of Geneva Convention IV, moreover, grants a general prohibition against pillage.[86]

78. The prohibition of plunder is general in its application and not limited to occupied territories only. This is confirmed by the fact that Article 33 of Geneva Convention IV is placed in Part III of the Convention, which contains provisions that apply both in occupied territory and anywhere in the territory of a Party to the conflict.[87] Likewise, Article 28 of the Hague Regulations is found in the section dealing with hostilities. The text of the Nuremberg Charter and Control Council Law No. 10 also do not require the crime to be committed in occupied territory.

79. The Appeals Chamber has not previously set out a definition for the crime of plunder as mentioned in Article 3(e) of the Statute. The Trial Chamber held that the essence of the offence was defined as:

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[82] Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, unanimously adopted by the UNGA in 1950 (UNGAOR, 5th Session, Supp. No. 12, UN Doc. A/1316).
[83] Judgement of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, p. 64.
[84] Report of the Secretary-General, para. 35.
[85] *Cf. Blaškić* Appeal Judgement, para. 147, referring to *Čelebići* Trial Judgement, para. 591.
[86] *Cf. Čelebići* Trial Judgement, para. 591.
[87] *Cf.* Commentary to Geneva Convention IV, p. 226.

> all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as "pillage'"[88]

The Appeals Chamber concurs with this assessment. It notes that in accordance with Geneva Convention IV, the Statute itself does not draw a difference between public or private property.[89]

80. According to Article 3, read in conjunction with Article 1 of the Statute, only serious violations of international law fall under the jurisdiction of this International Tribunal. The Appeals Chamber in *Tadić* specified that "serious" is to be understood as both a breach of a rule protecting important values *and* a breach that involves grave consequences for the victim.[90] It explained that:

> for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory.[91]

81. The prohibition of unjustified appropriation of private or public property is without a doubt a rule that protects important values. The norms mentioned above reflect the fact that it is not only the protected persons themselves that are protected from harmful conduct but also their property.[92]

82. The question remains at what point the breach actually involves grave consequences for the victim. The Trial Chamber in *Čelebići* referred to the *Tadić* Appeal Decision on Jurisdiction, when it held that there is a consequential link between the monetary value of the appropriated property and the gravity of the consequences for the victim.[93] The Appeals Chamber agrees with this conclusion. However, it stresses that the assessment of when a piece of property reaches the threshold level of a certain value can only be made on a case-by-case basis and only in conjunction with the general circumstances of the crime.[94]

83. The Appeals Chamber is, moreover, of the view that a serious violation could be assumed in circumstances where appropriations take place *vis-à-vis* a large number of people, even though there are no grave consequences for each individual. In this case it would be the overall effect on

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[88] Trial Judgement, para. 352 (footnote omitted), referring to *Čelebići* Trial Judgement.
[89] *Cf.* Commentary to Geneva Convention IV, p. 226; *Tadić* Appeal Decision on Jurisdiction, para. 94.
[90] *Tadić* Appeal Decision on Jurisdiction, para. 94.
[91] *Tadić* Appeal Decision on Jurisdiction, para. 94(iii).
[92] See Commentary to Geneva Convention IV, p. 226: "The purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds, etc., furniture, clothing, provisions, tools, etc.)."
[93] *Čelebići* Trial Judgement, para. 1154.
[94] The Appeals Chamber in this context notes that the requirement of grave consequences stems from the special jurisdictional provisions of the Statute. This discussion is therefore without prejudice to the general – less stringent – requirements for the crime of plunder under international criminal law.

the civilian population and the multitude of offences committed that would make the violation serious.

84. The Appeals Chamber therefore finds that the crime of plunder is committed when private or public property is appropriated intentionally and unlawfully. Furthermore, the general requirements of Article 3 of the Statute in conjunction with Article 1 of the Statute relating to the seriousness of the crime must be fulfilled.

### 8. Destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science

85. The seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science constitute a violation of the law or customs of war under Article 3(d) of the Statute. The Accused in the present case were found guilty only in relation to institutions dedicated to religion and education.

86. Kordić submits that there is no support in international law for penalising destruction or damage to "normal educational institutions" and that the Trial Chamber provided no support that the schools in the locations in question were of "great importance to the cultural heritage of peoples" or contained "valuable books and works of arts and science".[95]

87. The Prosecution submits that the Trial Chamber relied on three treaty provisions in support of its position that the crime of destruction or wilful damage to religious or educational institutions as a war crime is grounded in international law.[96]

88. The Trial Chamber discussed at paragraphs 355 to 362 of the Trial Judgement the legal elements of the offence. It held, *inter alia*, that:

> Article 1 of the Cultural Property Convention lists numerous types of cultural property for protection in the form of "movable or immovable property of great importance to the cultural heritage of every people", "buildings whose main and effective purpose is to preserve or exhibit the movable cultural property", and "centres containing a large amount of cultural property". This Convention had been binding on the former Socialist Federal Republic of Yugoslavia as a contracting State since 1956, and continues to apply to the Republic of Croatia and RBiH as from their dates of independence, following their deposit of declarations of succession.[97]
>
> The Trial Chamber notes that educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of

[95] Kordić Appeal Brief, Vol. I, p. 116, footnote 217.
[96] Prosecution Response, para. 5.30. The Prosecution notes that the references to educational institutions were made in passing while the Trial Chamber was in all instances dealing with religious institutions.
[97] Trial Judgement, para. 359.

> learning, arts, and sciences, with their valuable collections of books and works of arts and science.[98]

89. At the outset, the Appeals Chamber notes that international instruments provide two types of protection for cultural, historical and religious monuments. There is the general protection, which is provided for, *inter alia*, under Article 52 of Additional Protocol I and applies to civilian objects. The protection provided is that the building or monument cannot be destroyed unless it has turned into a military object by offering the attacking side "a definite military advantage" at the time of the attack. Schools and places of worship are part of this category of buildings.[99]

90. Certain objects are given special protection. Article 53 of the Additional Protocol I provides:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
>
> (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
>
> (b) to use such objects in support of the military effort;
>
> (c) to make such objects the object of reprisals.

The special protection conferred by Article 53 of Additional Protocol I applies to three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples.[100] The Diplomatic Conference drafting the Additional Protocols explicitly rejected the idea of providing any and all places of worship special protection.[101]

91. Article 1 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, which the Trial Chamber relied on, provides:

> *Definition of cultural property*
>
> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archeological sites: groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as

[98] Trial Judgement, para. 360. The Trial Chamber referred, *inter alia,* to Article 27 of the Hague Regulations, Article 53 of the Additional Protocol I, and Article 1 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.
[99] Article 52 of Additional Protocol I.
[100] Commentary on the Additional Protocols, p. 646.
[101] Commentary on the Additional Protocols, p. 647, para. 2067.

> scientific collections and important collections of books or archives or of reproductions of the property defined above.

Article 1 of the Hague Convention of 1954 refers to property which is "of great importance to the cultural heritage" and not as in Article 53 of Additional Protocol I, to objects which "constitute the cultural or spiritual heritage". The Commentary on the Additional Protocols states that despite this difference in terminology, the basic idea is the same, and that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.[102]

92. The Appeals Chamber cannot see how all educational buildings fulfil these criteria. Therefore, the Appeals Chamber finds that the Trial Chamber erred when it considered that "educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples".[103] The Trial Chamber did not consider whether and under which conditions the destruction of educational buildings constituted a crime *qua custom* at the time it was allegedly committed. Although Hague Convention IV is considered by the Report of the Secretary-General as being without doubt part of international customary law,[104] it does not explicitly refer to buildings dedicated to education. The same applies to Article 53 of Additional Protocol I and it is suggested that the adjective "cultural" used in Article 53 applies to historic monuments and works of art and cannot be construed as applying to all institutions dedicated to education such as schools. Schools are, however, explicitly mentioned in Article 52 of Additional Protocol I, which relates to schools, places of worship and other civilian buildings. Article 23(g) of the Hague Regulations states that it is especially forbidden to "destroy (…) the enemy's property, unless such destruction (…) is imperatively demanded by the necessities of war." The Report of the Secretary-General states that the above instrument and the Regulations annexed thereto have beyond doubt become part of international customary law.[105] There is no doubt that the crime envisaged of destruction of educational buildings was part of international customary law at the time it was allegedly committed.

[102] Commentary on the Additional Protocols, p. 646.
[103] Trial Judgement, para. 360.
[104] Report of the Secretary-General, para. 35.
[105] Report of the Secretary-General, para. 35.

## D. **Elements of crimes against humanity**

### 1. The elements common to all crimes against humanity

#### (a) Requirement that the acts of the accused must take place in the context of a widespread or systematic attack

93. The Appeals Chamber recalls that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population.[106]

94. In relation to the widespread or systematic nature of the attack, the Appeals Chamber notes the jurisprudence of the International Tribunal according to which the phrase "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[107] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.[108] Only the attack, not the individual acts of the accused, must be widespread or systematic.[109] The Appeals Chamber underscores that the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.[110]

#### (b) Requirement that the attack be directed against a civilian population

95. In *Kunarac et al.*, the Appeals Chamber discussed the requirement that an attack is directed against a civilian population, stating that:

> the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[111]

96. The Appeals Chamber in *Kunarac et al.* further stated:

> the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number,

[106] *Blaškić* Appeal Judgement, para. 98 (with further references).
[107] *Blaškić* Appeal Judgement, para. 101, referring to *Kunarac et al.* Appeal Judgement, para. 94.
[108] *Blaškić* Appeal Judgement, para. 101, referring to *Kunarac et al.* Appeal Judgement, para. 94.
[109] *Blaškić* Appeal Judgement, para. 101, referring to *Kunarac et al.* Appeal Judgement, para. 96.
[110] *Blaškić* Appeal Judgement, para. 101, referring to *Kunarac et al.* Appeal Judgement, para. 96.
[111] *Kunarac et al.* Appeal Judgement, para. 90 (footnotes omitted), cited in *Blaškić* Appeal Judgement, para. 105.

> the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.[112]

97. In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed.[113] The Appeals Chamber considers that Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law.[114] As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.[115]

(c) Is it a requirement that the acts of the accused and the attack itself must have been committed in pursuance to a pre-existing criminal policy or plan?

98. The Appeals Chamber notes that the Prosecution has withdrawn its first ground of appeal[116] on the basis that, since the *Kunarac et al.* Appeal Judgement, the jurisprudence on this point is settled.[117]

(d) Requirement that the accused has knowledge that his acts formed part of the broader criminal attack

99. The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.[118] Moreover, the Appeals Chamber considers that:

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

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[112] *Kunarac et al.* Appeal Judgement, para. 91 (footnote omitted), cited in *Blaškić* Appeal Judgement, para. 105.
[113] *Hadžihasanović* Appeal Decision on Jurisdiction in Relation to Command Responsibility, para. 44. See also on a more general note, Report of the Secretary General, (S/25704, 3 May 1993), paras 29, 34.
[114] *Blaškić* Appeal Judgement, para. 110.
[115] *Blaškić* Appeal Judgement, para. 110-116.
[116] *Cf.* Withdrawal of Prosecution's First Ground of Appeal in "Prosecution's Appeal Brief" of 9 August 2001, 16 February 2004**.**
[117] *Kunarac et al.* Appeal Judgement, para. 98 (footnote omitted). See also *Blaškić* Appeal Judgement, para. 120.
[118] *Blaškić* Appeal Judgement, para. 124, citing *Tadić* Appeal Judgement, para. 248; *Kunarac et al.* Appeal Judgement, paras 99, 102.

> At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[119]

100. The Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required.[120]

### 2. The elements of persecutions as a crime against humanity

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

> an act or omission which:
>
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
>
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[121]

These two elements of the crime will be considered separately.

#### (a) *Actus reus* of persecutions

102. The Appeals Chamber considers that:

> although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.[122]

Furthermore, the acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute.[123]

103. In this regard, it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law or in international treaty law at the time the accused is alleged to have committed the offence. As stated above, these acts must constitute a denial of or infringement upon a fundamental right laid down in international

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[119] *Kunarac et al.* Appeal Judgement, para. 103 (footnotes omitted); *Blaškić* Appeal Judgement, para. 124.
[120] *Blaškić* Appeal Judgement, para. 125, referring to *Tadić* Appeal Judgement, para. 248; *Kunarac et al.* Appeal Judgement, paras 99, 103.
[121] *Blaškić* Appeal Judgement, para. 131, referring to *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.
[122] *Blaškić* Appeal Judgement, para. 135, referring to *Vasiljević* Appeal Judgement, para. 113.
[123] *Blaškić* Appeal Judgement, para. 135, referring to *Krnojelac* Appeal Judgement, paras 199, 221.

customary or treaty law; not every act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity.[124]

(i) Attacks on civilians and civilian objects: cities, towns, and villages

104. In light of the discussion on this issue set out above, the Appeals Chamber holds that attacks launched deliberately against civilians or civilian objects may constitute persecutions as a crime against humanity.[125]

105. With respect to the question as to whether a particular result of the attack is required, the Appeals Chamber recalls that acts may constitute a crime of persecutions if they are of gravity equal to the other crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts. Therefore, the Appeals Chamber finds that unlawful attack launched deliberately against civilians or civilian objects may constitute a crime of persecutions without the requirement of a particular result caused by the attack(s).

(ii) Wilful killing, murder, causing serious injury, and inhuman treatment

106. With respect to the charges of wilful killing, murder, causing serious injury, and inhuman treatment, the Appeals Chamber considers that the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognised in customary international law and is embodied in Articles 6 and 7 of the ICCPR, and Articles 2 and 3 of the ECHR. It is clear in the jurisprudence of the International Tribunal that acts of wilful killing, murder, and of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions.[126] As concluded by *inter alia* the *Kupreškić et al.* Trial Chamber, the crime of persecutions has developed in customary international law to encompass acts that include "murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5."[127]

107. The Appeals Chamber considers that the acts charged in the Indictment which encompass the use of detained Bosnian Muslim civilians as hostages and human shields, their use to dig trenches in hostile, hazardous and combat conditions, and their subjection to physical and psychological abuse all rise to the level of gravity of the other crimes enumerated in Article 5 of the Statute.

[124] See *Blaškić* Appeal Judgement, para. 139.
[125] *Blaškić* Appeal Judgement, para. 159, referring to *Kupreškić et al.* Trial Judgement, para. 627; *Krnojelac* Trial Judgement, para. 434. See also *Blaškić* Appeal Judgement, paras 157-158.

(iii) Destruction and plunder/pillage of property

108. The Appeals Chamber finds that the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute.[128]

109. It has to be noted that the crime of pillage was the subject of criminal proceedings before the International Military Tribunal at Nuremberg and other trials following the Second World War, where in certain cases, it was charged both as a war crime and a crime against humanity.[129] The Appeals Chamber has to consider whether an act of plunder, committed separately or cumulatively, with discriminatory intent *in concreto* amounts to persecutions being of an equal gravity as the other crimes against humanity listed in Article 5 of the Statute.[130]

(b) *Mens rea* of persecutions

110. The Appeals Chamber reiterates that the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions as a crime against humanity requires evidence of a "specific intent to discriminate on political, racial, or religious grounds."[131] The requisite discriminatory intent may not be "inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity."[132] However, the Appeals Chamber considers that the "discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[133]

111. Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions.[134] The Appeals Chamber holds that the *mens rea* for persecutions "is the specific intent to cause injury to a human being because he belongs to a particular community or group." The Appeals Chamber stresses that there

[126] *Blaškić* Appeal Judgement, para. 143.
[127] *Blaškić* Appeal Judgement, para. 143, citing *Kupreškić et al.* Trial Judgement, para. 615.
[128] See *Blaškić* Appeal Judgement, para. 149.
[129] *Blaškić* Appeal Judgement, para. 148, referring to *Pohl* Case, p. 958 *et seq.; IG Farben* Case, p. 1081 *et seq.; Krupp* Case, p. 1327 *et seq.; Flick* Case, p. 1187 *et seq.*
[130] For the test see *Blaškić* Appeal Judgement, para. 135, referring to *Krnojelac* Appeal Judgement, paras 199, 221.
[131] *Blaškić* Appeal Judgement, para. 164, referring to *Krnojelac* Appeal Judgement, para. 184; *Vasiljević* Appeal Judgement, para. 113.
[132] *Blaškić* Appeal Judgement, para. 164, referring to *Krnojelac* Appeal Judgement, para. 184.
[133] *Blaškić* Appeal Judgement, para. 164, referring to *Krnojelac* Appeal Judgement, para. 184.
[134] *Blaškić* Appeal Judgement, para. 165.

is no requirement in law that the actor possess a "persecutory intent" over and above a discriminatory intent.[135]

112. In addition, the Appeals Chamber considers that a person who orders, plans or instigates an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, plan or instigation, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, planning or instigating. Ordering, planning or instigating with such awareness has to be regarded as accepting that crime. Thus, an individual who orders, plans or instigates an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the execution of the order, plan or instigation, may be liable under Article 7(1) of the Statute for the crime of persecutions.[136]

### 3. Murder pursuant to Article 5(a) of the Statute

113. The elements of murder as a crime against humanity are undisputed.[137]

### 4. Imprisonment pursuant to Article 5(e) of the Statute

114. The Appeals Chamber notes the finding of the Trial Chamber that imprisonment of civilians is unlawful where

- civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.* that they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;
- the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and
- the imprisonment occurs as part of a widespread or systematic attack directed against a civilian population.[138]

115. The Appeals Chamber finds that not all of these elements necessarily have to be met in order to establish liability for unlawful confinement pursuant to Article 5(e) of the Statute: the existence of an international armed conflict, an element of Articles 42 and 43 of Geneva Convention IV, is not required for imprisonment as a crime against humanity.

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[135] *Blaškić* Appeal Judgement, para. 165.
[136] *Blaškić* Appeal Judgement, para. 166.
[137] *Cf.* Trial Judgement, para. 236.
[138] Trial Judgement, para. 303.

116. The Appeals Chamber agrees with the Trial Chamber's finding "that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual[139] without due process of law, as part of a widespread or systematic attack directed against a civilian population".[140]

### 5. Inhumane acts pursuant to Article 5(i) of the Statute

117. The Appeals Chamber notes that inhumane acts as crimes against humanity were

> deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.[141]

The Appeals Chamber considers that the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle. In the present case, however, "other inhumane acts" are charged exclusively as injuries.[142] Inhumane acts as a crime against humanity is comprised of acts which fulfill the following conditions:

- the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- the suffering must be the result of an act or omission of the accused or his subordinate; and
- when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.[143]

[139] Read in context with para. 303 of the Trial Judgement, it becomes evident that the Trial Chamber referred to "individual" in the sense of "civilian".
[140] Trial Judgement, para. 302.
[141] *Kupreškić et al.* Trial Judgement, para. 563.
[142] Indictment, para. 42; Count 10 (Kordić), and Count 17 (Čerkez).
[143] *Cf.* Trial Judgement, para. 271.

# IV. ALLEGED ERRORS RELATING TO DENIAL OF DUE PROCESS OF LAW

118. Kordić[144] and Čerkez[145] claim that they were denied their right to a fair trial under Article 21 of the Statute. The provisions relevant to these grounds of appeal are primarily enshrined Articles 20(1) and 21(4) of the Statute.

119. Where a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the protections provided by the Statute, together with the Rules, were not extended to it by the Trial Chamber.[146] This requires the alleging party to prove

(1) that provisions of the Statute and/or the Rules were violated, and

(2) that the violation caused prejudice or "unfairness"[147] to the alleging party, such as to amount to an error of law invalidating the Trial Judgement.[148]

## A. The arguments of the parties and the matters at issue on appeal

### 1. Kordić's First Ground of Appeal: Kordić was denied "equality of arms" and did not receive a fair trial

120. Kordić submits[149] that the following aspects all served to deny him a fair trial: the Trial Chamber did not ensure that he had adequate notice of the charges and case against him (including both an alleged vagueness of the Indictment and changes in the Prosecution's case); he did not have adequate facilities to prepare his defence; he did not have equal access to materials available to the Prosecution; and the Trial Chamber wrongly admitted new evidence at the rebuttal stage of proceedings.[150]

### 2. Čerkez's Third Ground of Appeal: Čerkez was denied a fair trial

121. Čerkez argues[151] that his trial was unfair for the following reasons: the Trial Chamber's denial of his request for at least four weeks to prepare his Final Trial Brief[152]; the Prosecution's

[144] Kordić's first ground of appeal.
[145] Čerkez's second ground of appeal.
[146] *Tadić* Appeal Judgement, para. 56.
[147] *Blaškić* Appeal Judgement, para. 221; *Kupreškić et al.*Appeal Judgement, para. 87.
[148] Article 25(1)(a) of the Statute.
[149] Kordić Appeal Brief, Vol. I, pp 24-25.
[150] Kordić's allegation that the Trial Chamber erred in relying on Witness AT is addressed *infra*, section IV.E.
[151] Čerkez Appeal Brief, p. 33, paras 1-7.
[152] Čerkez Appeal Brief, p. 34, para. 1 and p. 38, para. 4. The Trial Chamber's Decision denying the motion for an extension was given orally on 20 November 2000, T. 27196-97.

pattern of both late and new disclosure, due in part to the Prosecution's tactics designated as an "ambush" of the defence[153], and constituting misuse of the disclosure process to frustrate defence work[154]; inability to examine documents known to exist in the archives of Bosnia and Herzegovina, and which favoured his case, in violation of Rule 68 of the Rules.

## B. Alleged vagueness of the Indictment, inadequate notice of the charges, and the Prosecution's case as a "moving target"

### 1. Submissions of the parties

122. Kordić[155] submits that the Prosecution's frequent and substantive changes to its stated case against the Accused were unfair, in that the Prosecution failed to inform them promptly and in detail of the nature of the charges against them, as required by Article 21(4)(a) of the Statute. As such, the Prosecution allegedly confronted them with a "moving target".[156]

123. Kordić in particular places great importance on the characterisation of the Prosecution's case by one of the Trial Judges as one which was "constructed as we go along."[157] He argues that an accused is entitled to know what the charges against him are, who the witnesses are, and what the evidence will be.[158]

124. One of Kordić's specific objections relates to the testimony of Witness AT in that it too allegedly presented Kordić with a rapidly moving target.[159] He argues that the Prosecution made no reference to the sorts of facts upon which Witness AT gave testimony, and Kordić's case was a response to the case presented by the Prosecution in its case in chief, which differed following the admission of Witness AT's testimony. The case pleaded in the Indictment and the case upon which evidence was presented by the Prosecution had, according to Kordić, varied in such a way as to deprive him of his rights under Article 21(4) of the Statute to be informed promptly of the nature and cause of the charge against him.

[153] Čerkez Appeal Brief, p. 36, para. 2.
[154] Čerkez Appeal Brief, p. 36, para. 2. The net result, according to Čerkez, was that he was allegedly forced to abandon his testimony - due to begin on Monday 16 October 2000 - because the Prosecution disclosed sizeable new material at 10.00 p.m. on Friday 13 October 2000.
[155] Kordić Appeal Brief, Vol. I, p. 28.
[156] Kordić Appeal Brief, Vol. I, p. 29.
[157] Kordić Appeal Brief, Vol. I, p. 28.
[158] Kordić Appeal Brief, Vol. I, p. 35.
[159] Kordić Appeal Brief, Vol. I, p. 29.

125. Čerkez also objects to Witness AT's testimony on several grounds[160], one of which was a general objection to the admission of Witness AT's testimony because, had the material been available at the beginning of Čerkez's case, he could have tailored his case accordingly.[161]

126. The Prosecution has interpreted this ground of appeal in its entirety as based on circumstantial evidence.[162] The Prosecution submits that there is no additional burden on the Prosecution where it relies on circumstantial evidence, nor is there any requirement that the Prosecution identify in the indictment the evidence on which it intends to rely.[163] As such, the Prosecution submits that the Indictment is neither vague nor otherwise deficient.[164] As regards the admission of Witness AT's evidence, the Prosecution submits that the Trial Chamber followed a "fair and transparent" procedure which did not cause prejudice to either of the Accused.

127. Finally, Čerkez also submits that the testimony of Witness Rebihić also violates his right to a fair trial.[165] In the absence of any argument as to how the Trial Chamber erred in relying on this witness's testimony[166], the Appeals Chamber declines to consider this submission any further.

### 2. Discussion

128. The Trial Chamber had already been seized of these objections, and held *inter alia* in an "Oral Ruling on the fairness of hearing Witness AT" that the rights of the accused under Article 21(4) of the Statute to be informed promptly of the nature and cause of the charge against him relate to the charge, and not to matters of evidence. Article 18(4) of the Statute requires that an indictment adheres to the required form, *inter alia* that it contain a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute, wording which is reflected in Rule 47(C) of the Rules.[167]

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[160] The first ground was that the Prosecution had breached Rule 66(A)(ii), which provides that copies of statements of additional Prosecution witnesses shall be made available to the Defence when a decision is made to call the witness. The Trial Chamber accepted the Prosecution's account of events, and that the decision to call the witness had only been made very recently at that time, and so found no breach of Rule 66. A further objection was that the Prosecution was in breach of Rule 68 obliging them to disclose exculpatory material. The Trial Chamber held that that obligation cannot come into play while the Prosecution is deciding whether or not to call the witness. T. 25526-27.

[161] Čerkez Appeal Brief, pp 52-53. In the Čerkez Appeal Brief, pp 45-48, Čerkez also objected to the Trial Chamber's reliance on Witness AT on the basis that there were other reasonable inferences available to be drawn. The Appeals Chamber considers the credibility of Witness AT's testimony, and the weight accorded to it by the Trial Chamber, in section IV.E. *infra*.

[162] Prosecution Response, para. 2.8.

[163] Prosecution Response, para. 2.10.

[164] Prosecution Response, para. 2.12.

[165] Čerkez Appeal Brief, pp 101-102, para. 55.

[166] See Trial Judgement, para. 512 footnotes 826, 828; para. 535, footnote 913; para. 619, footnotes 1165, 1167; para. 638, footnote 1241; para. 644, footnote 1250; para. 662, footnote 1316; para. 755, footnote 1543; and para. 807, footnote 1728.

[167] At the time the Indictment was filed on 2 October 1998, the relevant rule was in fact Rule 47(B). This Judgement will refer instead to Rule 47(C) where the relevant provision being discussed is the identically worded provision. Rule

129. Again, the Appeals Chamber considers that the approach adopted by the Trial Chambers in the *Krnojelac* and *Došen and Kolundžija* cases is consistent with the jurisprudence of the International Tribunal and lends support to the conclusion that the alleged mode of liability of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that "[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."[168] The nature of the alleged responsibility of an accused should be unambiguous in an indictment.[169]

130. The Appeals Chamber has recently considered the law applicable to the form of the indictment, where it held that:

> Articles 18(4) and 21(4) of the Statute and Rule 47(C) of the Rules accord the accused an entitlement that translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.
>
> There is a distinction between those material facts upon which the Prosecution relies which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded and is provided by way of pre-trial discovery.[170]

131. The Appeals Chamber will now turn to consider whether or not (1) the Indictment was pleaded according to the relevant principles, and, if necessary, (2) whether any defects in the Indictment served to render the trial unfair.

(a) Counts 1 and 2 as umbrella counts

132. The Indictment describes the conduct underlying the charges against the two Accused and provides information about their participation. The Appeals Chamber considers that at first glance Counts 1 and 2 (Persecutions for Kordić and Čerkez respectively) seem to be – read out of context – impermissibly vague as to the geographic and temporal scope of the charges, and that – on their own – could materially impair the Accused's ability to defend themselves.

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47(C) is the current number of the Rule which, up until the amendment to the Rule of 12 December 2003, had been Rule 47(B). Rule 47(C) currently reads as follows: "The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

[168] *Aleksovski* Appeal Judgement, para. 171, footnote 319; *Krnojelac* Appeal Judgement, para. 134. See also *Čelebići* Appeal Judgement, paras 350-351.

[169] *Blaškić* Appeal Judgement, para. 215. See also *Furundžija* Appeal Judgement, para. 147.

[170] *Blaškić* Appeal Judgement, paras 209-10.

133. However, the Appeals Chamber considers that Counts 1 and 2 have to be read as umbrella counts encompassing Counts 3 to 44, and paragraphs 25 to 35 on the charges in general, which further inform the Accused in greater detail of the charges against them.

134. That further information at the same time makes more specific and restricts the geographical and temporal scope of Counts 1 and 2, which – as such – are too broad to be acceptable.[171] However, viewed in the light of these specifications, the Appeals Chamber is satisfied that the Accused were informed of the charges against them and were able to defend themselves before the Trial Chamber against the charges contained in the umbrella counts.

135. As stated previously, under the Statute and according to the settled jurisprudence of the International Tribunal, there is no requirement that the evidence to be used by the Prosecution in support of the alleged facts need be included in the Indictment. Rather, the requirement is that the Prosecution provide a concise statement of the alleged facts underpinning the charges in order to give adequate notice to the accused of the charges against him.[172]

136. The fact that evidence, *inter alia* Witness AT's statements, came to light and became available at a later stage of the trial, and was therefore only disclosed to the Accused during the course of the trial, does not mean that the Indictment was invalidly pleaded. The Appeals Chamber notes that the Prosecution proceeded through the trial on the basis of the Indictment and did not seek to amend the Indictment even though fresh evidence became available, which might have altered the case of the Prosecution. Where evidence was submitted by the Prosecution, the Accused both took the opportunity to challenge its admission and did not seek to further challenge the Indictment.

(b) The form of liability expressed in the Indictment

137. As a further issue, the Appeals Chamber notes that, contrary to the arguments of the Prosecution, the Indictment does not explicitly plead the existence of a "joint criminal enterprise", for example, *inter alia* to persecute. It only states that:

> **Dario KORDIĆ** was a definite integral and important figure in the whole campaign, and had power, authority and responsibility to direct, control and shape its policies and execution, and to prevent, limit or punish crimes, violations or abuses which occurred or were carried out in the

[171] The temporal scope in general is, for Kordić, "from about November 1991 to approximately March 1994"; and for Čerkez, April 1992 to September 1993, which is found in the umbrella Counts 1 and 2 (see paras 36, 38 of the Indictment respectively), which however are further concretized in paras 34-35 of the Indictment, and the counts following for the charges contained therein. The temporal scope for Kordić thus ranges from 18 November 1991 (para. 24) through 1 October 1992 (Counts 37-39) to "approximately 31 March 1994" (Counts 21-28, para. 44); see generally para. 19 of the Indictment. The temporal scope for Čerkez ranges from 1 April 1993 (see *inter alia* Counts 29–36) to "approximately September 1993" (Count 44).
[172] Rule 47(C) of the Rules.

campaign. He publicly advocated the campaign's goals and encouraged and instigated the ethnic hatred, strife and distrust which served its ends.[173]

138. The Prosecution submits that the Indictment alleged that Kordić, together with other persons holding positions of authority, conceived of the common plan to persecute the Bosnian Muslim population of Central Bosnia, and that Kordić planned, prepared, instigated or ordered it: as "an overall architect" of the plan, he had the necessary *mens rea*, and intended to contribute to that joint criminal design.[174]

139. The Appeals Chamber considers that, as to the means by which the Prosecution envisaged the participation of Kordić in the commission of the crimes, the Indictment is too generally formulated. The issue is therefore whether the ambiguity resulting from unspecific allegations as to Kordić's liability was clarified by the Prosecution in its post-Indictment communications[175], and, if so, whether this gave Kordić sufficient and timely notice about it.[176]

140. The Appeals Chamber notes that the Indictment is supplemented by the Prosecution's Pre-trial Brief as to the form of responsibility envisaged, and it expressly alleges that Kordić's liability arises from his intentional participation in a common plan or design as a co-perpetrator.[177] The Prosecution's Pre-trial Brief also describes in detail[178] Kordić's actions and conduct supporting the allegation that he planned, ordered, and instigated persecutions.[179]

(c) Are material facts pleaded in the Indictment?

141. Kordić submits that the Indictment contained overly broad assertions against him, which did not put him on notice of any of the "material facts" underpinning the numerous charges filed against him, and charged him generally with being responsible for essentially everything that happened in HZ H-B, the HR H-B, and the City of Zenica, between November 1991 and March

[173] Indictment, para. 25.
[174] Prosecution Final Brief, paras 437-38.
[175] The ability of the Prosecution to provide sufficient notice of charges in post-indictment filings was recognised in the *Kupreškić et al.* Appeal Judgement, para. 119, 122.
[176] See *Kupreškić et al.* Appeal Judgement, para. 114, where the Appeals Chamber held that "in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."
[177] Prosecution Pre-trial Brief, paras 118-121.
[178] See in particular Prosecution Pre-trial Brief, paras 89-111.
[179] Namely through : (1) his co-chairing with Mate Boban of the meeting of 12 November 1991, whose conclusions led to the creation and operation of the HZ H-B, its presidency and the HVO as well as attendance of numerous subsequent meetings in March and April 1992; (2) his statements as to its objective of extending control over the proclaimed Croatian territories in BiH; his decisions, orders of discriminatory practices aimed at excluding Muslims from municipal structures and prominent positions, boycott of the BiH territorial defence, harassment and intimidation of Muslim civilians (arrest of Muslim leaders, burning Muslim houses, ultimatum to BiH forces to fall under the control of the HVO); participation in propaganda offensives and instigation of the Bosnian Croat population to seize control of the territories within the HZB and exclude the Muslim population; (3) his orders and actions within the HVO including ordering the takeover of JNA premises, of municipalities, the fact that he presented himself as the superior to General Blaškić, launching attacks on the Bosnian Muslim population during 1992-1993, *ibid*.

1994.[180] In particular, Kordić relies on three specific examples of crucial material facts absent from the Indictment, namely: (1) the 15 April 1993 meeting between civilian and military leaders[181]; (2) the shooting of Mirsad Delija on 20 January 1993; and (3) the shelling of Zenica on 19 April 1993.[182] Kordić submits that the Trial Chamber should have dismissed the Indictment or, alternatively, required the Prosecution to amend it further so that he could know the factual case against him.[183]

142. In *Kupreškić et al.,* the Appeals Chamber stated that Article 18(4) of the Statute, read in conjunction with Articles 21(2), 4(a) and 4(b) of the Statute, "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[184] Whether certain "facts" are "material" depends on the nature of the case, and if an indictment is insufficiently specific, such a defect "may, in certain circumstances cause the Appeals Chamber to reverse a conviction."[185] However, the Appeals Chamber in *Kupreškić et al.* left open the possibility of a defective indictment being cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[186] Where alleged material facts are shown to have been omitted from an indictment, the issue to be determined is whether the accused was in a reasonable position to identify the charges against him, and conduct specified in each paragraph, notwithstanding this omission.[187]

143. Whether the Prosecution has cured a defect in the Indictment and whether there remains any prejudice to the accused are both questions aimed at assessing, whether the trial was "rendered unfair".[188] The Appeals Chamber is not persuaded that the three facts presented by Kordić were either "material" or that their omission caused him prejudice.

144. First, Kordić avers that the meeting between civilian and military leaders of 15 April 1993 was "a crucial material fact, indeed, it is the fact at the crux of the Trial Chamber's conviction of Kordić as being partly responsible for the crimes committed in Ahmići."[189] The Appeals Chamber agrees that this meeting was a fundamental part of the Prosecution's case against Kordić not only

[180] Kordić Reply Brief, p. 5.
[181] See section IV.E.1.(a) *infra*.
[182] Kordić Reply Brief, pp 6-7.
[183] Kordić Reply Brief, p. 5.
[184] *Kupreškić et al.* Appeal Judgement, para. 88.
[185] *Kupreškić et al.* Appeal Judgement, para. 114.
[186] *Kupreškić et al.* Appeal Judgement, para. 114.
[187] *Furundžija* Appeal Judgement, para. 61. See also *Rutaganda* Appeal Judgement, para. 303.
[188] *Kupreškić et al.* Appeal Judgement, para. 122.
[189] Kordić Reply Brief, p. 6.

for the crimes committed in Ahmići but for his responsibility for the crimes occurring in the whole of Lašva Valley on and around 16 April 1993.

145. Second, as to the shooting of Mirsad Delija on 20 January 1993, the Appeals Chamber notes that the Trial Chamber found that "the alleged involvement of Dario Kordić in this crime is not made out."[190]

146. Third, regarding the shelling of Zenica, the Appeals Chamber notes that the Trial Chamber did not find Kordić responsible for that incident.[191]

147. In conclusion, the Appeals Chamber considers that the meeting held on 15 April 1993 should have been pleaded in the Indictment as it is a material fact, of which the accused should have been informed. As a result, the issue to be determined is whether the defect in the Indictment materially impaired Kordić's ability to prepare his defence and thus rendered his trial unfair.[192]

(d) Did the exclusion of the material fact cause prejudice?

148. The Appeals Chamber notes that Kordić was able to respond to the arguments of the Prosecution regarding this meeting, and to lead evidence to rebut it.[193] Kordić called three witnesses on the matter and was able to effectively contest the fact in question. The Appeals Chamber therefore concludes that he was not prejudiced by the omission of this fact in the Indictment.

(e) Conclusion

149. The Appeals Chamber concludes that Kordić's argument in this part is rejected.

3. Is the Indictment vague in relation to forcible transfer/expulsion?

(a) Was there lack of adequate notice of charges with respect to both Kordić and Čerkez?

150. The Appeals Chamber will now examine whether Kordić's and Čerkez's convictions for persecutions (Counts 1 and 2), imprisonment (Counts 21 and 29) and unlawful confinement (Count

[190] Trial Judgement, para. 567.
[191] Trial Judgement, para. 675.
[192] See *Blaškić* Appeal Judgement, para. 230; *Kupreškić et al.* Appeal Judgement, paras 115-123.
[193] See Trial Judgement, paras 614-619.

22 and 30) also include the forcible transfer[194] of Bosnian Muslim civilians, as these words are mentioned in paragraphs 45 and 51 of the Indictment.

(i) The findings of the Trial Chamber

151. The Trial Chamber found, *inter alia*, that:

> young and old were either murdered or expelled and their houses burned. The total number of dead may never be known, but it runs into hundreds, with thousands expelled.[195]

Prior to this finding, the Trial Chamber briefly mentioned forcible transfer and "the removal of civilians from their homes on discriminatory grounds" in the section on the applicable law under the headings of "attacking cities, towns and villages" and "wanton destruction and plundering" as alleged acts of persecutions.[196] Forcible transfer is also mentioned as an act that may constitute "other inhumane acts".[197] Referring to the *Tadić* Appeal Decision on Jurisdiction, the Trial Chamber also found that:

> [t]he third category, in relation to cases where there is a "shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed", seems particularly apposite to the issues in this case.[198]

With respect to Counts 1 and 2 (persecutions) of the Indictment, on the question whether the crime was established the Trial Chamber found that:

> [t]he campaign [of persecutions] was implemented by securing control of the territory and then using armed force and violence to remove the Muslims.[199]

152. In addition to these legal findings, the expulsion of Bosnian Muslims is mentioned elsewhere in the Trial Judgement:

> In January 1993 the Muslim call to prayer was forbidden in Busovača and Muslims were expelled.[200]
>
> In **Kiseljak** […] [t]here were incidents of […] Muslims being expelled from their homes.[201]
>
> In January 1993 relations were already deteriorating between the communities because of the arrival of the Bruno Brušić Brigade from Herzegovina which resulted in an increase in the crime rate and expulsion of Bosnian Muslims.[202]

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[194] To be equated under the jurisprudence of the Tribunal with forcible displacement, punishable under Articles 5(i) or 2(b) of the Statute, if not already under Article 5(d) of the Statute, reading in its French version "*expulsion*".
[195] Trial Judgement, para. 852.
[196] Trial Judgement, paras 203, 205.
[197] Trial Judgement, para. 270.
[198] Trial Judgement, para. 396 (footnote omitted).
[199] Trial Judgement, para. 493.
[200] Trial Judgement, para. 511. Accepted by the Trial Chamber in para. 520 of the Trial Judgement.
[201] Trial Judgement, para. 511. Accepted by the Trial Chamber in para. 520 of the Trial Judgement.

> […] all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire.[203]
>
> […] order to kill all the military-age men, expel the civilians and set the houses on fire.[204]
>
> […] in all 172 Muslims in the Vitez municipality were killed and 5,000 expelled, (1,200 having been detained).[205]
>
> The evidence was that the Muslim population of these villages was either killed or expelled […].[206]
>
> [Captain Liebert] found [in Rotilj] people who had been expelled from all the Muslim villages in the Kiseljak area.[207]

153. The Appeals Chamber notes, however, that forcible transfer and/or the expulsion of Bosnian Muslim civilians is not mentioned in the findings on the responsibility of the Accused under Article 7(1) of the Statute for Counts 1 and 2 (persecutions),[208] Counts 21 and 29 (imprisonment), or Counts 22 and 30 (unlawful confinement).[209] Instead, the Trial Chamber held that the

> campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) […] took the form of the most extreme expression of persecution, i.e., of attacking towns and villages with the concomitant destruction and plunder, killing, injuring and detaining Bosnian Muslims.[210]

154. As a result, the findings of the Trial Chamber on Kordić's and Čerkez's criminal responsibility for forcible transfer and/or expulsion are ambiguous, and it is not abundantly clear whether one or both Accused was convicted for it. This question, however, only becomes relevant if forcible transfer and/or expulsion was sufficiently pleaded in the Indictment, this being the prerequisite for any conviction. Therefore, it has first to be determined whether the forcible transfer and/or expulsion of Bosnian Muslim civilians was validly pleaded.

(ii) Is the Indictment vague in relation to forcible transfer/expulsion as an underlying act of persecutions?

155. Counts 1 and 2 (persecutions) of the Indictment read in their relevant part:

> This campaign of widespread or systematic persecutions was perpetrated, executed and carried out by or through the following means:
>
> […]

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[202] Trial Judgement, para. 594. Accepted by the Trial Chamber in para. 601 of the Trial Judgement.
[203] Trial Judgement, para. 613.
[204] Trial Judgement, para. 631.
[205] Trial Judgement, para. 646. Accepted by the Trial Chamber in para. 649 of the Trial Judgement.
[206] Trial Judgement, para. 665. Accepted by the Trial Chamber in para. 669 of the Trial Judgement.
[207] Trial Judgement, para. 793.
[208] Trial Judgement, paras 827-831.
[209] Trial Judgement, paras 800-802, 834, 836.
[210] Trial Judgement, para. 827.

(f) coercing, intimidating, terrorising and forcibly transferring Bosnian Muslim civilians from their homes and villages.[211]

156. The Appeals Chamber has already found[212] that Counts 1 and 2 are impermissibly vague in relation to dates and locations of the underlying crimes as set out in (a) to (k) (Count 1) and (a) to (j) (Count 2).[213] It has, however, found that this vagueness of the Indictment in Counts 1 and 2 was later cured[214] in general by the preceding paragraphs 24 to 35, together with the following Counts that have to be read into the first two umbrella-counts, primarily as regards their temporal and geographical scope. Therefore, the Appeals Chamber will now examine whether the forcible transfer and/or expulsion of Bosnian Muslim civilians was adequately pleaded as part of the aforementioned paragraphs 45 and 51 contained in Counts 21-28 and 29-36, respectively. In this context, the Appeals Chamber notes that in the French version of the Statute, the term "*expulsion*" is equated with the English term "deportation" as a crime against humanity punishable under Article 5(d) of the Statute.

(iii) Is forcible transfer/expulsion a part of imprisonment/unlawful confinement?

157. A careful reading of paragraphs 45 (relating to Kordić) and 51 (relating to Čerkez) of the Indictment shows that expulsion and forcible transfer of Bosnian Muslims is used:

> Many Bosnian Muslims were expelled or forcibly transferred from their homes and villages. […]

This wording is not, however, repeated in the subsequent Counts 21 and 22 (relating to Kordić) or Counts 29 and 30 (relating to Čerkez), as set out in paragraphs 49 and 54 of the Indictment. Instead, it reads as follows (with the same formulation for Čerkez):

> By these acts and omissions, **Dario KORDIĆ** committed:
>
> **Imprisonment/Unlawful Confinement:**
>
> **Count 21:** a **CRIME AGAINST HUMANITY**, as recognised by Articles 5(e) (imprisonment), 7(1) and 7(3) of the Statute of the Tribunal.
>
> **Count 22:** a **GRAVE BREACH**, as recognised by Articles 2(g) (unlawful confinement of civilians), 7(1) and 7(3) of the Statute of the Tribunal.

158. The Appeals Chamber notes that imprisonment and unlawful confinement are crimes which are distinct from forcible transfer or expulsion.

[211] Indictment, para. 37. Para. 39(e) in respect of Čerkez has the same wording (Count 2, persecutions).
[212] See section IV.B.2.(a) *supra.*
[213] Indictment, paras 37, 39.
[214] *Cf.* for this possibility *Kupreškić et al*. Appeal Judgement, para. 114.

159. The words "forcible transfer" are also mentioned in paragraph 33 of the Indictment, without, however, providing any further detail.

160. Based on the wording of the above-mentioned paragraphs of the Indictment, Kordić and Čerkez were not sufficiently informed that they had to – and how they could – defend themselves against possible allegations of forcible transfer and/or expulsion of Bosnian Muslim civilians.

(iv) Is forcible transfer/expulsion a part of inhuman and/or cruel treatment of detainees?

161. It could be argued that the references to forcible transfer and/or expulsion in paragraphs 45 and 51 of the Indictment also relate to the counts on inhuman and/or cruel treatment of detainees (Counts 23, 24, 31, 32), respectively. However, a careful reading of paragraphs 46 and 52 in connection with paragraphs 49 and 54 of the Indictment clarifies that it is trench-digging that is charged as inhuman and/or cruel treatment of detainees, and that neither forcible transfer nor expulsion were pleaded under these counts.

162. Finally, it must be noted that Counts 10 and 12 (Kordić), and 17 and 19 (Čerkez) on inhumane acts and inhuman treatment do not contain any reference to a forcible transfer and/or expulsion of Bosnian Muslims. Instead, in paragraphs 42 and 43 of the Indictment, these Counts refer exclusively to "Injuries". Thus, the forcible transfer and/or expulsion of Bosnian Muslim civilians were not pleaded.

163. For the reasons set out above, the Indictment is impermissibly vague as regards forcible transfer/expulsion in relation to Counts 1 and 2, and this is not cured in Counts 3 through 44.

164. In applying the standard as set out by the Appeals Chamber in *Kupreškić et al.*, this vagueness of the Indictment does not constitute a "minor defect nor a technical imperfection"; instead, it amounts to a "fundamental defect" that "materially impaired" the ability of the Accused to defend himself against the charges.

(v) Has the vagueness of the Indictment been cured by the Pre-trial Brief or the opening statement?

165. An examination of the Prosecution Pre-trial Brief reveals that the information contained therein did not sufficiently inform the Accused of the nature and scope of a charge of forcible transfer and/or expulsion of Bosnian Muslim civilians as an underlying offence of persecutions. The Prosecution submitted that

> the evidence demonstrates that unlawful acts, namely, the killings, torture, beatings, attacks, destruction, imprisonment, hostage-taking, and inhuman treatment did occur. […] These acts constituted the crime against humanity of persecution.[215]

Neither forcible transfer nor expulsion of Bosnian Muslim civilians are mentioned. In other parts of the Pre-trial Brief, the information on the forced removal of Bosnian Muslims is rather vague and unspecific. The Prosecution submitted, for example, that

> [t]he details of the attacks reveal that the aim was to decimate the Muslim population and force Muslims to leave the areas that the Bosnian Croat leadership sought to control.[216]

166. No further reference was made as to where the Muslim population was forced to go, or from which areas they were forced to leave. Therefore, although the above-mentioned submission by the Prosecution can be seen as a hint to forcible transfer/removal and/or expulsion, it was not sufficiently clear to put the Accused on notice about the nature of a specific charge of forcible transfer/removal and/or expulsion.

167. In this context, the Appeals Chamber recalls its finding in *Kupreškić et al.* that a defective indictment can in some instances be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[217]

168. The Appeals Chamber finds, however, that the information contained in the Pre-trial Brief does not satisfy this test and that the Prosecution accordingly failed to cure the vagueness of the Indictment in relation to the forcible transfer and/or expulsion of Bosnian Muslim civilians in these locations. Although the Pre-trial Brief mentions more specifically the times and locations of the attacks in Novi Travnik, Busovača, Ahmići, Zenica, and Stupni Do, the Appeals Chamber is not satisfied that the Prosecution identified the "particular acts" or "the particular course of conduct"[218] with sufficient clarity to cure the vagueness of the Indictment in relation to these locations. The Accused were not put on notice about the nature of the allegations against them with respect to the forcible transfer and/or expulsion of Bosnian Muslim civilians. It does not specify in what way these Bosnian Muslims were allegedly expelled and to what destinations they were allegedly expelled. Furthermore, Annex 3 to the Prosecution Pre-trial Brief, a document linking witnesses to counts and locations, does not provide any further information on the forcible transfer and/or expulsion of Bosnian Muslim civilians.

[215] Prosecution Pre-trial Brief, para. 41.
[216] Prosecution Pre-trial Brief, para. 87. For further instances see paras 69, 82, 96, 101, 107.
[217] *Kupreškić et al.* Appeal Judgement, para. 114.
[218] *Blaškić* Appeal Judgement, para. 213 (with further references).

169. The Appeals Chamber notes that, in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment. However, an examination of the Prosecution Opening Statement[219] reveals that it did not further clarify the forcible transfer and/or expulsion of Bosnian Muslim civilians. The Prosecution only once referred "to the developing pattern of behaviour leading to […] the expulsion of one community from the territory aspired to by the other". This reference was made in relation to an attack which was "not the subject of a count in the indictment", and no specific information was given on the victims or the places to which they were expelled.[220]

170. Finally, the Appeals Chamber notes after reviewing the trial record that the Accused were not put on notice by the Trial Chamber with regard to this issue by way of an instructive, judicial suggestion.

(b) Conclusion

171. For the reasons set out above, the Appeals Chamber finds that the Indictment is defective in relation to the allegations concerning the forcible transfer/removal and/or expulsion of Bosnian Muslim civilians, and that these defects were not been cured in the Prosecution Pre-trial Brief, the Prosecution Opening Statement, or elsewhere.

172. The Appeals Chamber therefore finds that the Trial Chamber was not seized of the charge of forcible transfer and/or expulsion in relation to both Kordić and Čerkez. Therefore, the convictions of Kordić and Čerkez could not entail the forcible transfer and/or expulsion of Bosnian Muslim civilians.

## C. **Equality of arms**

### 1. Submissions of the parties

173. Kordić submits that much of the material necessary to his defence was inaccessible to him, thereby denying him equality of arms in violation of Article 21 of the Statute.[221]

174. The Prosecution avers that an appellant who raises the equality of arms as a ground of appeal must show that "the unequal treatment amounts to an error of *law on the part of the Trial Chamber*"[222], and that merely complaining about the manner in which the Prosecution conducted its

[219] T. 8-120.
[220] T. 50-51.
[221] Kordić Appeal Brief, Vol. I, pp 35–37. See Accused Dario Kordić's Renewed Motion, in Light of Subsequent Developments, for Full Access to the Non-Public materials in the Lašva Valley Cases, 15 May 2000.
[222] Prosecution Response, para. 2.4 (emphasis in original).

case is insufficient.[223] Furthermore, the Prosecution submits that the Trial Chamber "correctly set out the legal position in relation to access to confidential material and correctly referred the matter to the various Trial Chambers for the resolution of the Appellant's Motion."[224]

### 2. Discussion

175. The principle of equality of arms falls within the guarantee of a fair trial provided by the Statute[225], and has been described as obligating a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[226] The Appeals Chamber, in considering the scope for application of the principle, has held that at a minimum "a fair trial must entitle the accused to adequate time and facilities for his defence" under conditions which do not place him at a substantial disadvantage as regards his opponent.[227]

176. The Appeals Chamber has in the past given a broad interpretation to the principle of equality of arms.[228] In this case, the Appeals Chamber has already, prior to this appeal, had occasion to consider the principle[229], and held that the "principle of equality of arms is described as being only one feature of the wider concept of a fair trial."[230] Nevertheless, the right of an accused to have adequate time and facilities to prepare his or her defence does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of financial or personal resources.[231] The right to equality of arms is not a right to equality of relief.[232] Likewise, the Chambers are not obliged to regulate conditions beyond the control of the International Tribunal[233], and its application to the International Tribunal's procedures recognises the "peculiar difficulties under which [the] parties have to operate."[234] Only when the moving party has shown "good cause" may it be granted relief under that principle.[235]

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[223] Prosecution Response, para. 2.5.
[224] Prosecution Response, para. 2.50.
[225] *Tadić* Appeal Judgement, para. 44.
[226] *Tadić* Appeal Judgement, para. 48.
[227] *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 6.
[228] *Tadić* Appeal Judgement, para. 52; *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 7.
[229] *Tadić* Appeal Judgement, paras 48, 50, 52.
[230] *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 5.
[231] *Kayishema and Ruzindana* Appeal Judgement, paras 67-69.
[232] *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 9.
[233] *Tadić* Appeal Judgement, para. 49.
[234] *Tadić* Appeal Judgement, para. 52. *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 7.
[235] *Prosecutor v. Kordić and Čerkez*, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 7.

177. The Appeals Chamber notes that this submission has already been the subject of lengthy proceedings in this and other cases.[236] The Statute and Rules[237] provide for the disclosure of, and access to, material in other cases. A party averring that the International Tribunal has failed to apply these provisions correctly must show that an error of law has been committed. Kordić has failed to do so in this instance.[238] It is of course open to that party further to allege that his right to equality of arms has been violated, but where such allegations have already been adjudicated, the requisite good cause for the requested relief must be shown. The Appeals Chamber is not persuaded that Kordić has shown good cause for relief for any alleged violation of his right to a fair trial by the Trial Chamber. This argument is rejected.

### D. **The Prosecution's alleged violations of its disclosure obligations under Rule 68**

178. Rule 68, governing the "Disclosure of Exculpatory and Other Relevant Material," currently provides *inter alia* that:

> […] the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.[239]

179. The test to be applied for disclosure under Rule 68 comprises two steps.[240] First, if the Defence believes that the Prosecution has not complied with Rule 68, it must establish that additional evidence exists that might prove exculpatory or mitigating for the accused, and is in the possession of the Prosecution. Second, it must present a *prima facie* case making out the probable exculpatory or mitigating nature of the materials sought.[241] Once the Defence has satisfied a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any), must examine whether or not the Defence has been prejudiced by a breach of Rule 68, and may now decide pursuant to Rule 68*bis*.[242]

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[236] See *inter alia Prosecutor v. Blaškić,* Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, Case No.: IT-95-14-A, 28 January 2004; Order of the President on the Defense Motion to Allow Access to Confidential Material in the Case *The Prosecutor v. Kordić and Čerkez,* 7 June 2002.
[237] Notably Rules 66, 68 and 75(D).
[238] The Appeals Chamber notes that Čerkez joined the argument.
[239] During the proceedings at trial (the Rule was amended on 12 December 2003) the Rule read as follows: "The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused of a crime charged in the indictment."
[240] *Blaškić* Appeal Judgement, para. 268.
[241] *Blaškić* Appeal Judgement, para. 268.
[242] Rule 68*bis* governs "Failure to Comply With Disclosure Obligations", and was adopted on 13 December 2001.

1. Alleged violations at the trial stage: certification

180. Kordić submits that the Trial Chamber erred twice in not requiring the Prosecution to certify that it had complied with its Rule 68 obligations, as this constituted a failure to enforce Rule 68 adequately.[243]

181. The Prosecution's submission is that certification is and was unnecessary, and is not specifically provided for in the Rules.[244] It avers that the Trial Chamber correctly presumed the Prosecution to have acted in good faith in meeting its Rule 68 obligations[245], and that Kordić did not demonstrate a failure on the part of the Prosecution.[246]

182. The Appeals Chamber considers that Kordić's allegation seeks to read into the Rules something that the Rules in themselves do not anticipate. There is no requirement on the Prosecution to certify that it has met its disclosure obligations, and it is not for the Appeals Chamber to impose such a requirement.

183. The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute.[247] Indeed, the rationale behind Rule 68 is that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution, and that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion.[248] The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution.[249]

The general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice[250], and the Prosecution's execution of that function in good faith.[251]

[243] Kordić Appeal Brief, Vol. I, p. 38.
[244] Prosecution Response, para. 2.55.
[245] Prosecution Response, para. 2.55.
[246] Prosecution Response, para. 2.56.
[247] *Blaškić* Appeal Judgement, para. 264.
[248] *Blaškić* Appeal Judgement, para. 264.
[249] *Blaškić* Appeal Judgement, para. 264.
[250] *Blaškić* Decision on the Production of Material, Suspension or Extension of the Briefing Schedule, para. 32.
[251] *Blaškić* Decision on the Production of Material, Suspension or Extension of the Briefing Schedule, para. 45.

2. Alleged violations at the trial stage: late and new disclosure

184. Both Kordić[252] and Čerkez[253] submit that the Prosecution consistently made late disclosures of evidence (and witness identities) which it had had in its possession for some time, and that the Prosecution was systematically permitted to violate discovery deadlines and introduce new evidence, often at late stages of proceedings or even in rebuttal, with the result that the Prosecution's case was continuously evolving and deprived the Accused of a clear understanding of the Prosecution's case which the Accused required in order to prepare their own cases.

185. In particular, Kordić argues that the Trial Chamber erred in admitting Witness AT's testimony as rebuttal evidence[254], and in admitting Exhs Z610.1[255] and Z1380.4[256], at the end of proceedings.

186. Čerkez submits that the Trial Chamber erred in allowing Witness AT to testify after the close of the case in chief of the defence, and that he was unable to tailor his case accordingly. As such, he submits his rights as an accused under Article 21(4)(a) of the Statute were breached.[257]

(a) Did alleged late and new disclosure prevent Čerkez from testifying?

187. Čerkez submits that the Trial Chamber erred by failing to prevent the Prosecution from presenting new evidence during the trial, despite the fact that the Prosecution demonstrated a clear pattern of both late and new disclosure which reduced his ability to prepare his defence, and to confront several witnesses with documentary evidence.[258] Čerkez alleges that the Prosecution had adopted "tactics" to plan and execute an "ambush" using new material, notably in respect of the "Zagreb Materials"[259], which forced Čerkez to forego the opportunity to testify in his own defence.[260] Čerkez argues further that the majority of all the significant evidence was disclosed in the final months of the trial, that this frustrated the defence's work, and infringed his right to a fair

[252] Kordić Appeal Brief, Vol. I, pp 31, 41-43.
[253] Čerkez Appeal Brief, pp 34-35, para. 2.
[254] Kordić Appeal Brief, Vol. I, pp 45-46
[255] Kordić Appeal Brief, Vol. I, pp 50, 53. Exh. Z610.1 (War Diary).
[256] Kordić Appeal Brief, Vol. I, p. 53. Exh. Z1380.4 is a set of anonymous documents describing the promotion of Darko Kraljević to the rank of HVO Colonel.
[257] Čerkez Appeal Brief, pp 39-40.
[258] Čerkez Appeal Brief, pp 33-40.
[259] Čerkez Appeal Brief, p. 35. The "Zagreb Materials" refer to evidence obtained from the Republic of Croatia in the form of documents from archives in Zagreb. Evidence in the form of transcripts said to be of meetings held in the Office of the President of the Republic of Croatia in Zagreb while Franjo Tudman was President of the Republic of Croatia, and alleged to have been recorded on his instructions, were referred to at Trial as "Presidential Transcripts".
[260] Čerkez Appeal Brief, p. 35. Čerkez submits that, because the documents of "more than one [foot] high" were disclosed to him at 10.00 p.m. on Friday 13 October 2000, the Client was unable to review the documents before he was due to testify on Monday 16 October 2000.

trial.[261] The basis of Čerkez's argument is that there was no reason in this case to depart from the procedural practice of the International Tribunal, which would have allowed Čerkez more time.[262]

188. Regarding the general allegations of the Prosecution's late and new disclosure of evidence, the Prosecution submits that where this occurred, it was not through fault of the Prosecution, but due to objective reasons[263], and that where Čerkez sought access to materials not subject to the disclosure obligations of the Prosecution, he could have employed the solution available to him under Rule 66(B) but decided not to do so.[264] As to the "Zagreb Materials", the Prosecution explained at trial the reasons for the late disclosure, stating that they had only recently been received from the Republic of Croatia, and had been provided to the defence as soon as possible.[265]

189. The Prosecution responds further that, as regards Čerkez's claim of an unfair trial for lack of time to prepare, Čerkez has failed to prove that the Trial Chamber erred in law in not granting him an extension of time.[266]

190. In a decision of 1 December 2000, the Trial Chamber considered the arguments of the parties regarding the admission of the Zagreb Materials. The Trial Chamber correctly stated the relevant test for the admission of new evidence[267], and proceeded to exclude a large number of exhibits from admissibility for various reasons, *inter alia*: (1) the document(s) had already been admitted; (2) the material had already been produced in other proceedings before the International Tribunal and therefore had been available to the Prosecution when it presented its case; (3) the material was not sufficiently significant to warrant admission at so late a stage of the proceedings; (4) the material was cumulative and did not add to the voluminous material already in evidence; or (5) the material was based on anonymous sources or hearsay statements that were incapable of then being tested by cross-examination. Furthermore, the probative value of some of the evidence was found to be so reduced that it is substantially outweighed by the need to ensure a fair trial; "to admit it at this stage of the proceedings would violate the accused's right to a fair trial" as the Defence would have had no opportunity to cross-examine witness.[268] The Trial Chamber voiced its disapproval of any conduct of the Prosecution threatening the defence's ability to prepare its

[261] Čerkez Appeal Brief, p. 36.
[262] See, section IV.D.2.(b) *infra.*
[263] Prosecution Response, para. 9.7, notably the "consistent pattern of obstructionism adopted by Croatia's previous regime." See footnote 619.
[264] Prosecution Response, para. 9.10.
[265] T. 26552, 26559.
[266] Prosecution Response, para. 9.3. The Trial Chamber refused Čerkez's oral request for an extension of time, T. 26562.
[267] *Prosecutor v. Kordić and Čerkez,* Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, Case No.: IT-95-14/2-T, 1 December 2000, para. 36; T. 27358.
[268] *Prosecutor v. Kordić and Čerkez*, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, Case No.: IT-95-14/2-T, 1 December 2000, para. 40.

case.[269] Yet, in considering its duty to ensure that a trial be fair and at the same time expeditious, the Trial Chamber declined to grant an adjournment and effectively refused to admit the majority of the evidence, thereby expressing that the interests of the defence could thus be safeguarded.

191. In connection with Čerkez's general allegations of the Prosecution's late and new disclosure of evidence, the Appeals Chamber does not find that the Prosecution disclosed evidence late so as to ambush the Accused. The Prosecution has amply demonstrated that circumstances beyond its control were at play in securing evidence from the Republic of Croatia.

192. The Appeals Chamber considers, however, that Rule 127(A) of the Rules requires the moving party to show good cause for an extension of time. Already in its decision of 11 September 2001, the Appeals Chamber considered Čerkez's motion and identified the misapprehension in this approach:

> It cannot be "good cause" for an extension of time to be granted to Čerkez to file his Respondent's Brief to the prosecution's Appellant's Brief simply because the prosecution has shown "good cause" for an extension of time to file its Respondent's Brief to the Appellant's Briefs filed by Čerkez and Kordić. That is to read into the right to equality of *arms* a right to equality of *relief*, even when the circumstances are quite different in each case and provide no basis whatsoever for granting equal relief.[270]

193. For this argument to succeed, Čerkez must prove that by not granting him an extension of time which would have enabled him to testify, the Trial Chamber committed an error of law. He has failed to do so. This argument is dismissed.

(b) Did alleged late and new disclosure preclude Čerkez from preparing his final trial brief?

194. Čerkez submits that the Trial Chamber erred by not allowing him the delay he requested in order to prepare his Final Trial Brief properly.[271] According to Čerkez, the Trial Chamber's decision[272] to deny an extension of time to prepare his Final Trial Brief or testimony was "flagrantly *in contrario* to the present practice of the Tribunal", especially in the context of the Prosecution's "almost continuous disclosure process".[273] Because his right to an expeditious trial is secondary to his right to adequate time, and in light of new evidence constantly being disclosed by the Prosecution, Čerkez argues that he was deprived adequate time and facilities for the preparation of his Final Trial Brief.

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[269] T. 26554-57.
[270] *Prosecutor v. Kordić and Čerkez*; Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, Case No.: IT-95-14/2-A, 11 September 2001, para. 9 (emphasis in original).
[271] The Trial Chamber's Decision denying the motion for an extension was given orally on 20 November 2000, T. 27196.
[272] Čerkez Appeal Brief, pp 33-40.
[273] Čerkez Appeal Brief, pp 34, 37.

195. The Prosecution submits that Čerkez's allegations are flawed and do not demonstrate any abuse of discretion on the part of the Trial Chamber[274], that there is no established "Tribunal practice" governing extensions of time[275] since Trial Chambers are competent to regulate their own procedures[276], and that Čerkez's submission that his right to an expeditious trial is secondary to his right to adequate time is incorrect.[277]

196. Čerkez's argument that there is a practice of the International Tribunal to allow extensions of time in similar cases is inapposite. The Trial Chambers have inherent jurisdiction to regulate their own procedure efficiently:

> [I]n long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings. That control may well need to be vigorous, provided of course that it does not encroach on the right of a party to a fair hearing.[278]

Čerkez's contention cannot therefore be upheld. Rule 127(A) of the Rules governing the variation of time limits requires the moving party to show good cause for the motion, not that its motion reflect any supposed practice of the International Tribunal. Čerkez has failed to prove to the Appeals Chamber that an error of law was committed by the Trial Chamber which occasioned a miscarriage of justice. This argument is dismissed.

3. Alleged violations at the trial stage: Blaškić's open-session and closed-session testimony

197. Kordić submits that the non-disclosure of Blaškić's open-session and closed-session testimony in Blaškić's own case, which was not disclosed to him, flatly contradicted several witnesses *in casu*, in particular Witness AT, or at least called into question the credibility of those witnesses.[279] Because of this alleged violation of Rule 68, Kordić submits that he was denied fundamental guarantees of fair treatment.[280]

198. The Prosecution argues that any diligent counsel, with knowledge of the proceedings of the *Blaškić* case, would be expected to monitor those proceedings carefully and ensure they were aware of any public material that could be of assistance to their client, and that in any event the Prosecution's policy (of which Kordić was aware) has always been that "open-source material",

[274] Prosecution Response, para. 9.16.
[275] Prosecution Response, para. 9.16.
[276] Prosecution Response, para. 9.17.
[277] Prosecution Response, para. 9.22.
[278] *Jelisić* Appeal Judgement, para. 16.
[279] Kordić Reply Brief, pp 20-21.
[280] Kordić Appeal Brief, Vol. I, p. 6.

including open session testimony, which was or is generally accessible to all parties, is not disclosed to the defence pursuant to Rule 68.[281]

199. The Prosecution also submits that by at least February 2000 the defence acknowledged that it had available to it the open-session transcripts of Blaškić in the *Blaškić* trial.[282] Therefore the Prosecution concludes that it could reasonably infer that Kordić had access to Blaškić's open session testimony from the *Blaškić* case during the Prosecution case in the present case, and furthermore, that he had actively objected to the admission of this testimony into evidence in his own trial after having reviewed it.[283] The Prosecution's conclusion is that it may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory evidence was known and was accessible to the Accused. In such circumstances, the Prosecution submits, the Accused would not be materially prejudiced by any alleged breach of Rule 68 of the Rules.

200. The Appeals Chamber is satisfied that Kordić was indeed monitoring the content of *Blaškić*'s open session material to which he was granted access by the Registry and that he does not appear to have ever complained that such access had been restricted. In these circumstances, there is no reason to conclude that the Trial Chamber erred in its administration of the Prosecution's Rule 68 obligations in connection with Blaškić's open session testimony.

201. As for Blaškić's closed-session testimony, Kordić has failed to demonstrate that the allegedly exculpatory nature of Blaškić's open session testimony would be revealed only in conjunction with his closed-session testimony. The Appeals Chamber notes further that Kordić did not move the *Blaškić* Trial Chamber to grant him access to Blaškić's closed-session testimony on the basis of a legitimate forensic purpose, and he did not seek to have Blaškić's testimony admitted on appeal pursuant to Rule 115. Having taken the decision at trial not to seek access to the material in question, he cannot claim on appeal that he was prejudiced by the non-disclosure of this material.

202. Kordić's argument with regard to the non-disclosure of Blaškić's testimony is rejected in its entirety.

[281] Prosecution Response Rule 68, filed confidentially on 8 March 2004, paras 54, 73-77.
[282] Prosecution Response Rule 68, filed confidentially on 8 March 2004, para. 84.
[283] Prosecution Response Rule 68, filed confidentially on 8 March 2004, para. 87.

(a) Alleged violations of Rule 68 post-trial: the ABiH archive

203. In addition to the alleged violations of Rule 68 of the Rules at trial, Kordić alleges that the Prosecution made "false representations" in violation of the Rule during the post-trial discovery phase in respect of material procured from an ABiH archive.[284]

204. Čerkez submits that the Trial Chamber erred by concluding the "evidence procedure" without the provision of "documents from the Federation of BiH", which had been requested pursuant an Order of the Trial Chamber on 27 January 2000. By doing this, the Trial Chamber allegedly deprived the Accused of possible favourable evidence.[285]

205. Regarding Kordić's allegation of post-trial violations of Rule 68, the Prosecution contends that Kordić has not succeeded in showing a breach of that Rule, and never filed a motion to have the relevant evidence admitted, which indicates that no prejudice was occasioned in any event.[286] The Prosecution avers that the complaint of the Accused is "untenable" because a Trial Chamber cannot be found to be in error on the basis of a third party's failure to adhere to one of its orders, and because no error is in fact alleged, and no application for a stay in proceedings (the logical solution) was ever made.[287]

206. The Pre-Appeal Judge in this case included in an order the statement that "[t]he prosecution is aware of its obligations under Rule 68, and it is inappropriate to make any order against the Prosecution unless there is a failure by it to act,"[288] a statement of deference to the Prosecution which the Appeals Chamber supports. Nevertheless, in a decision of 2 July 2001[289], the Pre-Appeal Judge noted that the prosecution has conceded that it had obtained access to the ABiH archive in October 2000 while the trial was still in progress and the defence cases were being presented, and that "[t]hese matters obviously require proper investigation and explanation by the prosecution."[290]

207. The Appeals Chamber notes that the materials contained in the ABiH archive (and others) were the subject of several filings in this case, and that the Prosecution accounted for its conduct in

[284] Kordić Appeal Brief, Vol. I, p. 32, footnote 43; p. 39.
[285] Čerkez Appeal Brief, pp 38-39.
[286] Prosecution Response, paras 2.63-2.64.
[287] Prosecution Response, para. 9.29.
[288] *Prosecutor v. Kordić and Čerkez*, Decision on Application by Mario Čerkez for Access to Confidential Material from *Prosecutor v. Hadžihasanović et al.* and for Order Compelling Prosecution to Produce Rule 68 Material, Case No.: IT-95-14/2-A, 7 September 2001.
[289] *Prosecutor v. Kordić and Čerkez*, Decision on Second Motions to Extend Time for Filing Appellant's Briefs, Case No.: IT-95-14/2-A, 2 July 2001, para. 4.
[290] *Prosecutor v. Kordić and Čerkez*, Decision on Second Motions to Extend Time for Filing Appellant's Briefs, Case No.: IT-95-14/2-A, 2 July 2001, para. 10.

that respect, which account is summarized *inter alia* in its Appeal Brief.[291] The key issues to be determined are (1) whether the Prosecution breached Rule 68 obligations, and (2) if so, whether the breach occasioned prejudice to the case of Kordić.

208. The Appeals Chamber has been consistently mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia, where some States "have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal."[292]

> The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.[293]

209. The Appeals Chamber concludes that the Prosecution has sufficiently accounted for its own conduct in this regard, that the ABiH material was disclosed "as soon as practicable" in accordance with Rule 68, and that Kordić and Čerkez have failed to demonstrate that the Prosecution's disclosure of the ABiH materials constituted a breach of its obligations under Rule 68.

210. Kordić's argument is accordingly rejected on this basis.

### 4. The Trial Chamber's alleged procedural abuses regarding evidence

#### (a) Was the presentation of Witness AT's testimony rebuttal evidence?

211. At the time of the decision to admit Witness AT's testimony, Kordić conceded that he could not object to it[294], but he now submits on appeal that the Trial Chamber erred in allowing Witness AT's testimony on fresh (non-rebuttal) issues during the rebuttal phase of the trial.[295] Kordić denies that he waived his right to contest the admission of Witness AT's testimony, and since the materials given to him by the Prosecution did not disclose the fundamentals of Witness AT's testimony in any event, he was never able to contest it.[296]

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[291] Prosecution Response (confidential), paras 2.62-2.63. In brief, the Prosecution avers that the ABiH materials had not been produced earlier due to the process of indexing the material and making it searchable. The materials had consequently only arrived in The Hague on 25 October 2000 as a result of these searches and were therefore disclosed as soon as practicable.
[292] *Tadić* Appeal Judgement, para. 52.
[293] *Tadić* Appeal Judgement, para. 55 (emphasis in original).
[294] T. 25527-28.
[295] Kordić Appeal Brief, Vol. I, pp 41-42, 56.
[296] Kordić Reply Brief, p. 26-29.

212. The Prosecution submits that because Kordić did not object to the admission of Witness AT's testimony,[297] he must be taken to have waived his rights to challenge it.[298]

213. Čerkez submits that the Trial Chamber committed an error of law in terms of the procedural timing of Witness AT, who testified on 27 and 28 November 2000, after the Defence case in chief was completed on 16 October 2000, in spite of the fact that the Prosecution had been well aware of Witness AT's potential testimony since May 2000. Čerkez argued he was denied the equality of arms, where the Prosecution intentionally manipulated the discovery of that evidence. Čerkez submits that he was deprived of his right to have adequate time to prepare for cross-examination of Witness AT and the Defence had no additional time to prepare the related rebuttal evidence.[299]

214. The Prosecution responds that Čerkez's allegations are in error and premised on a distorted version of the events at trial.[300] According to the Prosecution, Čerkez overlooked the fact that he was put on notice by the Prosecution as to its intention to call Witness AT as a rebuttal witness, including the main issues which the witness was expected to cover in evidence, before completion of its case in chief on 22 September 2000. The Prosecution further requested the Trial Chamber to have the witness interposed, in order to allow Čerkez to address any relevant issues covered by the witness' testimony if Čerkez decided to give evidence. The Prosecution explained that during the hearings of 25 September 2000, it gave detailed reasons why the material had not been disclosed earlier, including the fact that the decision to have Witness AT called had only been taken two days before the Prosecution filed its Motion requesting that the witness be called. The procedure followed by the Prosecution and the Trial Chamber were fair and transparent and did not, the Prosecution submits, cause prejudice to Čerkez.

215. The Prosecution maintained its position that Witness AT be heard as a rebuttal witness for reasons of timing[301], but said that this testimony would also have been admissible either by way of

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[297] Prosecution Response (confidential), para. 2.67.

[298] Prosecution Response (confidential), para. 2.72, citing the *Čelebići* Appeal Judgement, para. 640: "The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party. This principle, established in many national jurisdictions, has been recognised in previous decisions of the Appeals Chamber. See *Furundžija* Appeal Judgement, para. 174: "[The Appellant] could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On that basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss his ground of appeal". See also *Tadić* Appeal Judgement, para. 55, where in the context of a complaint on appeal that the Defence had not been able to call witnesses essential to the Defence case, the Appeals Chamber stated: "The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case". See also *Aleksovski* Appeal Decision on Admissibility of Evidence, para 20: "no such complaint was made to the Trial Chamber [...] and it should not be permitted to be made for the first time on appeal."

[299] Čerkez Appeal Brief, pp 39-40, 52-53.

[300] Prosecution Response (confidential), para. 9.34.

[301] Prosecution Response, para. 2.77.

reopening the case or by application of Rule 98.[302] Counsel for Čerkez agreed with the Trial Chamber's classification, submitting that, in the event that Witness AT was allowed to testify, then his evidence ought to be treated as rebuttal evidence[303], a position with which Kordić initially concurred.[304]

216. The Appeals Chamber recalls that the presentation of evidence must follow the established order of requiring the Prosecution to close its case, and permitting the defence to begin answering the allegations against it.[305] There are, however, exceptions to this order of presentation such as the admission of evidence in rebuttal, fresh evidence and, explicitly, Rule 98.[306]

217. The Appeals Chamber is not persuaded that Kordić was precluded of his right to challenge the admission of Witness AT's testimony, since he was unable to ascertain the nature of that evidence at the time of its admission, and will accordingly take into account his arguments on appeal, together with those of Čerkez.[307]

218. Witness AT's testimony was heard during the rebuttal stage of the trial. However, this does not mean that it was actually all classified as rebuttal material, and in the oral decision to admit Witness AT's testimony, the Trial Chamber queried whether, had the Prosecution known about Witness AT's existence, or the likelihood of his being a witness, it would have called him, to which the Prosecution replied in the affirmative, suggesting that the classification of the material as rebuttal was for temporal reasons.[308] That led Judge May to state the following:

> Well, he's in no sense rebutting. Only in the most general sense is he rebutting in the sense that Mr. Kordić has put matters in issue. What you are saying is that here is a new witness we knew

[302] Prosecution Response (confidential), para. 2.75(c). Rule 98 governs the power of Chambers to order the production of additional evidence.
[303] T. 25514. Only on appeal did Čerkez object to the admission of Witness AT's evidence, not on the basis of it being either in rebuttal or fresh, but on the basis that it contributed to a significant violation of his right to a fair trial, Appeals Hearing, T. 476.
[304] T. 25517 (Private Session): By the time of his closing arguments, once the testimony of Witness AT had been heard, Kordić had changed his position and stated that Witness AT was in fact providing fresh evidence, Appeals Hearing, T. 228. Kordić objected to the admission of Witness AT's evidence on appeal, not on the basis of it being either in rebuttal or fresh, but on the basis that reliability is a central component of admissibility, Appeals Hearing, T. 240.
[305] *Čelebići* Trial (*Prosecutor v. Delalić et al.*) Decision on the Prosecutor's Alternative Request to Open the Prosecution's Case, Case No.: IT-96-21-T, 19 August 1998.
[306] *Čelebići* Trial (*Prosecutor v. Delalić et al.*) Decision on the Prosecutor's Alternative Request to Open the Prosecution's Case, Case No.: IT-96-21-T, 19 August 1998, para. 22, stated that "The most significant of these [exceptions] … is the calling of evidence in rebuttal"; Note that, in the *Kupreškić et al.* Appeal Judgement, para. 43, the Appeals Chamber used the terms "additional evidence" as provided for in Rule 115, "fresh evidence" and "new evidence" interchangeably. In this Judgement the Appeals Chamber favours the use of the term "fresh evidence" as distinct from "additional evidence", because in this case it is clear that Witness AT's testimony was not submitted pursuant to a Rule 115 Motion.
[307] Čerkez challenged the Trial Chamber's admission of Witness AT *in toto* on the basis that its late admission was in breach of Rule 21 and is unfair, an argument which is dealt with in section IV.D. *supra*. Čerkez's arguments as to the Trial Chamber's assessment of Witness AT's credibility, and its reliance on his evidence, are considered in section IV.E. *infra*.
[308] T. 26643.

> nothing about, he is highly probative, and therefore he should be called. That's surely your position.[309]

219. The Appeals Chamber will therefore consider whether Witness AT's testimony was admissible as fresh evidence.

(b) The presentation of Witness AT's testimony as fresh evidence

220. In its decision to admit *inter alia* the testimony of Witness AT, the Trial Chamber reasoned that only highly probative evidence on a significant issue in response to Defence evidence which could not reasonably have been foreseen[310], and not mere reinforcement of the Prosecution case in chief, would be permitted.[311] Furthermore, in allowing Witness AT to testify, the Trial Chamber stated in trial proceedings that "[t]his is evidence of a new witness not known to the Prosecution, unavailable to them until very late in the trial. It is potentially highly probative and the Trial Chamber bears in mind the duty to ascertain the truth of what occurred."[312]

221. While the Appeals Chamber considers that the Trial Chamber correctly applied the test for the admission of rebuttal evidence, what is at issue is the admissibility of the alleged non-rebuttal evidence, or fresh evidence, provided by Witness AT. The non-rebuttal or fresh evidence allegedly went beyond rebuttal evidence because it did not respond to significant issues arising out of the Defence evidence, and is, according to Kordić, better classified as fresh evidence. The Appeals Chamber agrees with this account. The Trial Chamber admitted portions of Witness AT's testimony as fresh evidence, albeit heard at the rebuttal stage of proceedings. The distinction is relevant for the following reason:

> Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies.[313]

222. The Trial Chamber was therefore competent to admit fresh evidence brought by the Prosecution after its case in chief if the evidence in question satisfied the applicable criteria. The admission of fresh evidence is merely the Trial Chamber's exercise of its discretionary powers to admit or exclude relevant evidence pursuant to Rules 89(C) and (D)[314], taking into account both the

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[309] T. 26643.
[310] Oral Decision, T. 26646.
[311] T. 26647.
[312] T. 26648. The Trial Chamber stated orally that "to allow an extensive rebuttal case and evidence would be to contravene that duty [to ensure a fair and expeditious trial]. Therefore, only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted", T. 26647.
[313] *Čelebići* Appeal Judgement, para. 117.
[314] *Čelebići* Decision on Request to Reopen the Prosecution's Case, para. 17.

probative value of that evidence and the need to ensure a fair trial. The Appeals Chamber established the standard for the admissibility of fresh evidence in the *Čelebići* Appeal Judgement:

> The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.[315]

223. The reasoning of the Trial Chamber in its admission of Witness AT's evidence[316] has been discussed above, and satisfies the first criterion of the test for the admissibility of fresh evidence, namely that the evidence was "of a new witness not known to the Prosecution, unavailable to them until very late in the trial" and it was "potentially highly probative."[317] The burden is on the alleging party to demonstrate that the Trial Chamber erred in exercising its discretion in admitting evidence.[318] The Appeals Chamber finds that the Accused have failed to do so in relation to this first criterion of the test. The Appeals Chamber is satisfied that the Trial Chamber did not err in its conclusion that the evidence could not have been found with the exercise of reasonable diligence before the close of the Prosecution's case.

224. The burden of demonstrating that the Trial Chamber erred in exercising its discretion with regard to the second criterion of the test also rests on the party alleging it.[319] The Accused have not done this either. The Accused made extensive use of the opportunity to cross-examine Witness AT, and to lead rejoinder evidence against him. The mere fact that his testimony was probative of the Prosecution's case does not mean that the Accused were prejudiced.

225. Witness AT's testimony was validly admitted into evidence in a manner which satisfied the applicable tests. The Appeals Chamber is not satisfied that the Trial Chamber erred in admitting Witness AT's testimony into evidence. The arguments of the parties are dismissed.

(c) The Trial Chamber's admission of certain exhibits

226. The Accused challenge the admission of certain pieces of evidence in addition to the Zagreb Materials.

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[315] *Čelebići* Appeal Judgement, para. 283 (emphasis in original).
[316] T. 26648.
[317] T. 26643.
[318] *Čelebići* Appeal Judgement, para. 293.
[319] *Čelebići* Appeal Judgement, para. 293.

(i) Exhibit Z610.1 – the War Diary

227. The War Diary is a notebook of almost 100 pages containing the observations, or log, of the HVO duty officer at the CBOZ Headquarters, and is also known as the War Diary. The Trial Chamber admitted the War Diary on the grounds that it was an important document, contemporaneously made and carrying its own authenticity (including the Zagreb archives stamp), "being written in several hands and having every sign of being what it purports to be."[320] The Trial Chamber concluded that it is "under duty to try and ascertain the truth and to deprive itself of this document would put that duty at risk."[321]

228. Kordić appeals against the admission of the War Diary because the Prosecution failed to establish either its authenticity, or that it is an accurate record of the events it purports to describe.[322] As to the War Diary's authenticity, Kordić argues that it contains serious and inexplicable anomalies identified by witnesses who considered it, and that he was never able to confront any of its putative authors because none had been identified or provided by the Prosecution.[323] Consequently, the War Diary's authenticity cannot be said to be reliable, authentic or genuine, and in the absence of an opportunity to challenge the authors of the evidence as to its alleged accuracy or alteration[324], his right to a fair trial has been violated.[325]

229. The Prosecution submits that the Trial Chamber's decision cannot be faulted, and that numerous exhibits and other evidence corroborate the accuracy of the War Diary [326]

230. Kordić's appeal is against the factual findings of the Trial Chamber in its admission of Exh. Z610.1. The Appeals Chamber recalls that, in reviewing the decisions of the Trial Chamber, the correct standard of review applicable to an alleged error of fact is whether no reasonable trier of fact could have reached the conclusion beyond reasonable doubt.[327] In this instance, the Trial Chamber provided a reasonable decision and applied the correct test for the admission of fresh evidence. In so doing, it rejected a large amount of other new evidence, and in admitting the War Diary as new evidence, it provided cogent reasons for doing so.

231. Kordić argues that there is no reason to distinguish the War Diary from "the shower of anonymous documents supposedly garnered from a flock of various intelligence agencies in the

[320] Decision on Prosecutor's submissions concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 44.
[321] *Ibid.*
[322] Kordić Appeal Brief, Vol. I, pp 47 *et seq.*
[323] Kordić Appeal Brief, Vol. I, pp 47-48.
[324] Kordić Appeal Brief, Vol. I, p. 49.
[325] Kordić Appeal Brief, Vol. I, pp 47, footnote. 67; p. 50.
[326] Prosecution Response (confidential), para. 2.102; Prosecution Final Trial Brief, Annex XI.

Republic of Croatia, and in the Republic of Bosnia-Herzegovina"[328] which the Trial Chamber rejected because they were "based on anonymous sources or hearsay statements that are incapable of now being tested by cross-examination."[329]

232. This argument is inapposite. The determination of whether the admission of a particular piece of evidence is precluded, under the circumstances, by the need to ensure a fair trial, is one which lies within the discretion of the Trial Chamber. The Appeals Chamber will revise such a determination only where the party challenging it has demonstrated that no reasonable trier of fact could have reached the conclusion. The Accused have failed to do this. The Appeals Chamber is satisfied that a reasonable trier of fact could have reached the conclusion of the Trial Chamber as to the admissibility of Exh. Z610.1 – the War Diary, and dismisses the challenges to it.

(ii) Exhibit Z1380.4

233. Exh. 1380.4 is a letter, originally in B/C/S, apparently from the Croatian Information Services (HIS) to President Franjo Tuđman regarding divisions and power struggles in the HR H-B, dated 18 February 1994.

234. Kordić appeals the admission of Exh. 1380.4 because there is no proof as to its authorship, it makes "scurrilous and factually unfounded" contentions and is "uncorroborated and unsupported rank speculation and hearsay."[330] Kordić had orally contested the admission of this exhibit, and in admitting it into evidence during cross-examination, the Trial Chamber addressed the Prosecution:

> [W]e shall admit this document but in the fashion that you were given it, that is, as a document which was given you by the Office of the President and which will serve you in your cross-examination today. Of course, needless to say, the probative value accorded to this document will be determined by the Chamber in due time. Naturally, with regard to the weight and probative value of this document, it can be challenged also and will be determined by the Chamber in due time.[331]

235. The Prosecution submits that Kordić's arguments about Exh. 1380.4 are either speculative or irrelevant, and that the Trial Chamber committed no error either in admitting it, or otherwise causing prejudice to Kordić's case.[332]

236. A review of a decision of a Trial Chamber on appeal requires proof the Trial Chamber erred in law. For the admission of evidence during trial, a Trial Chamber is entitled to exercise its

[327] *Blaškić* Appeal Judgement, para. 24(a).
[328] Kordić Appeal Brief, Vol. I, p. 50.
[329] Decision on Prosecutor's submissions concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 39.
[330] Kordić Appeal Brief, Vol. I, p. 54-55.
[331] T. 20252 (2 June 2000), cross-examination of Witness Zoran Marić.
[332] Prosecution Response (confidential), paras 2.114-2.117.

discretion, either to admit any relevant evidence which it deems to have probative value, or to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.[333] Kordić has not demonstrated that the Trial Chamber erred in admitting Exh. 1380.4. Furthermore, Kordić concedes that the Trial Chamber did not place any particular reliance on it.[334] This aspect of Kordić's ground of appeal fails.

(iii) Exhibits Z692.2 and Z692.3

237. Čerkez alleges that the Trial Chamber erred in relying on Exh. Z692.2[335], an exhibit that was never admitted.[336] The Prosecution concedes that Čerkez "appears to be correct in that assertion"[337] but that any such error is inconsequential because "[t]here is admitted evidence establishing by itself, and beyond a reasonable doubt, that the Accused was actively involved in the crimes charged"[338] and that "its essence is contained in admitted Exhibit Z673.7."[339]

238. The Appeals Chamber finds that this argument is moot, as this exhibit was indeed finally inconsequential.

239. As to Exh. Z692.3, Čerkez alleges that the Trial Chamber erred by admitting evidence whose authenticity he had challenged (namely Exhs Z692.2 and Z692.3), in that originals were not proffered by the Prosecution.[340] The Prosecution submits *inter alia* that Exh. Z692.3's authenticity was established by the testimony of Witness Prelec[341], whom Čerkez declined to cross-examine on this evidence.

240. The Appeals Chamber finds that the Trial Chamber admitted and relied upon Exh. Z692.3 in the absence of a contemporaneous challenge to its authenticity by Čerkez. Čerkez cannot raise on appeal what he ought to have argued at trial, when he had the opportunity to do so, and this argument is rejected.

## 5. Conclusion

241. The Accused have submitted that the Prosecution violated its Rule 68 obligations at trial in various ways, and in relation to a variety of evidence. They, however, failed to establish that the

[333] Rules 89(C) and (D).
[334] Kordić Appeal Brief, Vol. I, pp 53-4.
[335] In the Trial Judgement, para. 689(a), Exh. Z692.2 is referred to among other evidence "as pointing to Mario Čerkez's involvement with the events of 16 April" and discusses the authenticity of that exhibit in footnote 1391.
[336] Čerkez Appeal Brief, p. 53, para. 24(a).
[337] Prosecution Response, para. 10.19.
[338] Prosecution Response, para. 10.21.
[339] Prosecution Response, para. 10.22.
[340] Čerkez Appeal Brief, p. 57, para. 25.
[341] T. 27215-323.

Trial Chamber erred in permitting any such violations, and the arguments are dismissed accordingly.

242. Nevertheless, the Appeals Chamber cannot fail to note that the issues raised by the evidence in this case have been problematic for all parties. The Appeals Chamber has emphasised that the right of an accused to a fair trial is a fundamental right protected by the Statute and by the Rules.[342] Rule 68, imposing disclosure obligations on the Prosecution, is an important shield in the accused's possession. It is clearly established that proof of prejudice to an accused is required before a remedy under Rule 68 can be given[343], but that burden on the alleging party cannot serve to isolate violations of the Rule to the detriment of a fair trial. The Appeals Chamber reiterates that the onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute.[344]

243. The Appeals Chamber notes that the Prosecution has accounted for the presentation of the evidence in this trial *in extenso*, and is satisfied that it fulfilled its obligations to assist the Trial Chamber in good faith, in view of the complex nature of the case, and of the difficulties encountered in accessing large amounts of evidence.[345] It is clearly required, however, notwithstanding the practical difficulties encountered by the Prosecution, that evidence of an exculpatory nature must also be disclosed to the defence forthwith.

### E. **The Trial Chamber's alleged error in relying upon the testimony of Witness AT**

244. The Appeals Chamber repeats that, to merit its interference in the findings of a Trial Chamber, an alleged error of fact must have occasioned a miscarriage of justice.[346] It has been argued in the instant case that this is precisely what occurred in the Trial Chamber's assessment of the testimony of Witness AT.[347] The Appeals Chamber will therefore now turn solely to the question of the admissibility of the testimony of Witness AT.

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[342] *Krstić* Appeal Judgement, para. 211.
[343] *Blaškić* Appeal Judgement, para. 295.
[344] *Prosecutor v. Kordić and Čerkez,* Case No.: IT-95-14/2, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 14; *Blaškić* Appeal Judgement, para. 264.
[345] See *Tadić* Appeal Judgement, para. 51
[346] *Kupreškić et al.* Appeal Judgement, para. 29. Errors occasioning a miscarriage of justice have been found to include *inter alia* a conviction in the absence of evidence of an essential element of the crime charged; *Furundžija* Appeal Judgement, para. 37.
[347] Appeals Hearing, T. 190. The arguments of the parties concerning Witness AT were extensive, and at times conflated the distinction between matters relating to the charges against the accused, and matters relating to the admission and treatment of evidence, a distinction which this Appeals Chamber is at pains to respect. Arguments concerning the rights of an accused to a fair trial (as set out in Article 21(4)(a) of the Statute) have been properly made in respect of Witness AT's testimony. However, provisions relating to charges do not relate to matters of evidence, a distinction with the Trial Chamber correctly identified and maintained, see T. 25527. For this reason, matters relating to charges are dealt with in section IV.B of the Judgement.

1. Overview of the appeal against the testimony of Witness AT

(a) Introduction to the testimony of Witness AT at trial

245. Witness AT's testimony is cited in the reasoning of the Trial Judgement, most notably for its revelations regarding a series of meetings on 15 April 1993, and how allegedly "the HVO planned an attack for the next day at a series of meetings that afternoon and evening."[348] It is part of the evidence of the various meetings of 15 April 1993 at which the decision was taken to carry out subsequent military operations during which atrocities were committed[349], and of placing both of the appellants at those meetings or detailing the proceedings thereof.[350]

246. The Trial Chamber attached special importance to Witness AT's testimony.[351] Although not present at the meetings concerned, Witness AT gave the following testimony based on what he allegedly heard from Paško Ljubičić: (1) the attendance at a First Meeting, which included Kordić[352], and at which a decision was taken to attack Ahmići the following day[353]; and (2) the attendance at a Second Meeting, which included Čerkez.[354] Witness AT also testified that he personally saw and met with Čerkez in the Hotel Vitez immediately after the Second Meeting[355], and that he personally heard Ljubičić order an escort to accompany Kordić back to Busovača.[356]

(b) Submissions presented by Kordić

247. Kordić phrased the essence of his objection to the testimony of Witness AT in general as the Trial Chamber's erroneous reliance on "the uncorroborated hearsay testimony of a convicted murderer and admitted liar."[357] Kordić submits that the Trial Chamber committed numerous errors in relying "exclusively" on Witness AT to conclude that Kordić was responsible for planning,

[348] Trial Judgement, para. 610.
[349] See Exh. Z610.1, the War Diary.
[350] For the current purposes, these meetings are referred to as follows (according to the partly disputed findings of the Trial Judgement at paras 610-613): First Meeting - the meeting of the political leadership of Novi Travnik, Vitez and Busovača, attended by Kordić, held in the office of Tihomir Blaškić at the Hotel Vitez; Second Meeting - the meeting of the HVO leadership, this time including the military leaders on 15 July 1993, attended by Čerkez held in the office of Tihomir Blaškić at the Hotel Vitez at approximately 5:30 p.m.; Third Meeting - the briefing given by Paško Ljubičić to the MP 4th Battalion in the TV room of the Hotel Vitez, at which Witness AT was present; Fourth Meeting – the first briefing allegedly given by Paško Ljubičić to the Military Police at the Bungalow (a former restaurant in Nadioci, near Ahmići where the Jokers were stationed; Trial Judgement, para. 612), and at which Witness AT was present; and the Fifth Meeting – the second briefing given allegedly by Paško Ljubičić to the Military Police at the Bungalow, at which Witness AT was present.
[351] T. 27914: "The second matter is how we deal with Witness AT's evidence in our judgement. Clearly, he's not a witness who can be simply ignored. He is an important witness. We are going, therefore, to have to cover his evidence in the judgement."
[352] T. 27590-92.
[353] T. 27593.
[354] T. 27592.
[355] T. 27593.
[356] T. 27596.
[357] Kordić Appeal Brief, Vol. I, p. 6.

instigating or ordering crimes of which he was convicted.[358] Kordić described those errors as: (1) the legal error allowing Witness AT's testimony on fresh (non-rebuttal) issues during the rebuttal phase of the trial[359]; (2) the legal error of basing Kordić's conviction on Witness AT's evidence of questionable credibility[360]; (3) the legal error of concluding from Witness AT's uncorroborated testimony that Kordić was present at the meetings in the Hotel Vitez on 15 April 1993, when alternative inferences favourable to the Accused ought to have been drawn[361]; (4) the factual error of inferring Kordić's presence from the unclear evidence concerning the Second Meeting[362]; and (5) the factual error of believing "the completely uncorroborated hearsay testimony of a convicted murderer" in convicting Kordić.[363]

248. Kordić submits that the Trial Chamber's numerous errors in its handling the testimony of Witness AT justifies invalidating his conviction for the crimes committed in Ahmići, which was based principally on Witness AT's evidence.[364] As a remedy, he requests the reversal of his convictions, and the dismissal of all charges against him, which involve the "planning", "instigating" or "ordering" of crimes committed in Vitez, Busovača and Kiseljak municipalities from April to July 1993.[365]

249. In response, the Prosecution argues that Kordić has not demonstrated that the Trial Chamber erred either in the manner in which it considered Witness AT's testimony, or the reliance it placed on Witness AT's testimony. Furthermore, the Prosecution submits that the importance to the case of Witness AT's testimony about the meetings on 15 April 1993 has been exaggerated by the Accused, and that it is the position of neither the Prosecution nor the Trial Chamber that the case depended on "a two-hour meeting one afternoon in April."[366] Rather, it is the Prosecution's submission that Kordić was directly involved in the commission of crimes from November 1991 to March 1994[367], and that Witness AT's testimony corroborates the rest of the case, not the converse.[368] The Prosecution avers that there was no abuse of discretion in the Trial Chamber's handling of Witness AT.[369]

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[358] Kordić Appeal Brief, Vol. I, p. 14.
[359] Kordić Appeal Brief, Vol. I, pp 42, 56.
[360] Kordić Appeal Brief, Vol. I, p. 60.
[361] Kordić Appeal Brief, Vol. I, p. 60.
[362] Kordić Appeal Brief, Vol. I, p. 62.
[363] Kordić Appeal Brief, Vol. I, p. 62.
[364] Kordić Reply Brief, p. 21.
[365] Kordić's Amended Grounds of Appeal, p. 3; Kordić Appeal Brief, Vol. I, pp 6-10, 56, 69; Kordić Appeal Brief, Vol. I, pp 14-22.
[366] Appeals Hearing, T. 355.
[367] See the discussion of the temporal scope of the Indictment.
[368] Appeals Hearing, T. 356, 412.
[369] Prosecution Response, para. 3.106.

(c) Submissions presented by Čerkez

250. Čerkez also appeals against the Trial Chamber's reliance on the testimony of Witness AT. Čerkez submits that Witness AT's testimony, insofar as it establishes Čerkez's presence at the Second Meeting in the Hotel Vitez on 15 April 1993, is hearsay and should be corroborated in order to be relied upon[370], especially given the significance of the inference the Trial Chamber drew from this and other evidence.[371] Čerkez also lists several alleged contradictions of Witness AT's testimony in arguing its questionable credibility.[372] Čerkez essentially mirrors Kordić's third argument against Witness AT, submits that the testimony is not credible[373], and that in relying on it instead of on evidence supporting an alternative description of events, the Trial Chamber's findings are "questionable and cannot satisfy the beyond reasonable doubt criteria."[374]

251. As a remedy, Čerkez submits that the errors of evidence in the Trial Judgement justify its reversal[375] and he seeks acquittal on all counts.[376]

252. The Prosecution's general response is that Čerkez acted pursuant to a persecutory plan, and that the testimony of Witness AT is indicative of Čerkez's knowledge of that plan but is not the only evidence of it.[377] More specifically, the Prosecution points out that Witness AT testified to having seen Čerkez himself at the Second Meeting, and that this testimony was not hearsay requiring corroboration in any way.[378]

253. Furthermore the Prosecution avers that, simply because the War Diary does not record a subsequent bilateral meeting between Blaškić and Kordić, it cannot be concluded that any event not recorded in the War Diary did not occur.[379] The Prosecution points out that where the Trial Judgement makes its findings as to the role of Čerkez[380], mention is indeed made of Witness AT,

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[370] Čerkez Appeal Brief, p. 43; Appeals Hearing, T. 479-50. Čerkez submits that while he met with Blaškić on 15 April 1993, he did so alone, and did not attend any of the other alleged meetings on that day, Čerkez Appeal Brief, p. 50.
[371] See Trial Judgement, para. 703.
[372] Čerkez Appeal Brief, p. 44, para. 11. Those alleged contradictions are, *inter alia*: (1) the War Diary fails to mention Čerkez's presence at the Second Meeting; (2) Witness AT's testimony is inconsistent; and (3) Witness AT has in the past lied about his own participation in the attack on Ahmići. Regarding (1), Čerkez notes that the War Diary provides details of who was called to attend the Second meeting, and that because Čerkez's name does not appear on the list of people called to attend, he argues that this is proof that he did not attend the meeting, an assertion which allegedly contradicts the hearsay evidence of Witness AT that he did so attend, and which grounds an interpretation which *in dubio pro reo* should have been relied upon.
[373] Čerkez Appeal Brief, p. 45, para. 12.
[374] Čerkez Appeal Brief, pp 45-48. The alternative description of events that Čerkez advances is the execution of a justifiable defensive military plan, in order to legitimately protect personnel and civilians under the authority of the CBOZ commander.
[375] Appeals Hearing, T. 490.
[376] Appeals Hearing, T. 491.
[377] Appeals Hearing, T. 649.
[378] Appeals Hearing, T. 513.
[379] Prosecution Response (confidential), para. 2.101.
[380] Trial Judgement, para. 703.

but reference is also made to the War Diary and other documentary evidence from which the Trial Chamber drew its conclusions.[381]

2. Alleged undue reliance on Witness AT's testimony as lacking credibility and as uncorroborated hearsay evidence

(a) Credibility

254. The Trial Chamber recognised that Witness AT's credibility was in issue.[382] In its review of the applicable law in other national jurisdictions, the Trial Chamber was aware that a witness with a self-interest to serve, such as Witness AT, may seek to inculpate others and exculpate himself, but it also stated that it "does not follow that such a witness is incapable of telling the truth."[383]

255. Both Kordić and Čerkez contest the credibility of Witness AT, and submit that his testimony was an insufficient basis upon which the Trial Chamber could draw the inculpatory inferences it did. In Kordić's case, his "putative presence" at the First Meeting on 15 April 1993 permitted the Trial Chamber incorrectly to draw the inference that he must have been guilty of planning the crimes at Ahmići and elsewhere.[384] As for Čerkez, he submits that there exists the alternative inference that he was implicated in the execution of a justifiable defensive military plan, in order to legitimately protect personnel and civilians under the authority of the CBOZ commander.[385]

256. Kordić claims that since Witness AT is a convicted criminal, the credibility of his evidence must be assessed in light of this fact.[386]

257. The Prosecution responds that it was clearly found that Witness AT was criminally responsible for a serious crime.[387]

258. Both Čerkez[388] and Kordić submit that Witness AT lied on several occasions, most notably when he explicitly acknowledged having provided a lying alibi defence.[389]

259. In general, the Prosecution submits that Kordić's characterisation of Witness AT as "a liar" is somewhat inaccurate and an overstatement of his case, in that the lies in question were made by

[381] Appeals Hearing, T. 514. See Trial Judgement, para. 703.
[382] Trial Judgement, paras 593(iv), 627, footnote 1194; T. 27914.
[383] Trial Judgement, para. 629.
[384] Kordić Appeal Brief, Vol. I, p. 60.
[385] Čerkez Appeal Brief, pp 45-48.
[386] Kordić Appeal Brief, Vol. I, pp 56, 62.
[387] Prosecution Response (confidential), para. 3.145(c).
[388] Čerkez Appeal Brief, p. 11.
[389] Appeals Hearing, T. 238-39.

Witness AT's defence and not by him.[390] The Prosecution stresses that the Trial Chamber indeed recognised the fact that Witness AT may have had reason to lie[391], and took into consideration the evidence which suggested Witness AT's involvement in the attack on Ahmići, and concluded that Witness AT could not bring himself to tell the truth of his own involvement.[392] The Prosecution avers that the defence was given "ample opportunity" to address the issue of Witness AT and to cross-examine him before the Trial Chamber, and they did so, with the Trial Chamber making its own, fully informed and reasoned opinion.

260. As a further indication of his credibility, the Prosecution underlines that Witness AT testified to having received a letter from counsel for Blaškić, encouraging him to change his testimony regarding 15 April 1993, the night before the attack on Ahmići, and to implicate Kordić while exonerating Blaškić, but that Witness AT refused to do so:

> I had this letter as a form of pressure to testify on behalf of the Defence. The aim will be clear to you when I read the letter. I did not accept. I can no longer live with this, Your Honours. I don't care what happens to me.[393]

261. The Appeals Chamber accepts that Witness AT misled both the Prosecution and the International Tribunal by what can only be described as a lie, an assessment which Witness AT himself accepted under cross-examination by counsel in these proceedings.[394] The Appeals Chamber accepts – as do all the Parties and Witness AT himself – that Witness AT fabricated some of his past testimony. The Appeals Chamber further accepts that this is a matter requiring its careful consideration, especially given the qualified importance of the witness to the findings of the Trial Chamber in this case.

262. The Appeals Chamber is called upon to assess the impact of Witness AT's previous conviction and fabrications upon the probative value the Trial Chamber assigned to Witness AT's testimony in the instant case.

263. The Appeals Chamber notes that the testimony given by Witness AT in this case may be distinguished by two significant factors. First, Witness AT has been convicted and sentenced. Kordić has suggested that Witness AT, in cooperating with the Prosecution in this case, was

[390] Prosecution Response (confidential), para. 3.145(b).
[391] Prosecution Response (confidential), para. 3.146.
[392] Prosecution Response (confidential), para. 3.148.
[393] Witness AT discusses a letter that he received, allegedly from Blaškić's Counsel, suggesting a plan for testifying in concert with other defence teams. Witness AT refused to participate in the scheme because he "could no longer carry all this guilt in secret," T. 27726-27 (closed session).
[394] T. 27654 (closed session).

attempting to "buy a discount from his sentence" by providing a "story" which was not verifiable at that time because the declarant behind the hearsay – Paško Ljubičić – was at large.[395]

264. The Appeals Chamber cannot exclude that Witness AT thought to have an incentive for misleading both the Prosecution and the International Tribunal. Although he could no longer avoid responsibility for his own crimes, he may have sought to carry favour with the Prosecution by providing it with testimony to assist its present case.

265. The Prosecution, however, rejects this contention, and stated clearly that there was no "deal" made with Witness AT, no immunity was given or promised, and there was no agreement with Witness AT at the time he testified.[396] Moreover, at the outset of his interviews with the Prosecution in this case, Witness AT was expressly told of the possibility that his testimony would be evaluated, and that if it could be shown that he had provided substantial co-operation to the Prosecution's investigators, the Trial or Appeals Chambers would be informed.[397]

266. The second point to note is that Witness AT himself provided an explanation for his past misrepresentations and deceit in an exchange with the President of the Trial Chamber.[398] He further declared that the change of government in Croatia reduced the fear he had for the security of himself and of his family.

267. The Trial Chamber expressly realised that Witness AT was problematic as a witness[399], and that his evidence was disputed.[400] Nevertheless, the Trial Chamber decided that Witness AT's testimony was of probative value[401] and was credible to the extent that it was consistent with all the circumstances and confirmed by other evidence.[402] The Trial Chamber concluded that the problems raised by the defence at trial were "not of such significance as to make [Witness AT's] evidence unbelievable"[403], and that he "did tell the truth about the preparations for the Ahmići attack, including the meetings at Hotel Vitez and the subsequent briefings."[404]

[395] Appeals Hearing, T. 221.
[396] Prosecution Response (confidential), paras 3.149-3.150; Appeals Hearing, T. 361.
[397] Exh. D351, p. 2.
[398] T. 27738 (closed session).
[399] Trial Judgement, para. 628.
[400] Trial Judgement, para. 619.
[401] T. 26648.
[402] Trial Judgement, paras 629-630.
[403] Trial Judgement, para. 630.
[404] Trial Judgement, para. 630.

(b) Witness AT's alleged uncorroborated hearsay testimony

268. Kordić's second argument relates to the lack of corroboration of the testimony of Witness AT, and to its hearsay nature, an argument also submitted by Čerkez.[405]

269. Kordić stresses that the Trial Judgement refers to two pieces of corroboration to substantiate Witness AT's account, but that in any event neither makes any references to Kordić.[406] Those two references were the War Diary and a report written by the HVO Police.[407] Kordić reiterates that he expressly challenged the Trial Chamber's contention that the military orders offered by the Prosecution as "confirmation" of Witness AT's testimony either confirmed or corroborated that evidence.[408]

270. Kordić relies upon two decisions of the Appeals Chamber to substantiate his appeal against the Trial Chamber's reliance on Witness AT's uncorroborated evidence, the first being the Appeals Chamber's Decision of 21 July 2000.[409] However, the Appeals Chamber notes, already at this stage, that the issue in that decision was whether the unsworn, uncross-examined, out-of-court statement of a deceased witness should have been admitted into evidence.

271. Second, Kordić submits that the 18 September 2000 Decision[410] provides that corroboration has to be focused specifically on the material fact asserted by the witness, and that corroboration of the general circumstances of the witness testimony is insufficient.[411] The material fact in the instant case according to Kordić is his presence at the meetings on 15 April 1993. Kordić avers that while there is no direct corroboration of that fact, and only a series of inferences, there is instead evidence to controvert a finding that the meeting occurred at all.[412]

272. The Prosecution argues that the factual assertion that Witness AT's testimony was uncorroborated is not accurate[413], since some of Witness AT's evidence included some direct evidence[414], and Kordić did not challenge the Trial Chamber's finding to the contrary.[415] The

[405] Čerkez Appeal Brief, p. 43.
[406] Kordić Appeal Brief, Vol. I, pp 35-37.
[407] Exhs Z610.1, Z498.1 respectively. The latter exhibit, dated 26 February 1993, concerns the raising of a Republic of BiH flag in Vitez, and does not relate to the events of 15 April 1993.
[408] Kordić Reply Brief (confidential), p. 35, referring to Kordić Appeal Brief, Vol. I, p. 54.
[409] *Prosecutor v. Kordić and Čerkez,* Decision on Appeal Regarding Statement of a Deceased Witness, Case No.: IT-95-14/2-AR73.5, 21 July 2000, para. 18.
[410] *Prosecutor v. Kordić and Čerkez,* Decision on Appeal Regarding the Admission Into Evidence of Seven Affidavits and One Formal Statement, Case No.: IT-95-14/2-AR73.6, 18 September 2000, ("18 September 2000 Decision"). See Kordić Reply Brief, p. 40. Rule 94*ter* has been deleted from the Rules on 13 December 2000..
[411] Appeals Hearing, T. 252.
[412] Kordić Appeal Brief, Vol. I, pp 49-51.
[413] Prosecution Response, paras 3.8, 3.48, 3.59, 3.69.
[414] Prosecution Response (confidential), para. 3.16.
[415] Prosecution Response, paras 3.9 and 3.11-3.15.

Prosecution highlights the Trial Chamber's conclusion at paragraph 630 of the Trial Judgement that there was indeed "confirmation" of Witness AT's testimony[416] and that Kordić's submission implying that only direct evidence actually placing Kordić at the meetings can constitute corroboration of Witness AT's testimony is simply incorrect.[417]

273. As to Kordić's interpretation of the 18 September 2000 Decision, the Prosecution avers that corroborative evidence is not limited to that which mirrors the primary testimony specifically; rather, it is evidence which tends to convince the trier of fact that a witness is telling the truth.[418]

274. The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence.[419] In *Kupreškić et al.*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation.[420] A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question.

275. As regards the decision of 18 September 2000, the Appeals Chamber recalls that in *Kupreškić et al.*, it held that "[i]t follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration."[421]

276. It is incorrect to suggest that circumstantial evidence cannot be regarded as corroborative. In this case, the Trial Chamber specifically determined to what extent Witness AT's testimony was confirmed by other evidence.[422] The Appeals Chamber notes that Witness AT's testimony was given live and under solemn declaration, and was subject to cross-examination.

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[416] Prosecution Response, para. 3.8; Appeals Hearing, T. 360-361.
[417] Prosecution Response, paras 3.48-3.58.
[418] Appeals Hearing, T. 358.
[419] *Čelebići* Appeal Judgement, para. 506: "there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony". See also *Kunarac* Appeal Judgement, para. 268; and *Aleksovski* Appeal Judgement, para. 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration."
[420] *Kupreškić et al.* Appeal Judgement, para. 135.
[421] *Kupreškić et al.* Appeal Judgement, para. 33.
[422] Trial Judgement, para. 630.

277. The Appeals Chamber is not satisfied that the Trial Chamber erred in its assessment of the evidence corroborating Witness AT's testimony.

278. Kordić recognises that hearsay evidence is admissible.[423] Kordić submits , however, that the Trial Chamber erred in denying him the right to confront and cross-examine Ljubičić, while allowing hearsay testimony from Witness AT, primarily based on what Ljubičić allegedly said to Witness AT, and relying on it.[424]

279. The Prosecution does not deny the fact that parts of Witness AT's evidence constitute hearsay, but points out that not all of Witness AT's testimony is so classified[425], and responds that it is of limited significance because the Appeals Chamber has recognised that such evidence can be of probative value.[426] It responds further that the fact that Kordić could not cross-examine the initial declarant Ljubičić is not determinative of Witness AT's reliability, but may only affect the weight to be afforded the evidence.[427]

280. The Prosecution stresses that in *Kunarac et al.,* the Trial Chamber (upheld on appeal) found the circumstances surrounding the hearsay testimony of a witness to be of sufficient reliability such as to form the basis of the alleged crime itself.[428]

281. In *Aleksovski* the Appeals Chamber found that Trial Chambers have a wide discretion in admitting hearsay evidence. The Appeals Chamber held that establishing the reliability of hearsay evidence is of paramount importance, since hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.[429]

282. Hearsay is defined as "the statement of a person made otherwise than in the proceedings in which it is tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says."[430]

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[423] Kordić Appeal Brief, Vol. I, pp 59-60. Paško Ljubičić himself was indicted by the Tribunal on 27 September 2000, the indictment against him being unsealed on 30 October 2001. Until this time, Ljubičić's whereabouts were unknown. He surrendered voluntarily to the authorities of the Republic of Croatia on 9 November 2001, and he was then transferred to the UNDU on 2l November 2001 before his initial appearance on 30 November 2001. Since the Trial Judgement in the instant case was delivered on 26 February 2001, Ljubičić himself was never called as a witness. Ljubičić's case (Case No.: IT-00-41-PT) is currently at the pre-trial stage; a date for the commencement of the trial had not been set at the date of this Judgement.
[424] Kordić Appeal Brief, Vol. I, pp 63-64.
[425] Prosecution Response, para. 3.24.
[426] Prosecution Response, para. 3.25.
[427] Prosecution Response, para. 3.25.
[428] Prosecution Response, para. 3.45.
[429] *Aleksovski* Appeal Decision on Admissibility of Evidence, para. 15.
[430] *Aleksovski* Appeal Decision on Admissibility of Evidence, para. 14.

283. The Trial Chamber clearly was conscious that some of Witness AT's testimony was hearsay.[431] Nevertheless, the Trial Chamber evidently weighed the probative value of portions of that evidence and concluded that it was reliable for the purpose of proving the truth of its contents, in the sense of being voluntary, truthful and trustworthy.[432]

284. The Appeals Chamber finds that the manner of the Trial Chamber's admission of and reliance on Witness AT's testimony, to the extent that it was hearsay, was not erroneous, and the argument against it is dismissed.

(c) Alleged errors on circumstantial evidence

285. Kordić claims that the Trial Chamber erred in law by relying on the testimony of Witness AT to establish the details of meetings on 15 April 1993, at which Kordić was allegedly present, and that there were other reasonable inferences to be drawn from all of the evidence.[433] Kordić argues first that Witness AT's testimony was the only evidence about the existence of the meetings of 15 April 1993, and that it was indirect evidence at that. Under these circumstances two inferences were possible: one was that the meeting occurred and that Kordić was present, and the second was that it did not occur.[434] Kordić claims that as a matter of law the Trial Chamber was obliged to draw the latter inference, *in dubio pro reo*.[435]

286. The Prosecution responds that Kordić misunderstands the concept of circumstantial evidence and that the fact that there are two contradictory versions of an event does not mean that there are two equally open inferences as a result of which the Trial Chamber is obliged to acquit. It submits that even before reaching the determination of what inferences can be drawn, evidence must be accepted by the Trial Chamber, and that here the defence's evidence was rejected.[436]

287. The Prosecution further responds that in light of all the evidence, not just that of Witness AT, there was ample evidence from which to infer that the meeting of the political leadership that Kordić attended took place in the afternoon of 15 April 1993, and aimed at planning the unlawful attack on Ahmići.[437]

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[431] Trial Judgement, para. 610. The Appeals Chamber notes that Witness AT provided some direct evidence in his testimony, *inter alia* that he personally saw and met with Čerkez in the Hotel Vitez immediately after the Second Meeting, T. 27593. He also personally heard Ljubičić order an escort to accompany Kordić (together with Koštroman) back to Busovača after that meeting, T. 27596 (closed session).
[432] Trial Judgement, paras 627-630.
[433] Kordić Appeal Brief, Vol. I, p. 60.
[434] Kordić Appeal Brief, Vol. I, p. 22.
[435] Kordić Appeal Brief, Vol. I, p. 22.
[436] Prosecution Response (confidential), paras 3.116-3.117.
[437] Prosecution Response (confidential), paras 3.118-3.128.

288. The Appeals Chamber notes that the International Tribunal's law on appellate proceedings, namely whether "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt," permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial. The Appeals Chamber has recognised that such circumstances may exist where multiple reasonable findings are possible:

> [t]he Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding.[438]

289. The Appeals Chamber acknowledges that application of the standard of appellate review in the *Blaškić* Appeal Judgement may at first appear to be inconsistent with the *Čelebići* Appeal Judgement, where it was held that:

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him [….] Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[439]

290. The *Čelebići* Appeal Judgement is however to be distinguished from the findings of the Appeals Chamber in the *Blaškić* and *Krnojelac* cases. The *Čelebići* Appeal Judgement expressly states that the alternative conclusion which is also reasonably open from that evidence must be "consistent with the innocence of the accused." This is a practical application of the presumption of innocence[440], but applied only to circumstances where a conclusion of the accused's innocence is what a reasonable trier of fact could have reached beyond reasonable doubt. The inference that the Trial Chamber drew from the testimony of Witness AT is not that Kordić was innocent or guilty, and Kordić errs in characterising it that way. Rather, the Trial Chamber inferred from all of the evidence presented to it that the Accused had indeed attended and participated in the meetings of 15 April 1993 as recorded in the Trial Judgement.

### 3. Conclusion

291. In the preceding discussion, the Appeals Chamber has considered the manner in which the Trial Chamber assessed and relied upon the testimony of Witness AT. The standard of review to be applied does not require the Appeals Chamber to decide for itself whether or not this evidence is

[438] *Krnojelac* Appeal Judgement, para. 12 (emphasis in original).
[439] *Čelebići* Appeal Judgement, para. 458 (emphasis added).

reliable or corroborated; rather, it requires the Appeals Chamber to consider whether no reasonable trier of fact could have come to the conclusions of the Trial Chamber as regards Witness AT's testimony.

292. The Trial Chamber's treatment of Witness AT's testimony was thorough and cautious, and taken together with the manner in which it was relied upon at trial, the Appeals Chamber concludes that the Accused have failed to demonstrate that the Trial Chamber erred in its assessment of the credibility of that witness. The Trial Chamber did not err in its assessment of the primary circumstantial evidence corroborating Witness AT's testimony. The manner of Trial Chamber's reliance on Witness AT's testimony, to the extent that it was hearsay, was not erroneous.

293. The Appeals Chamber is conscious that the Trial Chamber did not solely rely upon the testimony of Witness AT. The Trial Chamber also took into account circumstantial evidence. The Appeals Chamber notes that the Trial Chamber meticulously analysed Witness AT's testimony and rejected parts of it. The Appeals Chamber recalls in this context that a Trial Chamber is best placed to assess a testimony and the demeanour of a witness. Based on this, the Trial Chamber primarily made the following findings: First, that Kordić was present at the First Meeting on 15 April 1993 which authorised the attack the following day, and that he thus participated in the planning of the military operations against various Lašva Valley villages. Second, that Čerkez, as Commander of the Viteška Brigade, was present at the Second Meeting.[441] Neither of these conclusions elevate Witness AT's testimony to the status of a *conditio sine qua non* for the factual conclusions of the Trial Chamber.

294. The Trial Chamber considered the probative value of Witness AT's evidence and – together with other evidence – arrived at its conclusions in a fully-reasoned and methodical manner. The Appeals Chamber has considered the arguments alleging Witness AT's evidence to be uncorroborated hearsay evidence deficient in credibility and finds that the Accused have failed to demonstrate that the Trial Chamber erred in its assessment of the evidence. The Trial Judgement reflects the prudence exercised by the Trial Chamber in accurately analysing the factual matrix surrounding the events in the Lašva Valley in mid-April 1993, and Witness AT's place within it. The arguments against the Trial Chamber's reliance upon the testimony of Witness AT are dismissed.

[440] Enshrined in Article 21(3) of the Statute.
[441] Trial Judgement, para. 631.

# V. INTERNATIONAL ARMED CONFLICT

295. Both Kordić[442] and Čerkez[443] submit that the Trial Chamber erroneously held that an international armed conflict existed during the Indictment period and consequently found them guilty of grave breaches of the Geneva Conventions of 1949 pursuant to Article 2 of the Statute. In addition, Kordić claims that no armed conflict existed before 15 April 1993, thus barring a conviction under Articles 3 and 5 of the Statute.[444] The Appeals Chamber will first examine errors allegedly made by the Trial Chamber in determining the law before scrutinizing the Trial Chamber's application of the law on the factual findings.

## A. Alleged errors in determining the law

296. Kordić and Čerkez argue that the Trial Chamber erred when it set out the legal prerequisites for the existence of an international armed conflict in Central Bosnia (Lašva Valley) at the time relevant to the Indictment.[445]

297. Čerkez submits that the Trial Chamber erroneously applied legal categories, such as "international armed conflict," and wrongly applied the *overall control* test.[446] He further submits that a crime under Article 2 of the Statute must be directed against persons or property protected under the Geneva Conventions, and that the Bosnian Muslim civilians and property in the relevant geographical and temporal scope of the Indictment did not fulfil this requirement.[447] He also argues that the Trial Chamber's interpretation of the relevant norms violates the principle of *nullum crimen sine lege*.[448]

298. Kordić submits that the Trial Chamber erred in adopting the *overall control* test when determining that an international armed conflict existed, as the application of this test instead of the *effective control* test applied by the ICJ in the *Nicaragua* Case violates the *nullum crimen sine lege* principle.[449]

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[442] Kordić Appeal Brief, Vol. I, pp 20, 122.
[443] Čerkez Appeal Brief, para. 1.
[444] Kordić Appeal Brief, Vol. I, p. 122
[445] Čerkez Appeal Brief, para. 1; Kordić Appeal Brief Vol. I, p. 122; Kordić Reply Brief, p. 65.
[446] Čerkez Appeal Brief, paras 1, 8.
[447] Čerkez Appeal Brief, para. 2.
[448] Čerkez Appeal Brief, paras 8, 11.
[449] Kordić Appeal Brief, Vol. I, pp 122-124.

1. Could the *overall control* test be considered as a part of international customary law at the time relevant to the Indictment?

299. When determining the international character of the armed conflict, the Trial Chamber applied the *overall control* test set out in the *Tadić* Appeal Judgement, according to which an armed conflict becomes international when a foreign state exercises overall control over the military forces of one of the belligerents.[450]

300. Čerkez submits that the *overall control* test applied by the Trial Chamber is broader than the *effective control* test established in the *Nicaragua* Case[451] and that, according to the *nullum crimen sine lege* principle, the Trial Chamber was not authorised to apply the *overall control* test as it had not beyond any doubt become part of international customary law.[452] He also claims that the *overall control* test has several weaknesses, chiefly confusing the criminal responsibility of the intervening State with that of its agent.[453]

301. Čerkez further argues that the *Tadić* Appeal Judgement could not have been binding on the Trial Chamber since it dealt with a wholly different conflict.[454] Referring to the Report of the Secretary-General,[455] Čerkez submits that the Trial Chamber had no authority to extensively interpret the definitions of the crimes set out in the Statute or to resort to analogy by applying new international standards.[456]

302. Kordić also submits that at the time of his alleged criminal conduct international customary law provided for the internationality of an armed conflict only if a foreign state exercised *effective* control over a military group engaged in the conflict.[457] He contends that departing from the *effective control* test means creating *ex post facto* law to his detriment and violating the principle of legality.[458]

303. Kordić argues that the *Tadić* Appeal Judgement was rendered five years after the relevant events in this case and that at that time he could not have known that the conflict would later be deemed to be of an international character.[459] He further points to the *Tadić* Trial Judgement, where the Trial Chamber applied the *effective control* test, and he asks how he could have been on

[450] Trial Judgement, paras 111-115.
[451] Čerkez Appeal Brief, para. 7.
[452] Čerkez Reply Brief, para. 10.
[453] Čerkez Appeal Brief, para. 7.
[454] Čerkez Appeal Brief, para. 8.
[455] Report of the Secretary-General, paras 34-35.
[456] Čerkez Appeal Brief, para. 8.
[457] Kordić Appeal Brief, Vol. I, pp 122-123; Kordić Reply Brief, pp 62-63.
[458] Kordić Reply Brief, pp 62-64.
[459] Kordić Appeal Brief, Vol. I, p. 124.

notice that the conflict was international in character in 1993 and 1994 if there was disagreement on that issue within the International Tribunal itself.[460]

304. The Prosecution responds that the Appeals Chamber in *Čelebići* found that the International Tribunal is not bound by the precedents of the ICJ.[461] It submits that the Appeals Chamber in *Tadić* found that the *overall control* test[462] was not a novelty or replacement of a pre-existing test, but a more accurate interpretation of the same information on the basis of which the ICJ enunciated the *effective control* test in 1986. Thus, according to the Prosecution, the *overall control* test constituted the law applicable both in 1986 and from 1991 to 1994.[463]

305. The Prosecution further submits that the principle of legality does not demand that an accused be thoroughly familiar with the exact legal definition of the offence he is about to commit.[464] What was required under the law applicable in 1991 to 1994 was to put Kordić on fair notice that in the event an armed conflict was characterised as international under the applicable test at the time, certain of his acts would constitute grave breaches of the Geneva Conventions.[465]

306. The *Tadić* Appeal Judgement addressed in detail the circumstances under which armed forces may be regarded as acting on behalf of a foreign state, thereby rendering the armed conflict international. The Appeals Chamber in that case determined the elements of a foreign state's *overall control* over such armed forces:

> [C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). […] The control required by international law may be deemed to exist when a State […] *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.[466]

307. The Appeals Chamber confirmed this reasoning in *Aleksovski* and reiterated that the *effective control* test, as set out by the ICJ in the *Nicaragua* Case, is not persuasive.[467] The Appeals Chamber does not see any reason to depart from this settled jurisprudence.

308. The *Tadić* Appeal Judgement initially held that:

> [one] should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up *an organised and hierarchically structured group*,

[460] Kordić Appeal Brief, Vol. I, p. 124.
[461] Prosecution Response, para. 6.6 (referring to *Čelebići* Appeal Judgement, paras 21, 24).
[462] Prosecution Response, para. 6.6 (referring to *Tadić* Appeal Judgement, paras 116-145).
[463] Prosecution Response, para. 6.6.
[464] Prosecution Response, para. 6.8.
[465] Prosecution Response, para. 6.9.
[466] *Tadić* Appeal Judgement, para. 137.
[467] *Aleksovski* Appeal Judgement, paras 131-134. This finding was upheld by the Appeals Chamber in the *Čelebići* Appeal Judgement, para. 26.

> such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.[468]

The Appeals Chamber agrees with this analysis.

309. The Appeals Chamber also found in *Tadić* that the *Nicaragua* judgement was at variance with judicial and state practice and held that "[i]n cases dealing with members of *military or paramilitary* groups, courts have clearly departed from the notion of "effective control" set out by the International Court of Justice".[469] By citing jurisprudence on a national, regional and international level, the Appeals Chamber held that:

> [i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. […] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[470]

310. The Appeals Chamber concurs with this reasoning. It must be stressed that the Appeals Chamber in *Tadić* did *not* create new law, as held in the *Aleksovski* Appeal Judgement:

> [t]he Appeals Chamber wishes to clarify that when it interprets Article 2 of the Statute, it is merely identifying what the proper interpretation of that provision has always been, even though not previously expressed that way.[471]

Accordingly, it is of no legal relevance in this regard that the *Tadić* Appeal Judgement was rendered *after* the time of the events set out in the Indictment.[472]

311. The *nullum crimen sine lege* principle does not require that an accused knew the specific *legal* definition of each element of a crime he committed. It suffices that he was aware of the *factual* circumstances, *e.g.* that a foreign state was involved in the armed conflict. It is thus not required that Kordić could make a correct legal evaluation as to the international character of the armed conflict. Consequently, it is irrelevant whether Kordić believed that the *effective control* test constituted international customary law.

312. The Appeals Chamber moreover reiterates that:

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[468] *Tadić* Appeal Judgement, para. 120 (emphasis in the original). Note that a different test is required in situations where individuals or groups are not organized into (para)military structures, *cf. Tadić* Appeal Judgement, paras 118-119.
[469] *Tadić* Appeal Judgement, para. 125.
[470] *Tadić* Appeal Judgement, para. 131.
[471] *Aleksovski* Appeal Judgement, para. 135.
[472] See also *Aleksovski* Appeal Judgement, paras 126-127; *Blaškić* Appeal Judgement, para. 181; *cf. Čelebići* Appeal Judgement, para. 173 and *Ojdanić* Appeal Decision on Joint Criminal Enterprise, paras 34-39.

> [w]hat is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision.[473]

The question of when an armed conflict can be characterised as being international is of an abstract legal nature and not *per se* related to the factual findings of a case. It is therefore of no significance that the Appeals Chamber's findings in *Tadić*, relating to the *legal* definition of the existence of an international armed conflict, were applied in a different *factual* context.

313. For the reasons set out above, the Trial Chamber did not err in law when it applied the *overall control* test for the determination of the international character of the armed conflict in Central Bosnia.

2. The geographical scope when determining the international character of an armed conflict

314. In relation to the question of whether Croatian troops directly intervened in the armed conflict in Central Bosnia, the Trial Chamber held that "all that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part."[474] It found that it was not barred from using evidence that pointed to the presence of Croatian troops in areas outside of Central Bosnia, "if the location of those areas is of strategic significance to the conflict."[475]

315. In its factual findings the Trial Chamber assessed the evidence accordingly:

> What is required in relation to the first criterion of determining the international character of an armed conflict, is proof of Croatian intervention in the conflict. This proof may come, not only from evidence of Croatian troops in Central Bosnia, but also from evidence of those troops in neighbouring areas of strategic importance to the conflict in Central Bosnia.[476]

It then found that "the conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina was internationalised by the intervention of Croatia in that conflict through its troops."[477]

316. Čerkez submits that the evidence did not prove that the HV fought Bosnian Muslims in the Lašva Valley. He claims that contact between the HV and the HVO was not possible and argues

[473] *Aleksovski* Appeal Judgement, para. 110.
[474] Trial Judgement, para. 27.
[475] Trial Judgement, paras 70-72.
[476] Trial Judgement, para. 108.1.
[477] Trial Judgement, para. 109.

that the Trial Chamber wrongly held that it would be artificial to narrow the inquiry of the *loci delicti commissi* to Central Bosnia.[478]

317. Kordić likewise submits that the Trial Chamber erred in concluding that the presence or impact of Croatian troops elsewhere in Bosnia made the armed conflict international in character.[479]

318. The Prosecution responds that the Trial Chamber properly interpreted the jurisprudence of the Appeals Chamber by holding that its inquiry regarding the presence of Croatian troops should not be limited to Central Bosnia.[480] It argues that the Trial Chamber was correct when it put the emphasis on the organisational aspect of the control over the HVO rather than on the geographical aspect.[481]

319. The Appeals Chamber recalls that the *Tadić* Appeal Decision on Jurisdiction explained that "the very nature of the [Geneva] Conventions – particularly [Geneva] Conventions III and IV – dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose."[482] It further held that in the case of an armed conflict, until a peaceful settlement is achieved, "international humanitarian law continues to apply in the *whole* territory of the warring States […], whether or not actual combat takes place there."[483] It concluded that "[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[484] The Appeals Chamber also held that "the conflicts in the former Yugoslavia have both internal and international aspects."[485]

320. In the light of these findings, the Appeals Chamber holds that the Trial Chamber correctly found that:

> [t]he determination as to whether the conflict is international or internal has to be made on a case-by-case basis, that is, each case has to be determined on its own merits, and accordingly, it would not be permissible to deduce from a decision that an internal conflict in a particular area in Bosnia was internationalised that another internal conflict in another area was also internationalised. However, it would be wrong to construe the Appeals Chamber's Decision as meaning that evidence as to whether a conflict in a particular locality has been internationalised must necessarily come from activities confined to the specific geographical area where the crimes were committed, and that evidence of activities outside that area is necessarily precluded in determining that question.[486]

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[478] Čerkez Appeal Brief, para. 6.
[479] Kordić Appeal Brief, Vol. I, p. 127.
[480] Prosecution Response, paras 6.15-6.20.
[481] Prosecution Response, para. 6.13.
[482] *Tadić* Appeal Decision on Jurisdiction, para. 68.
[483] *Tadić* Appeal Decision on Jurisdiction, para. 70 (emphasis added).
[484] *Tadić* Appeal Decision on Jurisdiction, para. 70.
[485] *Tadić* Appeal Decision on Jurisdiction, para. 77.
[486] Trial Judgement, para. 70.

321. This reasoning is supported by the purpose of the Geneva Conventions. Once an armed conflict has become international, the Geneva Conventions apply throughout the respective territories of the warring parties. Accordingly, the Trial Chamber did not err by taking into account the situation in other areas within Bosnia and Herzegovina linked to the armed conflict in Central Bosnia when examining the international character of the armed conflict.

### 3. The determination of the status of "protected persons"

322. The Trial Chamber followed the Appeals Chamber's judgements in *Tadić*, *Aleksovski* and *Čelebići* and held that in determining the protected status of a person pursuant to Article 4 of Geneva Convention IV, it was not bound by the common citizenship of both perpetrators and victims and could instead apply the *allegiance* test,[487] which provides that nationality is not as crucial as allegiance to a party to the armed conflict.[488]

323. It also held that if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV applies.[489]

324. Čerkez submits that the Trial Chamber erred in applying the *allegiance* test and argues that any such teleological interpretation of Geneva Convention IV violates the *nullum crimen sine lege* principle. He claims that Article 4 of Geneva Convention IV requires different nationalities of the perpetrator and his victim,[490] and submits that the definition of "protected persons" should not vary depending on the circumstances of a case, arguing that in the present case the Bosnian Muslim victims and the Bosnian Croat perpetrators were nationals of the same state, *i.e.* Bosnia and Herzegovina.[491] He argues that international customary law demands the application of the *agent* test, *i.e*. that the members of the seceding entity could be assessed as nationals of a foreign state only if there was proof of union or identity between the seceding entity and the foreign state.[492]

325. Čerkez further argues that the Trial Chamber erred in finding that the Bosnian Muslims were automatically considered to be in the hands of Croatia if Croatia indeed participated in the conflict.[493]

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[487] Trial Judgement, paras 152-153.
[488] *Cf. Tadić* Appeal Judgement, para. 166.
[489] Trial Judgement, para. 150.
[490] Čerkez Appeal Brief, para. 11.
[491] Čerkez Reply Brief, para. 10.
[492] Čerkez Appeal Brief, para. 12.
[493] Čerkez Appeal Brief, para. 12.

326. The Prosecution submits that the *allegiance* test is unassailable and that the Trial Chamber arrived at it neither on the basis of a wrong legal principle nor *per incuriam*.[494] The Prosecution notes that the Appeals Chamber reaffirmed the *allegiance* test in both *Aleksovski* and *Čelebići*.[495]

327. It further argues that the conclusion that the Bosnian Muslims were protected persons, because they were in the hands of Croatia exercising overall control over the Bosnian Croats, is "less a new understanding of the protected status than a matter of relevant provisions of the Geneva Conventions operating towards their logical conclusion."[496]

328. The Appeals Chamber notes that this issue has been thoroughly discussed in four Appeal judgements.[497] In these decisions the Appeals Chamber rejected arguments that the victims of grave breaches of Geneva Convention IV should be excluded from the status of "protected persons" according to a strict construction of the language of its Article 4. Likewise, the Appeals Chamber rejected allegations that its interpretation of this norm violates the principle of legality.[498]

329. The Appeals Chamber reiterates that:

> […] depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions.[499]

330. It finds that Article 4 of Geneva Convention IV cannot be interpreted in a way that would exclude victims from the protected persons status merely on the basis of their common citizenship with a perpetrator. They are protected as long as they owe no allegiance to the Party to the conflict in whose hands they find themselves and of which they are nationals.

331. The Appeals Chamber notes that in *Blaškić*, the Appeals Chamber cited paragraphs 150 and 151 in the *Aleksovski* Appeal Judgement to stand for the holding that protected person status may be established simply by virtue of the international nature of the conflict. The Appeals Chamber finds that the citation of those paragraphs was in fact a paraphrase of the Prosecution's submission, which, although generally accepted by the Appeals Chamber in *Aleksovski*, was not the reasoning actually applied. Rather, the Appeals Chamber in *Aleksovski*, as the Appeals Chamber does here,

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[494] Prosecution Response, paras 6.24-6.25.
[495] Prosecution Response, para. 6.24.
[496] Prosecution Response, para. 6.27.
[497] *Tadić* Appeal Judgement, paras 163-166; *Aleksovski* Appeal Judgement, paras 151-152; *Čelebići* Appeal Judgement, paras 56-84; *Blaškić* Appeal Judgement, paras 180-182.
[498] *Cf. Blaškić* Appeal Judgement, para. 181.
[499] *Čelebići* Appeal Judgement, para. 81.

ultimately rested its decision for determining protected person status on the *allegiance* test set out in the *Tadić* Appeal Judgement.[500]

## B. Alleged errors in applying the law

332. The Appeals Chamber turns now to an examination of the Trial Judgement in relation to the correct assessment of the evidence under the relevant law.

### 1. Did an armed conflict exist in Central Bosnia before April 1993?

333. The Trial Chamber held that:

> while it was not until April 1993 that a generalised state of armed conflict in the form of protracted violence broke out in the territory of Central Bosnia between the HVO and the ABiH, prior to that period there were localised areas of conflict, within which a state of armed conflict could be said to exist.[501]

334. Kordić submits that the Trial Chamber did not make a factual finding as to the existence of an armed conflict in Central Bosnia prior to 15 April 1993.[502] He argues that the wording of the Trial Judgement in paragraph 31 suggests that protracted violence in the region occurred only after this date.[503]

335. The Prosecution submits that the Trial Chamber found that by reason of Croatia's intervention there was a resort to armed force between States even before April 1993. Therefore, it was not necessary for the Trial Chamber to determine the existence of internal protracted violence.[504] Alternatively, the Prosecution argues that the protracted violence threshold has been met, because two organised military formations were engaged in high-intensity combat operations in Novi Travnik in October 1992 and in Busovača in January 1993.[505]

336. In relation to the period prior to January 1993, the Trial Chamber referred to an "incidence of violent clashes", not to an armed conflict.[506] However, the Appeals Chamber considers that the wording of paragraph 31 of the Trial Judgement is unambiguous in that although the Trial Chamber held that there was no *generalised* state of armed conflict prior to April 1993, it also found that there were *localised* areas in which a state of armed conflict existed. Moreover, the Trial Chamber

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[500] *Aleksovski* Appeal Judgement, para. 152. See also *Blaškić* Appeal Judgement, paras 172-173, 175.
[501] Trial Judgement, para. 31.
[502] The Appeals Chamber notes that Kordić used at times 16 April 1993 as the relevant date in his fifth ground of appeal, at times 15 April 1993 (*cf.* Kordić Appeal Brief, Vol. I, p. 122). This distinction, however, is of no relevance in relation to the events in Novi Travnik in October 1992 and Busovača in January 1993.
[503] Kordić Appeal Brief, Vol. I, p. 122; Appeals Hearing, T. 316.
[504] Prosecution Response, para. 6.3.; Appeals Hearing, T. 387.
[505] Appeals Hearing, T. 388.
[506] Trial Judgement, para. 29.

explicitly used the phrase "armed conflict" and cited the *Tadić* Appeal Decision on Jurisdiction.[507] This shows that it applied the concept of "armed conflict" as defined by the Appeals Chamber there:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[508]

337. The Trial Chamber accepted that fighting broke out in Novi Travnik when the HVO attacked an ABiH unit on 19 October 1992, and that the conflict lasted until 26 October 1992.[509] During this conflict, civilian buildings owned by Bosnian Muslims were set on fire or demolished.[510] The Trial Chamber also accepted Col. Stewart's evidence that he found heavy fighting going on in Novi Travnik on the afternoon of 20 October 1992,[511] and the message sent by Kordić and Blaškić to the HVO Bugojno referring to the information that two ABiH battalions were moving from Bugojno towards Novi Travnik on 24 October 1992.[512] The Trial Chamber further relied on Col. Stewart's evidence that cease-fire negotiations were conducted after the outbreak of the conflict.[513]

338. The Trial Chamber held that on 19 October 1992, the TO put up a barricade in Ahmići in order to prevent HVO reinforcements reaching Novi Travnik. Ivica Šantić and Čerkez unsuccessfully negotiated with the Muslim side the removal of the barricade, which was then attacked by the HVO. On 22 October 1992, a general cease-fire for the Vitez municipality was signed by, *inter alia*, Čerkez on behalf of the HVO HQ.[514] The Trial Chamber held that the conflict in Novi Travnik had repercussions in Vitez, because a witness saw 27 HVO members from Vitez together with an anti-aircraft gun leaving in the direction of Novi Travnik on 19 October 1992.[515] Furthermore, the Trial Chamber found that the HVO had met "significant opposition" when taking control of Novi Travnik and Ahmići.[516]

339. With regard to Busovača, the Trial Chamber found "that the first really serious conflict in the war between Bosnian Croats and Muslims" occurred in this location.[517] On 24 January 1993, an exchange of fire took place at the Kaćuni checkpoint between the HVO and the ABiH during which

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[507] Trial Judgement, para. 24.
[508] *Tadić* Appeal Decision on Jurisdiction, para. 70.
[509] Trial Judgement, para. 526, referring to Witness C who testified on "intensive combat activity", T. 792-93.
[510] Trial Judgement, para. 526.
[511] Trial Judgement, para. 527 (it is not clear whether the Trial Chamber accepted Witness AT's testimony that the Commander of the military police sent a group as reinforcements to Novi Travnik, T. 27571).
[512] Trial Judgement, para. 528, referring to Exh. Z249.
[513] Trial Judgement, para. 529, referring to T. 12356.
[514] Trial Judgement, para. 533.
[515] Trial Judgement, para. 535.
[516] Trial Judgement, para. 537.
[517] Trial Judgement, para. 565.

two Croats were killed.[518] On 25 January 1993, the HVO attacked Kadića Strana, the Muslim part of Busovača, and there was shooting and shelling from surrounding hills.[519] The Trial Chamber accepted the evidence of Witness AS, a Bosnian Muslim member of the Jokers participating in the fighting, that the military police, units of the Ludvig Pavlović Brigade and companies of the Viteška Brigade and the Vitezovi were involved.[520] The Trial Chamber appears to find that the attack in Busovača resulted in at least 27 deaths.[521] It accepted Witness AS's testimony that "the campaign required huge logistical efforts and preparation and, for many days before its start, trucks laden with armaments and ammunition were being sent from Novi Travnik to Busovača".[522] On 30 January 1993, a cease-fire agreement was arranged under the auspices of the ECMM and UNPROFOR, and it was reaffirmed on 1 February 1993.[523]

340. The Trial Chamber accepted the report of UNPROFOR HQ in Kiseljak that the Bosnian Croat political and military leaders had made "a grab for control of provinces 3, 8 and 10", province 10 including – according to the Vance-Owen Peace Plan – the municipality of Busovača.[524] The Trial Chamber also relied on Witness A's evidence that the fighting spread to the whole territory of Busovača, including the village of Merdani, where buildings were destroyed and the population was evacuated.[525] On 25 January 1993, a fire fight took place at Kaonik junction, HVO soldiers fired at civilian houses in Kaćuni, and the fighting between the HVO and the ABiH continued until nightfall.[526] On 26 January 1993, the HVO fired three rounds of heavy artillery fire at a bridge in Kaćuni, and in Donje Polje HVO soldiers were leaving houses which then caught fire, with destruction along the road to Kaćuni.[527]

341. The Appeals Chamber finds that the evidence assessed by the Trial Chamber shows the existence of an armed conflict prior to April 1993. The requirement of *protracted* fighting is significant in excluding mere cases of civil unrest or single acts of terrorism. Even before April 1993, the conflict in Central Bosnia could not be subsumed under these categories. At any rate, in the time following October 1992 there was serious fighting for an extended period of time. This finding of the Trial Chamber is upheld.

[518] Trial Judgement, para. 568, referring to Exh. Z461.
[519] Trial Judgement, para. 569.
[520] Trial Judgement, para. 571.
[521] Trial Judgement, para. 570.
[522] Trial Judgement, para. 571, referring to Witness AS, T. 16355.
[523] Trial Judgement, para. 580 (g), (h).
[524] Trial Judgement, paras 574, 576.
[525] Trial Judgement, para. 572 (Witness A, T. 354-56).
[526] Trial Judgement, para. 573.
[527] Trial Judgement, para. 573.

2. Was the armed conflict in Central Bosnia international?

342. The Trial Chamber held that the armed conflict in Central Bosnia was of an international character,[528] owing both to Croatia's direct intervention[529] and its overall control of the HVO.[530]

343. Kordić submits that even under the *overall control* test, there was not enough evidence to establish a sufficient degree of participation by Croatia to render the armed conflict in Central Bosnia international.[531] He argues that the Trial Chamber did not make any finding as to an engagement of HV units vis-à-vis the ABiH before 15 April 1993.[532]

344. Čerkez concedes that at the time and place covered by the Indictment an armed conflict occurred in Central Bosnia,[533] but submits that it was not internationalised. He argues that the mere presence of the HV in other parts of Bosnia-Herzegovina should not be considered:[534] if Croatia intervened, it was against the Serb forces, the JNA and the BSA in 1992 and not against the Bosnian Muslims in the first half of 1993.[535] According to Čerkez, this happened with the acquiescence of the President of the Presidency of Bosnia and Herzegovina.[536] Likewise, he denies that the fighting of HV troops against Serbs outside Central Bosnia had a strategic importance on the armed conflict between the Bosnian Croats and the Bosnian Muslims.[537]

345. Čerkez further submits that the fact that Croatia gave logistic support to both the HVO and the ABiH demonstrated that there was no international armed conflict.[538]

346. He also argues that neither Croatia nor Bosnia and Herzegovina proclaimed or recognised a state of war between them, and that the Permanent Representative of Bosnia and Herzegovina wrote in a letter to the President of the UN Security Council a few days after the killings in Ahmići that this was "a conflict between local leaders", affirming the alliance between the HVO and the ABiH. Čerkez argues that there is no international armed conflict if all belligerent parties deny the existence of it, thus lacking the *animus belligerandi*.[539]

[528] Trial Judgement, para. 146.
[529] Trial Judgement, para. 109.
[530] Trial Judgement, para. 145.
[531] Kordić Appeal Brief, Vol. I, pp 125-27.
[532] Kordić Reply (confidential), pp 60-61.
[533] Čerkez Appeal Brief, paras 5, 14.
[534] Čerkez Appeal Brief, para. 2, footnote 12.
[535] Čerkez Appeal Brief, para. 3.
[536] Čerkez Appeal Brief, para. 4.
[537] Čerkez Appeal Brief, paras 5-6.
[538] Čerkez Appeal Brief, para. 9.
[539] Čerkez Appeal Brief, para. 13.

347. Čerkez further argues that additional tests may assert the existence of an international armed conflict, such as the rupture of diplomatic relations or bilateral and international treaties.[540] He submits that throughout the period of the armed conflict in Central Bosnia there was no deterioration in the relations between Bosnia and Herzegovina and Croatia; even shipments of arms and support passed through Croatia for the ABiH.[541]

348. Čerkez also maintains that there was no partial or total occupation by HV units in Bosnia and Herzegovina in 1993, as they did not establish their own administration on any portion of its territory and/or performed or violated their rights and obligations as an occupying power pursuant to the Hague Regulations.[542]

349. The Prosecution submits that there is sufficient evidence that Croatia provided financial and training assistance and military support to the HVO and also participated in the co-ordination and planning of HVO operations.[543]

350. The Appeals Chamber observes that the appealed counts relate to the period between October 1992 and September 1993, and will thus focus on this period when examining the finding that the conflict was international.

351. The Trial Chamber held that Croatia's support of the Bosnian Croats in their armed conflict with the Serbs gave relief to the Bosnian Croats in their "overlapping" conflict with the Bosnian Muslims.[544] Thus, the Trial Chamber found that the conflict between Bosnian Croats and Bosnian Muslims in Bosnia and Herzegovina became international in character by the intervention of Croatian army troops in that conflict.[545]

352. The Trial Chamber was satisfied that although no Croatian army troops were sighted in Central Bosnia, there were several sightings of such troops in bordering areas which were of strategic importance to the conflict.[546] The Trial Chamber relied particularly on the reports produced by military monitoring organisations which were prepared on the basis that Croatian army forces were participating in the conflict between the Bosnian Muslims and the Bosnian Croats; most of these reports, however, did not deal with the situation before January 1993.[547] One exception is

[540] Čerkez Appeal Brief, para. 15.
[541] Čerkez Appeal Brief, para. 15.
[542] Čerkez Appeal Brief, para. 13.
[543] Prosecution Response, para. 6.12.
[544] Trial Judgement, paras 73-78, referring to an ECMM report dated 3 June 1993 and a report from the Spanish Battalion of the Rapid Action Forces, dated January 1994. See also Trial Judgement, paras 108(1)-108(2).
[545] Trial Judgement, para. 109.
[546] Trial Judgement, para 84, referring to Witness Buffini, T. 9311-13; who refers to February 1993, and para. 108.1.
[547] See Trial Judgement, paras 85-86, 88-89. Note that the Trial Chamber actually held the conflict to be international in the period between November 1991 and March 1994, para. 28.

the evidence given by Major Rule[548] who testified that some time before Christmas 1992, his subordinates had reported seeing regular troops with an HV badge (Tiger) at the checkpoint Makljen, a high pass to the south of Gornji Vakuf which was the only route from Prozor into Gornji Vakuf.[549]

353. In addition to the evidence stemming from reports produced by military monitoring organisations, the Trial Chamber also relied on reports to and from the United Nations covering the period in which the armed conflict took place in Busovača. A report of the Secretary-General of the United Nations, dated 18 January 1993, noted that "UNPROFOR had also confirmed that elements of the Croatian army [HV] are deployed in certain parts of BiH", continuing, however, that representatives of the HV stated that their presence was "only in those areas from which attacks have been made on Croatian territory and that they would be removed as soon as they [the attacks] ceased".[550] No further detail was given as to the areas in which the Croatian soldiers were deployed.

354. The Trial Chamber further relied on an order of the Zenica HVO headquarters dated 26 November 1992 requiring HV members in Bosnia and Herzegovina to remove their HV insignia "as this creates trouble for the Republic of Croatia"; and an order from the 3rd HVO Battalion dated 9 December 1992 according to which HV members were to wear HVO insignia during their "deployment in our area".[551]

355. The Appeals Chamber finds that on the basis of this evidence, even taking into account that there was no requirement for Croatian troops to be present in Central Bosnia, that no reasonable trier of fact could have found that Croatia *directly* intervened in the armed conflict in Central Bosnia.

356. The Trial Chamber itself admitted to the weakness of some of the evidence: in summarizing two of the four groups of evidence it relied on (reports to and from the United Nations; other reports, including death notices), the Trial Chamber stated that the evidence in these two groups alone did not prove the presence of Croatian troops; only when taken together with the evidence of the other two groups (reports of military monitoring bodies; HVO documents) did this evidence become relevant in the view of the Trial Chamber.

[548] He served in Bosnia and Herzegovina in late 1992 and early 1993.
[549] Trial Judgement, para. 87.
[550] Trial Judgement, para. 92.
[551] Trial Judgement, paras 97.2-97.3.

357. As for the reports of military monitoring bodies, the Appeals Chamber finds that the testimony given by witnesses and the information gained from the reports appear to be inconsistent. Similarly, the Trial Chamber noted the discrepancy in the number of Croatian soldiers that were actually seen in Bosnia.[552]

358. In relation to the reports to and from the United Nations, the Appeals Chamber takes note of the broad period of time covered in these reports and their lack of specificity. The Appeals Chamber also notes that the Trial Chamber did not specify the exact period in which it believed there was direct Croatian intervention.

359. Moreover, the Appeals Chamber finds inconclusive the content of the orders given by various HVO units. The fact that members of the HV were in the service of the HVO does not imply without doubt that they were there on the direct order of Croatia. Indeed, the Trial Chamber considered this problem but nevertheless decided otherwise.[553]

360. The Appeals Chamber is aware that deference is due to these findings by the Trial Chamber, which under the Statute has the primary responsibility for hearing and evaluating the evidence presented before it.[554] However, the evidence is inadequate to an extent that a reasonable trier of fact could not have established beyond reasonable doubt that Croatian troops were indeed sent to Central Bosnia.

361. The Appeals Chamber now turns to the question of whether the HVO acted on behalf of Croatia. It will examine whether the Trial Chamber erroneously held that these criteria were satisfied and thus Croatia exercised overall control over the HVO:

a) The provision of financial and training assistance, military equipment and operational support;

b) Participation in the organisation, coordination or planning of military operations.[555]

362. The Trial Chamber relied on a chart detailing shipments of military equipment from Croatia to the HVO and the ABiH in 1992, 1993 and 1994,[556] and a recommendation from the Vitez Military District Office for Defence for a soldier who, as a member of the Vitez HVO in the territory of Vitez municipality and Central Bosnia, had carried out logistic support for the armed

[552] Trial Judgement, para. 90. The Trial Chamber held that even if some of the Croatians involved in the struggle between Bosnian Muslims and Bosnian Croats "were volunteers and their presence is discounted, this would not affect the general finding by the Trial Chamber that there were Croatian troops involved in the conflict," Trial Judgement, para. 108.3.
[553] Trial Judgement, para. 108.3.
[554] *Cf. Kupreškić et al.* Appeal Judgement, para. 29; *Krnojelac* Appeal Judgement, para. 12.
[555] Trial Judgement, paras 115 (referring to *Tadić* Appeal Judgement, para. 137), 145.
[556] Exh. Z2497.2.

forces of Croatia between 1 March 1992 and 16 April 1993.[557] The Trial Chamber also relied on a second recommendation from the Vitez Military District Office for Defence for another soldier who, as commander of the Municipal Communications Centre, *inter alia*, "participated in the implementation of logistics communications of the Ministry of Defence of the Republic of Croatia for purposes of HV logistics support to Kiseljak HVO units" from April 1992 until 1993.[558]

363. The Trial Chamber moreover considered orders by the Ministry of Defence of Croatia to provide military supplies to the HVO in Bugojno,[559] a receipt for military hardware provided to the municipal headquarters in Vareš by the Croatian Army Logistics Corps,[560] and a certificate by the Croatian Army confirming the delivery of artillery to Bugojno.[561] The Trial Chamber also relied on an order by Col. Blaškić that set out instructions regarding the passage of military goods from Croatia to Central Bosnia.[562] All of these documents date from 1992. The Trial Chamber also referred to several documents relating to the provision of training assistance from Croatia to the HVO and the cooperation between Croatia and the HVO in relation to the wounded and sick.[563]

364. The Trial Chamber further relied on Witness AS who had testified that around 20 October 1992 he noticed that uniforms, vehicles and other supplies had been provided to the HVO in Central Bosnia by Croatia.[564] Furthermore, it considered an order from Blaškić to the HVO Vitez unit, dated 24 July 1992, referring to the training of HVO reconnaissance units in Croatia.[565]

365. The Trial Chamber was satisfied that General Bobetko, commander of all Croatian army units on the southern front of Croatia – bordering Bosnia and Herzegovina – since 10 April 1992, appointed officers to the defence command of Tomislavgrad "in order to achieve effective, operational and secure command in the units of the HVO of the Croatian Community of Herceg-Bosna".[566] The Trial Chamber found that "although the evidence relating to General Bobetko covers a period prior to the outbreak of the armed conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina, the Chamber is satisfied that General Bobetko's influence and leadership continued throughout that conflict."[567] Furthermore, the Trial Chamber observed that the *Blaškić* Trial Judgement attached significant weight to General Bobetko's role

[557] Exh. Z2487.
[558] Exh. Z2490.
[559] Trial Judgement, para. 120.
[560] Trial Judgement, para. 119, referring to Exh. Z2374.1.
[561] Trial Judgement, para. 119, referring to Exh. Z2376.1.
[562] Trial Judgement, para. 119, referring to Exh. Z2377.
[563] Trial Judgement, paras 122-123.
[564] Trial Judgement, para. 116 (Witness AS, T. 16349). The Trial Chamber also relied on the testimony of Ismet Šahinović, but it is not clear whether his evidence relates to either October 1992 or January 1993, see T. 1037.
[565] Trial Judgement, para. 121, referring to Exh. Z2374; see also Exh. Z2386.
[566] Trial Judgement, para. 125, Exh. Z2360.6.
[567] Trial Judgement, para. 126.

when determining this issue.[568] The Appeals Chamber notes that General Bobetko used an HVO document to make this order.[569]

366. The Trial Chamber also relied on Witness CW1, a high-ranking officer in the HVO from April 1992 to April 1994, who stated that part of his salary was paid by the Croatian government.[570] He also testified that in 1992 it was "logical" for General Bobetko to send his people "to monitor the situation and to act as coordinators, because if the front line at Livno collapsed, the whole of southern Croatia would have been lost".[571]

367. The Trial Chamber also found that President Tuđman harboured hopes to expand Croatia into Bosnia and Herzegovina to encompass areas with a majority Bosnian Croat population. This finding is based on, *inter alia*, the testimony of expert witness Dr. Allcock, President Tuđman's speeches, and the testimony of Paddy Ashdown.[572]

368. Furthermore, the Trial Chamber found that the ties between President Tuđman and the leadership of the HDZ-BiH and the HZ-BiH were strong throughout the conflict, observing that Stjepan Kljuić, the first leader of the HDZ-BiH, testified that he was forcibly removed and replaced by Mate Boban in October 1992, who said "what many people in Zagreb wanted to hear".[573]

369. The Appeals Chamber finds that on the basis of the evidence set out above a reasonable trier of fact could have found beyond reasonable doubt that Croatia exercised overall control over the HVO at the relevant time.[574]

370. A reasonable trier of fact could rely on the evidence, viewed in its entirety, when concluding that Croatia supplied logistic support to the HVO, beginning in 1992.

371. Likewise, the Trial Chamber reasonably based its finding that Croatia provided leadership in the planning, coordination and organisation of the HVO on reliable evidence. The Appeals Chamber notes that the Trial Chamber considered a multitude of factors when making its analysis. It not only assessed the broad political context of President Tuđman's territorial ambitions, but also included several other elements in its analysis, such as General Bobetko's involvement and the payments made by Croatia towards the salary of Witness CW1, all of which indicate Croatian involvement in the HVO's organisation.

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[568] Trial Judgement, para. 126, referring to *Blaškić* Trial Judgement, para. 112.
[569] Exh. Z2360.6.
[570] Trial Judgement, para. 127.
[571] Trial Judgement, para. 131.
[572] Trial Judgement, paras 133-138.
[573] Trial Judgement, para. 139.
[574] See *Blaškič* Appeal Judgement, para. 175.

372. Furthermore, while the Appeals Chamber takes into account that Croatia provided logistical support to the forces of both the HVO and the ABiH, it must be noted that this support was made in relation to two different armed conflicts, *i.e*. the one of the HVO and the ABiH against the Serbs, and the one between the HVO and the ABiH. The Appeals Chamber finds that the provision of assistance to both parties does not affect the question of whether Croatia participated in the organisation, coordination or planning of military operations by the HVO. It may well be that Croatia, for strategic or other reasons, logistically supported two parties in the larger Bosnian conflict – although these parties at some point fought against each other – and still only controlled one of them, *i.e*., the HVO.

373. Last, the Appeals Chamber turns to the argument that there was no international armed conflict between Croatia and Bosnia and Herzegovina because they denied the existence of a state of war between them. Without prejudice to the factual veracity of this claim, the Appeals Chamber finds any such argument irrelevant. Article 2 of Geneva Convention IV speaks of "armed conflict […] between two or more of the High Contracting Parties, even if the state of war is not recognised by *one* of them."[575] However, this article cannot be interpreted to rule out the characterisation of the conflict as being international in a case when *none* of the parties to the armed conflict recognises the state of war. The purpose of Geneva Convention IV, *i.e*. safeguarding the protected persons, would be endangered if States were permitted to escape from their obligations by denying a state of armed conflict. The Appeals Chamber recalls that "[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."[576]

374. For the reasons set out above, the Appeals Chamber upholds the Trial Chamber's finding that the armed conflict between the HVO and the ABiH was international in character.

### 3. Was Article 4(2) of the Geneva Convention IV applicable?

375. With regard to the protected persons requirement, Čerkez submits that Bosnian Muslim civilians who were victimised by Bosnian Croats would still not be protected persons under the Geneva Conventions because Croatia and Bosnia and Herzegovina were in an alliance, fighting the Bosnian Serbs and the JNA.[577]

376. The Appeals Chamber notes that the Trial Chamber reasonably came to the conclusion that the conflict between the HVO and the ABiH was international, due to Croatia's overall control over

[575] Geneva Convention IV, Art. 2 (emphasis added).
[576] *Cf.* Commentary to Geneva Convention IV, p. 21.
[577] Čerkez Appeal Brief, para. 12.

the HVO. Croatia and Bosnia and Herzegovina could therefore be considered belligerents, pursuant to Article 4(2) of Geneva Convention IV. This, in itself, establishes that they were not in alliance as co-belligerents within the meaning of Article 4(2) for the purpose of crimes arising out of the conflict in Central Bosnia.[578]

377. The Trial Chamber did therefore not err in holding that the Bosnian Muslims were protected persons under Article 4 of Geneva Convention IV.

### C. **Conclusion**

378. Čerkez's first and Kordić's fifth ground of appeal are dismissed in their entirety.

[578] *Cf. Blaškić* Appeal Judgement, paras 185-187.

# VI. THE CRIMES

## A. Introduction

379. Kordić submits that the Trial Chamber committed both an error of law invalidating the Judgement and an error of fact occasioning a miscarriage of justice when concluding that he committed war crimes and persecutions and that he can be held responsible for unlawful detention.[579]

380. Kordić argues that the Trial Chamber committed errors of law by failing to make explicit findings and to give a "reasoned explanation" with respect to each necessary element of each crime charged. Kordić submits that the Trial Chamber proceeded by way of "conclusory finding" as in paragraph 649 of the Trial Judgement. Kordić specifically submits that the Trial Chamber erred in failing to back up its legal findings with factual findings and in omitting to provide a reasoned decision.[580]

381. The Prosecution responds that looking at the factual findings establishing the crime base, it agrees that, in general, the Trial Chamber did not set out each of the underlying crimes element by element. According to the Prosecution, the real question is whether the Appeals Chamber finds that those concluding factual findings are sustained on the record, and that the only inference possible is that the Trial Chamber must have accepted the evidence set out in the Trial Judgement before the concluding paragraph in order to reach that factual finding.

382. In the Appeals Chamber's view, the Trial Chamber correctly stated that it "will only deal with such evidence as is necessary for the purposes of the Judgement",[581] meaning that not each and every piece of evidence has to be discussed.

383. However, this approach does not relieve the Trial Chamber from its obligation pursuant to Article 23(2), sentence 2, of the Statute, translated into Rule 98*ter*(C), sentence 2, of the Rules to give a reasoned opinion, meaning that all the constituent elements of a crime have to be discussed and supporting evidence has to assessed by the Trial Chamber. Where, as in this case, "a vast amount of detail has been presented", in fact "too much"[582] – an opinion with which the Appeals Chamber agrees – the obligation to give a reasoned opinion continues to apply. Apparently, this presentation of too much detail has hindered the Trial Chamber from focusing on the evidence underlying the crimes charged.

[579] Kordić Appeal Brief, Vol. I, pp 120-121.
[580] Appeals Hearing, T. 266.

384. The Appeals Chamber notes that the Trial Chamber did not in most cases make specific explicit factual findings with regard to each element of the crimes, but expressly concluded that the crimes were established. The Appeals Chamber considers that by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings required to cover the elements of the crimes.

385. However, the Appeals Chamber considers that such an approach falls short of what is required. The Trial Judgement must enable the Appeals Chamber to discharge its task pursuant to Article 25 of the Statute based on a sufficient determination as to what evidence has been accepted as proof of all elements of the crimes charged, and, if discussed, its assessment of, *inter alia*, the credibility and demeanour of a witness. Relying in part on a catch-all phrase[583] cannot substitute the Trial Chamber's obligation to give "a reasoned opinion in writing" as envisaged in the afore-mentioned Article 23(2), sentence 2, of the Statute.

386. The Appeals Chamber considers, however, that this does not automatically lead to a dismissal of the charges and agrees with the Prosecution that, in this particular circumstance, the issue before it is to establish whether the Trial Chamber's findings that the crimes were established, are sustained on the record.

387. The failure of the Trial Chamber to discuss all constituent elements of all crimes charged and to request the Prosecution to further amend the Indictment has forced the Appeals Chamber to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial, instead of being in a position – as foreseen in the Statute – of focussing on the mere legal and factual issues of the case as described in Chapter II on the law governing appellate proceedings.

388. The Appeals Chamber must reconsider the crimes, and will do so location by location. The Appeals Chamber must determine element by element of the respective crimes whether the Trial Chamber's finding that that particular element was factually established is a finding that a reasonable trier of fact could have made. As Kordić and Čerkez are co-accused under certain counts, a finding that a particular crime was not established on the record is applicable to both of them.[584]

[581] Trial Judgement, para. 20.
[582] Trial Judgement, para. 20.
[583] Trial Judgement, para. 20.
[584] Čerkez Appeal Brief, p. 4.

## B. Attacks on towns and villages and related crimes

### 1. Novi Travnik – October 1992

389. Kordić submits that the ABiH started the fighting in Novi Travnik, that it was ended by UNPROFOR, and that there were no war crimes involved.[585]

390. The Trial Chamber based its relevant findings on evidence of wanton destruction of Muslim-owned buildings at paragraph 526 of the Trial Judgement:

> In October 1992 fighting broke out again in Novi Travnik. One witness stated the cause to be a demand by the HVO that they be allowed to take over the Bratsvo [sic] factory which the ABiH refused. According to Witness C the conflict lasted from 19 to 26 October and began with the HVO attacking an ABiH unit in the fire brigade building. The front line between the forces ran through the middle of the town. During the conflict a number of Bosnian Muslim-owned buildings, including houses, business premises and restaurants were set on fire or demolished.

Furthermore, the Trial Chamber described evidence of destruction and plunder in Novi Travnik at paragraph 805 of the Trial Judgement:

> (i) Novi Travnik: During the attack on Novi Travnik, between 19-26 October 1992, a number of Muslim buildings, including houses, business premises and restaurants were set alight and demolished: cars were taken away by HVO soldiers.[586]

391. The testimony of Witness P, upon which the Trial Chamber relied amongst others, is that when he entered the town of Novi Travnik on 24 October 1992, a few days after the second conflict broke out, he saw burnt and destroyed property, houses, business, apartments of Bosnian Muslims, including those of some of his relatives. "Everything looked like something that consisted of ashes alone. All houses had been burnt down, that is those under Croatian control."[587] Witness P also testified that a relative who had business premises in Novi Travnik was "killed on the spot" and everything was taken away on a truck and taken to Busovača, and that he had heard from other people present that those involved were from many units present from all parts of Central Bosnia, Croatian units.[588] The Trial Chamber also relied on the testimony of Witness C according to which, apart from the buildings destroyed or damaged due to the fighting along the separation line between the two forces, a number of buildings with no military interest belonging to civilian Muslims were destroyed in the part of the old town called Bare (the lower part, Ratanjska, at the entry of Novi Travnik). The nearest military objective was approximately 200-300 metres from there and other destroyed Muslim buildings were 700-800 metres from the front line.[589] The Trial Chamber further

[585] Kordić Appeal Brief, p. 113.
[586] Ismet Halilović, T. 14362-64.
[587] Witness P, T.7269.
[588] Witness P, T. 7269-70.
[589] The Appeals Chamber notes that the correct reference is Witness C, T. 798-800.

relied on the testimony of Witness Ismet Halilović who testified that during the second conflict in Novi Travnik in October 1992 three HVO soldiers came to his building, asked the garage owners and took his car away as well as many others. Not only cars but other objects they considered to be important for them at the time were stolen.[590] The Appeals Chamber is of the view that, although part of the HVO attack on Novi Travnik might have pursued a legitimate military purpose, a reasonable trier of fact could have, on the basis of the evidence in question, come to the conclusion beyond reasonable doubt that wilful and large scale destruction of Muslim properties not justified by military necessity also occurred in its course and that HVO forces were involved in widespread and systematised acts of dispossession of property of sufficient monetary value to result in grave consequences for the victims. Therefore, the Appeals Chamber holds that Kordić does not demonstrate that the Trial Chamber erred in concluding that the underlying conduct in Counts 38 and 39 is established with regard to Novi Travnik between 19 and 26 October 1992.

### 2. Town of Busovača– January 1993

392. Kordić argues that the Trial Chamber's conclusion that the purpose of the Bosnian Croats during the fighting was to remove or subjugate the Muslim population is an unreasonable inference and that in any event it was not the only reasonable conclusion in the circumstances, especially considering the testimony and contemporaneous conclusions of the UNPROFOR Commander on the ground.[591] According to Kordić, another reasonable inference was that the January fighting in Busovača was just a civil conflict started by the ABiH. As Witness Lt.-Col. Stewart said, "the two sides had a go at one another".[592] Kordić submits that the Trial Chamber erred in law in drawing the above adverse inference against him and that it should have accepted the most favourable inference.

393. In response, the Prosecution refers to the corresponding paragraphs of the Trial Judgement, namely paragraph 229 (wilful killing), paragraph 233 (murder), paragraph 256 (inhuman treatment) paragraph 271 (inhumane acts) and paragraph 328 (unlawful attack). The Prosecution contends that the Trial Chamber further discussed all relevant evidence pertaining to the nature of the attacks and the crimes committed therein at paragraphs 569-574 of the Trial Judgement and stresses that paragraph 576 reflects its conclusions including reference to the main items of evidence it relied upon.

394. The Trial Chamber found that:

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[590] Ismet Halilović, T. 14362-64.
[591] Kordić Appeal Brief, Vol. I, p. 104.
[592] Kordić Appeal Brief,Vol. I, p. 111, citing Exh. D104/1 (25 and 26 January exerpts from the diary of Lt.-Col. Stewart.).

> following the ultimatum of 20 January, the HVO attacked the municipality of Busovača on 25 January 1993, using the incidents at the Kaćuni checkpoint as a pretext. The attack involved the use of artillery and infantry and was the beginning of a pattern of attacks in the locality, the purpose of which was to remove or subdue the Muslim population. While there was some defence by the ABiH the Trial Chamber rejects the defence case that the HVO were on the defensive in Busovača. Accordingly, the Trial Chamber finds that all the elements in the underlying offences relating to Busovača in the following counts are made out:
>
> (a) Counts 3-4 (unlawful attacks on civilians and civilian objects);
>
> (b) Counts 7-13 (wilful killings, murder, inhuman [*sic.*] acts and treatment).[593]

395. According to the Trial Chamber, the criminal conduct as such started with incidents at a checkpoint established by the ABiH Army at Kaćuni, south of Busovača, controlling the road to Kiseljak. It led on the afternoon of 20 January 1993 to the murder of Mirsad Delija, a Bosnian Muslim resident of Busovača. However, the Trial Chamber did not find any involvement of Kordić in this incident.[594] The second incident occurred at the Kaćuni checkpoint on 24 January 1993 when an exchange of fire occurred between the HVO and the ABiH in the presence of UNPROFOR and two Croats were killed.[595]

(a) Unlawful attack on civilians, Count 3 (Kordić)

396. The Appeals Chamber notes that the Trial Chamber considered that the Accused were charged for attacks directed at civilians and not for indiscriminate attacks or attacks which although pursuing a legitimate military objective would have been disproportionate.[596] Therefore, a finding that the January Busovača attack was directed at the civilian population or civilians is necessary to support the Trial Chamber's conclusion at paragraph 576 of the Trial Judgement that Count 3 is established in Busovača. Although it did not explicitly find that the Busovača attack was directed at the civilian population or civilians, the Trial Chamber found at paragraph 576 of the Trial Judgement that the purpose of the attacks was to subdue or remove the Muslim population. The Appeals Chamber considers that "Muslim population" at least covers the civilian population and that the above conclusion constitutes an implicit finding that the attack was directed at the civilian population or at civilians.

[593] Trial Judgement, para. 576.
[594] Trial Judgement, para. 567.
[595] Trial Judgement, para. 568.
[596] See Trial Judgement, para. 322 according to which the Prosecution defined the fact that the attack was wilfully directed at the civilian population or individual civilians as one of the elements of the crime of unlawful attack on civilians.

397. The Appeals Chamber turns now to Kordić's argument that the evidence before the Trial Chamber does not support the conclusion that an unlawful attack against civilians was committed in Busovača in January 1993.[597]

398. As to the attack itself, the Trial Chamber determined the following: on 24 January 1993, at about 5:30 a.m. or 6:00 a.m., the HVO attacked Kadića Strana, the Muslim part of Busovača.[598] The Trial Chamber relied on the testimony of Witness J who saw soldiers with HV and HVO patches and with HOS insignia, as well as soldiers from a brigade from Herzegovina, participating in the attack.[599] Evidence was given that certain Muslims had been warned of this attack by Croat colleagues or friends.[600] The remaining Muslims in the town (around 90 in all) were rounded up in the square. Women and children (around 20 in total) were allowed to return home and the men (70 in all), some as young as 14-16 years, were loaded onto buses and taken to Kaonik camp.[601]

399. Although the Trial Chamber found that there was some defensive action by the ABiH, it found that the purpose of the attacks in the locality was to remove or subdue the Muslim population. The Trial Chamber considered the defence case and supporting evidence according to which: i) the ABiH commenced the hostilities, the ABiH military objective during the January attack was "to cut off communications at Kaonik and Kaćuni", isolating Busovača from Vitez and Kiseljak, and iii) that during the conflict the HVO troops were greatly outnumbered while there were many more ABiH troops attacking the town than HVO troops defending it.[602]

400. The Trial Chamber relied primarily on the testimony of Witness AS and accepted his evidence that he was taking part in a "cleansing operation" launched by the HVO in Busovača

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[597] Appeals Hearing, T. 275-81.

[598] Witness AG, T. 14140-41. There was shooting, shelling from the hills (Witness J, T. 4528); Nasiha Neslanović, T. 11216); Muslims were called on to surrender (Witness T, T. 9467); see Trial Judgement, footnote 1010.

[599] Witness J, T. 4529; Exh. Z1529; Exh. Z2564.

[600] For example, Witness O said that on 20 January 1993, Florijan Glavočević told him that Božo Rajić had given an order to attack ABiH positions in Busovača and that vicinity. The witness sent his family to Zenica but returned to collect another son and some items when he was arrested on 27 January 1993 by two armed HVO soldiers and taken to Kaonik: T. 7148-50.

[601] Witness J, T. 4534-35; Nasiha Neslanović, T. 11217: her husband was also taken to Kaonik; Witness T, T. 9467-68.

[602] Trial Judgement, para. 575. The Trial Chamber cites the following evidence presented by the defence: Witness CW1 did not accept that the HVO was the aggressor in Busovača in January 1993, considering that there was no reason for it since there was free passage between Kiseljak and Busovača; he did not accept that the Vance-Owen Peace Plan, never signed, had any significance (T. 26728). Major Marko Prskalo stated that the attack was carried out from three sides and that "When the Muslim forces took this area, they achieved control over another very important supply route" (T. 17875-76). Witness CW1 and Brigadier Nakić testified that after 25 January 1993 the HVO no longer had control over the main supply route between Busovača and Kiseljak, thus causing the Kiseljak and Busovača areas to be geographically and militarily isolated (Witness CW1, T. 26842; Brig. F. Nakić, T. 17290). The Defence relies on another extract from Col. Stewart's diary, to the effect that the Bosnian Muslims were doing everything to create a full-scale war in the Kiseljak Valley (T. 12371-72; Exh. D104/1, pp 3-4) and on the evidence of Witness AS, that during the fighting the HVO military police were never ordered to conduct or conducted offensive operations against civilians or burn Muslim villages (T. 16399-402), but that the offensive operations were exclusively directed towards the ABiH forces (T. 16400. See also Exh. Z527.3, Report of the Military Police, 8 March 1993).

municipality, a finding supported by the UNPROFOR report.[603] In this respect, Kordić submits that the expression "cleansing" was suggested to the witness through a leading question of the Prosecution and that it cannot be taken to mean "ethnic cleansing", which would be in complete contradiction with the rest of the witness's testimony, but rather to mean "mopping up" which is common in the military context in urban fighting. The Prosecution concedes that Witness AS said that the HVO military police were never ordered to direct offensive operations against civilians or burn Muslim houses. It argues, however, that "it is difficult to see when AS himself agreed with the Prosecution's description of this attack as a "cleansing operation" how he could have understood this to mean a normal military cleansing or cleaning or clearing operation", in light of the fact that in re-examination, Witness AS, agreed with the Prosecution's description that it was an ethnic cleansing operation.[604]

401. The confirmation by Witness AS that he participated in a "cleansing operation" must be placed in its context. The Appeals Chamber notes that during his examination in chief, Witness AS admitted, upon being questioned by the Prosecution's Counsel, that he himself participated in cleansing operations in the Busovača region:

> Q: In January 1993, Witness AS, you participated in cleansing operations in the Busovača region and in the surrounding villages, such as Brdo, Kovačevac, Strane, and Rovna.
>
> A: Yes, and some others. Gavrine Kuće, Merdani, Putiš, I was there, because I believed in that, what I fought for, and that is why I did it.[605]

402. In re-examination, when specifically asked whether he participated in an ethnic cleansing operation in January 1993 in Busovača, he answered as follows:

> Q. You participated in an ethnic cleansing campaign in Busovača, didn't you, in January 1993, and you said that your immediate commander, Paško Ljubičić, regularly went to the Tisovac Hotel during that period of time, didn't he?
>
> A. Yes.[606]

Asked whether he received specific permission to carry out looting in the villages, the witness answered:

> A. Yes. Everybody took whatever they needed. There was no problem whatsoever. A car, a motorcycle, whatever anybody wanted to take. For example, we took TV sets, billiard sets, washing machines. Whatever we needed for the Bungalow, we took from houses. We didn't have to ask anyone; we'd just go and get it.
>
> Q. And all the property belonged exclusively to the Busovača Muslims; is that correct?

[603] Trial Judgement, para. 576.
[604] Appeals Hearing, T. 408, referring to T. 16437.
[605] Witness AS, T. 16354-55.
[606] Witness AS, T. 16437.

A. Yes.[607]

403. The Appeals Chamber notes that in this context the expression "cleansing operation" is ambiguous since it could be understood as synonymous with "mopping up operation" in the military sense or with unlawful "ethnic cleansing". The Appeals Chamber notes further that, in the presence of a compound question such as the one containing the Prosecution's description of the attacks in which Witness AS participated as an "ethnic cleansing campaign", a trier of fact must be particularly cautious when interpreting the answer given by the witness. However, read in context, the answer "yes" given by Witness AS applied to all aspects of this question, including the ethnic connotation, supported by his answer that looting was also exclusively directed against Muslims. Additionally, there was nothing to "mop up" in a military sense.

404. The Trial Chamber also relied upon Witness AS's testimony that the forces involved were the military police, units of the Ludvig Pavlović Brigade, companies of the Viteška Brigade and the Vitezovi.[608] The witness's commander, Paško Ljubičić, said to his unit: "It's begun in Busovača. Our guys from Busovača are already there, but we need more people". The Trial Chamber found that "[t]he campaign required a huge logistical effort and preparation and, for many days before its start, trucks laden with armaments and ammunition were being sent from Novi Travnik to Busovača" and that "the fighting spread to the whole territory of Busovača."[609]

405. It follows from Witness AS's testimony that the attack was launched in general against Muslims and Muslim-owned property, irrespective of the military combatant or civilian status; thus it was also directed against civilians and civilian property. Therefore, the Appeals Chamber finds that a reasonable Trial Chamber, based on the testimony of Witness AS alone, could reach a conclusion beyond reasonable doubt that the Busovača town attack was directed at civilians.

406. The Trial Chamber also relied upon Exh. Z390.2, a report from the UNPROFOR Headquarters in Kiseljak dated 24 January 1993, and Exh. Z454, an ECMM report, holding that increased tensions between the Bosnian Croats and Muslims in Central Bosnia led to an outbreak of fighting after the HVO Declaration on 15 January 1993.[610] In this respect, Kordić submits that Exh. Z390.2 is somewhat removed from the action, while Exh. Z454 gives a more accurate assessment of the fighting, does not blame the Croats and does not cite the "15 January" declaration as a causative factor for the fighting.[611] The Appeals Chamber finds that together these reports confirm that the growing tension between the Bosnian Muslims and the Bosnian Croats, earlier allied against the

[607] Witness AS, T. 16356-57.
[608] Witness AS, T. 16354-55, 16437-38.
[609] Trial Judgement paras 571-572.
[610] Trial Judgement, para. 574.

Bosnian Serbs, led to an outbreak of fighting between the Muslim and Croat forces following the "15 January" HVO declaration that all ABiH troops in provinces 3, 8 and 10, designated Croatian under the Vance Owen plan, should submit to HVO command. The declaration in question is attached to this UNPROFOR report,[612] and states that the members and formations of the ABiH who will not be subordinated to the HVO Command in the three provinces in question will have to leave the area; otherwise they will be treated as paramilitary and disarmed. The same document includes a similar clause with regard to HVO formations in the (Muslim) provinces 1, 5 and 9 under the command of the ABiH. Additionally, Exh. Z390.2 points *inter alia* to the fact that, undoubtedly "the Croat leaders in BH read the current provincial plan as guaranteeing them control of a three province 'ethnic canton'"; that "their protestations that they are only trying to prepare for the implementation of the Geneva plan clearly show the hegemonist interpretation they put on the plan," and that "the significant Muslim minorities in the new provinces will inevitably carry considerable weight in the infrastructure of these provinces if the democratic processes are allowed to prevail." Moreover, Exh. Z454 contains evidence of heavy fighting in towns along the supply-route from Split to Central Bosnia until the cease-fire agreement signed by President Izetbegović and Mate Boban on 27 January 1993 establishing a joint HVO-BiH command. Croat leaders were certainly not prepared to accept the outcome of a democratic process, which could turn to their disadvantage in the municipalities with significant Muslim minorities in the three provinces, and were instead prepared to fight against any Muslim forces refusing to be subordinated to the HVO command.

407. During the Appeals Hearing, Counsel for Kordić invited the Appeals Chamber to take into account various pieces of evidence related to the military nature of the Busovača attack.[613] He *inter alia* relied upon Exh. Z527.3, Exh. Z423, Milinfosum No 91 of 30 January 1993, as well as the testimony of Brigadier Grubešić,[614] according to which the Croats moved on the morning of 25 January to disarm fifty to a hundred TO members, Muslim combatants, who were in fortified positions in and around Kadića Strana, a Muslim area on a hill immediately overlooking the downtown area of Busovača. When the Muslims were warned but refused to surrender, the fighting continued into the early afternoon.

408. The Appeals Chamber also takes into account the testimony of Witness AG upon which the Trial Chamber relied in relation to the attack against Kadića Strana, the Muslim part of Busovača. Witness AG testified that three days before the HVO attacked Busovača she heard explosions in the

[611] Appeals Hearing, T. 278.
[612] Exh. Z390.2.
[613] Appeals Hearing, T. 275-80.
[614] T. 28015-16.

town.[615] She testified further that all eleven Muslim businesses in town were destroyed.[616] She heard that around this time unknown fighters had turned up by bus and after that many of the Muslim families began to leave Busovača.[617] According to Witness AG, when the HVO attacked Kadića Strana there were only some poor people without fire arms remaining in Busovača, and soldiers, many of whom died during the three days of the January attack. According to the witness, they were killed because they had the firearms.[618] Witness AG also confirmed that men wearing the camouflage uniform of the HVO took the other Muslim men to the Kaonik prison.[619]

409. The Appeals Chamber finds that this evidence cannot affect the overall picture, in that a reasonable trier of fact could have concluded beyond reasonable doubt that the January attack against Busovača was directed against all Muslims, not only against armed forces, thus also targeting civilians. The Appeals Chamber is of the view that on the basis of the entirety of the evidence relied upon by the Trial Chamber, a reasonable trier of fact could have concluded that after an armed conflict broke out between Bosnian Croats and Bosnian Muslims in January in the Busovača area, civilians and civilian objectives were also targeted in Busovača and not exempted from the attack.

(i) Status and number of victims

410. The Trial Chamber made no specific finding that "civilians" were actually killed in the attack on Busovača of 25 January 1993 or that this attack caused serious bodily injuries within the civilian population. In principle, the crime of unlawful attack on civilians does not require a specific number of civilians being killed or seriously injured as long as there is evidence establishing beyond reasonable doubt that the attack in question is also directed at civilians. In this respect, the Trial Chamber found that the attack on Busovača resulted in many deaths although the precise number is not clear. The Trial Chamber relied on Exh. Z2697, a handwritten list of twenty-seven Muslims noted down by Witness B, all of whom had died a violent death.[620] The Appeals Chamber notes that Kordić is charged for crimes committed in January 1993 in Busovača while Exh. Z2697 lists the names of Muslim persons buried from April until July 1993, and evidence does not provide details as to the circumstances of their respective deaths. The Trial Chamber also relied on Exh. Z461, "a police report show[ing] that 43 people were murdered in Busovača in January and February 1993" and stated, *inter alia*, that the violence continued after the January attack.[621] The

[615] T. 14138.
[616] T. 14139.
[617] T. 14140.
[618] T. 14141-42.
[619] T. 14138-42.
[620] Trial Judgement, para. 569 footnote 1016; T. 453-459; Exh. Z2697; Witness J, T. 4533.
[621] Trial Judgement, para. 570.

Appeals Chamber notes that the body of the report in question is more specific than its conclusion quoted by the Trial Chamber as to the status of victims. According to the report, the forty-three persons killed were ABiH soldiers. Sixteen of them were armed, and the rest were "civilians". The report in question also contains evidence that at least three young Muslims were killed during their arrest in January 1993 in Busovača, simply because they were Muslim.

411. To conclude that Muslims died violent deaths, the Trial Chamber also relied upon the testimony of Witness J, a Muslim inhabitant of Busovača, who stated that civilians were killed in Busovača in January 1993.[622] Witness J named twelve Muslim men, allegedly all civilians, who were killed during the 25 January attack: Sedin Merdan, killed by a sniper from a nearby house; Irhad Ekmečić, killed on the same occasion; Nedžad Novalić, Nihad Merdan, Amir Hodžić, whose bodies were seen in the streets; Nijaz Neslanović, the young Hadžibegović, and a third whose name the witness could not remember, killed in the same room at the other end of the town; Sunulahpašić and Medju Seliac, killed on the bridge; a math teacher called Budo, killed somewhere near the police station and Jahić, a man of 50 to 55, killed on the road towards Kaonik, somewhere halfway there, near the Vatrostalna factory.

412. The fact that these persons were civilians, as stated by the witness, and were not engaged in the defence of the Muslim part of Busovača, was strongly challenged in cross examination by the Defence. The witness agreed that although there was no armed unit of the Patriotic league or the TO in Busovača, but in Kaćuni, young men of the Muslim part of Busovača (including himself, Nedžad Novalić, Sedin Merdan and Irhad Ekmečić) had weapons[623] and gathered during the night of the attack in various houses of Kadića Strana. Asked whether he would agree that these were combat positions, the witness answered "Do you think we should have just waited for somebody to attack us?"[624] At trial even the Prosecution conceded that there was some resistance to the 25 January 1993 HVO attack.[625]

413. In light of the above, the Appeals Chamber is of the view that a reasonable trier of fact could have concluded beyond reasonable doubt that numerous civilians were targeted and killed in Busovača in January 1993.

(ii) Discriminatory context within which the attack occurred

414. It is also important to take into account the discriminatory context within which, according to the Trial Chamber, the attack occurred. Concerning evidence that, when they assumed power in

[622] Footnote 1016 of the Trial Judgement, referring to Witness J, T. 4533.
[623] T. 4652-54.
[624] T. 4650.

Busovača, the HVO initiated a campaign of persecutions in this municipality, the Trial Chamber relies upon the evidence adduced by the Prosecution that:

> During a peaceful demonstration in Busovača the demonstrators were dispersed by shots being fired in the air. Persons were evicted from their apartments. In January 1993 the Muslim call to prayer was forbidden in Busovača and Muslims were expelled: in the same month most left.[626]

Concerning evidence that various forms of persecutions took place in the wider Central Bosnia area before January 1993, the Trial Chamber essentially refers to Bosnian Muslims being arrested and their business premises being damaged, blown up or looted in Kiseljak. The Trial Chamber also refers to instances of Muslims being murdered in 1992 and damage caused to Muslim businesses in late 1992 and January 1993 in Vitez. With regard to the municipality of Busovača, the Trial Chamber relies in particular upon Exhs Z332.1 and Z332.2, notes taken by Edib Zlotrg, a Muslim member of the Vitez police who compiled details of thirty-seven crimes against Muslims in the municipality, between December 1992 and April 1993. These crimes involved harassment, wounding and murder and the bombing, shooting at and arson of Muslim business premises.[627] The Trial Chamber also refers to many instances of physical harassment of Muslims in Novi Travnik after the first conflict.[628]

(iii) Conclusion

415. The Appeals Chamber finds that on the basis of the above evidence before the Trial Chamber, a reasonable trier of fact could have come to the conclusion beyond reasonable doubt that the overall HVO January attack on Busovača was in part directed at the civilian population. A reasonable trier of fact could have concluded beyond reasonable doubt that numerous Muslim civilians were deliberately killed during its course and that as such the attacks against these civilians were unlawful. Kordić's submission that the Trial Chamber erred in its conclusion that the crime of unlawful attack on civilians is established in the town of Busovača in January 1993, fails.

(b) Unlawful attack on civilian objects, Count 4 (Kordić)

416. The Trial Chamber considered that Kordić was charged for attacks deliberately directed at civilian objects and not for indiscriminate attacks or attacks which although pursuing a legitimate military objective would have been disproportionate.[629]

[625] See Prosecution's question to Witness T, T. 9467.
[626] Trial Judgement, para. 511 (footnotes and emphasis omitted).
[627] Trial Judgement, paras 511, 512.
[628] Trial Judgement, para. 513.
[629] Trial Judgement, paras 323-328.

417. The Appeals Chamber notes that, under Count 4 of the Indictment, Kordić is charged with unlawful attack on civilian objects only in the town of Busovača, but not in the Municipality of Busovača, and not in the villages of Kaćuni and Donje Polje. The Trial Chamber made no factual finding regarding unlawful attack on civilian objects in the town of Busovača. It made an express finding that on 25 January 1993, Major Jennings saw HVO soldiers firing at civilian houses in Kaćuni with a combat-type weapon (anti-tank weapon).[630] The Trial Chamber also found that on 26 January, the witness patrolled in Donje Polje and saw HVO soldiers leaving houses which then caught fire, and also saw a number of houses which had been burned.[631]

418. The Appeals Chamber now turns to Kordić's specific arguments that the evidence before the Trial Chamber does not support the conclusion that an unlawful attack on civilian objects had been committed in Busovača in January 1993.[632] The Trial Chamber relied upon the testimony of Witness AG in relation to the attack against Kadića Strana, the Muslim part of Busovača. The Prosecution invites the Appeals Chamber to consider Witness AG's testimony as well as Witness J's testimony.[633] Witness AG testified that three days before the HVO attacked Busovača, she heard explosions in the town, and that all eleven Muslim businesses in town were destroyed. This evidence is confirmed by Witness B,[634] Witness J,[635] and Exh. Z461, relied upon by the Trial Chamber.[636]

419. Witness J testified in particular that his own house was destroyed by use of explosives during the night of 23 and 24 January 1993. Witness J added that two more Muslim shops were looted, blown up and destroyed during that night and that on the night of 24 or 25 January, most of the remaining Muslim shops including the witness's were blown up and looted.[637] There is nothing in the record to suggest that the properties in question were actually used for military purposes. Witness J testified that various units were involved, and that on the morning of 25 January 1993, when the Muslims had been forced to the square in the centre of Busovača, he saw the insignia of the HV army, HVO, HOS and the Runolist Brigade. It must be noted that Exh. Z 527.3, a report from Vlado Ćosić, the HVO, IV Military Police Battalion Deputy Commander, of 8 March 1993,[638] confirms that members of the civil police, the "Vitezovi" special purpose unit from Vitez and other soldiers participated in joint actions with the military police officers of the HVO HZ H-B from Busovača. Exh. Z461 consists of a police report stating that during the night between 20 and 21

[630] Trial Judgement, para. 573.
[631] Trial Judgement, para. 573.
[632] Appeals Hearing, T. 275-280.
[633] Appeals Hearing, T. 408., referring to T. 4524-29, 14138-39.
[634] T. 447.
[635] T. 4524-25.
[636] Trial Judgement, para. 570, footnote 1017.
[637] T. 4525-28.

January 1993, members of the HVO military police as well as some MUP members conducted a weapons search of Muslim houses in Busovača. During the search, weapons were found in several of the Muslim houses. Explosives were thrown into shops and buildings, on some occasions after the owner refused to surrender weapons and on other occasions before even conducting the search. In the Appeals Chamber's view, this police report suggests that the HVO and police officers involved in these events had accurate information as to the fact that several of the houses in question contained weapons which might justify their search, in the context of an armed conflict between Bosnian Croats and Bosnian Muslims. However, the Appeals Chamber holds that a reasonable Trial Chamber could have concluded beyond reasonable doubt that throwing explosives into civilian Muslim shops and numerous Muslim civilian houses, resulting in their partial or total destruction even before conducting a weapons search, and in the absence of information that the properties in question were used for military purposes, amounts to unlawful attack on civilian objects. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in its conclusion that the crime of unlawful attack on civilian objects in January 1993 in the town of Busovača is established.

(c) Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

420. The Appeals Chamber cannot rely on the evidence related to the murder of Mirsad Delija, shot at his home in Busovača, since the Trial Chamber found that the alleged involvement of Kordić in this crime is not established and this finding is not appealed by the Prosecution.

421. The Appeals Chamber takes into account Exh. Z461, which refers to the fact that on 25 January 1993, "[d]uring the arrest of Muslims in the centre of the town, 13 young men were killed only because they had been deployed on many fronts as soldiers of the BH Army [ABiH], while others were killed simply for being Muslim". The same report continues: "[d]uring the fighting between 20 January and 12 February 1993, a total of 43 BH Army [ABiH] soldiers were killed. Only sixteen of them were armed, the rest were civilians. Of the 43 soldiers killed, ten were captured and then killed, three of them in the most monstrous way. Seven were killed immediately after their arrest, while a terrible crime was committed against three of them." The Appeals Chamber recalls that during an armed conflict, until a soldier is demobilized, he is considered a combatant whether or not he is in combat, or for the time being armed. However, read together, the above excerpts from Exh. Z461 constitute evidence that numerous persons were killed during their arrest, simply because they were Muslims, and ABiH soldiers were killed after their arrest, after being placed *hors de combat*. These persons, wilfully killed by Croat forces, were without doubt

[638] See Trial Judgement, para. 575, footnote 1037.

"protected persons" in the sense of Article 2 of the Statute and "civilians" in the sense of Article 5 of the Statute and these acts were closely related to the armed conflict. The Appeals Chamber further recalls that the Trial Chamber found at paragraph 520 of the Trial Judgement that the weight of the evidence points clearly to persecutions against the Muslims in Busovača after the HVO take over of the municipality. There is no doubt that these acts were also part of the widespread attack conducted at that time against the civilian Muslim population.

422. Therefore, a reasonable trier of fact could have come to the conclusion that the crimes of murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić) were committed in the town of Busovača in January 1993.

(d) Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

423. A review of the evidence shows that it only relates to inhumane acts and inhuman treatment inflicted upon detainees.[639] Since these acts were charged under Counts 24 and 25 for which Kordić was acquitted, the Appeals Chamber reverses the Trial Chamber's conclusion that inhumane acts (Count 10) and inhuman treatment (Count 12) were established with respect to Busovača in January 1993.

(e) Wanton destruction not justified by military necessity, Count 38 (Kordić) and plunder of public or private property, Count 39 (Kordić)

424. The Trial Chamber relied on Exh. Z2799, a video recording made in 1996 showing the damage to the Lašva Valley and surroundings, the transcript of Witness Lt.-Col. Capelle, who testified about that recording taken from a helicopter, as well as the evidence it summarized, location by location, at paragraphs 805 to 807.

425. The Trial Chamber also found at paragraph 805 of the Trial Judgement that:

> (ii) Busovača: In late January 1993 explosions were heard in the town and Muslim shops and restaurants were destroyed. Property was stolen in the HVO attack on 23 January 1993. Witness J saw HVO soldiers looting houses in town. They blew up Muslim business premises. This continued.

426. The testimonies of Witnesses AS, AG and J, relied upon by the Trial Chamber,[640] have been discussed above with regard to the crimes of unlawful attack on civilians and civilian objects. The Appeals Chamber is of the view that, although part of the HVO attack on Busovača might have pursued a legitimate military purpose, a reasonable trier of fact could have, on the basis of the evidence in question, come to the conclusion that wilful and large scale destruction of Muslim

[639] See in particular, Exh. Z461 and Witness J, T. 4453.

shops and houses not justified by military necessity also occurred in its course, and that HVO forces, including soldiers and Military Police officers, were involved in widespread or systematised acts of dispossession of property of sufficient monetary value to result in grave consequences for the victims. Therefore, the Appeals Chamber holds that Kordić does not demonstrate that the Trial Chamber erred in concluding that the underlying elements of Counts 38 and 39 are established with regard to Busovača in January 1993.

### 3. Merdani – January 1993

427. As to Merdani, which is situated in Busovača municipality, Kordić submits that the Trial Chamber erred since it concluded on the one hand that the attack was not conclusive and on the other hand that the allegations as to related Count 37 (extensive destruction of property) and Count 38 (wanton destruction) are established.[641] The Prosecution responds that this misrepresents the Trial Chamber's finding that the evidence on the attack on Merdani was not conclusive enough to support a finding of unlawful attack as charged under Counts 3-4 of the Indictment, but that Merdani had been attacked by HVO forces, involving extensive destruction of property not justified by military necessity.

428. The Appeals Chamber notes that the Trial Chamber ultimately did not find Kordić responsible with regard to Count 37 (extensive destruction), and that as far as Merdani is concerned, it only retained his responsibility for Count 38 (wanton destruction).

429. The only discussion by the Trial Chamber in relation to Merdani is found at paragraph 572 of the Trial Judgement, which states that:

> [t]he fighting spread to the whole territory of Busovača. Thus, on 25 January 1993 the HVO shelled the village of Merdani. Witness A saw the shelling that morning at about 6 a.m. Buildings were destroyed and the civilian population ran up a hill in the direction of Zenica: the witness participated in getting buses to help evacuate the population.

A review of the testimony of Witness A reveals that there is no support for a finding regarding the scale of destruction in Merdani, since the witness merely stated: "I saw the destruction of certain buildings". Moreover, this testimony contains no evidence allowing conclusions as to whether the shelling of Merdani was or was not justified by military necessity. Thus, no reasonable trier of fact could have concluded that Count 38 is established in relation to Merdani. Therefore, Trial Chamber's finding must be reversed.

[640] Trial Judgement, paras 571, 805 (ii) and footnotes 1711, 1712.
[641] Kordić Appeal Brief, Vol. I, p. 110, footnote 211.

### 4. Vitez and Stari Vitez – April 1993

430. According to Kordić, the central legal issue involved is whether the HVO attacks were directed against legitimate military objectives, and he argues that they did not cause civilian losses disproportionate to the military objectives achieved. In Kordić's submission, the attacks constituted neither war crimes nor persecutory acts.[642]

431. Although the Indictment differentiates the crimes committed in Vitez and Stari Vitez, the Appeals Chamber notes that, for a discussion in general, it is not disputed that Stari Vitez (meaning old Vitez) is actually part of the town of Vitez proper.

432. The Prosecution's evidence related to the attack launched on 16 April 1993 in Vitez and Stari Vitez is summarized at paragraphs 643 and 644 of the Trial Judgement:

> Prosecution witnesses gave evidence about the attack on Vitez. Thus, Colonel Watters said that in the early morning of 16 April 1993 he was at the British Battalion base near Vitez and received reports of shelling and firing on Muslim areas of Kruščica and Vitez. A Croat artillery piece was firing from a quarry. At 9.30 a.m. the witness interviewed the Croat brigade commander in the Vitez cinema and also the Muslim commander. Both sides said they were under attack from the other. Based on his own observations, he came to the opinion that most of the destruction and casualties were in the Muslim area of the town. […] In the witness's professional judgement the ABiH had been taken by surprise. It was the first coordinated offensive in the area with attacks happening simultaneously up and down the valley.[643]

> According to those in Vitez, the attack started at about 5.45 to 6 a.m. with artillery shelling, which increased during the morning and included mortar fire of various calibre. The evidence of the local TO commander was that he found that there were 50 to 100 soldiers deployed in defence: the attack was very much a surprise. Edib Zlotrg said that he was awoken by a detonation from the direction of Ahmići. He saw smoke coming from Ahmići and also saw HVO members in camouflage uniforms in the streets of Vitez, arresting Muslims and killing them in their apartments. He later learnt that among those killed was his brother-in-law, who had previously published a letter in a newspaper criticising HVO soldiers for firing their weapons in town. The prominent Muslims of the town were arrested. Anto Breljas, a former member of the Vitezovi, said that the Viteška Brigade and the Vitezovi attacked Stari Vitez.[644]

The Prosecution case concerning the Vitez municipality (including but not limited to Vitez and Stari Vitez proper) is summarized in paragraph 646:

> In all 172 Muslims in the Vitez municipality were killed and 5,000 expelled, (1,200 having been detained): 420 buildings were destroyed, together with three mosques, two Muslim seminaries and two schools.[645]

#### (a) Unlawful attack on civilians, Count 3 (Kordić) and Count 5 (Čerkez)

433. It is recalled that the Trial Chamber considered that the Accused were charged with attacks directed at civilians and not for indiscriminate attacks or attacks which although pursuing a

[642] Appeals Hearing, T. 268.
[643] Trial Judgement, para. 643 (footnotes omitted).
[644] Trial Judgement, para. 644 (footnotes omitted).

legitimate military objective would have been disproportionate. The Trial Chamber did not make an explicit finding that the civilian population or civilians were targeted in Vitez/Stari Vitez in April 1993, *i.e.*, the time foreseen in the Indictment. The Trial Chamber accepted the Prosecution's case that there was a coordinated offensive in the area of Vitez on 16 April 1993, which took the ABiH by surprise[646] and, rejecting the defence case, made a clear finding that the evidence pointed to "organized HVO attacks" in the area.[647] The Trial Chamber relied in particular upon the testimony of Col. Watters that "[b]oth sides said they were under attack from the other. Based on his own observations, he came to the opinion that most of the destruction and casualties were in the Muslim area of the town".[648] However, in the Appeals Chamber's view, this finding alone does not amount to a finding that the civilian population or civilians were targeted. By contrast, the wording of paragraph 642 of the Trial Judgement related to the attack upon Ahmići is more explicit and concrete since the Trial Chamber found that the aim of the attack was killing or driving out the Muslim population, resulting in a massacre.[649]

434. The Trial Chamber found in paragraph 649 of the Trial Judgement that the HVO attack on Vitez and Stari Vitez was "coordinated" and was to be seen "against the background of the expiry of the 15 April 1993 deadline as part of a wider attack on Vitez and the Muslim villages of the Lašva Valley".[650] This finding must be read together with the Trial Chamber's findings elsewhere in the Trial Judgement. The Trial Chamber inferred from the evidence related to Ahmići (and the evidence of other HVO attacks in April 1993) "that there was by this time a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims".[651] Additionally, the Trial Chamber found that there was a campaign of persecution,[652] whose purpose was "the subjugation of the Bosnian Muslim population."[653] The Appeals Chamber considers that the term "Muslim population" also covers civilians. Furthermore, the Trial Chamber also found that the attacks on Vitez, Stari Vitez and Donja Večeriska were "a high point of the campaign of persecution".[654]

435. In light of the above, the Appeals Chamber is of the view that although the Trial Chamber did not make any specific findings relating to the purpose of the attack in Vitez and Stari Vitez as it

[645] Trial Judgement, para. 646 (footnotes omitted).
[646] Trial Judgement, para. 643.
[647] Trial Judgement, para. 649.
[648] Trial Judgement, para. 643; Col. Watters, T. 5694-99; Exh. Z2007 is a series of photographs of smoke and fires arising from the fire and bodies lying in a line on the far side of Vitez (past Dubravica). There were a number of bodies in Stari Vitez. In the northern, Croat, part nothing was going on.
[649] See also Trial Judgement, para. 576, with respect to Busovača.
[650] Trial Judgement, para. 649.
[651] Trial Judgement, para. 642.
[652] Trial Judgement, para. 831.
[653] Trial Judgement, para. 827.

did with respect to the events that occurred in Busovača in January 1993 or in Ahmići in April 1993, it considered tacitly that these attacks were also launched deliberately against civilians,[655] by assessing all these incidents in a context, thus providing an all-inclusive rather than a fragmented approach.

436. The Appeals Chamber turns now to Kordić's argument that the evidence before the Trial Chamber does not support the conclusion that the attacks in areas other than Ahmići were targeting civilians. He submits that the fighting in the area, between Hotel Vitez (Col. Blaškić's Headquarters) and Stari Vitez (ABiH stronghold), as supported by the evidence before the Trial Chamber, represented typical fighting in built-up areas with collateral impact on properties and persons.[656] The Prosecution responds that the Trial Chamber substantiated its conclusion that the evidence clearly pointed to organised HVO attacks in these areas and that the underlying offences were established.[657] It states further that the international witnesses, Col. Stewart and Bowers, acknowledged the existence of the technique of fighting in built-up areas but rejected the idea that it could explain the destruction that occurred in the various places, in Ahmići and all of the other places.[658]

437. The question before the Appeals Chamber is whether a reasonable Trial Chamber could have concluded that the attack in Vitez/Stari Vitez was directed at the civilian population or civilians.

(i) Means used by the HVO for the attack, and crimes committed during its course

438. The Appeals Chamber considers that artillery shelling, including mortar fire of various calibres, is as such typical of a military attack but is not telling as to what the target of the attack is. Nihad Rehibić, a Muslim former Captain in the JNA who joined the Vitez TO, testified that in Stari Vitez, the first shell was lobbed at around 5:45 a.m. near the command post of the TO Headquarters.[659] As to the nature of crimes committed in the course of the attack, the Trial Chamber referred to the fact that a witness testified that HVO members killed Muslims in their apartments. However, the witness in question is neither specific as to whether these Muslims were combatants or civilians nor as to the circumstances of the killings in question. The Trial Chamber expressly relied on one instance of sexual assault (see below discussion on Counts 12 and 19). By

[654] Trial Judgement, para. 831.
[655] See above on the distinction to be made between a deliberate attack (also) against civilians opposed to indiscriminate attacks and attacks directed at a legitimate military target with a disproportionate use of force.
[656] Kordić Appeal Brief, Vol. I, p. 116.
[657] Prosecution Response, para. 5.23.
[658] Appeals Hearing, T. 413.
[659] T. 8360.

contrast, for unknown reasons, although the Trial Chamber considered that constant shelling and coordinated sniping campaign aimed at intimidating the civilian population during the siege (from April 1993 until February 1994[660]) was deplorable and a matter for consideration under Count 1 (persecutions), it does not appear to have taken this aspect of the April 1993 attacks in Vitez as constituting a basis for conviction under Counts 3 and 4. There is no discussion to be found.[661]

439. Since this aspect of the Trial Chamber's approach has not been appealed by the Prosecution, the Appeals Chamber will not consider it.

(ii) Strategic interest of Stari Vitez

440. At paragraph 642 of the Trial Judgement, the Trial Chamber drew the inference from the evidence regarding the attack in Ahmići and the evidence of other HVO attacks in April 1993, that there was by this time a common plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims. In the same paragraph, the Trial Chamber rejected the Defence's assertion that the massacre in Ahmići was justified strategically. Although the Trial Chamber did not make such an explicit finding with regard to Stari Vitez, it appears to have disregarded the possibility that Vitez/Stari Vitez was a justified military objective for the HVO.

441. The Trial Judgement refers to the evidence of Witness TW10 (based on transcripts from the *Blaškić* trial), according to whom there were approximately fifty to a hundred soldiers deployed in defence at the time of the attack on 16 April 1993.[662] The witness also testified that 100 soldiers were accommodated in the ABiH headquarters,[663] the building called the firehouse; and of them "a certain number of soldiers were in their own houses". Another group of soldiers were deployed on the front line in Visoko and in Vlasić.[664] There were about 1,600 residents of Stari Vitez then.[665] In the Appeals Chamber's view, the firehouse, headquarters of the Muslim TO, can only be considered as a military target. Additionally, although military operations directed at dwellings and other installations that are used only by civilians are prohibited, civilian property making an effective contribution to military action whose total or partial destruction offers a definite military advantage may constitute a legitimate military objective. In this respect, Witness TW10 testified that the ABiH had no trenches in Stari Vitez at the time of the HVO attack and that they hid behind houses and from these positions resisted the attack.[666] The witness testified further that both the soldiers

[660] Trial Judgement, para. 661.
[661] See Trial Judgement, paras 754-755. Additionally, the Trial Chamber does not rely upon these events in paras 643-644 when describing the attack on Vitez/Stari Vitez.
[662] Trial Judgement, para. 644 and footnote 1251.
[663] See also testimony of Nihad Rebihić, T. 8358.
[664] *Blaškić, T.* 1205-06.
[665] *Blaškić, T.* 1206.
[666] *Blaškić, T.* 1208.

and other citizens of Stari Vitez attempted to defend themselves and that on 17 April 1993 defence lines were formed.[667] Witness TW10 also testified that on 18 April 1993 forty men who had fled to Stari Vitez when Novaci, (located about 500 meters from Stari Vitez), was attacked, stayed throughout the war and helped to defend Stari Vitez.[668] In the Appeals Chamber's view, these men taking part in combat activities became "combatants" in the legal sense and were no longer specifically protected as civilians for the time that they were directly involved in hostilities.

442. The testimony of Col. Watters, upon which the Trial Chamber partly relies to conclude that the 16 April attack was a coordinated offensive and a surprise for the ABiH, also describes the resistance of the ABiH immediately after the 16 April 1993 HVO attacks. According to Col. Watters, the HVO had gained control of key routes and key junctions, and the actual core areas of the Muslim population had been able to defend themselves, with some exceptions related to ethnic cleansing and, as the witness later discovered, the wholesale destruction of villages along the Lašva Valley. The key areas of Kruščica, Stari Vitez, and villages down the Kiseljak valley were still holding out. The Muslim 3rd Corps launched a counter-offensive from Zenica, linked up with these isolated Muslim enclaves, and by 20 April had actually rolled back most of the HVO gains and were in a very strong position on the evening of 20 April 1993.[669]

443. Furthermore, Exh. Z660.1.A, a preparatory combat command from Blaškić dated 15 April 1993, "for the defence of the HVO and the town of Vitez from extremist mujahedin-Muslim forces", specially refers to the forces brought by the Muslim side to the firehouse in Vitez.

444. The defence case at trial was that it was the ABiH who started the attack in the town of Vitez and that at 5:30 a.m. a shell fell in the vicinity of the HVO headquarters (15 minutes before the time at which, according to Witness Nihad Rehibić, the first Croat shell was fired).

445. The Appeals Chamber recalls that the question of who attacked first is not determinative of whether Vitez/Stari Vitez constituted a legitimate military objective for the HVO. In the Appeals Chamber's view, a reasonable Trial Chamber could have come to the conclusion that there was a justified military objective for the attack on Vitez/Stari Vitez in April 1993 in light of the evidence, regarding the firehouse (headquarters of the Muslim TO), and the private houses used in the combat operations.[670]

(iii) Status and number of victims

[667] *Blaškić, T.* 1212.
[668] *Blaškić, T.* 1212-13.
[669] T. 5712-14.
[670] See *Blaškić* Appeal Judgement, para. 444 whereby the Appeals Chamber concluded in respect of the attack on 16 April 1993 in the Vitez town that it was not an unlawful military action.

446. The Trial Chamber made no specific finding as to whether any of the Muslims killed in Vitez/Stari Vitez were civilians or combatants or as to the number of victims in Vitez/Stari Vitez in April 1993. The crime of unlawful attack on civilians does not require that a specific number of civilians be killed or seriously injured. However, in a circumstantial case such as the present one, the scale of civilian casualties may be relevant to determine whether an attack is directed at civilians. The Trial Chamber's finding at paragraph 646 of the Trial Judgement that "[i]n all 172 Muslims in the Vitez municipality were killed", does not by itself establish that civilians were among the killed Muslims, or that any of the deaths occurred in Vitez/Stari Vitez in April 1993. Having reviewed the evidence set out in the Trial Judgement,[671] the Appeals Chamber concludes that the only evidence supporting the fact that at least four Muslim civilians were killed in Vitez/Stari Vitez in April 1993 is Exh. Z2715, a Report of the BiH Presidency State Commission for gathering facts on War Crimes in the territory of Bosnia and Herzegovina dated 17 July 1995.[672] This exhibit does not state whether the Muslims killed in Vitez in April 1993 were civilians. However, it can safely be inferred that the four persons killed, aged respectively 7, 70, 79, and 83 were civilians.

447. The Appeals Chamber finds that it was reasonable for the Trial Chamber to rely on Exh. Z2715, after having heard the testimony of Enes Surković, a Muslim, former professor in Vitez and active member of the SDP, and a member of the above Commission. Enes Surković explained how he collected information related to Muslims killed in various localities in Vitez Municipality which form the basis for this part of Exh. Z2715.

448. As to evidence of civilians being seriously injured, the reference in Exh. Z2715 to the fact that "many civilians were wounded in the old Vitez during the 10-month encirclement" is not such that a reasonable trier of fact could have relied on since it does not specify when the civilians were injured or the seriousness of their injuries. There is therefore no evidence that could have allowed the Trial Chamber to conclude that among the victims of the April 1993 attacks in Vitez/Stari Vitez civilians were seriously injured.

(iv) The discriminatory context within which the attack occurred

449. The Trial Chamber found at paragraph 520 of the Trial Judgement that the weight of the evidence pointed clearly to persecutions of the Muslims in the Central Bosnian municipalities taken over by the HVO, including Vitez, and that the persecution followed a pattern in each municipality and demonstrated that the HVO had launched a campaign against the Bosnian Muslims in these

[671] Trial Judgement, paras 643-644, and footnotes 1246-1254.

municipalities. The Trial Chamber relied upon the evidence of Edib Zlotrg and Sulejman Kalčo that several Muslims were murdered in Vitez in 1992; of Nihad Rebihić that in late 1992 and January 1993 damage was caused to Muslim businesses in Vitez; of Witness AC that in January 1993 two armed HVO soldiers forced their way into an apartment in Vitez, abused a witness and his family and stole money and valuables, and that he heard that the same thing happened to about twenty other Muslim families in the same part of the town. The Trial Chamber also referred to both the testimony of Edib Zlotrg and to his notes (Exhs Z332.1, Z332.2) in which he compiled details of thirty-seven crimes against Muslims in the municipality, between December 1992 and April 1993, involving harassment, wounding and murder of persons and the bombing, shooting at and arson of Muslim business premises.[673] This discriminatory context as well as the fact that there was an open conflict between Muslims and Croats when the HVO launched its attack against Vitez/Stari Vitez on 16 April 1993, is the background against which the Trial Chamber had to determine whether the evidence sufficed to render the attack as such unlawful.

(v) Conclusion

450. Despite discriminatory actions against the Muslim community in Vitez municipality at the time, the Trial Chamber had no direct evidence that the HVO attack of 16 April 1993 in Vitez/Stari Vitez was directed at civilians. The Appeals Chamber therefore considers that no reasonable trier of fact could have concluded that the HVO attack was directed at civilians.[674] In making this conclusion the Appeals Chamber has, in particular, given due consideration to the existence of an armed conflict between Croats and Muslims in the area, the number of legitimate military objectives present in Vitez/Stari Vitez, and the resistance offered by Muslim forces, as well as the absence of evidence of civilian victims in April 1993.

451. Therefore, the Trial Chamber's finding that the war crime of unlawful attack on civilians, under Article 3 of the Statute, Count 3 (Kordić) and Count 5 (Čerkez), is established with respect to Vitez/Stari Vitez, must be reversed**.**

(b) Unlawful attack on civilian objects, Count 4 (Kordić) and Count 6 (Čerkez)

452. The Trial Chamber considered that the Accused were charged for attacks deliberately directed at civilian objects and not for indiscriminate attacks which although pursuing a legitimate

[672] Exh. Z2715, p. 9, lists 42 Muslim citizens killed in Vitez on various dates. The Appeals Chamber has identified the persons killed in April 1993, based on the trial record and evidence admitted at trial.
[673] Trial Judgement, para. 512.
[674] The Appeals Chamber notes that the principle "*in dubio pro reo*" and its impact on findings in such a border line case has not been discussed by the Trial Chamber.

military objective would have been disproportionate.[675] The Trial Chamber did not make an explicit finding that civilian objects were deliberately targeted in Vitez/Stari Vitez in April 1993. However, it appears to have considered that the attack was directed at civilian objects as part of a wider plan whose purpose was to subdue or remove the Muslim population and took the form of attacking towns and villages with the concomitant destruction.

453. The Appeals Chamber will now determine the scale of civilian destruction resulting from the attack. The Appeals Chamber is of the view that, in principle, the crime of unlawful attack on civilian objects does not require proof of a specific amount of civilian destruction as long as there is evidence which proves beyond reasonable doubt that civilian objects were deliberately attacked. However, in a circumstantial case such as the present one, the scale of civilian destruction may be relevant to determine whether an attack is aimed at civilian objects. The Trial Chamber found that in the Vitez municipality, "420 buildings were destroyed, together with three mosques, two Muslim seminaries and two schools".[676] It did not find however that the 420 buildings and the two schools were destroyed in the town of Vitez proper in April 1993, and it did not make the necessary finding as to the status of the buildings in question.

454. Having reviewed the evidence set out in paragraphs 643-644 and referred to in footnotes 1246 to 1254 of the Trial Judgement, the Appeals Chamber notes that the scale of civilian destruction occurring in Vitez/Stari Vitez in April 1993 remains unknown. Exh. Z2715 does not indicate when the buildings were destroyed (80 houses, together with 1 fire station).[677] Because Exh. Z2715 also refers to persons killed on various dates in April, June, August, and October 1993, and civilians wounded in old Vitez during the 10-month encirclement and Muslims detained in camps in Vitez in the second half of April 1993, and because the Trial Chamber found that Stari Vitez was under constant shelling until February 1994,[678] the Appeals Chamber considers that no safe inference can be made as to whether the 80 houses in question were destroyed in April 1993. Col. Watters testified about the April attacks that in his opinion "most of the destruction and casualties were in the Muslim area of the town".[679] The witness is, however, silent as to the number of civilian buildings destroyed, as opposed to buildings used for military purposes.

455. The Appeals Chamber takes note of the fact that Muslim forces (soldiers and members of the TO, and persons actively taking part in resisting the attack) were present in private houses.

[675] See Trial Judgement, para. 323, according to which the Prosecution defined the fact that the attack was wilfully directed at civilian objects as one of the elements of the crime of unlawful attack on civilian objects.
[676] Trial Judgement, para. 646.
[677] The Appeals Chamber has held above that the fire station, were most of the ABiH soldiers were deployed, may constitute a military objective.
[678] Trial Judgement, para. 755.
[679] Trial Judgement, para. 643, referring to Col. Watters, T. 5694-704.

Additionally, the Trial Chamber found that the 18 April truck bomb in Stari Vitez, which also destroyed civilian houses, was not attributable to any of the Accused.[680]

456. In light of the above, the Appeals Chamber is of the view that no reasonable trier of fact could have concluded that civilian objects were unlawfully targeted in Stari Vitez.

457. Consequently, the Trial Chamber's conclusion that the war crime of unlawful attack on civilian objects, Count 4 (Kordić) and Count 6 (Čerkez) is established with respect to Vitez/Stari Vitez must be reversed.

(c) Murder, Counts 7 (Kordić) and 14 (Čerkez) and wilful killing, Counts 8 (Kordić) and 15 (Čerkez)

458. The Trial Chamber made no express factual findings regarding the crimes in question in relation to Vitez/Stari Vitez. However, it expressly referred to the testimony of a Muslim witness, Edib Zlotrg, that his brother,[681] who had previously published a letter in a newspaper criticizing HVO soldiers for firing their weapons in town, was deliberately killed by HVO soldiers in his apartment in the town of Vitez in April 1993. Additionally, the testimony of Edib Zlotrg states that his sister-in-law was shot in the stomach by the same HVO soldiers who were shooting through the apartment door.[682] According to the witness, the soldiers did not allow medical assistance to be given to his sister-in-law and she subsequently bled to death. At trial, the witness was not explicit as to whether his brother and sister-in-law were civilians. However, Exh. Z332.2, which consists of the record of Edib Zlotrg's interview by an Investigative Judge, mentions the fact that his brother, Nedim Zlotrg, was "assistant commander for personnel with the Vitez Municipal TO", and that his wife Mira Zlotrg "also worked at the TO Municipal staff". On the basis of the above evidence, there is no doubt that the soldiers who shot both victims had the intent to kill them or to inflict them serious injury in the reasonable knowledge that it was likely to result in death. However, the Appeals Chamber considers that as TO members, the two victims are to be considered as "combatants" and cannot claim the status of civilians**.**

459. The other evidence considered by the Trial Chamber is even less specific as to the circumstances under which the other five civilians were killed. It is not excluded that they were caught in the midst of fire during the lawful attack of military objectives. The above evidence does not establish beyond reasonable doubt that protected persons were wilfully killed by the HVO soldiers in Vitez/Stari Vitez in April 1993. In particular, the Appeals Chamber notes that Nedim

[680] Trial Judgement, para. 807.
[681] Erroneously referred to as his brother-in-law by the Trial Chamber at para. 644 of the Trial Judgement.
[682] T. 1645-46.

and Mira Zlotrg cannot be considered as protected persons. The Appeals Chamber finds that no reasonable trier of fact could have concluded that the crimes of wilful killing and murder were established in relation to Vitez/Stari Vitez.

460. The Trial Chamber refers to the testimony of Witness Enes Surković regarding the shooting and stabbing of Salih Omerdić.[683] Although the testimony establishes that the victim died as a result of his injuries,[684] it is unclear whether he was a civilian or a member of the TO present in the town.

461. Consequently, the Trial Chamber's conclusion that the crimes of murder, a crime against humanity, Count 7 (Kordić) and Count 14 (Čerkez); and wilful killing, a grave breach of the Geneva Convention of 1949, Count 8 (Kordić) and Count 15 (Čerkez), are established with respect to Vitez/Stari Vitez, must be reversed.

(d) Inhumane acts, Count 10 (Kordić) and Count 17 (Čerkez) and inhuman treatment, Count 12 (Kordić) and Count 19 (Čerkez)

462. The Trial Chamber also refers to the testimony of Witness TW21 (based on transcripts in the *Blaškić* trial), according to whom armed men came into her house in Vitez looking for weapons, sexually assaulted her and stole her jewellery. A review of the transcript reveals that Witness TW21, a female Muslim inhabitant of Vitez, only answered in the affirmative to the Prosecution's questions as to whether the man who took her upstairs sexually assaulted her and as to whether the second man who came into the room also did so. It is unclear from the witness's testimony whether the perpetrators of these sexual assaults were soldiers and she was not even asked about their ethnicity. She testified that one of the men who assaulted her was wearing civilian clothes and the other camouflage trousers. The Appeals Chamber also takes into account further portions of the witness's testimony. She testified that during the events, a third man stayed downstairs with her younger son, taking some jewellery allegedly needed "for the army". She further recounted the conversation she had later that same night with two Croat soldiers who came to her door having heard about the "rape". The Appeals Chamber considers that a reasonable trier of fact could have found that Witness TW21 was sexually assaulted. It is clear that the assault caused serious mental suffering to her and constituted a serious attack on her human dignity. In the particular circumstances of the case, a reasonable Trial Chamber could have concluded on the basis of the transcript of her testimony that Witness TW21 was a civilian. The Appeals Chamber considers that since it is unclear who the perpetrators were of this crime, it is not established whether it was

[683] Trial Judgement, footnote 1252 referring to T. 4386-87.
[684] T. 4387.

civilians or soldiers or which unit these soldiers belonged to. Further, this incident was not charged in the Indictment.

463. Consequently, the Appeals Chamber finds that the Trial Chamber's conclusion that the crime of inhumane acts, Count 10 (Kordić), Count 17 (Čerkez), and inhuman treatment, Count 12 (Kordić) Count 19 (Čerkez) in Vitez/Stari Vitez were established, must be reversed.

(e) Wanton destruction not justified by military necessity, Count 38 (Kordić) and Count 41 (Čerkez)

464. The Appeals Chamber notes that, as summarized at paragraph 807 of the Trial Judgement, the evidence of destruction related to Vitez and Stari Vitez is irrelevant as to Counts 38 and 41 in this location: evidence of destruction of Muslim property after October 1992 and destruction of Muslim property in early 1993 do not necessarily include the charged destruction committed in April 1993; evidence of destruction of civilian houses by the truck bomb is irrelevant as the Trial Chamber found that there is no evidence to connect either of the Accused with this act of pure terrorism; and evidence of destruction of mosques and religious schools is irrelevant for Counts 38 and 41 since destruction of institutions dedicated to religion (*lex specialis*) is charged under Counts 43 and 44.

465. The Appeals Chamber takes into account the testimony of Col. Watters according to which most of the destruction during the April attacks was in the Muslim area of the town of Vitez, but has already held that the scale of such destruction is unknown. Exh. Z2715 does not specify when eighty houses were destroyed in the town of Vitez; part of these houses were obviously destroyed as a result of the 18 April truck bomb, which the Trial Chamber did not link with either of the Accused.[685] Moreover, there were military objectives in Vitez/Stari Vitez, including the headquarters of the Muslim TO and the private houses from where combatants, (including members of the ABiH, the TO and every person taking a direct part to hostilities), were resisting.

466. In the absence of evidence as to the scale of the destruction and as to the lack of military justification, the Appeals Chamber finds that no reasonable Trial Chamber could have concluded that destruction not justified by military necessity occurred in Vitez/Stari Vitez in April 1993.

467. The Trial Chamber's finding that Counts 38 and 41 are established in Vitez/Stari Vitez must therefore be reversed.

[685] Insert cross-reference to corresponding paragraph above.

(f) Plunder of public or private property, Count 39 (Kordić) and Count 42 (Čerkez)

468. Having considered the evidence summarized at paragraph 807 of the Trial Judgement, the Appeals Chamber is of the view that it is not such that a reasonable trier of fact could have concluded that the crime of plunder is established in Vitez/Stari Vitez in April 1993, the period covered by the Indictment. This was conceded by the Prosecution at the Status Conference on 6 May 2004 with regard to Vitez.[686]

469. Therefore, the Trial Chamber's finding that the crime of plunder is established in Vitez/Stari Vitez must be reversed.

(g) Wilful damage to institutions dedicated to religion or education, Count 43 (Kordić) and Count 44 (Čerkez)

470. The Prosecution conceded that evidence pertaining to the 18 April 1993 truck bomb which damaged the mosque, for which Čerkez was not held liable, is the only evidence it relied upon in relation to the destruction of protected property in Stari Vitez.[687] The Prosecution also conceded during the Status Conference held on 6 May 2004 that the same applies for Kordić.[688]

471. The Appeals Chamber finds that in the absence of any supporting evidence, no reasonable Trial Chamber could have found that Counts 43 and 44 were established in Stari Vitez. Therefore, these findings must be reversed.

5. Ahmići – April 1993

472. Kordić agrees that the killings in Ahmići on 16 April 1993 were "clearly crimes" and amounted to a massacre.[689] He also stated that the "method of attack insofar as it singled out civilians was clearly disproportionate",[690] and that the attack "constituted a war crime."[691] The Appeals Chamber has considered Kordić's statement, the Trial Chamber's findings and the evidence[692] and is of the view that a reasonable trier of fact could have found that: unlawful attack on civilians, Count 3 (Kordić); unlawful attack on civilian objects, Count 4 (Kordić); murder, Count 7 (Kordić);[693] wilful killing, Count 8 (Kordić); inhumane acts, Count 10 (Kordić); inhuman treatment, Count 12 (Kordić); wanton destruction not justified by military necessity, Count 38

[686] Status Conference on Appeal, T. 164.
[687] Prosecution Response, para. 10.67.
[688] Status Conference on Appeal, T. 165.
[689] Kordić Appeal Brief, Vol. I, pp 105-106. See also Appeals Hearing, T. 273.
[690] Kordić Appeal Brief, Vol. I, p. 105.
[691] Appeals Hearing, T. 273.
[692] Trial Judgement, para. 632 (i)-(iii), and footnote 1210; p. 215 ("Approximately 180 houses were destroyed and some were still smouldering. (The approximately 15 Croat houses remain untouched)".

(Kordić); plunder of public or private property, Count 39 (Kordić); destruction or wilful damage to institutions dedicated to religion or education, Count 43 (Kordić), were established.

### 6. Šantići, Nadioci and Pirići

473. As a preliminary issue, the Appeals Chamber will address the Prosecution's argument that the villages Nadioci, Pirići and Šantići were part of the Ahmići area and intertwined with Ahmići proper and that the orders related to Ahmići therefore also applied to these places.[694] The Appeals Chamber agrees with the Prosecution in so far as orders issued relating to Ahmići could also apply to the associated villages; this will be discussed in its context in the part on individual criminal responsibility. The Trial Chamber treated Šantići, Nadioci and Pirići as associated with Ahmići; however, in the Indictment, these villages are listed separately. It is therefore the duty of the Prosecution to prove all the elements of all the crimes in relation to each of the three places; proof of a crime in relation to one of the places cannot stand as a basis for a conviction in relation to another place. The Appeals Chamber will therefore consider whether the elements of each crime in each place are established.

#### (a) Šantići

##### (i) Unlawful attack on civilians, Count 3 (Kordić)

474. Witness U testified as to how his father and brother were killed[695] and Witness Nura Pezer testified that her son and husband were wounded and then shot in the head.[696] Further, in analyzing the death certificates relating to the attack in Exh. Z1583.1, the Appeals Chamber notes that in Šantići, 28 people died; of them, one was a 15-year old male, one was a 68-year old male, and one was female. From this evidence, a reasonable trier of fact could have found that these three were civilians.

475. The Appeals Chamber finds that a reasonable trier of fact could have found that the crime of unlawful attack on civilians, Count 3 (Kordić) was established and thus upholds the Trial Chamber's finding.

[693] Trial Judgement, para. 638.
[694] Prosecution Response, para. 5.21.
[695] T. 10206-07.
[696] T. 15449-51.

(ii) Unlawful attack on civilian objects, Count 4 (Kordić))

476. Witness U testified that only the homes of Muslim residents of Šantići were burned or damaged and confirmed the damage shown in the aerial photograph presented as Exh. Z1982.[697] Witness Nura Pezer testified that:

> Q. Could you see if those soldiers were carrying some kind of petrol cans or something like that?
> A. Yes, they had petrol canisters, some 20 litres, some 10 litres. They would throw them into our houses and then put fire to them. I mean, Muslim houses.

477. The Appeals Chamber is of the view that a reasonable trier of fact could have found an unlawful attack against civilian objects since damage only to Muslim houses could not have been caused by military fighting, and soldiers carrying around petrol canisters shows that the damage was wilful. The Appeals Chamber thus upholds the Trial Chamber's finding that the crime was established.

(iii) Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

478. The Prosecution Appeal Brief[698] refers to Witness U's evidence that his father and brother were killed on 16 April 1993 and that he saw two bodies already killed:

> As we were passing along the road, I saw that there were many soldiers in front of Pican's cafe and they were laughing at us. They were also wearing camouflage uniforms and their faces were painted in different colours. Then I saw the bodies of Ribo Munib and Mustafa Dedic. Then one of the two told my brother to open the door of the garage, of Mustafa Dedić's garage, and they told me and my mother to go into the garage. My brother also tried to enter the garage, but he told him to go back and to lock the garage. After, that I heard shots immediately. I peeped through the openings on the garage doors, the openings between the boards, and I saw my father and brother lying there dead. Q. Why did they kill your father and brother? A. Yes. Q. Why did they? Why were they killed? A. Because they were Muslims. Q. Had your father or brother offered any resistance at any time during that morning? A. No, no resistance at all.[699]

479. Further, the Prosecution during the appeals hearing[700] referred to Witness Nura Pezer, who testified at trial that her son was killed when he had surrendered with his hands above his head.[701]

480. The Appeals Chamber considers that whether the father and the brother of Witness U and the son of Nura Pezer were civilians is beside the point. They were killed when in the hands of the soldiers and were *hors de combat*. The Appeals Chamber upholds the Trial Chamber's finding that murder (Count 7) and wilful killing (Count 8) for Kordić were established.

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[697] T. 10212.
[698] Prosecution Appeal Brief, para. 3.36, referring to Witness U, T. 10205-06. The Appeals Chamber notes that parts of Witness U's testimony refers to a grenade attack that took place in October 1992, which is outside the temporal scope stated in the Indictment in relation to Counts 3-4 and Counts 7-20, T. 10199-200.
[699] Witness U, T. 10206-07.
[700] T. 15450.
[701] T. 15449-51.

(iv) Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

481. The evidence of Witness Nura Pezer provides that her husband was injured in the leg; she testified:

> Q. Very well. Your husband went out that morning and he received -- he was gravely injured in the leg, but he nevertheless managed to get back to the garage of your house, and after that you tried to help him with your son. You tried to dress his wound, bandage it. And your son suggested that you should surrender or, rather, leave the house, because -- seeing what was happening to the house. A. Yes. But we could not do anything but put something on his leg. But there was not -- no real help, because the injury was very grave, because those were dumdum bullets and we couldn't do anything from imitation bullets. So we couldn't do anything. We simply had to leave the house.[702]

The circumstances surrounding the husband's injuries are unknown; it appears, however, that he was injured in the morning when he "went out". The witness's husband and son were active members of the Šantići TO.[703]

482. Lacking further clarification as to how the injury was obtained, the Appeals Chamber concludes that no reasonable trier of fact could conclude that inhumane acts, Count 10 (Kordić) or inhuman treatment, Count 12 (Kordić) were established.

(v) Wanton destruction not justified by military necessity, Count 38 (Kordić)

483. The Trial Chamber found "[m]uch evidence was given about the destruction and plunder of Ahmići and its associated hamlets on 16 April 1993 and there is no need to repeat it all here,"[704] and that "there was a pattern of destruction (not justified by military necessity) and plunder in all places attacked by HVO and mentioned in Counts 37 – 39 and 40 – 42 (save for those deleted at the close of the Prosecution case and those for which there was insufficient evidence)"[705].

484. The Trial Chamber found that "[t]he house of Nura Pezer and her family came under attack and was set on fire."[706] The house was situated in Šantići,[707] and she testified that:

> Q. Could you see if those soldiers were carrying some kind of petrol cans or something like that?
> A. Yes, they had petrol canisters, some 20 litres, some 10 litres. They would throw them into our houses and then put fire to them. I mean, Muslim houses.

Witness U testified that only the homes of Muslim residents of Šantići were burned or damaged and confirmed the damage shown in the aerial photograph presented as Exh. Z1982.[708]

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[702] T. 15449-50.
[703] T. 15443.
[704] Trial Judgement, para. 807 (iii).
[705] Trial Judgement, para. 808.
[706] Trial Judgement, para. 632. T. 15448-55, 15459-62.
[707] T. 15448, referred to in footnote 1206.

485. Based on the same evidence discussed in the section on unlawful attack on civilian objects, the Appeals Chamber is of the view that a reasonable trier of fact could have found that damage to only Muslim houses was of such nature that it could not have been caused by the fighting and was thus not justified by military necessity and that the fact that soldiers were carrying around petrol canisters shows that it was deliberate. The Appeals Chamber upholds the Trial Chamber's finding that wanton destruction, Count 38 (Kordić) was established.

(b) Nadioci

(i) Unlawful attack on civilians, Count 3 (Kordić)

486. Witness Morsink, a monitor with the ECMM, testified that he saw six dead bodies on the road to Vitez, near Nadioci and Pirići.[709] Although the witness testifies to seeing these bodies, no further information is provided as to their status or any identifying characteristics which would indicate the circumstances surrounding the killings and therefore does not assist in finding whether the attack on Nadioci was directed against civilians.

487. In analyzing the death certificates relating to the attack in Exh. Z1583.1, the Appeals Chamber notes that in Nadioci three persons were killed, among whom two were female. From this it may be concluded that the majority of those killed in Nadioci were women.

488. The Appeals Chamber finds that a reasonable trier of fact could have found that the crime of unlawful attack against civilians, Count 3 (Kordić) was established. The Appeals Chamber thus upholds the Trial Chamber's finding.

(ii) Unlawful attack on civilian objects, Count 4 (Kordić)

489. The Appeals Chamber has not been able to identify evidence in support of destruction in Nadioci. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that unlawful attack on civilian objects, Count 4 (Kordić) was established and therefore reverses the Trial Chamber's finding.

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[708] T. 10212.

[709] T. 7983-84. "Q. On that road to Vitez, did you see – and close to Nadioci and Pirići -- did you see six bodies, dead bodies, on the road? A. That's correct. Q. What were you informed about those bodies, so far as their previous movement of the bodies is concerned? A. I was told by one of the monitors in the same car that he felt this very strange because he was told that BritBat had removed bodies from the road the night or the evening before. Q. And so they had been put back on the roadside? A. Apparently, yes. Q. Were you informed where they had been moved on the previous day? A. I'm not sure. As I recall it, they were moved to the side of the road. Q. And then put simply back on the road itself? A. That's what I recall, yes."

(iii) Murder, Count 7 (Kordić) and wilful killings, Count 8 (Kordić)

490. Based on the aforementioned testimony of Witness Morsink, the Appeals Chamber also upholds the Trial Chamber's finding that murder, Count 7 and wilful killing, Count 8 (Kordić) were established.

(iv) Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

491. The Appeals Chamber notes that the Indictment limits the inhumane acts charged in Count 10 and the inhuman treatment charged in Count 12 to injuries,[710] and the Appeals Chamber will therefore only consider evidence in relation to injuries.

492. The Prosecution directed the Appeals Chamber during the appeals hearing to the evidence of Witness S, on which the Trial Chamber relied in other parts of the Trial Judgement, and which are relevant to these charges.[711] Witness S testified to two incidents. First she testified to women who had received injuries from firearms while being held in houses in Novaci. Since Novaci is a part of Vitez, this evidence will not be considered in this respect in relation to Nadioci. Witness S further testified about a crime (rape) (of which she was told of by colleagues) that occurred in "the Bungalows," which the Prosecution submits is in Nadioci (the Jokers' headquarters). The Trial Chamber placed the rape in Novaci (Vitez), and found that "Doctors in Vitez received complaints and examined women who had been held (for purposes of rape) by HVO soldiers in a house in Novaci".[712]

493. Having reviewed the transcript, even though it is a bit unclear and does mention the Bungalows, the Appeals Chamber is satisfied that from the context no reasonable trier of fact could have found that the crime occurred in Nadioci.[713] Having no other evidence to support the Trial Chamber's finding, the Appeals Chamber reverses the Trial Chamber's findings that inhumane acts (Count 10) and inhuman treatment, Count 12 (Kordić) were established in Nadioci.

(v) Wanton destruction not justified by military necessity, Count 38 (Kordić)

494. The Trial Chamber found that Exh. Z2799, "a video recording made in 1996 showing the damage to the villages of the Lašva Valley and surroundings. The recording was taken from a helicopter and prepared by Witness Lt.-Col. Capelle, who gave evidence about it."[714]

[710] Indictment, para. 42.
[711] Appeals Hearing, T. 414.
[712] Trial Judgement, para. 797.
[713] T. 7940-46.
[714] Trial Judgement, para. 804.

495. It is not sufficient for the Prosecution to prove that destruction occurred. It also has to prove when and how the destruction occurred. It has to establish that the destruction was not justified by military necessity, which cannot be presumed and especially in the context of the Indictment in which the Prosecution pleaded that fighting continued until March 1994.[715] The Appeals Chamber considers that in the absence of further evidence as to how the destruction occurred, no reasonable trier of fact could find that wanton destruction not justified by military necessity, Count 38 (Kordić) is established.

(c) Pirići

(i) Unlawful attack on civilians, Count 3 (Kordić)

496. Based on the aforementioned testimony of Witness Morsink in relation to Nadioci, the Appeals Chamber finds that a reasonable trier of fact could have found that the crime of unlawful attack against civilians, Count 3 (Kordić) was established. The Appeals Chamber thus upholds the Trial Chamber's finding.

(ii) Unlawful attack on civilian objects, Count 4 (Kordić)

497. The Appeals Chamber has not been able to identify sufficient evidence in support of destruction in Pirići. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that unlawful attack on civilian objects, Count 4 (Kordić) was established and therefore reverses the Trial Chamber's finding.

(iii) Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

498. Taking into consideration the evidence discussed above under unlawful attack on civilians, the Appeals Chamber upholds the Trial Chamber's finding that murder (Count 7) and wilful killing, Count 8 (Kordić), were established.

(iv) Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

499. The Appeals Chamber notes that the Indictment limits the inhumane acts charged in Count 10 and the inhuman treatment charged in Count 12 to injuries.[716] The Appeals Chamber will therefore only consider evidence in relation to injuries.

500. The Prosecution directed the Appeals Chamber during the hearing to the evidence of Witness Nura Pezer and Exh. Z1594.[717] Witness Nura Pezer however, testified about Šantići and

[715] Indictment, paras 24 and 36.

her testimony is considered in that context.[718] The Prosecution further submitted that Exh. Z1594.3 referred to Enes Hrustanović. The Appeals Chamber notes that Exh. Z1594.3 is a list of inhabitants in Ahmići and surrounding villages and that it specifies whether a person was killed, killed in war, injured or injured in war and that the remark made in connection with Enes Hrustanović, born in 1965 in Pirići is that he was "injured in war." Further, the list states where Enes Hrustanović was born but not where he was injured.

501. The Appeals Chamber considers that no reasonable trier of fact could have found, based on this evidence, that Enes Hrustanović was subjected to inhumane acts or inhuman treatment since there is indication that injury suffered by the victim was inflicted during fighting. The Appeals Chamber did not identify further evidence supporting the Trial Chamber's finding that inhumane acts and inhuman treatment occurred in Pirići. The Appeals Chamber reverses the Trial Chamber's finding that inhumane acts (Count 10) and inhuman treatment (Count 12) were established in Pirići.

(v) Wanton destruction not justified by military necessity, Count 38 (Kordić)

502. The Trial Chamber found that Exh. Z2799, "a video recording made in 1996 showing the damage to the villages of the Lašva Valley and surroundings. The recording was taken from a helicopter and prepared by Lt.-Col. Capelle, who gave evidence about it."[719] The Trial Chamber held in relation to Pirići that "[h]ouses were being rebuilt."[720]

503. Having reviewed the evidence, the Appeals Chamber considers that it is established that houses were destroyed. However, the Appeals Chamber considers that in the absence of further evidence as to how the destruction occurred, no reasonable trier of fact could have found that wanton destruction not justified by military necessity was established.

## 7. Gaćice – April 1993

### (a) Wanton destruction not justified by military necessity, Count 38 (Kordić)

504. The Trial Chamber found that:

> In late 1992 and January 1993 damage was caused to Muslim businesses in Vitez. The same occurred in the village of Gaćice nearby, where according to one witness, intimidation of the Muslims was greater after visits of Dario Kordić.[721]

[716] Indictment, para. 42.
[717] Appeals Hearing, T. 414.
[718] T. 15449-51.
[719] Trial Judgement, para. 804.
[720] Trial Judgement, para. 804.
[721] Trial Judgement, para. 512.

It is unclear whether the Trial Chamber considers that destruction of Muslim property occurred at the same time, *i.e.,* in late 1992 and January 1993. Kordić was only indicted for wanton destruction not justified by military necessity in Gaćice in April 1993.

The Trial Chamber further found that:

> On 20 April 1993, Gaćice, a village to the south-east of Stari Vitez, was attacked by the HVO; this village was one which was evenly divided between Muslims and Croats. According to the evidence of Witness AP the village came under attack from three sides at 5.30.[722]

It is clear that extensive destruction had occurred; the question is when and by whom. Having reviewed the transcript of Witness AP, who is the witness upon whom the Trial Chamber relied for both findings, it is clear that the witness is testifying that Muslim houses and the Mekteb were burnt down on 20 April 1993 by HVO soldiers during the attack.[723] The Appeals Chamber concludes that a reasonable trier of fact could have found that wanton destruction not justified by military necessity, Count 38 (Kordić), was established.

### 8. Večeriska and Donja Večeriska – April 1993

#### (a) Unlawful attack on civilians, Count 3 (Kordić) and Count 5 (Čerkez) and unlawful attack on civilian objects, Count 4 (Kordić) and Count 6 (Čerkez)

505. Kordić argues that there were no specific civilian casualties in the villages in question.[724] The Prosecution argues that this attack has to be seen as part of a wider attack on Vitez and the Muslim villages of the Lašva valley.[725] The Prosecution argues further that Donja Večeriska's strategic position on a hill overlooking the Vitezit factory does not justify HVO soldiers' attack on Muslim civilians and their houses.[726]

506. The Trial Judgement held in paragraph 645:

> The reference to "Večeriska-Donja Večeriska" in the Indictment is to the two villages of Donja and Gornji [sic] Večeriska. The prosecution case is that these associated villages (near the Vitezit or SPS factory to the south-east of Vitez) were attacked on 16 April 1993 as part of the general HVO attack on the Lašva Valley. Donja Večeriska was a small, mixed village, 60 per cent Muslim, with no military installations. The HVO military forces had established a presence in the course of 1992. On the night of 15 April 1993, most Croats left the village for Gornji Večeriska, with only the able-bodied men remaining. Nonetheless, an attack was not expected since the Croats had evacuated the village several times before. The shelling started at 5.30 a.m. with an anti-aircraft gun shooting from the factory nearby. Grenades were thrown into the houses and the residents and others were then arrested and beaten. Witness V recognised some of his Croat neighbours and HVO soldiers (some were wearing helmets with a black "U") and some with

[722] Trial Judgement, para. 677.
[723] T. 15876-77.
[724] Kordić Appeal Brief, Vol. I, p. 116.
[725] Prosecution Response, para. 5.23.
[726] Appeals Hearing, T. 419.

> stripes painted on their faces and ribbons on their shoulders. The witness saw the majority of Muslim houses were burning. The TO organised some defence. Eventually, at 3 a.m. on 18 April 1993, the villagers (around 400 in all) managed to escape from the village with the help of UNPROFOR. At least eight persons died in the attack and the village was destroyed by explosives and fire.[727]

(i) Unlawful attack on civilians, Count 3 (Kordić) and Count 5 (Čerkez)

507. The Trial Chamber made no finding that the civilian population or civilians were targeted in Večeriska/Donja Večeriska. The Trial Chamber relied upon the Prosecution's case that these associated villages were attacked on 16 April 1993 as part of the general attack on the Lašva Valley. Although the Trial Chamber was cognisant of the fact that the TO was present in the village with 40-50 men and organised some defence, as testified by Witness V, it stressed that there were no military installations and no expectation of an attack from the Croats. The Trial Chamber's finding at paragraph 649 of the Trial Judgement that the HVO attack on Večeriska/Donja Večeriska was coordinated must be read together with its other findings that there was in April 1993 a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims; there was also a campaign of persecution, whose purpose was the subjugation of the Bosnian Muslim population; and that Donja Večeriska was a high point of this campaign of persecution.

508. The above elements clearly suggest that although the Trial Chamber did not make any specific findings relating to the purpose of the attack in Večeriska/Donja Večeriska as it did with respect to the events that occurred in Busovača in January 1993 or in Ahmići in April 1993, it implicitly considered that these attacks were deliberately launched against civilians.

509. The Appeals Chamber turns now to Kordić's argument that this conclusion is not supported by the evidence before the Trial Chamber. As far as the attack on Donja Večeriska is concerned, the Trial Chamber appears to rely exclusively upon the testimony of Witness V, a Muslim villager of Donja Večeriska and member of the TO.

a. Strategic interest of Večeriska/Donja Večeriska

510. Witness V testified that on 16 April 1993, there were forty-two members of the TO with only a limited number of light weapons due to a shortage of weapons.[728] The witness also testified that there were no trenches and no organized defence in the village before the attack on 16 April.[729] Asked in cross-examination whether he agreed to the fact that there were explosives, taken out of

[727] Trial Judgement, para. 645.
[728] T. 10420.
[729] T. 10371.

the plant, in the houses of the village, the witness said that there were none in his house or his brother's house and that he did not know about others. He testified nonetheless, that Džemal Haskić, a Muslim neighbour, had been wounded while he wanted to use a grenade and was hit in the arm while the grenade went off.[730] In light of the presence of the above Muslim forces who resisted the attack until they ran out of ammunition in the early hours of 18 April 1993, the Appeals Chamber finds that no reasonable Trial Chamber could have failed to consider that Večeriska/Donja Večeriska constituted a legitimate military target.

b. Means used by the HVO for the attack and crimes committed during its course

511. Witness V testified that HVO forces were present in the village from about autumn 1992, and that a number of HVO personnel moved into the SPS factory.[731] Witness V testifed further that the HVO forces included soldiers from a unit of the HV,[732] and that the HVO used a café belonging to Franjo Drmić as headquarters.[733] Witness V testified that the HVO launched an attack against his village on 16 April 1993. The use of grenades thrown into the houses[734] will have to be assessed in light of the evidence as to whether the houses in question hosted only civilians or also soldiers, members of the TO, or villagers taking an active part in resisting the attack. As to the fact that most Croats left the village of Gornja Večeriska the night of 15 April 1993, with only the able bodied men remaining,[735] it is a reasonable indication that the attack was planned, but it is not determinative as to whether the attack was also targeted against civilian objectives.

512. As to the course of the attack, Witness V testified that, on 16 April 1993, he was awoken by detonations, probably mortar shells, and there was an anti-aircraft gun shooting from the factory.[736] In the Appeals Chamber's view, in the context of an armed conflict, the above circumstances are not, as such, decisive as to what the target of the attack was.

513. As to the identification of some of the HVO members participating in the attacks on 16 and 17 April 1993, Witness V testified that he was arrested by a group of HVO soldiers, amongst whom were some of his Croat neighbours and some soldiers from Herzegovina. Some of them wore helmets with the letter "U".[737] According to Witness V, it was around 3:00 a.m. on 18 April 1993 that he, as well as civilians and members of the TO who did not have weapons, retreated with the

[730] Witness V, T. 10383.
[731] T. 10373.
[732] T. 10374.
[733] T. 10371.
[734] Trial Judgement, para. 645.
[735] Trial Judgement, para. 645.
[736] T. 10377.
[737] "U" is an abbreviation for "Ustasha", T. 10380-82.

assistance of the UNPROFOR towards its compound, while TO members having weapons crossed the Lašva and went to Grbavica.[738]

c. Status and number of victims

514. It must be stressed that the Trial Chamber made no finding that civilians were killed or seriously injured. It only found that at least eight persons died in the attack without specifying their status. Kordić submits that "they [HVO] fought for 48 hours until the ABiH ran out of ammunition", and it is unclear that civilians were killed there.[739]

515. Witness V testified that eight persons were killed. Among these eight persons were his parents, without doubt civilians since they were aged 72 and his mother was bedridden. His parents remained in the house when he left it on 16 April 1993 and he never saw them alive after that. The victims named by Witness V are the same persons also referred to as having been killed in Donja Večeriska on 16 April 1993 in Exh. Z2715. Exh. Z2715 shows that four of these victims were women and that all but one man was more than 62 years old. A reasonable trier of fact could have found that at least seven civilians were killed on 16 April 1993 in Donja Večeriska, the exact circumstances of their death remaining unknown.

516. Further review of the witness testimony does not reveal sufficient evidence to conclude that civilians were deliberately targeted. In some instances, it is unclear whether the victims of deliberate killing or wounding were civilians. This is the case of Meho Haskić who was deliberately shot by a soldier as he was lighting a cigarette. In other instances, the person targeted was clearly a member of the TO. This is the case of Witness V himself who was shot at with a machine gun when he ran to alert his relatives, and who was fired at when he managed to flee after having been arrested. It is unclear whether the witness was armed during the second attack. Although a member of the TO, he did not have a weapon before the attack,[740] but he managed to take one of another TO member who had been wounded, during the day on 16 April.[741] In the Appeals Chamber's view, even if the witness did not have a weapon when he was shot at, he may be considered as a legitimate military target. In the few instances where Witness V testified about the existence of civilian casualties during the attack, the circumstances under which these civilian casualties occurred are unknown. Witness V also testified that a Croat set on fire a stable where a refugee from Donji Vakuf, wounded at the beginning of the attack, had taken refuge. It is unclear,

[738] T. 10387, 10424.
[739] Appeals Hearing, T. 440.
[740] T. 10378.
[741] T. 10387.

however, whether the Croat in question knew that a wounded person was in the stable.[742] Eventually, Witness V testified that grenades were thrown into the corridor of the house of his neighbours, a Muslim family, including a woman, her husband who was not armed and their three children. Witness V was not asked to clarify whether the man in question belonged to the TO or was a civilian. In any event, since Witness V, who is a member of the TO, was in the house in question during this particular attack, no reasonable trier of fact could have concluded that, as such, the fact of throwing a grenade into the house in question amounts to a deliberate attack on civilians. It is unknown whether any person was injured during this particular incident.

d. Conclusion

517. The Appeals Chamber is of the view that in the absence of direct evidence of civilians being deliberately targeted, given the presence and resistance of the Muslim forces from the houses of the village during the attack, the context of armed conflict between Muslims and Croats, and the limited number of civilian casualties accepted by the Trial Chamber, no reasonable trier of fact could have concluded beyond reasonable doubt that the April 1993 attacks on Večeriska/Donja Večeriska were deliberately directed at civilians.

518. Consequently, the Trial Chamber's conclusion that the crime of unlawful attack on civilians (Counts 3 and 5) is established with respect to Večeriska/Donja Večeriska must be reversed.

(ii) Unlawful attack on civilian objects, Count 4 (Kordić) and Count 6 (Čerkez)

519. Kordić argues that Muslim houses were frequently destroyed because that is where people were shooting from in a combat situation.[743] The Prosecution responds that the strategic position of Donja Večeriska on the up-slope of a hill overlooking the Vitezit factory does not sanction HVO soldiers to bombard the civilian houses and to use this indiscriminate shelling and firing, and throwing grenades into people's houses.

520. The exact number of civilian objects destroyed during the attack is unknown. Exh. Z2715 refers to 30 buildings having been destroyed in Donja Večeriska, with no indication as to when the destruction occurred. However, Witness V testified that on 16 April he saw that the majority of Muslim houses in the village had been burnt,[744] and that his parents' house was totally destroyed.[745] In light of the resistance organized by the TO from the village's houses after the start of the attack

[742] T. 10378-79.
[743] Appeals Hearing, T. 440.
[744] T. 10384.
[745] T. 10378.

on 16 April 1993, and until they ran out of ammunition in early morning on 18 April 1993, the Appeals Chamber is of the view that no reasonable trier of fact could have found beyond reasonable doubt that this first onslaught was directed at civilian objects. However, Witness V also testified that further destruction occurred between 18 and 21 April 1993, when Muslim forces had left the village for Grbavica – having run out of ammunition – and civilians and unarmed TO members took refuge at the BritBat Compound in Divjak. The Defence did not submit at trial that the Muslim forces came back into the village before the second onslaught occurred. A reasonable trier of fact could have concluded that civilian objects were deliberately targeted during the second round of unlawful destruction. It must be stressed however that the witness, who could only observe this later destruction from the distant location of the Britbat Compound near Divjak, is silent as to which unit(s) were involved in these later attacks.

521. The Appeals Chamber considers that the Appellants failed to demonstrate that the Trial Chamber erred when it concluded that the crime of unlawful attack on civilian objects (Counts 4 and 6) were committed in Večeriska/Donja Večeriska.

(b) Murder, Count 7 (Kordić), Count 14 (Čerkez) and wilful killing, Count 8 (Kordić), Count 15 (Čerkez)

522. The Appeals Chamber has not been able to identify sufficient evidence supporting these counts in relation to Večeriska/Donja Večeriska.

523. Therefore, the Trial Chamber's finding that Counts 8 (Kordić) and 15 (Čerkez), wilful killing, a grave breach of the Geneva Conventions of 1949, pursuant to Article 2 of the Statute, and Counts 7 (Kordić) and 14 (Čerkez), murder, a crime against humanity, pursuant to Article 5(a) of the Statute are made out in Večeriska/Donja Večeriska, must be reversed.

(c) Inhumane acts, Count 10 (Kordić) and Count 17 (Čerkez) and inhuman treatment, Count 12 (Kordić) and Count 19 (Čerkez),

524. The Trial Chamber expressly referred to the fact that grenades were thrown into houses and that the residents and others were arrested and beaten. The circumstances of Witness V's arrest by HVO soldiers when he tried to escape after a grenade was thrown into the house where he had searched for shelter has already been discussed above. The Appeals Chamber has considered that no reasonable trier of fact could have concluded beyond reasonable doubt that this particular incident targeted civilians. Witness V also testified that he and others were beaten with the butts of

the rifles of the soldiers who arrested him.[746] However, this is not evidence that he or others suffered serious bodily injuries or serious mental harm as a result of being beaten and he did not testify in that sense spontaneously. Therefore, the Appeals Chamber is of the view that no reasonable Trial Chamber could have concluded that inhumane acts and inhuman treatment were committed in Večeriska/Donja Večeriska. The Trial Chamber's conclusion that the crimes of inhumane acts, Count 10 (Kordić) and Count 17 (Čerkez) and inhuman treatment, Counts 12 (Kordić) and Count 19 (Čerkez) are established in relation to Večeriska/Donja Večeriska, must therefore be reversed.

(d) Wanton destruction not justified by military necessity, Counts 38 (Kordić) and 41 (Čerkez)

525. The Appeals Chamber understands that the Trial Chamber relied on Exh. Z2799, a video recording made in 1996 showing the damage to the Lašva Valley and surrounding, the transcript of Witness Lt.-Col. Capelle, who testified about that recording taken from a helicopter, as well as the evidence it summarized location by location at paragraphs 805 to 807 of the Trial Judgement.

526. The Appeals Chamber held above that during the second round of destruction between 18 and 21 April 1993, after the members of the TO had left the village, a reasonable Trial Chamber could have concluded that the attacks deliberately targeted civilian objects. On the basis of the above discussion, the Appeals Chamber finds that a reasonable Trial Chamber could have concluded that large scale destruction not justified by military necessity occurred in April 1993 in Večeriska/Donja Večeriska. Therefore, the Appeals Chamber is of the view that the Appellants did not demonstrate that the Trial Chamber erred in finding that the crime of wanton destruction, Count 38 (Kordić), and Count 41 (Čerkez) is established in this location.

(e) Plunder of public or private property, Count 39 (Kordić) and Count 42 (Čerkez)

527. The Appeals Chamber notes that neither paragraph 807 (iv) nor paragraph 645 of the Trial Judgement points to evidence supporting the Trial Chamber's finding that the crime of plunder is established in Večeriska/Donja Večeriska.

528. At the Status Conference of 6 May 2004, the Prosecution conceded that the Trial Chamber did not make the necessary factual findings with regard to the crime of plunder in relation to Donja Večeriska for the period covered by the indictment (April 1993).[747]

[746] Trial Judgement, para. 645.
[747] Appeals Hearing, T. 164.

529. In light of the above, the Appeals Chamber finds that no reasonable Trial Chamber could have come to the conclusion beyond reasonable doubt that plunder was committed in Večeriska/Donja Večeriska in April 1993. Thus, the Appeals Chamber is of the view that the Trial Chamber's finding that the crime of plunder, Count 39 (Kordić) and Count 42 (Čerkez) is established in Večeriska/Donja Večeriska must be reversed.

### 9. Lončari

#### (a) Plunder of public or private property, Count 39 (Kordić)

530. The Trial Chamber describes the events at Lončari as follows:

> The villages [including Lončari] were then attacked by the HVO in April. Between 4.30 and 5 a.m. on 16 April 1993 Witness H hid in the woods with other Bosnian Muslim men. There was mortar and artillery fire around Lončari. The witness, his son and other men were arrested by HVO soldiers and taken to Kaonik prison. As noted above, the nearby village of Putiš had been attacked on 15 April.[748]

It must be noted that although the Trial Chamber referred to the fact that the valuables of 20 men from Lončari were stolen by HVO soldiers, those valuables were taken upon the men's arrival at Kaonik on 16 April 1993, the place where the men were detained, and not at Lončari.[749]

531. The Appeals Chamber finds that no reasonable trier of fact could have found that the crime was established. Therefore, the Trial Chamber's finding that Count 39 was established in Lončari must be reversed.[750]

### 10. Očehnići – April 1993

#### (a) The Trial Chamber's finding

532. Kordić argues that the Trial Chamber erred in convicting him for wanton destruction (Count 38) and plunder (Count 39) in Očehnići. The Appeals Chamber notes that Kordić erroneously assumed that he was convicted for plunder in Očehnići and that Kordić's argument in this part therefore is moot.

#### (b) Wanton destruction not justified by military necessity (Count 38)

533. The Appeals Chamber turns now to Kordić's argument that that the Trial Chamber erred in finding that wanton destruction (Count 38) was committed in Očehnići in April 1993.

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[748] Trial Judgement, para. 658.
[749] Trial Judgement, para. 659.
[750] Trial Judgement, para. 834.

534. Paragraph 659 describing the events at Očehnići reads as follows:

> The village of Očehnići is to the south of Busovača. According to the Prosecution, it was subject to HVO attack in April 1993. The prosecution evidence was as follows. In the afternoon of 16 April 1993 masked HVO soldiers attacked the village by firing incendiary bullets into the houses. Within half an hour all the Muslim houses were burning. The villagers were unarmed and did not put up any resistance. One resident heard, at second-hand, that Paško Ljubičić was the leader of the unit that had attacked the village and that he had been ordered to do so by Brigadier Duško Grubešić, commander of the Zrinski Brigade, to "cleanse" Muslims from the area. The damage to Očehnići is clearly shown on the video recording taken during a helicopter flight over the area in May 1996 and played to the court during the trial. Around 20 men from Lončari were detained and taken to Kaonik on 16 April 1993. Upon arrival they were lined up and their valuables were stolen by HVO soldiers.[751]

In the Appeals Chamber's view, a reasonable trier of fact could have concluded that the wilful destruction of all Muslim houses in Očehnići was of a large scale and was not justified by military necessity since the villagers were unarmed and did not put up any resistance. Therefore, Kordić's argument that the Trial Chamber erred in finding that wanton destruction was committed in Očehnići in April 1993 fails. The Appeals Chamber upholds the Trial Chamber's finding that the crime was established.

## 11. Kiseljak municipality

### (a) Rotilj in April 1993

535. The Trial Chamber found that:

> On Sunday, 18 April 1993, it was the turn of the Muslim villages in the Kiseljak municipality to come under attack. (A number of villages were attacked; however, only one, Rotilj, is mentioned in the relevant counts of the Indictment.) The background to the attacks was an order by Colonel Blaškić to an HVO brigade to capture two of the villages where all enemy forces were to be placed under HVO command. On 18 April 1993 the villages of Gomionica, Svinjarevo and Behrići (which were all close to each other and connected by the main road) were attacked by the HVO, together with Rotilj, Gromiljak, Polje Višnjica and other Muslim villages in this part of the Kiseljak municipality. The evidence was that the Muslim population of these villages was either killed or expelled, houses and mosques were set on fire and, in Svinjarevo and Gomionica, houses were plundered. In the case of Rotilj the TO were asked to surrender their guns before the HVO shelled the village. As a result the lower part of the village was set on fire and 20 houses or barns were destroyed: seven civilians were killed. Later there was graffiti on a wall to the effect: "This was done by the Maturice", (a para-military unit from Kiseljak).[752]
>
> International observers saw the destruction in the villages in the next few days. An officer of the Canadian battalion of UNPROFOR, Captain Lanthier, drove through the Kiseljak pocket and saw many looted and burned houses. The villages were deserted. His impression was that the attack on Rotilj had been carried out according to infantry platoon tactics for fighting in built-up areas. When ECMM Monitors visited the villages they found almost all the Muslims had left and their houses had been burned and they concluded that ethnic cleansing had taken place in the area. (It should be noted in this connection that the CBOZ Duty Officer recorded Colonel Blaškić as saying on 20 April, with reference to Gominonica, that the police would be used for "cleansing".)[753]

[751] (Footnotes omitted).
[752] Trial Judgement, para. 665 (footnotes omitted).
[753] Trial Judgement, para. 666 (footnotes omitted).

> No defence evidence was called about this HVO offensive. The Trial Chamber concludes that it was part of the general offensive launched by the HVO against the Muslims in this area and in relation to Rotilj the underlying offences in Counts 3-4 and 7-13 are made out.[754]

(i) Unlawful attack on civilians, Count 3 (Kordić)

536. At the outset the Appeals Chamber notes that the Indictment in relation to unlawful attack on civilians (Count 3), in Kiseljak municipality in April 1993, only mentions Rotilj and therefore the Appeals Chamber will only consider evidence relating to Rotilj.

537. The Trial Chamber found that "[t]he background to the attacks was an order by Col. Blaškić to an HVO brigade to capture two of the villages where all enemy forces were to be placed under HVO command."[755] As such, this finding means that the initial attack on 18 and 19 April 1993 had a military purpose: however, the atrocities described by Witness Lt.-Col. Landry, including executions of seven civilian Muslims, demonstrate that civilians were also targeted during the course of the military offensive. His testimony was:

> Q. The information reported to you indicated that approximately 20 HVO soldiers had attacked Rotilj on the 18th and 19th of April, 1993, burnt down approximately 19 Muslim houses, also some barns and other buildings. Again seven Muslims were executed. The village was not defended by the ABiH, based on the information known to you, with any elements or members of those forces instead deployed to the Visoko area. Some of the houses were looted before being burnt down. In contrast, none of the Croat houses in the village were damaged. Is that correct?
>
> A. It is correct.
>
> Q. The seven persons who were killed and the reported circumstances of their deaths were Zibiza Skrso, a 31-year-old, was raped and then killed by 13 small-arms fire. You could still see evidence of the rape and blood stains in the house; is that correct? A. It is correct. Q. Another victim was Miralem Topalović, 43 years old, and Esad Topalović, 28 years old, both killed by having their heads split open, were found laying on the side of the road; Bajro Pusculović, years old, and Zila Pusculović, 61 years old, both reportedly burnt alive in their house. Devad Hodic, 22 years old, was murdered, and Zijad Kosovac, 16 years old, was murdered. Is that correct?
>
> A. It is correct.[756]

Furthermore, Exh. Z818, a report dated 28 April 1993 by Witness Lt.-Col. Landry describes the situation faced by the Muslim population after the initial attack..[757]

Witness Major Baggesen, who inspected the village following Witness Lt.-Col. Landry's report, testified that HVO soldiers had taken up positions on the hills surrounding Rotilj and that every

[754] Trial Judgement, para. 667.
[755] Trial Judgement, para. 665.
[756] T. 15298-99.
[757] Exh. Z818, p. 2.

time "the inhabitants" tried to leave the valley, they were shot at. So the HVO controlled the area, and so they were not able to have any food or anything into the village."[758]

538. The exact number of TO members and civilians present in Rotilj during the attack is unknown; it is, however, clear that the majority of the Muslim population in the village were civilians.[759] Following the attack, women were still allowed to leave the village to go to Kiseljak for necessities, while all men were prevented from leaving the village. This was effected by the HVO blocking off the road by which the village could be entered and exited and stationing soldiers on the hilltops surrounding the village. The inhabitants were still kept in Rotilj in September 1993.

539. The Appeals Chamber finds that a reasonable trier of fact could have found that the crime of unlawful attack on civilians, Count 3 (Kordić) was established in Rotilj from 18 April 1993 until the end of April 1993.

(ii) Unlawful attack on civilian objects, Count 4 (Kordić)

540. The Trial Chamber found that "[i]n the case of Rotilj the TO were asked to surrender their guns before the HVO shelled the village. As a result the lower part of the village was set on fire and 20 houses or barns were destroyed."[760]

541. The testimony of Witness Captain Lanthier, an officer of the Canadian Battalion of UNPROFOR, does not relate to destruction in Rotilj specifically but refers to ethnic cleansing of the Muslim population in the Kiseljak pocket and states that the military attacks were directed at the civilians. A report of the ECMM monitors, upon which the Trial Chamber relied, is dated 29 April 1993 and reports on extensive destruction of Muslim houses, killings and the exodus of Muslims, in varying numbers from the villages of Polje Višnjica, Hercezi, Doci, Višnjica and Gomionica. However, unlawful attack on civilian objects was not charged in the Indictment in relation to any of these places, and the report does not mention Rotilj. From the evidence it is clear that a reasonable trier of fact could have found that extensive destruction occurred in Kiseljak municipality in April 1993; however, the evidence does not relate to Rotilj. The evidence of Witness TW07[761] states that houses were destroyed during the shelling. The Appeals Chamber finds that no reasonable trier of fact could have found that an unlawful attack on civilian objects occurred, and reverses the Trial Chamber's finding that Count 5 for Kordić was established.

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[758] T. 7550.
[759] *Blaškić*, T. 7976-77. Witness TW07 testimony it is not clear how many TO-members were present in Rotilj at the time of the offensive.
[760] Trial Judgement, para. 665.
[761] Transcript witness from the *Blaškić* trial.

(iii) Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

542. Witness Lt.-Col. Landry testified that during the offensive on Rotilj, on 18-19 April 1993, seven individuals were killed: Zibiza Skrso, a 31-year-old, was raped and then killed by small-arms fire; Miralem Topalović, 43 years old, and Esad Topalović, 28 years old, both killed by having their heads split open, were found lying on the side of the road; Bajro Pusculović, 20 years old, and Zila Pusculović, 61 years old, both reportedly burnt alive in their houses. Devad Hodić, 22 years old, was murdered, and Zijad Kosovac, 16 years old, was murdered.[762]

543. Taking into account that the killings occurred in the context of an unlawful attack on civilians, the Appeals Chamber considers that a reasonable trier of fact could have found that the elements of murder, Count 7 (Kordić), and wilful killing, Count 8 (Kordić) were established. The Appeals Chamber therefore upholds the Trial Chamber's finding.

(iv) Inhumane acts, Count 10 (Kordić) and inhuman treatment, Counts 12 (Kordić)

544. The Appeals Chamber notes that the Indictment limits the inhumane acts charged in Count 10 and the inhuman treatment charged in Count 12 to injuries,[763] and the Appeals Chamber will therefore only consider evidence in relation to injuries.

545. Witness Lt.-Col. Landry, referring to Zibiza Skrso, testified that there was blood in the house from her murder, and evidence of her having been raped. He did not elaborate further as to what this evidence was.[764] Witness TW07 stated that Zibiza Skrso's body was found on a table, covered with a sheet and that she had been hit by rifle bullets in the chest area.[765]

546. The Appeals Chamber considers that a reasonable trier of fact could have found that Zibiza Skrso was assaulted and that it was a "serious attack on human dignity" constituting inhumane acts and inhuman treatment. The Appeals Chamber upholds the Trial Chamber's finding that inhumane acts and inhuman treatment, Counts 10 and 12 (Kordić) were established.

(v) Wanton destruction not justified by military necessity, Count 38 (Kordić)

547. The Appeals Chamber considered the Trial Chamber's findings together with the evidence discussed above under the heading "unlawful attack on civilian objects." Based on that discussion, the Appeals Chamber notes that there was insufficient evidence to determine whether the destruction of the houses was militarily justifiable. The Appeals Chamber finds that no reasonable

[762] T. 7935-37.
[763] Indictment, para. 42.
[764] T. 7935-37.

trier of fact could have found that the crime of wanton destruction not justified by military necessity was established, Count 38 (Kordić), and reverses the Trial Chamber's finding.

(vi) Plunder of public or private property, Count 39 (Kordić)

548. The Trial Chamber relied on Witness Lt.-Col. Landry, an ECMM monitor, who confirmed that Muslim houses were looted.

766

549. The Appeals Chamber finds that a reasonable trier of fact could have found that plunder had been committed in the village of Rotilj, Count 39 (Kordić).

(b) Town of Kiseljak in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

550. The Trial Chamber found "[a]fter January 1993 Muslim business premises in Kiseljak were being damaged or blown up".[767]

551. The Appeals Chamber finds that no reasonable trier of fact could have found that this incident related to April 1993, since the finding was based on Witness D, who testifies in relation to the end of January 1993.[768] As there is no charge in the Indictment for wanton destruction in January 1993, the Appeals Chamber overturns the Trial Chamber's finding that the crime of wanton destruction not justified by military necessity, Count 38 (Kordić), was established in Kiseljak in April 1993.

(ii) Plunder of public or private property, Count 39 (Kordić)

552. The Appeals Chamber has not identified any factual findings of plunder in the Trial Judgement or sufficient evidence and therefore finds that no reasonable trier of fact could have found that the crime of plunder was established in the town of Kiseljak in April 1993, Count 39 (Kordić).

(c) Svinjarevo in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

[765] T. 7935-37.
[766] Lt.-Col. Landry, T. 15299.
[767] Trial Judgement, para. 806.
[768] T. 2055.

553. Witness AM testified that "two houses remained intact, in the sense of they were not burning, and there were Croats living there".[769] About 100 houses were destroyed and the mosque was burnt down.[770] This was confirmed by Witness Lt.-Col. Capelle.[771]

554. The Appeals Chamber thus finds that the destruction of property occurred on a large scale and was targeted against Muslims while houses of Croats were not destroyed. The Appeals Chamber concludes that a reasonable trier of fact could have found that this destruction was not justified by military necessity and that the perpetrators acted with the intent to destroy the property in question. The Appeals Chamber therefore upholds the Trial Chamber's finding that wanton destruction not justified by military necessity occurred in Svinjarevo, Count 38 (Kordić).

(ii) Plunder of public or private property, Count 39 (Kordić)

555. The Trial Chamber states that the destruction and plunder in Svinjarevo has already been noted,[772] but fails to state where in the Trial Judgement it did so.

556. The Appeals Chamber has not been able to identify any factual findings in the Trial Judgement or evidence relating to plunder and therefore considers that no reasonable trier of fact could have found that plunder was established in Svinjarevo, Count 39 (Kordić).

(d) Gomionica in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

557. The Trial Chamber found that Gomionica was shelled by the HVO[773] and that HVO soldiers later set houses on fire, destroying 131 of its 159 houses along with the Mekteb and the Turbe[774]. Witness TW04 (based on transcripts from the *Blaškić* trial) testified that the burnings were committed in order to "destroy any proof of plundering".[775] The witness further testified that no damage was done to the Catholic Church or to Croat homes and buildings.[776]

558. The Appeals Chamber thus finds that the destruction of property occurred on a large scale and was targeted against Muslims' houses, while houses of Croats were not destroyed; therefore a reasonable trier of fact could have found that the destruction was not justified by military necessity

[769] Witness AM, T. 15586.
[770] Trial Judgement, para. 806.
[771] T. 13317-18.
[772] Trial Judgement, para. 806.
[773] Trial Judgement, para. 665.
[774] Trial Judgement, para. 806.
[775] *Blaškić*, T. 9271.
[776] *Blaškić*, T. 9273.

and that the perpetrators acted with the intent to destroy the property in question. The Appeals Chamber upholds the Trial Chamber's finding that wanton destruction not justified by military necessity was established in Gominonica, Count 38 (Kordić).

(ii) Plunder of public or private property, Count 39 (Kordić)

559. The Trial Chamber relied on the testimony of Witness TW01 (based on transcripts from the *Blaškić* trial), which stated that the HVO "came in trucks, on tractors, and they plundered the lower part of the village, taking away everything they could at the time"[777], later being aided by civilians "who carried, on their backs and wheelbarrows, valuable things."[778]

560. The Appeals Chamber finds that a reasonable trier of fact could have found that plunder was established in Gomionica, Count 39 (Kordić).

(e) Višnjica in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

561. The Trial Chamber found that Muslim property was destroyed during the attack on Višnjica on 18 April 1993. It stated that houses were set on fire,[779] leaving almost all the houses gutted.[780] Witness D described the situation as follows:[781]

> Q. In terms of the Muslim population in these villages, what was the result of these attacks in April 19 1993, to your observation? A. Well, the Muslim population was already seized by panic because it was quite evident that the HVO knew no limits and that the torching of buildings was not foreign to them because so many houses were set on fire […] Q. Approximately how many houses, Bosniak houses are you aware of that were destroyed in connection with the attacks in April, 1993? A. Right now, I wouldn't know the exact number, but I know that it was quite a number in Višnjica and Gromiljak, quite a large number of houses were set on fire, destroyed, demolished.

Witness Lt.-Col. Capelle confirmed the devastation in his testimony.[782]

562. The Appeals Chamber concludes that the destruction of property occurred on a large scale and was targeted against Muslims' houses and that a reasonable trier of fact could have found that this destruction was not justified by military necessity and that the perpetrators acted with the intent to destroy the property in question. Wanton destruction not justified by military necessity was thus established in Višnjica, Count 38 (Kordić).

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[777] *Blaškić*, T. 9270.
[778] *Blaškić,* T. 9270.
[779] Trial Judgement, para. 806.
[780] Trial Judgement, para. 804.
[781] Witness D, T. 9258-59.
[782] T. 13308-43.

(f) Polje Višnjica in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

563. The Trial Chamber found that on 18 April 1993, Polje Višnjica was attacked and "some houses were burnt down,"[783] noting that among the destroyed houses, Croat houses remained intact.[784] This finding was made on the testimony of Witness TW11 (based on transcripts from the *Blaškić* trial). Witness TW11 gave evidence that houses were torched and those houses all belonged to Muslims, not a single Croat house being targeted.[785] The Trial Chamber further held that "[b]etween 10-13 civilians were killed and 103 structures burned".[786] The Appeals Chamber notes that for unknown reasons murder or unlawful attack on civilian was not charged and the Appeals Chamber is therefore barred from discussing this evidence.

564. The Appeals Chamber concludes that a reasonable trier of fact could have found that wanton destruction not justified by military necessity had been committed in the village of Polje Višnjica, Count 38 (Kordić).

(g) Behrići in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

565. The Trial Chamber found that almost all the houses in Behrići were destroyed.[787] It relied on the testimony of Witness Lt.-Col. Capelle who stated that "indeed the destruction here is much more evident."[788] He further explained that "almost all of the houses are without roofs,"[789] leading to almost total devastation: "We see a group of houses which were all destroyed, all of them. One sees, for instance, houses to the right and closer to us that still have roofs, but one can see that the interior of all those houses was destroyed, and the same holds true of the houses which are behind those in the front."[790]

566. The Appeals Chamber thus finds that the destruction of property occurred on a large scale throughout the Kiseljak municipality in connection with the attacks and that a reasonable trier of fact could have found that this destruction was not justified by military necessity and that the

[783] Trial Judgement, para. 806.
[784] Trial Judgement, para. 804.
[785] *Blaškić*, T. 6721.
[786] Trial Judgement, footnote 1327.
[787] Trial Judgement, para. 804.
[788] T. 13316.
[789] T. 13316.
[790] T. 13316.

perpetrators acted with the intent to destroy the property in question. Wanton destruction not justified by military necessity was thus established in Behrići, Count 38 (Kordić).

(h) Gromiljak in April 1993

(i) Wanton destruction not justified by military necessity, Count 38 (Kordić)

567. The Trial Chamber found that the HVO attacked Gromiljak, ejecting the inhabitants and setting fire to the houses.[791] The Trial Chamber relied on Witness TW26[792] who confirms that destruction occurred as part of the HVO attack.[793]

568. The Appeals Chamber finds that a reasonable trier of fact could have found that wanton destruction not justified by military necessity, Count 38 (Kordić), was established in Gromiljak.

(i) Tulica and Han Ploča-Grahovci in June 1993

569. The Trial Chamber found that murder and inhuman treatment were established in relation to Tulica and that on 12-13 June 1993, the HVO attacked villages in the Kiseljak municipality; however, the only villages charged in the Indictment for June in Kiseljak municipality are Tulica and Han Ploča-Grahovci; therefore the evidence will only be considered in relation to these places and not in relation to the whole of Kiseljak municipality. The Trial Chamber found:

> Tulica is about 15 kilometres from Kiseljak, towards Sarajevo to the south. Before the war it had a population of about 350, all Muslim, but surrounded by villages with Croat or Serb populations. During the war Tulica found itself between the positions of the HVO and the BSA and was subject to intermittent shelling. Some of the inhabitants left and the population was reduced to 250. The prosecution case is that, on 12 June 1993, Tulica was attacked by the HVO, resulting in the deaths of at least 12 villagers and the destruction of the village. The attack began with heavy shelling of the village from about 10 a.m. to midday. The shelling was followed by an infantry attack on the village from several directions. One witness described the HVO soldiers singing and shouting as they set the houses on fire (they were carrying pumps or sprays to apply the gasoline) and herding the civilian population to where the men were separated from the women. The same witness saw the murders of seven men whom he knew: he also heard of more killings, including those of a pensioner and three women, one of whom was burnt to death in her house. The surviving men were loaded onto a truck and taken to Kiseljak barracks. Another witness described the women being forced to give up their money and jewellery, the men being led away in a line and four taken out and shot: according to this witness, 11 men and one woman were killed. The soldiers were in black or camouflage uniforms and had white ribbons around their arms: those in black were identified as coming from the Apostoli and Maturice units, based in Kiseljak, and those in camouflage as members of the HVO.[794]
>
> Han Ploča and Grahovci are associated villages which also lie to the south of Kiseljak on the way to Sarajevo, not far from Tulica. Shortly after the attack on Tulica they were also subject to attack by the HVO. The prosecution evidence was that the HVO issued an ultimatum to the Muslims to surrender their weapons. After the ultimatum expired, the village was shelled by the HVO and the BSA, and houses were set on fire. An HVO infantry attack followed. Having come into the

[791] Trial Judgement, para. 665, footnote 1327.
[792] Based on transcripts from the *Blaškić* trial.
[793] *Blaškić,* T. 8015-16.
[794] Trial Judgement, para. 721 (footnotes omitted).

village, HVO soldiers lined up three Muslim men against a wall and shot them. They also killed some other men and set fire to a garage with people in it. The women and children were then taken to the Kiseljak barracks. One witness said that his sister (aged 15), father and grandmother were all killed and that in all 64 people were killed during the attack or after their capture.[795]

(i) Tulica

a. Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

570. Witness AN and Witness AF testified to the killing of twelve civilians, including Zijad Huseinović, Aziz Huseinović, Casim Huseinović, Safet Haskić, Refik Huseinović, Ahmed Bajraktarević, and Mufid Tulić.[796] From Witness AN's testimony it is unclear whether these individuals were combatants, as it is mentioned that Mufid Tulić had an identity card saying that he was a member of the ABiH, and that Ahmed Bajraktarević was questioned about documents.[797] However, regardless of whether these individuals were combatants at the time that they were killed, the evidence is clear on the fact that they were in the custody of the HVO, and were being detained at the Tulica village graveyard,[798] and therefore *hors de combat.*

571. The Appeals Chamber considers that a reasonable trier of fact could have found that these killings in Tulica in June 1993 constituted murder, Count 7 (Kordić) and wilful killings, Count 8 (Kordić).

b. Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

572. The Trial Chamber relied on Witness AF, who testified that the killed individuals were first subjected to ill-treatment: Kasim Huseinović, was beaten in his chest and head by soldiers with rifle butts, and kicked, before he was shot. Aziz Huseinović was shot in the leg before he was killed, Safet Katkić, Refik Huseinović, Aziz Huseinović, Mufid Tulić and Ahmed Bajraktarević were made to run down a steep slope and then fired at, causing them to fall down the slope.[799]

573. The Appeals Chamber concludes that a reasonable trier of fact could have found that inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić) had been committed in the village of Tulica.

[795] Trial Judgement, para. 722 (footnotes omitted).
[796] T. 15667-68. Witness AF, T. 14056.
[797] T. 15671-73.
[798] T. 15669-71.
[799] T. 14056-58.

c. Wanton destruction not justified by military necessity, Count 38 (Kordić)

574. The Trial Chamber relied on Witness TW15 (based on transcripts from the *Blaškić* trial), who testified that on 12 June 1993 several houses in Tulica were set on fire by HVO soldiers, including one named Medić,[800] who used a gas can to pour petrol on the houses; the witness did not see what was used to set the fire.[801] He testified that the houses belonged to Sifet Kačačić, Zijad Huseinović, and the witness himself and that the houses may have been set on fire because arms were found inside.[802]

575. The Appeals Chamber concludes that a reasonable trier of fact could have found that the fact that arms were found in the house did not constitute a militarily justifiable reason to destroy them. The Appeals Chamber therefore upholds the Trial Chamber's finding that wanton destruction not justified by military necessity, Count 38 (Kordić) was established for Tulica in June 1993.

d. Plunder of public or private property, Count 39 (Kordić)

576. The Trial Chamber relied on the testimonies of Witness AF and Witness AN, who witnessed soldiers looting valuables from the houses in Tulica and driving off with them;[803] an HVO soldier pushing a wheelbarrow full of electronic equipment, including a television set, stereo and video-equipment;[804] and HVO soldiers driving around in cars belonging to the villagers.[805]

577. The Appeals Chamber concludes that a reasonable trier of fact could have found that the crime of plunder was established in Tulica in June 1993, Count 39 (Kordić).

(ii) Han Ploča-Grahovci

a. Murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić)

578. The Trial Chamber found, in relation to Han Ploča, that: "[h]aving come into the village, HVO soldiers lined up three Muslim men against a wall and shot them. They also killed some other men and set fire to a garage with people in it."[806]

[800] *Blaškić*, T. 8667-68.
[801] *Blaškić*, T. 8639, 8667-68.
[802] *Blaškić*, T. 8640-41.
[803] Witness AF, T. 14060.
[804] Witness AN, T. 15665-66.
[805] Witness AN, T. 15665-66.
[806] Trial Judgement, para. 722.

579. Witness TW12[807] testified that approximately 60 people were taken to the Kiseljak barracks; they never returned and have not been accounted for.[808] Witness TW08[809] testified to having seen Muslims being led away as hostages and that since the attack 95-100 people were missing from the village of Grahovci.[810] Witness TW16 testified that he had been told by persons present during the incident that his 15-year-old sister had been killed and that his mother and grandfather had disappeared since the day of the attack, as had 64 people in total.[811] When pressed by the Judge to indicate whether they had disappeared or been killed, the witness said that none of these people had reappeared, that a number of them had been arrested, taken to the Kiseljak barracks, had not been seen since, and that consequently he considered them dead.[812] Further, the village did not put up a substantive resistance as the villages were only defended by about 20 "village guards" who were not members of the ABiH.[813] It is unclear whether they were members of the TO.

580. Even though the exact number of missing persons is unknown (varying from 60 to 100), as is the way in which the persons were killed or disappeared, the high number of missing persons supports a conclusion that a reasonable trier of fact could have inferred that many of them were killed after they were in the custody of the HVO soldiers in Han Ploča. The Appeals Chamber upholds the Trial Chamber's finding of murder, Count 7 (Kordić) and wilful killing, Count 8 (Kordić).

b. Inhumane acts, Count 10 (Kordić) and inhuman treatment, Count 12 (Kordić)

581. The Trial Chamber relied on Witness TW08[814] who gave evidence that she had not witnessed rape but that she knew a younger woman from the village of Duhri who was raped. Witness TW08 provided no further information about the incident. She further testified that she had seen Adina Jusić being taken away in a car by Zoran Ljevak, but that she does not know whether anything happened to Adina Jusić.

582. The Appeals Chamber notes that there is no charge relating to the village of Duhri in the Indictment and that therefore evidence relating to Duhri is not before the Chamber. Based on the fact that women were afraid and fled, and Adina Jusić was taken away in a car, the Appeals Chamber considers that no reasonable trier of fact could have found that inhumane acts, Count 10

[807] Based on transcripts from the *Blaškić* trial.
[808] *Blaškić*, T. 8997.
[809] Based on transcripts from the *Blaškić* trial.
[810] *Blaškić,* T. 8997.
[811] *Blaškić,* T. 8950.
[812] *Blaškić,* T. 8950-51.
[813] *Blaškić,* T. 9005.
[814] Based on transcripts from the *Blaškić* trial.

(Kordić) and inhuman treatment, Count 12 (Kordić), were established, and reverses the Trial Chamber's finding.

c. Wanton destruction not justified by military necessity (Count 38)

583. The Trial Judgement summarized:

> Witness TW12 described the attack on Grahovci, where the HVO came into the village to set fire to houses; he saw […] HVO soldiers set fire to the mosque. […] The Han Ploča mosque was set on fire first and then the houses.[815]

584. The two witnesses relied on were Witness TW08 and Witness TW12.[816] Witness TW12 gave the evidence that

> A. Yes, I saw HVO soldiers. They had the HVO insignia. I was 30 to 50 metres away from them. As I said, there wasn't much shooting. They simply ran to the door, broke it down with a kick, and then just burned the house down.

585. Witness TW08[817] verified that pictures shown to her by the Prosecution were of destroyed houses belonging to Muslims. The witness further testified that:

> A. All these houses that were destroyed used to be Muslim houses. The mosque was the first building that was set on fire and our houses followed. Everything was burnt down.[818]

The exact day on which the destruction occurred is not known, but it is clear that it occurred during the days of attack. Witness TW08 testified that the ABiH army was not in the village but that there were about twenty armed "village guards". She further gave evidence that the shelling started on the first day.

586. The Appeals Chamber considers that a reasonable trier of fact could have found that the destruction was wilful and not justified by military necessity since only Muslim houses were destroyed, and the destruction occurred when there was not much fighting. The Appeals Chamber therefore upholds the Trial Chamber's finding that wanton destruction not justified by military necessity, Count 38 (Kordić), was established.

d. Plunder of public or private property, Count 39 (Kordić)

587. The Trial Chamber relied on Witness TW12[819] who testified that he: "saw cars and buses being taken away or trucks, if somebody had them. [He] saw looting and they just took all those

[815] Trial Judgement, para. 806 (footnotes omitted).
[816] Both based on transcripts from the *Blaškić* trial.
[817] Based on transcripts from the *Blaškić* trial.
[818] *Blaškić,* T. 9003.

things that they could take away right now and right there. And they were talking to each other saying, 'Take this now and leave the rest here. We will come back later and take the other stuff.' And they took the stuff to Brnjaci."[820]

588. The Appeals Chamber concludes that a reasonable trier of fact could have found that plunder had been committed in the villages of Han Ploča-Grahovci, Count 39 (Kordić).

e. Destruction or wilful damage to institutions dedicated to religion or education (Han Ploča)

589. The Trial Chamber relied on Witness TW08,[821] who was living in Grahovci and who testified that "[t]he mosque was the first building that was set on fire and our houses followed. Everything was burnt down".[822] It appears that the witness was in Grahovci, which is about one and a half kilometre from Han-Ploča. She was not asked to indicate whether she had seen the mosque burn or how she knew of its destruction. The evidence is not conclusive as to which day she is saying that it was destroyed. The Trial Chamber further relied on Witness TW12,[823] who testified

> Yes. I saw the mosque being burned down. […]
>
> Q. Can you describe to the Judges exactly what you saw taking place at the mosque in Han Ploča?
>
> A. Yes. I saw HVO soldiers being very happy and merry. There were 10 to 15 soldiers there. I saw when three or four soldiers ran to the mosque, kicked the door down, entered the mosque and they set fire to it, and they also fired incendiary bullets at it.[824]

The evidence of Witness TW12 show clearly that the mosque was deliberately set on fire.

590. The Appeals Chamber considers that a reasonable trier of fact could have concluded that the mosque was destroyed deliberately by HVO soldiers and that the crime of destruction or wilful damage to institutions dedicated to religion or education occurred. The Appeals Chamber upholds the Trial Chamber's finding that Count 43 (Kordić) was established.

[819] Based on transcripts from the *Blaškić* trial.
[820] *Blaškić,* T. 9532.
[821] Based on transcripts from the *Blaškić* trial.
[822] *Blaškić,* T. 9003.
[823] Based on transcripts from the *Blaškić* trial.
[824] *Blaškić,* T. 9532.

## C. **Detention related crimes**

### 1. Introduction

591. The Trial Chamber dealt with Counts 21, 22, 29, 30, 31, 33, 35 in the Trial Judgement's Part Three, Chapter V on imprisonment and inhuman treatment. Čerkez was found guilty under both Article 7(1) and 7(3) of the Statute for unlawful confinement and imprisonment (Counts 29, 30) and inhuman treatment (Count 31) in relation to the Chess Club, Vitez Cinema, SDK building and Veterinary Station and for taking civilians hostage (Count 33) and inhuman treatment (human shields) (Count 35). Kordić was found guilty under Article 7(1) of the Statute for unlawful detention and imprisonment (Count 20, 21) in relation to the Chess Club, Vitez Cinema, SDK building, Veterinary Station, Kaonik, Dubravica Elementary School, Kiseljak barracks, Kiseljak municipal building, and Rotilj.

### 2. Centres of Detention – Imprisonment, Count 21 (Kordić), Count 29 (Čerkez) and unlawful confinement of civilians , Count 22 (Kordić), Count 30 (Čerkez)

#### (a) The Dubravica Elementary School

592. The Trial Chamber found:

> This school was an important centre for the detention of over 300 Muslims by the HVO between 16-30 April 1993. The facilities were poor and detainees were forced to dig trenches. Two prosecution witnesses, in particular, gave evidence about the school:
>
> (i) When Fuad Zećo was transferred from the Veterinary Station he and the other detainees (about 360 in all) were kept in the school gymnasium. Their needs were provided by their families who could bring food, drink and other necessities for them. However, some detainees were taken to dig trenches in Nadioci, Pirići, Kuber, Tolovići and other locations. Some were killed and others wounded; some suffered physical mistreatment and humiliation while digging trenches. When the fighting came close to the school, the HVO soldiers told the detainees that they would be blown up along with the building. However, the detainees were released on 30 April 1993 and were told they could either stay in the Vitez municipality or leave.
>
> (ii) Anto Breljaš gave evidence that the Vitezovi took charge of the school on 16 April 1993. He confirmed that there were about 350 Muslim prisoners (men, women and children) in the school. Women and children were separated from the men; the former were kept in the classrooms and the latter in the gymnasium. Military prisoners were kept in the basement and 15 of them were killed. In the witness's opinion the conditions were appalling; in the gymnasium there was not enough air; there was inadequate food and no medical treatment. The detainees were mistreated and would be used as human shields and for trench-digging in the area near the school and Kula. This all led the witness to protest against the mistreatment of prisoners.[825]

[825] Trial Judgement, para. 783 (footnotes omitted).

593. The Trial Chamber found according to the testimony of Anto Breljaš "there were about 350 Muslim prisoners (men, women and children) in the school. Women and children were separated from the men."[826]

594. Having reviewed the testimony of Anto Breljaš, the Appeals Chamber finds that a reasonable Trial Chamber could have concluded that unlawful confinement of civilians and imprisonment (Counts 21 and 22 for Kordić) occurred in the Dubravica Elementary School.

(b) The Chess Club

595. The Trial Chamber found:

> The Chess Club was in a building, not far from the Cinema. It was not used extensively for the purposes of detention. However, there was some prosecution evidence about it. Edib Zlotrg was detained there; as was Witness L who was beaten up and threatened with a knife by a guard. Witness G was also detained in the club and said that no visits were allowed there.[827]

596. The Trial Chamber found that Edib Zlotrg was detained in the Chess Club.[828] Edib Zlotrg testified that he was in the Vitez Police force under Pero Skopljak until the police force was separated into Croat and Muslim contingencies, at which point "the TO commander took [him] on to perform all those duties as a criminal technician for the military police [of the Muslim side]."[829] There is no basis for regarding Edib Zlotrg as a civilian since he was undisputedly a member of the military police. Edib Zlotrg does not give evidence as to the status of any of the other detainees in the Chess Club.

597. The Trial Chamber also found that Witness G was detained in the Chess Club, but made no finding as to his status.[830] Since the witness was given protective measures, the Appeals Chamber cannot publicly discuss the content of his evidence.[831] Neither the Prosecution nor the Trial Chamber clarified Witness G's position at the time of detention in April 1993. The Appeals Chamber finds that no reasonable trier of fact could have found that Witness G was a civilian.

598. The Trial Chamber also found that Witness L was detained in the Chess Club, but made no specific finding as to his status.[832] Since the witness was given protective measures the Appeals Chamber cannot publicly discuss the content of his evidence.[833] However, neither the Prosecution nor the Trial Chamber clarified his specific role in April 1993, when he was arrested and detained.

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[826] Trial Judgement, para. 783, referring to T. 11718-20.
[827] Trial Judgement, para. 779 (footnotes omitted).
[828] Trial Judgement, para. 779.
[829] T. 1607.
[830] Trial Judgement, para. 799.
[831] T. 3889-92.
[832] See Trial Judgement, para. 799.

In the absence of any evidence, the Appeals Chamber finds that the Prosecution has not proven that Witness L was a civilian. The Appeals Chamber notes that in addition, Witness L testified that he wanted to be arrested in order to be in a larger group, because he feared being killed if he was found alone.[834] Since the witness wished to be arrested, he joined the lorry of those arrested by his own accord, and was only listed as detainee upon his arrival at the Cinema,[835] no formal decision was taken to arrest or detain Witness L and it is at least doubtful whether this can be considered a detention.

599. The Appeals Chamber finds that no reasonable trier of fact could have concluded that the crimes of imprisonment and unlawful confinement (Counts 21 and 22 for Kordić, and Counts 29 and 30 for Čerkez) were committed in the Chess Club, and thus reverses the Trial Chamber's finding.

(c) The Veterinary Station

600. The Trial Chamber found that:

> The prosecution case is that a detention centre was established in this station [Veterinary Station] and was used for the first few days of the conflict in Vitez. Evidence was given by Fuad Zećo, Director of the Station, who was taken there by HVO soldiers on the morning of 16 April, having been arrested in his home. He said that there were about 40 Muslims detained in the basement on his arrival and around 70 people were detained there at any one time: […] After four days the detainees were taken to the Dubravica school.[836]

601. The Trial Chamber found that there were "40 Muslims" and "70 people" detained in the Veterinary Station, but made no explicit finding as to the status of the detainees.

602. The Trial Chamber relied on the testimony of Witness Fuad Zećo, who was referred to as the Director of the Veterinary Station. That may imply that the Trial Chamber considered him a civilian. Upon review of the transcript, it is clear that Fuad Zećo was not only the Director of the Veterinary Station but also "commander of the municipal headquarters of civil defence."[837] Thus the Appeals Chamber concludes that no reasonable trier of fact could have found that Fuad Zećo was a civilian.

603. With regard to the other persons detained, Witness Fuad Zećo testified that all the detainees were male civilians.[838] Neither the Prosecution nor the Trial Chamber inquired further as to why the witness considered all the detainees to be civilians or how long they were detained. The

[833] T. 6837.
[834] T. 6901.
[835] T. 6901-02.
[836] Trial Judgement, 780 (footnotes omitted).
[837] T. 6508.

Appeals Chamber is of the view that the determination as to whether a person is a civilian in the meaning required for a particular crime is a determination for the Chamber, and the Chamber in order to be in a position to draw such a conclusion must be provided with sufficient information to do so. A testimony stating that the detainees were civilians in the mind of the witness, without any further details as to why the witness believes that they were civilians, or any other information about the detainees, leaves a Chamber in a situation where no reasonable trier of fact could have concluded that the detainees were in fact civilians. Further, in this particular case, the witness appeared to incorrectly consider himself a civilian and the leading nature of the questions undermined the value of his testimony. In the absence of clarifications or other supporting evidence, the Appeals Chamber finds that the Prosecution has not proven beyond reasonble doubt that the detainees in the Veterinary Station were civilians.

604. On the basis of the foregoing, the Appeals Chamber finds that no reasonable Trial Chamber could have concluded that civilians were unlawfully confined and imprisoned in the Veterinary Station, Counts 21 and 22 (Kordić), and Counts 29 and 30 (Čerkez).

(d) The SDK building

605. The Trial Chamber found:

> A third Vitez detention centre was established in the SDK building, a block of offices in Vitez. Detainees were kept there for about two weeks after 16 April 1993, before they were all transferred or released. Apart from the fact that there was no space to lie down, there were no allegations of mistreatment by prosecution witnesses: there was enough food and water, families were allowed to visit and there was access to a doctor. However, the detainees were taken to dig trenches. Mirsad Ahmić was taken to dig for five days at Kratine, close to the front line where it was very dangerous: the detainees were threatened with an axe and had to work day and night.[839]

606. The Trial Judgement found that "detainees" were held in the SDK building, but made no finding as to the status of the detainees.

607. Witness Sulejman Kavazović was a member of the TO and he gave evidence that when he heard that the fighting had started, "[he] didn't dare [to] go out, because [he] knew that everybody knew that [he] was a member of the TO headquarters."[840] Witness Mirsad Ahmić was also mobilized in the TO.[841] The Appeals Chamber concludes that no reasonable trier of fact could have

[838] T. 6513-14.
[839] Trial Judgement, para. 781 (footnotes omitted).
[840] T. 7365.
[841] T. 13780.

found that these witnesses were civilians. Further, Edib Zlotrg was detained in the SDK building,[842] but as found above, he was not a civilian.

608. Witness Sulejman Kavazović also testified that when he arrived at the SDK building on 18 April 1993, there were male prisoners – "children 12 and up, and there was Nazif Arnaut, who was 64 years of age."[843] Based on this testimony, the Appeals Chamber concludes that a reasonable trier of fact could have found that the "children 12 and up" were civilians. Regarding Nazif Arnaut, whom the witness appears to have known, the Appeals Chamber concludes that a reasonable trier of fact could have found that Nazif Arnaut was older than the conscription age, thus a civilian. There was no attempt from the Prosecution to establish the length of Nazif Arnaut's detention.

609. The Appeals Chamber considers that the detaining power must within a reasonable time process and decide whether detained persons are civilians. In the circumstances the evidence does not support that the HVO carried out blanket detentions of all Muslim civilians, but rather suggests that men of military age between 18 and 60 were targeted. The detaining power has a reasonable time to determine whether a particular person is a civilian and further to determine whether there are reasonable grounds to believe that the security of the detaining power is threatened. The Trial Chamber made a general finding that "[t]he assertion that they [the detainees] were detained for security reasons, or for their own safety, is in the Chamber's view, without foundation".[844] The assessment that each civilian taken into detention poses a particular risk to security of the State must be made on an individual basis. The Appeals Chamber, in the *Čelebići* Appeal Judgement, accepted that some reasonable time is given to the detaining power to determine, which of the detainees is a threat.[845]

610. The Appeals Chamber finds that a reasonable trier of fact could have concluded that Nazif Arnaut and several children were unlawfully detained and upholds the Trial Chamber's finding that imprisonment, Count 21 (Kordić), Count 29 (Čerkez) and unlawful confinement, Count 22 (Kordić), Count 30 (Čerkez) were established in the SDK building.

(e) The Vitez Cinema (Cultural Centre)[846]

611. The Trial Chamber found:

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[842] T. 1663-65.
[843] T. 7366-67, "I arrived on the 18th and some had been brought there on the 16th and 17th, to that SDK building. There were children 12 and up, and there was Nazif Arnaut, who was 64 years of age. They were all Muslims. There were no Serbs or Romanise or anyone else, only Muslims. The premises of SDK was tight given how many we were. We did not have enough room to lie down. We had to sit during the night." The Witness answered to the question whether they were all males, -"yes, only males".
[844] Trial Judgement, para. 800.

> The Vitez Cinema is part of a complex variously called "the Cinema", "Cultural Centre" or "Workers' University". During the war this complex housed the headquarters of the Viteška Brigade. Parts of it (first the basement, then the cinema hall) were also used after 16 April 1993, for the detention of some 200-300 Muslim men of all ages, who had been rounded up.[847]

612. The Trial Chamber found that "some 200-300 Muslim men of all ages, […] had been rounded up,"[848] but made no finding as to their status.

613. The Trial Chamber relied on Witness AC, who testified that he was detained in the Cinema together with a group of thirteen prominent Muslims.[849] Since the witness was given protective measures, the Appeals Chamber cannot publicly discuss the content of his evidence.[850] However, neither the Prosecution nor the Trial Chamber attempted to clarify the exact status the witness had in April 1993, and the Appeals Chamber concludes that no reasonable trier of fact could have found that Witness AC was a civilian in the absence of clarifications or other supporting evidence to that effect.

614. With regard to the thirteen prominent Muslims held together with Witness AC, the Trial Chamber made no findings relating to the status of them, *inter alia*, Enes Surković, Mirsad Ahmić, Edib Zlotrg, Kadir Džidić. As found above, Edib Zlotrg and Mirsad Ahmić were not civilians. Witness Kadir Džidić gave evidence that he was "a member of the SDA and […] the president of its local section in Vitez", "a member of the coordinating committee for the protection of Muslim interests in Vitez", "a member of the war presidency in Vitez" and "a co-opted member of the war presidency upon [his] release from the prison in Zenica."[851] Neither the Prosecution nor the Trial Chamber clarified his status in April 1993. The Appeals Chamber finds that no reasonable trier of fact could have found Witness Kadir Džidić to be a civilian.

615. With regard to all the other persons held in the detention centre, Witness Kadir Džidić testified that:

> Q. Were the people, I mean people who were already in the cellar, were they wearing uniforms?
>
> A. Those who were prisoners did not wear uniforms, but those who were guards did wear them
>
> Q. The detainees were the civilians; is that what you are telling us?
>
> A. Yes, yes, that is correct.

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[845] *Čelebići* Appeal Judgement, para. 327.
[846] Also referred to by Witnesses as the Workers' University building.
[847] Trial Judgement, para. 777 (footnotes omitted).
[848] Trial Judgement, para. 777.
[849] T. 12606-07.
[850] T. 12567-68; 12608-09.
[851] T. 4003.

Q. Were they only men?

A. These were men of different ages, from 17, 18, up to 65 and above.[852]

Neither the Prosecution nor the Trial Chamber attempted to establish why the witness considered all the detainees to be civilians. The value of the testimony is diminished by the leading nature of the questions. In the absence of clarifications and other supporting evidence, the Appeals Chamber finds that no reasonable trier of fact could have found that the Prosecution had proven that all the detainees were civilians. However, the Appeals Chamber considers that a reasonable trier of fact could have found that the detainees referred to as being 17 years old and those above 65 years were civilians.

616. Witness L, found above not to be a civilian, gave the evidence that there were 200 detainees, all male and aged between seventeen and sixty years.[853] Since they are all men of military age, there is clear doubt as to whether they were civilians and in the absence of further evidence, the Appeals Chamber concludes that no reasonable trier of fact could have found that all the detainees were civilians, but that a reasonable trier of fact could have found that the 17-year-old detainees were civilians.

617. The Trial Chamber found that Witness S, a medical doctor, "treated civilians (men and women) detained in the cinema."[854] A review of the transcript shows that Witness S treated women who had been held in Novaci, not the Vitez Cinema.[855] Even though the detention of these women was under extremely difficult circumstances, the Appeals Chamber would act *ultra vires* when discussing this incident since neither of the Accused were charged with this. Witness S gave evidence that she examined Muslim men at the Health Centre, who in her submission were civilians.[856] The Appeals Chamber is of the view that the evidence is not clear as to where these men were held. Witness S gave evidence that she examined about 50 prisoners from the Cinema at the end of April 1993 as part of a Commission which saw about 150 prisoners in total, in order to determine whether any of the detainees were to be released on medical grounds. Witness S gave evidence that "[m]ost of them were young and middle-aged, but there were some elderly too."[857] The mere testimony that most were "young" and some were "elderly" is insufficient for a reasonable trier of fact to find that the detainees were civilians.

[852] T. 4017.
[853] T. 6861.
[854] Trial Judgement, para. 778.
[855] T. 7940-41.
[856] T. 7939.
[857] T. 7948.

618. Further, according to Witness S, Dr. Drita Mahmutović said that her husband, Dr. Ekrem Mahmutović, was detained in the Cinema.[858] But neither the Prosecution nor the Trial Chamber clarified the position of Ekrem Mahmutović. Short of elaborations and clarification on this issue, the Appeals Chamber concludes that no reasonable trier of fact could have found that Ekrem Mahmutović was a civilian.

619. The Trial Chamber further found:

> During their meeting in the Cinema on 17 April 1993, Mario Čerkez told Colonel Morsink of the ECMM, that he had people in his prison (males since he considered every male as somebody able to fight): the women and children he had released.[859]

During his examination in chief, Witness Morsink stated that "we were informed by Mr. Čerkez that he had several people taken in prison" but the Prosecution does not clarify where they were held or their status.[860] It is during cross-examination that the detainees are said to be in the Cinema.[861] With regard to the detained men, no finding is made by the Trial Chamber as to their status. Neither the Prosecution nor the Trial Chamber asked the witness to clarify the men's status. In the absence of clarification or other evidence supporting that the men were civilians, the Appeals Chamber concludes that no reasonable trier of fact could have found that the male detainees were unlawfully detained based on this testimony.

620. With regard to the women and children, the Trial Chamber makes no finding as to their status, but the Appeals Chamber is of the view that a reasonable trier of fact could have found that the women and children were civilians. The evidence states that the women and children were released on 17 April 1993. Witness Morsink's testimony does not establish when the women and children were detained, but when analysed within the context of the case, the Appeals Chamber finds that it would not be reasonable to presume that it was before 16 April 1993. A detention of a civilian is unlawful unless detained upon reasonable grounds of belief that the security of the detaining power makes it absolutely necessary. Witness Morsink testified that when he asked Čerkez why they had detained women and children in the first place, Čerkez replied that it was difficult to distinguish soldiers and civilians taking part in the actual fighting and that, when they found out that only the males of a certain age were a threat, they released women and children.[862] The Appeals Chamber held in the *Čelebići* Appeal Judgement that there is no "blanket power to detain the entire civilian population of a party to the conflict […] but there must be an assessment

[858] T. 7937.
[859] Trial Judgement, para. 788.
[860] T. 7995.
[861] T. 8276-77.
[862] T. 8277.

that each civilian taken into detention poses a *particular* risk to the security of the State."[863] The detaining power is allowed "reasonable time" to perform an assessment of whether a detainee poses a threat to the security of the State.[864] However, the fact that women, children and all citizens are targeted and detained is impermissible.

621. Witness Buffini gave evidence that he attended a meeting of the joint commission, in the ECMM house in Vitez on 20-21 April 1993, with representatives of the local level of HVO and ABiH, including Čerkez.[865] It was decided that there would be an exchange of lists of prisoners and close co-operation with the ICRC about prisoner releases.[866] Witness Buffini testified that he was taken with General Petković (HVO) and General Halilović (ABiH) to the Vitez Cinema and that he saw about 60 male prisoners between 30 and 55, and that there were very few people under 30. The date of his visit was not clarified in this testimony.[867] He testified that the two generals agreed that all the prisoners were free to go as of that moment, and were able to walk out of the cinema, should they choose to do so. But that only six of the detainees chose to leave since all the others did not feel confident enough to leave and "feared that as soon as they left the cinema, they would either be shot or attacked by HVO troops in the local area. So they actually stayed."[868] The Appeals Chamber concludes that based on this testimony no reasonable trier of fact could have found that the detainees in the Cinema were unlawfully detained civilians.

622. The Trial Chamber further relied on documentary evidence and held that: "Ex. Z767; Ex.805; Ex. 807; Ex. 807/1 are documents signed by Tihomir Blaškić regarding the treatment of detainees in Central Bosnia."[869] These documents relate to "the treatment of detainees in Central Bosnia", but the Appeals Chamber is however of the opinion that no reasonable trier of fact could find that these documents support a finding that the detainees were civilians or unlawfully detained in the Vitez Cinema.[870]

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[863] *Čelebići* Appeal Judgement, para. 327 (emphasis in original).
[864] *Čelebići* Appeal Judgement, para. 328.
[865] T. 9372-75.
[866] T. 9346-47.
[867] T. 9347-48.
[868] T. 9348.
[869] Trial Judgement, para. 77, footnote 1614.
[870] Exh. Z807 is an order from Blaškić dated 24 April 1993 to all commanders of HVO Units in which Blaškić orders to "[t]reat captured combatants and civilians humanely and provide adequate protection for them," Exh. Z805 is an order by Blaškić dated 24 April 1993 stating: "1. Ensure a free access and help to every wounded person regardless whether he/she is a civilian, soldier or an enemy soldier. 2. Treat civilians and prisoners according to international conventions and regulations. Lists of those imprisoned and detained shall be immediately submitted to the Central Bosnia Operative Zone. 3. Immediate subordinate commanders shall be responsible to me [Blaškić] for carrying out of this order" and Exh. Z807/1 is an order from Blaškić dated 27 April 1993 addressed to the commander of the Viteška Brigade in which Blaškić orders that "1. I prohibit any treatment of temporary detained civilians which is contrary to the basic provisions of the Geneva Convention. 2. This order comes into effect immediately and the brigade commander is responsible to me for its execution".

623. In conclusion, the Appeals Chamber finds that based on the evidence given by Kadir Džidić, Witness L and Witness Morsink that there were male civilian detainees of 17 years and above 65 years of age and women and children detained, a reasonable Trial Chamber could have concluded that the crimes of imprisonment, Count 21 (Kordić), Count 29 (Čerkez) and unlawful confinement of civilians, Count 22 (Kordić), and Count 30 (Čerkez) were established in Vitez Cinema.

(f) The Kaonik detention centre

624. The Trial Chamber found that "Muslim civilians and TO members were detained in the camp on two occasions: first, after the HVO attack on the municipality in January 1993 and, secondly, after the attacks in the Lašva Valley in April 1993. For instance, in May 1993, 79 detainees were listed."[871]

625. Having reviewed the relevant transcripts, the Appeals Chamber finds that a reasonable trier of fact could have found beyond reasonable doubt that there were civilians held at Kaonik and therefore upholds the Trial Chamber's finding that the crimes of imprisonment, Count 21 (Kordić) and unlawful confinement of civilians were established, Count 22 (Kordić).

(g) The Kiseljak barracks and the Kiseljak municipal building

626. The Trial Chamber held that:

> In April and June 1993 two facilities were used by the HVO for the purpose of detaining Muslims from the villages around Kiseljak town, namely the barracks and municipal buildings in the town. […] Witness Y was transferred from the barracks to the municipal building which he described as being in a terrible condition, dirty, with a lot of garbage and mice running around: with 50 people to a room and no food for two days.[872]

The Trial Chamber found that "Muslims" were detained but did not state whether the detained persons were civilians.

627. The Trial Chamber's finding relates to two places charged separately in the Indictment and will be considered separately by the Appeals Chamber. With regard to the Kiseljak barracks, the first evidence relied on, which supports that civilians were detained, was that of Major Baggesen, an ECMM monitor[873] who was a trained and experienced military intelligence officer in the Danish army and a military observer.[874] He testified that he inspected the Kiseljak barracks on 30 April 1993 and found forty-eight detained Muslim civilians,[875] and that on 21 June 1993 they had still not

[871] Trial Judgement, para. 774.
[872] Trial Judgement, para. 790.
[873] T. 7432.
[874] T. 7429-30.
[875] T. 7563-64.

been released.[876] The Appeals Chamber considers that even though Witness Major Baggesen's evidence does not elaborate extensively as to why he considered the forty-eight men detained in the Kiseljak barracks to be civilians and that the fact that the detainees identified themselves as civilians is not assisting, the Appeals Chamber finds that Major Baggesen was a trained military and that therefore a reasonable trier of fact could have found that the detainees in the Kiseljak barracks were civilians.

628. With regard to the Kiseljak barracks in June 1993, Witness Y testified that on 14 June 1993, approximately fifty civilians were surrounded by twelve HVO soldiers on the street; that one of these soldiers came to the house where he was staying, beat him in the presence of his family and forced him and other villagers to get onto a truck; that they were then taken to the Kiseljak barracks;[877] and that a total of ninety-seven people were in a room with him.[878] Witness Y testified to being a member of the TO.[879] Witness Y was not asked either by the Prosecution or the Trial Chamber to clarify why he considered the surrounded group of 50 persons to be civilians. Similarly, Witness Y's testimony concerning the ninety-seven people does not give any information as to their status.[880] The Appeals Chamber concludes that no reasonable trier of fact could have found that the Prosecution had proven that Witness Y or the other detainees were civilians.

629. Witness AN testified that on 12 June 1993 the village of Tulica was attacked, following which he and a number of others were put onto a truck and taken to the Kiseljak barracks, where he was put in a cell together with approximately thirty-five people.[881] During cross-examination, Witness AN confirmed that before and after the attack on Tulica he served in the ABiH.[882] Witness AN was not asked by the Prosecution or by the Trial Chamber to clarify the status of the thirty-five persons that were in the cell together with him. The Appeals Chamber finds that no reasonable trier of fact could have found that the Prosecution had proven that Witness AN, or the other persons detained with him, were civilians.

630. Further, Witness TW09[883] gave evidence that he was a soldier in the ABiH, and that on 18 June 1993, when he was captured by the HVO and detained in the Kiseljak barracks, he was on

[876] T.7567-68.
[877] T. 11004.
[878] T. 11006.
[879] T. 11050.
[880] T. 11006.
[881] T. 15 678-79.
[882] T. 15655.
[883] Based on transcripts from the *Blaškić* trial.

leave in his home village.[884] The Appeals Chamber considers that no reasonable trier of fact could have found that Witness TW09 was a civilian.

631. In another part of the Trial Judgement, when the Trial Chamber discussed the attack in June 1993 on Tulica and Han Ploča-Grahovci (two villages in Kiseljak municipality), it found that "[t]he women and children were then taken to the Kiseljak barracks".[885] The Trial Chamber in this part relied on Witnesses TW08, TW12 and TW16. However, Witness TW16's evidence does not relate to the Kiseljak barracks as held but to the Kiseljak municipal building and will be considered in that context.[886]

632. Witness TW12[887] testified that he was held in the Kiseljak barracks from June 1993 to September 1993 and that "there were 40 of us prisoners there".[888] Witness TW12 was a member of the ABiH.[889] In the absence of further questions or clarification from the Prosecution or the Trial Chamber as to the status of the 40 detainees, the Appeals Chamber considers that no reasonable trier of fact could have found that Witness TW12 and the 40 detainees were civilians.

633. Witness TW12 further testified that:

> [t]hey were taken to the municipal building. They used to call it the barracks, and they had set up a detention centre there. This is where they kept women and children, and men were detained in school buildings and other barracks. When I went to Kiseljak to look for my husband, I went to one of these barracks, so I knew where they were. I had put on a black dress and I went to Kiseljak. They didn't know who I was, so I managed to pass through the checkpoints.[890]

The Appeals Chamber considers that a reasonable trier of fact could have found that women and children were held in the Kiseljak barracks.

634. In conclusion, the evidence does not relate to the first part of April 1993, but relates to the period starting on 30 April 1993, and the Appeals Chamber upholds the Trial Chamber's finding that there was imprisonment, Count 21 (Kordić), and unlawful confinement of civilians, Count 22 (Kordić), in the Kiseljak barracks from 30 April to 21 June 1993.

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[884] *Blaškić, T.* 9328-30.
[885] Trial Judgement, para. 722.
[886] Witness TW16 testified that "A. In view of the fact that people were separated into two groups, that is, men to one side and women and children to the other. And my mother was in that group, and on that same day, she was taken to the municipality building in Kiseljak, whereas the others who were in the other group were killed. So obviously there was some kind of a classification that they did themselves", *Blaškić,* T. 8954.
[887] Based on transcripts from the *Blaškić* trial.
[888] *Blaškić,* T. 9535-37, 9545-46.
[889] *Blaškić,* T. 9535; "I was a member of the army of Bosnia and Herzegovina".
[890] Witness TW12, *Blaškić,* T. 8996.

635. Regarding the Kiseljak municipal building, Witness TW09 testified to being detained there for about ten days.[891] Witness TW09 was a member of the ABiH at the time of the events in question. The Appeals Chamber therefore considers that no reasonable trier of fact could have found that TW09 was a civilian. Witness TW09 also testified to various other places where he was detained, for example a school in Otigošče, in the municipality of Fojnica. He testified that:

> In June, July and August, for about two and a half months, in the Kiseljak barracks in the Kiseljak municipality in the school in Grobjak (Phoen) there were, in all, about 700 people in detention. At the end of August this number started to decrease because there were some privately arranged exchanges. And then in September there were some organised exchanges, I don't know the details.[892]

Out of the places Witness TW09 testifies to, only the Kiseljak barracks and Kiseljak municipal building are mentioned in the Indictment, and therefore the criminal responsibility of the Accused can only be considered in relation to these two locations. The witness testified that he, together with other persons, was detained in the Kiseljak barracks and the Kiseljak municipal building. This was amplified by his testimony that during the months of June-August, approximately 700 people were detained in various locations including the Kiseljak barracks and the Kiseljak municipal building. However, it is not possible to determine from his testimony whether the persons detained with him were civilians, in that he gives no information from which such a conclusion could be drawn.

636. Witness TW16 testified that, when Han Ploča and Grahovci were attacked in June 1993 by the HVO, his mother was part of a group taken to the municipal building in Kiseljak.[893] The evidence is silent on the duration of the detention in the municipal building.

637. The Appeals Chamber finds that a reasonable trier of fact could have found that the detention of Witness TW16's mother in June 1993 was an imprisonment and unlawful confinement, Counts 21 and 22 (Kordić). The Appeals Chamber upholds the Trial Chamber's finding.

(h) Rotilj village

638. The Trial Chamber did not specifically state that the persons detained in Rotilj village were civilians. However, from the Trial Chamber's findings[894] it is evident that a whole village was surrounded by the HVO and cut off and that the persons in the village included families. The Appeals Chamber therefore finds that a reasonable trier of fact could have found that that there

[891] *Blaškić,* T. 9330.
[892] *Blaškić,* T. 9332.
[893] *Blaškić,* T. 8954.
[894] Trial Judgement, paras 792-793.

were civilians in Rotilj. This conclusion is supported by Witness Major Baggesen and by Witness Y, who testified that he came to Rotilj with his family.[895]

639. Witness Y testified that the HVO had stationed men at checkpoints at the entry to the village to ensure that no one left. He testified, by means of an affirmative answer to a question, that the village was like a concentration camp, "because there was no means of escape, the people were beaten and robbed and women were raped by HVO soldiers, who came to the village at night."[896] He testified that after 19 days the prisoners were told that the sick, the old and the invalid would be taken to the free territory.[897] The result of this was that Witness Y and his two sons were taken to Visoko.[898] Witness Y had testified earlier that both of his sons were invalids in that they were both handicapped and in wheelchairs.[899] Major Baggesen testified that Rotilj was situated in a valley, and was surrounded by hills, and that HVO soldiers had taken up positions in these hills.[900] Major Baggesen testified that every time "the inhabitants" tried to leave the valley, they were shot at and that the reason for his visit to the village was the report by Lt.-Col. Landry, and that his visit allowed him to confirm the contents of Lt.-Col. Landry's report.[901] The report is contained in Exh. Z818. The report states that about 600 people inhabited the south-western part of the village[902] and that:

> They are restricted to their village being surrounded by HVO. They are without electricity, water supply and food supply is low. They have an urgent need of a doctor/nurse they have kids with high fever and no medication. Within this number there are about 100-150 refugees from Visoko.[903]

640. The Appeals Chamber concludes that a reasonable trier of fact could have found that cordoning off Rotilj, preventing civilians from leaving the village, when the civilians were not detained in the village for their own safety, constitute imprisonment and unlawful confinement of civilians, Counts 21 and 22 (Kordić).

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[895] T. 11017-18.
[896] T. 11018.
[897] T. 11019.
[898] T. 11019.
[899] T. 10981.
[900] T. 7550.
[901] T. 7550.
[902] Witness Col. Morsink testified that Rotilj was a small village and that it was sealed off and that approximately 500-600 people were detained there, T. 8037 and 8077.
[903] Exh. Z818, p. 2.

## D. **Persecutions, a crime against humanity**

### 1. Kordić's Third Ground of Appeal: The Trial Chamber erred in finding that the Muslim-Croat conflict in Central Bosnia was a unilateral Bosnian-Croat campaign of persecutions

641. Kordić submits that the Trial Chamber committed both errors of law invalidating the Judgement and errors of fact occasioning a miscarriage of justice when it concluded that there had been a unilateral "campaign of persecution" waged by the Bosnian Croats against the Bosnian Muslims in the four municipalities considered in the Trial Judgement.[904] He submits further that the Trial Chamber erred when it declined to draw reasonable inferences consistent with his innocence in relation to the persecutions count.[905] He contends that no reasonable tribunal could have concluded, based on these facts, that every element of the crime of persecutions was proved beyond reasonable doubt,[906] and that he was guilty of persecutions beyond reasonable doubt.[907] Consequently, he concludes that he should be acquitted of all persecutions charges.[908]

642. Kordić emphasizes that the vast majority of the fighting in Central Bosnia arose from a civil war, and that the Bosnian Croats, a minority community, launched a political, and then military struggle, which was defensive in nature, in order "to protect its members' legitimate political interests and their communities and way of life in the chaos that reigned in the newly-established RBiH."[909] In relation to the attack on Ahmići, Kordić submits that his conviction hinges on the uncorroborated testimony of a murderer and self-confessed liar, Witness AT.[910]

643. Kordić further submits that the evidence shows that he was a moderate, caring person with a strong sense of responsibility; that he did not use derogatory terms with regard to Muslims; and that his speeches were never racially inflammatory or incited violence.[911]

644. Kordić further alleges that when all the facts in the record are considered, no reasonable Trial Chamber could have concluded that the Bosnian Croats were engaged in a campaign of persecution in Central Bosnia and could have found him guilty on this charge, as there were compelling alternative inferences and conclusions that were "reasonably open".[912] Kordić argues that a state of civil war existed at the time and what the Trial Chamber regarded as a "campaign of

[904] Kordić Amended Grounds of Appeal, p. 5.
[905] Kordić Amended Grounds of Appeal, p. 5.
[906] Kordić Appeal Brief, Vol. I, p. 15.
[907] Kordić Amended Grounds of Appeal, p. 5.
[908] Kordić Amended Grounds of Appeal, p. 5.
[909] Kordić Appeal Brief, Vol. I, p. 2.
[910] Kordić Appeal Brief, pp 10-11.
[911] Kordić Appeal Brief, Vol. I, p. 21 (referring to Trial Judgement, para. 523).

persecution" in fact constituted "isolated areas of offensive activities mounted by one ethnic minority against another in some areas, and *vice-versa* in others".[913] He argues that the vast majority of Bosnian Croat military operations in Central Bosnia[914] were not conducted with a disproportionate use of force and were not war crimes, although *ad hoc* war crimes did occur in Central Bosnia on both sides.[915] He stresses in particular that there can be no inference of a "widespread and systematic" policy or plan of discrimination drawn from the two independent, *ad hoc,* atrocities of Ahmići and Stupni Do.[916]

645. Kordić also advances other arguments concerning specific factual findings of the Trial Chamber. He states that contrary to the Trial Chamber's finding:

(i) there were no "ultimatums" on 15 January and 1 April 1993;[917] and

(ii) neither the alleged municipal "takeovers," nor the January 1993 fighting in Busovača constituted a campaign of persecution.[918]

He claims that the supposed 10 May 1992 takeover of the government in Busovača constituted a political event and that there was no discrimination from the HVO government from that point in time until the end of the war.[919] He claims that in 1992, both ethnic communities engaged in efforts to "circle the wagons" in the face of the Serb onslaught, to solidify their respective political power, and to negotiate with other relevant political ethnic groups.[920]

646. Counsel for Kordić also emphasized that the Trial Chamber made no express findings concerning the general elements of Article 5.[921] He also submitted that it was not plausible that there existed a campaign of persecution carried out by the Bosnian Croats against the more numerous Muslim community,[922] and that in the bulk of the situations involved, legitimate military objectives were being pursued.[923] Counsel further submitted that the alleged campaign of

[912] Kordić Reply Brief, pp 49-50.
[913] Kordić Amended Grounds of Appeal, p. 5.
[914] Specific examples are given by the Appellant in Kordić Appeal Brief, Vol. I, pp 103-108; responses to the examples in question are given by the Prosecution in Prosecution Response, paras 4.94-4.111.
[915] Kordić Appeal Brief, Vol. I, pp 102-106.
[916] Kordić Appeal Brief, Vol. I, p. 99.
[917] Kordić Appeal Brief, Vol. I, pp 94-95.
[918] Kordić Appeal Brief, Vol. I, p. 93 *et seq*.
[919] Kordić Appeal Brief, Vol. I, pp 93-96.
[920] Kordić Appeal Brief, Vol. I, pp 93-97.
[921] Appeals Hearing, T. 261.
[922] Appeals Hearing, T. 269, 295.
[923] Appeals Hearing, T. 441.

persecution, as well as Kordić's sharing of the discriminatory intent, is "only an inference circumstantially arrived at."[924]

647. The Prosecution responds that contrary to the way Kordić entitled this ground of appeal, the Trial Judgement contains no findings as to a unilateral, one-sided campaign of persecution.[925] However, it notes that the Trial Chamber found that there was overwhelming evidence of a campaign of persecution against Muslims in Central Bosnia.[926] It contends that Kordić fails to show how the Trial Chamber's findings are unreasonable.[927] It further points out that Kordić seems to neglect the Trial Chamber's observation concerning the unique nature of the crime of persecutions as a crime of cumulative effect.[928] It contends that whether persecutory acts be a single, although not isolated, incident or comprise a pattern, such acts must be examined in their context and weighed for their cumulative effect, and that the Trial Chamber's findings comprise a coherent whole in which the cited evidence is overwhelming.[929] It also refers the Appeals Chamber to its appeal brief which contains a summary of the more salient features of the evidence regarding that persecutory campaign, and it submits that Kordić's failure to acknowledge the entirety of this evidence should lead the Appeals Chamber to adopt an especially circumspect approach to his arguments.[930]

648. Kordić replies that, other than in the case of *ad hoc* crimes, the acts labelled "persecutory", seen in the context of military operations during the civil war, were rather unfortunate but expectable collateral consequences.[931]

649. The Prosecution stated it was clear that the Trial Chamber found that the criminal plan consisted of subjugating or removing the Bosnian Muslims from the region by "various acts of mistreatment, by unlawfully attacking towns and villages, by destroying their property, by killing Bosnian Muslims and doing all the other various inhumane acts…strewn throughout the judgement."[932] The Prosecution further declared that within the common criminal plan, design or enterprise, Kordić played a multitude of roles, sometimes direct and sometimes indirect.[933]

650. As to the "ultimatums", the Prosecution responds that on the basis of the evidence and in light of what followed thereafter – namely, the unleashing of series of unlawful attack on civilians

[924] Appeals Hearing, T. 266.
[925] Prosecution Response, paras 4.12-4.13.
[926] Prosecution Response, para. 4.31.
[927] Prosecution Response, para. 4.35.
[928] Prosecution Response, para. 4.19.
[929] Prosecution Response, paras 4.22-4.23.
[930] Prosecution Response, para. 4.91.
[931] Kordić Reply Brief, p. 50 (emphasis in original).
[932] Appeals Hearing, T. 397.

and civilian objects, killings, imprisonment, destruction and plunder – the Trial Chamber was more than entitled to conclude that there were such "ultimatums" and that there was a campaign of persecution in Central Bosnia.[934]

651. The Prosecution refers to paragraphs 603 and 604 of the Trial Judgement, where the Trial Chamber describes the events leading to the conflagration and recalls that according to the Prosecution case, talks in March 1993 between Presidents Izetbegović and Tuđman resulted in a joint statement in which the Republic of Croatia supported the signing of the Vance-Owen Peace Plan by President Izetbegović and Mr. Boban, and both called for the implementation of the plan. The Prosecution further points out that in paragraph 603 of the Trial Judgement, the Trial Chamber states that on 4 April 1993, according to the news agency Reuters, the HVO HQ in Mostar set a deadline for President Izetbegović to sign the above agreement and stated: "If Izetbegović fails to sign this agreement by April 15, the HVO will unilaterally enforce its jurisdiction in cantons three, eight and 10".[935] This, according to the Prosecution, was the second of the ultimatums issued by the Bosnian Croats and it was no coincidence that an attack followed the expiration date.[936] The Prosecution recalls the Trial Chamber's ensuing observation that the stage had been set for the conflict which erupted in Lašva Valley on 16 April 1993, and in the area which came to be known as "Vitez pocket".[937]

652. The Prosecution further maintains that Kordić fails to identify any errors in the Trial Judgement and simply repeats his trial submissions.[938] It contends in particular that the Appellant does not challenge two of the most egregious types of formal discrimination found by the Trial Chamber, namely, the "tighter control over gatherings of Muslims" and the ban on the Islamic call to prayer, both in Busovača.[939] As to the other municipalities, the Prosecution fails to see how widespread crimes, committed systematically against Muslims civilians in numerous villages throughout Central Bosnia, could solely be the result of the "rough and tumble of ethnic political processes."[940]

(a) Discussion

653. The Trial Chamber commenced its consideration of whether the Prosecution case was proven with respect to the existence of persecutions in the municipalities, by discussing first, the

[933] Appeals Hearing, T. 397.
[934] Prosecution Response, paras 4.74-4.86.
[935] Prosecution Response, para. 4.83 (quoting Trial Judgement, para. 603).
[936] Prosecution Response, para. 4.84.
[937] Trial Judgement, para. 604.
[938] Prosecution Response, para. 4.44.
[939] Prosecution Response, para. 4.50.
[940] Prosecution Response, para. 4.58.

HVO rise to power in and ultimate takeover of Busovača, Novi Travnik, Vareš, Kiseljak, Vitez, Kreševo, and Žepče,[941] and second, the evidence adduced by the Prosecution to the effect that with the assumption of power in these municipalities, the HVO initiated a campaign of persecution which took a number of forms.

654. As to the HVO takeovers in the various municipalities, the Trial Chamber provided no conclusion. The Appeals Chamber notes, however, that the Trial Chamber held that the allegations concerning the encouragement and promotion of hatred and the dismissal of Bosnian Muslims from employment did not amount to persecution for the purposes of the case or, in the case of the latter allegation, at all.[942]

655. In relation to the campaign of persecution in various municipalities, the Trial Chamber cited the following evidence:

> During a peaceful demonstration in **Busovača** the demonstrators were dispersed by shots being fired in the air. Persons were evicted from their apartments. In January 1993 the Muslim call to prayer was forbidden in Busovaca and Muslims were expelled: in the same month most left.[943]
>
> In **Kiseljak** Bosnian Muslims were arrested and their business premises were damaged or blown up. There were incidents of Muslim shops being looted and Muslims being expelled from their homes.[944]
>
> Several Muslims were murdered in **Vitez** in 1992. In late 1992 and January 1993 damage was caused to Muslim businesses in **Vitez.** The same occurred in the village of Gaćice nearby, where according to one witness, intimidation of the Muslims was greater after visits by Dario Kordić. Another said that violence was intentionally provoked by the Croats. In January 1993 two armed HVO soldiers forced their way into an apartment in Vitez, abused a witness and his family and stole money and valuables: the witness heard that the same thing had happened to about 20 other Muslim families in the same part of town. A Muslim member of the Vitez police compiled details of 37 crimes against Muslims in the municipality, between December 1992 and April 1993, involving harassment, wounding and murder; and the bombing, shooting at and arson of Muslim business premises.[945]
>
> There were also many instances of physical harassment of Muslims in **Novi Travnik** after the first conflict: Muslims came regularly to the police station to complain of violence and robbery, frequently by men in uniform from the HVO and HOS. The Muslims in the lower part of town were given ultimatums by HVO soldiers to leave within 24 hours. Muslims were also subjected to killings, rape and other mistreatment.[946]

656. The Trial Chamber appears to have rejected the Defence case presented at paragraphs 514 to 519 of the Trial Judgement, finding at paragraph 520 of the Trial Judgement that:

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[941] Trial Judgement, paras 494-509.
[942] Trial Judgement, para. 827.
[943] Trial Judgement, para. 511 (emphasis in original) (footnotes omitted).
[944] Trial Judgement, para. 511 (emphasis in original) (footnotes omitted). The Trial Chamber relied on Witnesses D, AN, and Y, according to whom these incidents occurred from early 1993 to mid-1993.
[945] Trial Judgement, para. 512 (emphasis in original) (footnotes omitted).
[946] Trial Judgement, para. 513 (emphasis in original).

> […] the weight of the evidence points clearly to persecution of the Muslims in the Central Bosnian municipalities taken over by the HVO: Busovača, Novi Travnik, Vareš, Kiseljak, Vitez, Kreševo and Žepče. The persecution followed a pattern in each municipality and demonstrates that the HVO had launched a campaign against the Bosnian Muslims in these municipalities. The fact that there may have been persecution of Croats by Muslims in other municipalities does not detract from this finding and in no way justifies the HVO persecution.

The Appeals Chamber notes that the Trial Chamber's finding that the evidence clearly pointed to the persecutions of the Muslims in the Central Bosnian municipalities seems to rely upon the evidence of persecutory acts committed following the takeovers and summarized at paragraphs 510 to 513 of the Trial Judgement under the heading "D. Persecution in the Municipalities." Apparently, the Trial Chamber regarded the HVO takeovers as a prelude to the crimes which followed and as reinforcing its view that the ensuing persecutions formed part of a pattern of conduct.

657. The Appeals Chamber further notes that the Trial Chamber did not refer to any specific evidence in the afore-mentioned section to support its finding in paragraph 520 of the Trial Judgement that the crime of persecutions was established in Kreševo, Vareš, and Žepče following the takeover of these municipalities by the HVO in April 1992, July 1992, and January 1993, respectively.

658. In relation to Vareš, however, the Trial Chamber did find at a later point in the Trial Judgement that the attack on the village of Stupni Do, located in the hills about one kilometre south of the town of Vareš, was a "concerted attack by the HVO upon the village, with a view to removing the Muslim population [… and that] it was part of the HVO offensive against the Muslim population of Central Bosnia and the result was a massacre."[947] The Trial Chamber further found, however, that "Kordić's influence and authority which were concentrated in the Lašva Valley did not extend to Stupni Do, which was thus outside his sphere of authority, and the attack on the village was not part of any common plan or design to which he was a party."[948] In light of this finding, which has not been appealed by the Prosecution, the Appeals Chamber considers that the attack on Stupni Do was not part of the Trial Chamber's finding concerning the campaign of persecution relevant to this case, and it need not be considered further.

659. The Appeals Chamber notes, in relation to Kreševo, that it is not listed in the relevant counts in the Indictment; thus, there is no basis for a conviction on Kreševo. In relation to the June 1993 offensives in Kreševo and Žepče, discussed in paragraphs 727 and 728 of the Trial Judgement, the Trial Chamber reaches no conclusion as to the nature of the assaults.

[947] Trial Judgement, para. 750.
[948] Trial Judgement, para. 753.

660. In view of the foregoing, the Appeals Chamber concludes that the finding contained in paragraph 520 of the Trial Judgement concerning persecutions in the municipalities must be reversed in relation to Kreševo, Žepče, and Vareš.

661. In relation to the crime of persecutions, the Trial Chamber further stated as follows:

> The Trial Chamber finds, on overwhelming evidence, that there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb. It took the form of the most extreme expression of persecution, i.e., of attacking towns and villages with the concomitant destruction and plunder, killing, injuring and detaining Bosnian Muslims. The Trial Chamber has already held that the allegations relating to the encouragement and promotion of hatred, etc., and the dismissal of Bosnian Muslims from employment do not amount to persecution for the purposes of this case or, in the case of the latter allegation, at all. The purpose of this campaign was the subjugation of the Bosnian Muslim population. All this, in the Trial Chamber's view, has been comprehensively proved and thus all the elements of the underlying offence made out. The defence case that these events amounted to a civil war in which the Bosnian Croats were on the defensive, and themselves subject to persecution, is rejected. For these purposes, as has been pointed out, the fact that individual atrocities were committed against Bosnian Croats is for these purposes irrelevant although they may be the subject of other criminal proceedings. (It is inherent in the above finding that there existed a common plan or design in the Bosnian Croat leadership to conduct this persecution.) However, as the Trial Chamber has found, the abuse and inhuman treatment of the detained Muslims (and using them as hostages and human shields and for trench-digging) was not part of the common plan or design.[949]

The Trial Chamber then stated:

> Its findings to date amount to this: Dario Kordić was the political leader of the Bosnian Croats in Central Bosnia with particular authority in the Lašva Valley and although having no formal position in the chain of command he was associated with the military leadership; as such he participated in the HVO take-over of the municipalities and the attacks on Busovača in January and the Lašva Valley in April and Kiseljak in June 1993. Whatever positions he may have held, the evidence does not support the contention that Dario Kordić was in the very highest echelons of the Bosnian Croat leadership or that he conceived the campaign of persecution. He was a regional political leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority. (It is to be inferred that he did so intending to advance the policy and sharing the discriminatory intent from his active participation in the campaign.) The evidence on which the Trial Chamber relies in making this finding is of the accused's positions as Vice-President of the HDZ-BiH and President of the Busovača HDZ, his role in the HVO take-over and attack on Busovača and his role in the attacks in the Lašva Valley and Kiseljak and in the confinement of Muslims.[950]

662. Kordić initially argues that the Trial Chamber erred in concluding that there was a unilateral "campaign of persecution" waged by the Bosnian Croats against the Bosnian Muslims in the four municipalities considered in the Trial Judgement. The Appeals Chamber disagrees with this interpretation of the Trial Chamber's findings. The Trial Chamber found at paragraph 827 that there was "a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims," and it further stated that "the fact that individual atrocities were committed against Bosnian Croats is for these purposes irrelevant although they may be the

[949] Trial Judgement, para. 827 (footnotes omitted).
[950] Trial Judgement, para. 829.

subject of other criminal proceedings." It also pointed out that there may have been persecutions of Croats by Muslims in other municipalities.[951] Hence, the Trial Chamber did not find that the campaign of persecution by the Bosnian Croats against the Bosnian Muslims was unilateral. Kordić's arguments in this regard are dismissed.

663. Kordić's third ground of appeal (and Čerkez's fourth ground of appeal)[952] also generally challenge the Trial Chamber's findings related to the existence of a campaign or plan of persecution by the Bosnian Croats against the Bosnian Muslims, and Kordić further submits that he should be acquitted of all persecutions charges. At the outset, the Appeals Chamber observes that at numerous instances in the Trial Judgement, the Trial Chamber discussed the role of Kordić and his direct participation in the crimes charged; *inter alia*, it found that:

> [Kordić] was associated with the military leadership; as such he participated in the HVO take-over of the municipalities and the attacks on Busovača in January and the Lašva Valley in April and Kiseljak in June 1993.[953]

The Trial Chamber further found that there was a campaign of persecution, and that Kordić

> lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority.[954]

The Trial Chamber therefore found that there was a link between Kordić's role and the campaign of persecution.

664. The Appeals Chamber will now determine whether a reasonable trier of fact could have concluded that the crimes committed in the municipalities in question amounted to persecutions, a crime against humanity.

(i) The elements of persecutions, a crime against humanity

a. Widespread or systematic attack directed against any civilian population

665. The common elements of crimes against humanity (Article 5 of the Statute) have been set out above.[955] The Trial Chamber merely stated that "all the elements of the underlying offence [have been] made out."[956] In doing so, the Trial Chamber did also consider, in general, that the elements of persecutions, a crime against humanity, were satisfied, including the elements common

[951] Trial Judgement, para. 520.
[952] Section I.C.1.
[953] Trial Judgement, para. 829.
[954] Trial Judgement, para. 829.
[955] See section III.D.
[956] Trial Judgement, para. 827.

to Article 5 of the Statute. It is for the Appeals Chamber to determine whether a reasonable trier of fact could have found that these elements were established.

666. The first issue is whether a reasonable trier of fact could have concluded beyond reasonable doubt that there was a widespread or systematic attack directed against any civilian population,[957] in this case, the term "widespread" referring to the large-scale nature of the attack and the number of targeted persons, and the term "systematic" referring to the organised nature of the acts of violence and the improbability of their random occurrence.[958] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence,[959] and only the attack, not the individual acts of the accused, must be widespread or systematic.[960] This attack is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.[961]

667. The evidence concerning the existence of crimes as such has already been considered in this Judgement. In January 1993 in the town of Busovača, numerous civilians were targeted and killed, and the following crimes were committed:

- murder, a crime against humanity;
- unlawful attacks on civilians and civilian objects;
- wanton destruction not justified by military necessity;
- and plunder of public or private property.

668. The following crimes were committed in Central Bosnia, in April and/or June 1993, *inter alia*, in:

- Ahmići: the massacre, which was directed against the civilian population;[962]
- Šantici: unlawful attack on civilians and civilian objects; murder, a crime against humanity; and wanton destruction not justified by military necessity;
- Nadioci, Pirići: unlawful attack on civilians; murder, a crime against humanity;
- Gaćice: wanton destruction not justified by military necessity;

[957] As for the clarification of this pre-requisite, see *Tadić* Appeal Judgement, para. 248; *Kunarac et al.* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, paras 98, 101.
[958] *Kunarac et al.* Appeal Judgement, para. 94; *Blaškić* Appeal Judgement, para. 101.
[959] *Kunarac et al.* Appeal Judgement, para. 94, *Blaškić* Appeal Judgement, para. 101.
[960] *Kunarac et al.* Appeal Judgement, para. 96; *Blaškić* Appeal Judgement, para. 101.
[961] *Kunarac et al.* Appeal Judgement, para. 86.
[962] See section VI.B.5.

- Večeriska/Donja Večeriska: unlawful attack on civilian objects and wanton destruction not justified by military necessity;
- Očehnići: wanton destruction not justified by military necessity;
- Kiseljak municipality: unlawful attack on civilians, murder, a crime against humanity, inhumane acts, a crime against humanity, and plunder of public or private property in Rotilj in April 1993; wanton destruction not justified by military necessity in Svinjarevo, Gomionica, Višnjica, Polje Višnjica, Behrići, and Gromiljak in April 1993; plunder of public or private property in Gomionica; murder and inhumane acts, crimes against humanity, and plunder of public or private property in Tulica in June 1993; and murder, a crime against humanity, and destruction or wilful damage to institutions dedicated to religion or education in Han-Ploča in June 1993; and wanton destruction not justified by military necessity and plunder of public or private property in Han-Ploča-Grahovci in June 1993;
- Kaonik, the Dubravica Elementary School, the SDK building, the Vitez Cinema, the village of Rotilj, the Kiseljak barracks; and the Kiseljak municipal building: unlawful confinement of civilians.

669. These findings, upheld above by the Appeals Chamber and underpinned by evidence discussed at length in this Judgement, demonstrate that there were attacks carried out by Croats against the Bosnian Muslim civilian population in Central Bosnia from January to June 1993. They have to be characterised as widespread, systematic and directed against a civilian population.

b. Crimes committed in armed conflict

670. The Appeals Chamber has already found that a state of international armed conflict existed in Central Bosnia from January 1993.

c. Equal gravity

671. The *actus reus* of persecutions, a crime against humanity, is defined as an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law. The acts underlying persecutions, whether considered in isolation or in conjunction with other acts, must constitute a criminal conduct of gravity equal to the crimes listed in Article 5 of the Statute.[963]

[963] *Krnojelac* Appeal Judgement, paras 199, 221; *Blaškić* Appeal Judgement, para. 135.

672. The underlying acts include killings, beatings, unlawful attacks on civilians and civilian objects, the unlawful imprisonment of civilians, destruction of civilian objects, and looting. All of them, considered in conjunction, amount to a criminal conduct of gravity equal to crimes listed in Article 5 of the Statute.

673. In accordance with settled jurisprudence,[964] the Appeals Chamber holds that these acts constitute criminal conduct of a gravity equal to the crimes listed in Article 5 of the Statute.

d. *Mens rea* of persecutions

674. The Appeals Chamber reiterates that the *mens rea* of the perpetrator carrying out acts of persecutions requires evidence of a "specific intent to discriminate on political, racial, or religious grounds."[965] The "discriminatory intent may be inferred […] as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[966]

675. The Appeals Chamber has carefully re-examined the factual context in which the crimes were committed in Busovača in January 1993, in Ahmići and the other afore-mentioned locations. They have in common that they were directed against Bosnian Muslims. Therefore, the Appeals Chamber finds that the discriminatory intent on the part of the perpetrators[967] is to be inferred from this factual context.

e. Conclusion

676. The Appeals Chamber finds that a reasonable trier of fact could have found that the crimes established and as described above amount to persecutions. The arguments in this regard are rejected.

(ii) The campaign of persecution

677. As stated above, in relation to the question of a campaign of persecution, the Trial Chamber found:

> on overwhelming evidence, that there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by

[964] See *Blaškić* Appeal Judgement, paras 143-159.
[965] *Blaškić* Appeal Judgement, para. 164.
[966] *Krnojelac* Appeal Judgement, para. 184.
[967] *Cf. Krstić* Appeal Judgement, para. 34 ("The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified.").

> the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb. It took the form of the most extreme expression of persecution, i.e., of attacking towns and villages with the concomitant destruction and plunder, killing, injuring and detaining Bosnian Muslims.[968]

The Trial Chamber did not elaborate further on the common plan or design.

678. The Trial Chamber did not define the term "campaign". The Appeals Chamber notes that in general, this term is defined as "any organized effort to promote a cause or to secure some definite result with any group of persons."[969]

679. A reasonable trier of fact could have concluded, in light of the afore-described persecutions, that indeed there was objectively such an organised effort to promote a cause or to secure some definite result with a group of persons in Central Bosnia, aimed at the Bosnian Muslims. The Appeals Chamber need not consider the question of the main orchestrators of this campaign because it is not necessary to do so for the purposes of this appeal.[970] The Appeals Chamber will focus solely on the central issue in this ground of appeal: the role of Kordić in the above-described campaign of persecution.

(iii) The role of Kordić in the campaign of persecution

680. First, the Trial Chamber discussed the role of Kordić in the HZ H-B, pointing out that he was one of its vice-presidents.[971] It stated that at a January 1992 rally in Busovača, Kordić was seen speaking to a cheering, flag-waving crowd, and he said that the rally:

> was proof that the Croatian people in Busovača are part of the united Croatian nation and that the HZ H-B, including Busovača, is 'Croatian land and that is how it will be.'[972]

The Trial Chamber further stated that in the scramble for weapons which began that year, Kordić was destined to play the role which brought him to a position of leadership.[973] The Trial Chamber also referred to evidence of interviews of Kordić:

> In early March 1992 Dario Kordić was interviewed by TV Sarajevo outside the Bratsvo factory. He said that the people in charge of the plant would be considered war criminals in the eyes of the Croatian people if they continued what they were doing (a reference, it must be supposed, to attempting to supply arms to the JNA). There followed a panel discussion in which Kordić explained the reasons for the HZ H-B taking the steps which it did, i.e., that there should be no monopoly of arms for the JNA and arms should be exported to Croatia; and that federal regulations were not binding on the HZ H-B, which recognised the legitimacy of the State of Bosnia and Herzegovina but not of the federal government. Dario Kordić also said that it was no

[968] Trial Judgement, para. 827.
[969] Black's Law Dictionary, 6th ed., p. 205. The 7th edition does not define this term.
[970] *Cf. Krstić* Appeal Judgement, para. 34.
[971] Trial Judgement, para. 472(f).
[972] Trial Judgement, para. 472(i).
[973] Trial Judgement, para. 473.

> secret that the Croatian people, like everyone else, were arming themselves and no-one could deny their right to organise themselves into the HZ H-B.[974]

681. Kordić's role in the HVO takeovers of several municipalities was also discussed by the Trial Chamber,[975] as was his role in the events leading to the conflict and on the eve of the conflict.[976] In relation to the takeover of Busovača, for example, the Trial Chamber found that on 22 May 1992, the President of the Busovača HVO issued an order, counter-signed by Kordić, lifting the blockade on the town, but imposing a curfew and putting the HVO in charge of the municipality.[977] The Trial Chamber referred to the evidence of Witness J, whose view was that "Kordić was in charge in the Lašva Valley: this was known to all Muslims and everyone in Busovača knew it."[978]

682. In relation to Novi Travnik, the Trial Chamber referred to the evidence of Witness P, who "spoke to some captured HVO soldiers who said that troops had been sent by Dario Kordić from Busovača."[979] In relation to Kreševo, Witness E testified that Kordić, as Vice President of the HDZ in Central Bosnia, "sent a long fax stating that the HVO was the only military force allowed and any other force would be treated as an occupying force."[980]

683. As to Kordić's role in the events leading to the conflict, the Trial Chamber pointed out the following:

> (a) On 28 July 1992 the first HVO press conference was held in Busovača. Dario Kordić was introduced as Vice-President of the HVO. […]
>
> (b) On 14 August 1992 a meeting of the Presidency of the HZ H-B was held in Grude, which was presided over by Dario Kordić (in the absence of Mate Boban) at which Mr. Prlić was appointed President of the HVO. […]
>
> (c) On 18 August 1992 Colonel Tihomir Blaškić, who by this time had taken command of what was to become the Central Bosnia Operative Zone (CBOZ) of the HVO, ordered that swearing-in ceremonies for the HVO forces should take place. Dario Kordić was much in evidence at these ceremonies. In Busovača he spoke and reviewed the troops. In Novi Travnik he was escorted by soldiers and in a speech said that Novi Travnik would be a Croatian town. In Fojnica between 800 and 1,000 took an oath to defend their "homeland" at a ceremony in the football stadium: Kordić was among the guests of honour. In Travnik, Kordić and Koštroman addressed the troops: the text of a proposed speech states that those who do not wish to live in the Croatian provinces of HZ H-B are all enemies and must be fought with both political and military means. In Vitez, the gist of Kordić's speech was a statement to the Muslims of the Lašva Valley that this was Croat land and that they had to accept that this was Herceg Bosna.
>
> (d) On 5 September 1992 a meeting of the HDZ Travnik Presidency was held with Kordić and Koštroman representing the HZ H-B. The minutes record that only one HVO government existed for the Croatian people in the municipality and the Croatian people did not accept a unitary State of BiH.

[974] Trial Judgement, para. 478 (footnotes omitted).
[975] See Trial Judgement, paras 496, 499, 508.
[976] Trial Judgement, paras 522, 547-556.
[977] Trial Judgement, para. 496.
[978] Trial Judgement, para. 497.
[979] Trial Judgement, para. 499.
[980] Trial Judgement, para. 508.

> (e) On 30 September 1992 Kordić, as Vice-President of HZ H-B, was present at a meeting of the Presidency of the Kakanj HVO, a neighbouring municipality to Vareš. The minutes of the meeting record Kordić as saying that the HVO was the government of the HZ H-B and what they were doing with the HZ H-B was the realisation of a complete political platform: they would not take Kakanj by force but "it is a question of time whether we will take or give up what is ours. It has been written down that Vareš and Kakanj are in HZ H-B. The Muslims are losing morale and then it will end with 'give us what you will'".[981]

The Trial Chamber also discussed evidence in connection with the October 1992 conflict in Novi Travnik, to the effect that Kordić had authority over HVO soldiers "who listened when he spoke and did what he said."[982] The Trial Chamber also cited "indirect and documentary evidence"[983] to that effect and found that Kordić "had a clear role leading the HVO in the fighting in Novi Travnik."[984] In relation to an incident concerning a barricade put up in Ahmići by the local TO, the Trial Chamber found that Kordić "demonstrated his political and military authority."[985]

684. Following its consideration of Kordić's role on the eve of the conflict, including his use of headquarters which, it seemed to two international witnesses, bore the hallmarks of military headquarters, his use of the rank of colonel, and his wearing of a uniform,[986] the Trial Chamber concluded:

> These were not normal times and the fact that the accused assumed a uniform (as many others did) does not mean that he had a military role. Nor, by itself, does the fact that he was called "Colonel". However, these facts, together with his involvement in the issue of orders, the presence of security guards around him and the facts already found by the Trial Chamber, allow it to draw the inference that Dario Kordić by this time combined political authority in Central Bosnia (as leader of the Bosnian Croats in the Lašva Valley) with military authority. This latter authority did not involve a formal rank but a position which he had won for himself by his energy, character and commitment to the Croatian cause.[987]

On the relationship between Kordić and Blaškić, the Trial Chamber discussed Kordić's involvement with the mixed military working group (MMWG) in November and December 1992, and found that at the MMWG meetings, Kordić

> was not only the leader of the HVO delegation but was also the superior of Colonel Blaškić; and that, no matter how he came to be given the rank of "Colonel", it was one which he enthusiastically adopted.[988]

685. The Trial Chamber discussed the role of Kordić in some of the attacks in question. In relation to the January 1993 conflict in Busovača, for example, the Trial Chamber found that Kordić "was implicated in the attack on Busovača as a leader exerting both political and military

[981] Trial Judgement, para. 522 (footnotes omitted).
[982] Trial Judgement, para. 527.
[983] Trial Judgement, para. 528.
[984] Trial Judgement, para. 530.
[985] Trial Judgement, para. 532.
[986] Trial Judgement, paras 547-550.
[987] Trial Judgement, para. 556.
[988] Trial Judgement, para. 544 (emphasis added).

authority."[989] The Trial Chamber drew this inference from the evidence of an audio-taped conversation between Kordić and Blaškić,[990] various pieces of documentary evidence,[991] and the evidence of his use of the headquarters and his control over the roads.[992] The Trial Chamber explicitly concluded that it was satisfied that there was no truth in the evidence put forward by the Defence that the Accused played no military part in the conflict and was simply helping his people.[993]

686. In relation to the above-referenced audio-taped conversation between Kordić and Blaškić, the Appeals Chamber notes that Kordić's words, "one hundred should be [killed] for every one, friend", may be assessed as reference to a so-called reprisal quota. In this context, the Appeals Chamber notes that, in principle, international humanitarian law allows for acts of war to be directed against military objectives, *e.g.*, enemy soldiers. However, the general lawfulness of destroying the life or limb of an enemy combatant is restricted by the principles of necessity and proportionality. "Military necessity" has already been defined in Article 14 of the Lieber Code of 24 April 1863 as

> the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

It follows that the unnecessary or wanton application of force is prohibited and that "a belligerent may apply only that amount and kind of force necessary to defeat the enemy."[994] This principle is, *e.g.*, the basis for the prohibition on employing arms, projectiles, or material calculated to cause unnecessary suffering (Article 23[e] of Hague Convention IV).

687. The Appeals Chamber is mindful of the *Hostages* Case in which Military Tribunal V held in April 1949

> that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquillity in occupied territory and has the effect of strengthening the position of a law abiding occupant.[995]

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[989] Trial Judgement, para. 586.
[990] See Trial Judgement, para. 577. Excerpts from this audio-taped conversation are as follows: "Let's have that VBR [multiple rocket launcher], friend. Get it ready for me, for Kacuni and Lugovi over here. Let me hear it roar." Blaškić: "When? Now?" Kordić: "It doesn't have to be right away ….". Blaškić: "Well, you just tell me when." Kordić: "Listen! You prepare everything. Select the targets for the mortars and the VBR, and everything there is. Let's burn everything." […] Kordić: "They killed two of our boys, friend." Blaškić: "Two?" Kordić: "Two of our boys, they killed them perfidiously, from behind. At the checkpoint in Kacuni.' Blaškić: "And them?" Kordić: "Only one of theirs." […] Kordić: "One hundred should be [killed] for every one, friend."
[991] Trial Judgement, paras 579-580.
[992] Trial Judgement, paras 581-586.
[993] Trial Judgement, para. 586.
[994] *Christopher Greenwood* in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, para. 130.
[995] *Hostages* Case, p. 1253.

688. However, it was only shortly afterwards that the taking of hostages and their execution without a proper trial was explicitly prohibited and penalised in Articles 3 and 147 of Geneva Convention IV, because

> although they were common practice until quite recently, they are nevertheless shocking to the civilized mind. The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish.[996]

> The taking of hostages should therefore be treated as a special offence. Certainly, the most serious crime would be to execute hostages which […] constitutes wilful killing. However, the fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify.[997]

689. Going one step further, the German Federal Supreme Court recently held in a case involving the killing of 60 Italian civilians by German soldiers during World War II as a "punitive measure", that such a "reprisal quota […] is simply incompatible with the meaning of the human right to life". It further held that such an "act must therefore be categorised as so inhuman that it can only be assessed as being unlawful", and that "an order to execute such a reprisal quota is manifestly unlawful".[998]

690. The Appeals Chamber notes that the Trial Chamber found in relation to Kordić's above-mentioned words that "the recording demonstrates more than mere bravado and shows Dario Kordić participating in the conduct of military affairs and, seemingly, enjoying it".[999] Having considered the content of the conversation and the context in which it took place, the Appeals Chamber finds that a reasonable trier of fact could have come to this assessment.

691. However, Kordić's words may be ambiguous as regards the status of the persons he was referring to. It remains unclear whether he was referring to non-combatants or combatants, and whether he alluded to killings in combat situations or to the execution of a reprisal quota.[1000] Therefore, a finding based on the latter alternative would infringe the principle *in dubio pro reo*.

692. The Appeals Chamber has considered the evidence discussed by the Trial Chamber from paragraphs 577 to 585 of the Trial Judgement in relation to Kordić's involvement in the January 1993 attack on Busovača, and finds that it was reasonable to conclude that Kordić was responsible

[996] Commentary to Geneva Convention IV, p. 39, regarding Article 3.
[997] Commentary to Geneva Convention IV, pp 600-601, regarding Article 147.
[998] BGH NJW 2004, 2316 (2318). The Court held that an order to execute such a reprisal quota is manifestly unlawful, even in the light of a deterioration of norms and customs in war time. The Court explicitly found that even an indoctrinated perpetrator cannot claim this indoctrination as a defence. *Ibid.*
[999] Trial Judgement, para. 578.
[1000] Trial Judgement, paras 577-578.

for the January 1993 attack on Busovača, and that the acts of Kordić formed part of the widespread and systematic attack that occurred in Busovača in January 1993.

693. In relation to the Ahmići massacre, the Trial Chamber referred to the evidence of Witness AT, according to which AT was told by Paško Ljubičić that Kordić was present at a meeting of the political leadership which took place in Blaškić's office at the Hotel Vitez.[1001] Following that meeting, according to AT, there was a second meeting in Blaškić's office, and during this meeting, "Ljubičić came to the witness's office in the Hotel Vitez and told him that at the previous meeting a decision had been made that in the morning an attack would be launched against the Muslims (the reason being that a report had been intercepted saying that the Muslims would attack in the morning); and that directions of attack were being determined for the units that were to take part."[1002]

694. Following these meetings, there was a briefing to a company of the Military Police IV Battalion, given by the battalion commander, Ljubičić. Witness AT was present at this meeting, and according to him, Ljubičić said that a decision had been made to start the war in the morning, that the company would be transferred to the Bungalow,[1003] and the direction of the attack would be Ahmići.[1004]

695. Witness AT further testified that after their arrival in the Bungalow, the military police received two additional briefings. At the first briefing, according to Witness AT, Ljubičić said that "Colonel Blaškić's order was to attack at 5:30 a.m. and all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire."[1005] Witness AT further testified that Ante Slišković, Commander of the CBOZ SIS, office at the Hotel Vitez, then stated that "if they did not attack, the Muslims would do so and commit slaughter and Mujahedin had been infiltrated into Ahmići during the night [and] he added that Dario Kordić had placed full trust in the police to carry out the action successfully."[1006] At the second briefing, Ljubičić said that the groups would move off in line and that there were to be no living witnesses.[1007]

[1001] Trial Judgement, para. 610.
[1002] Trial Judgement, para. 610.
[1003] This is described in the Trial Judgement as "a former restaurant in Nadioci, near Ahmići where the Anti-Terrorist Platoon of the Battalion (the "Jokers") already were," para. 612.
[1004] Trial Judgement, para. 612.
[1005] Trial Judgement, para. 613.
[1006] Trial Judgement, para. 613.
[1007] Trial Judgement, para. 613.

696. The Trial Chamber considered challenges to the testimony of Witness AT presented by the Defence.[1008] As to the presence of Kordić at the meeting of the political leadership in the Hotel Vitez, the Trial Chamber stated:

> Although no direct evidence was called as to the whereabouts of Dario Kordić after the Press conference on 15 April 1993, Brigadier Grubešić said that he heard that Kordić was at a luncheon at his offices in Tisovac. Even if this were true, the Prosecution claims that it would have been perfectly possible for Dario Kordić to get to the meeting in the Hotel Vitez: on the other hand, the witness claimed that with roadblocks it could take from 40 minutes to an hour to travel the few kilometres from Busovača to Vitez.[1009]

Acknowledging that Witness AT's evidence was disputed, the Trial Chamber stated:

> in deciding whether to accept the evidence of Witness AT the Trial Chamber must determine to what extent his evidence is confirmed by other evidence. In fact, there is no direct evidence supporting his account of the meeting. However, there is circumstantial evidence which does so. First, as will be seen, the events of the day in Ahmići followed the plan which he described. Secondly, no such plan could have been put into operation without prior meetings and without political approval. Next, no meeting of this importance of politicians in the Lašva Valley would have taken place without Dario Kordić being present. These matters, by themselves, would not be sufficient to lead the Trial Chamber to accept the witness's evidence. However, the account which he gave was a coherent one which was given fluently (in the manner of a person recalling incidents rather than one making them up) and was not shaken in cross-examination. Such inconsistencies as are relied on by the Defence are not of such significance as to make his evidence unbelievable. Furthermore, the Trial Chamber saw and heard the witness giving his evidence and thus had the opportunity of observing his demeanour. Although he could not bring himself to tell the full truth of his own involvement in the attack, and the Trial Chamber finds that he was mistaken in his evidence about the use of the mosque for defence purposes (which is not supported by the evidence of other witnesses) the Trial Chamber is satisfied that he <u>did</u> tell the truth about the preparations for the Ahmići attack, including the meetings at Hotel Vitez and the subsequent briefings.[1010]
>
> In those circumstances and in the absence of evidence to the contrary, the Trial Chamber is satisfied that Dario Kordić was present at the meetings of politicians which authorised the 16 April 1993 attack. He thus participated as the senior regional politician in the planning of the military operation and attack against Ahmići (and the other Lašva Valley villages), an operation which was aimed at 'cleansing' these areas of Muslims. The Chamber is satisfied that the meeting would have approved of Blaškić's order to kill all the military-age men, expel the civilians and set the houses on fire: such an order would not have been given without political approval. Kordić was thus associated with the giving of that order. (However, the Chamber cannot be sure that the second order, that there be no living witnesses, was not Ljubičić's own order, made without reference to any prior order.)[1011]

The Trial Chamber concluded:

> The Trial Chamber finds that the overwhelming evidence points to a well-organised and planned HVO attack upon Ahmići with the aim of killing or driving out the Muslim population, resulting in a massacre. The assertion that this attack was justified strategically, defensively, or in any other way, is wholly without foundation: such defenders as were available were taken completely by surprise and any defence put up thereafter was rudimentary, as the results of the day show. Furthermore, the Trial Chamber draws the inference from this evidence (and the evidence of other HVO attacks in April 1993) that there was by this time a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims.

[1008] See Trial Judgement, paras 614-616 (footnotes omitted).
[1009] Trial Judgement, para. 617 (footnotes omitted).
[1010] Trial Judgement, para. 630 (emphasis in original).
[1011] Trial Judgement, para. 631.

> Dario Kordić, as the local political leader, was part of this design or plan, his principal role being that of planner and instigator of it.[1012]

697. The Appeals Chamber considers that a reasonable trier of fact could have concluded beyond reasonable doubt, on the basis of this evidence and its detailed assessment, that there was a meeting of the Bosnian Croat political leadership on 15 April 1993 at the Hotel Vitez, and that Kordić was present at this meeting. A reasonable trier of fact could also have concluded that at this meeting, a decision to launch an attack against the Muslims was made. On the basis of Witness AT's evidence as to what transpired in the TV room briefing, a reasonable trier of fact could have concluded that the direction of the attack was to be Ahmići and other Lašva Valley villages.

698. In light of Witness AT's evidence concerning the briefings to the military police at the Bungalow, viewed together with the afore-discussed political developments and other corroborating evidence, the Appeals Chamber considers that a reasonable trier of fact could have concluded that an order was given to attack at 5:30 a.m., to kill all Muslim men of military age, to expel civilians, and to set houses on fire, and that this order was approved at the meeting of the political leadership, which was attended by Kordić. It is not necessary to determine who exactly initiated the order going beyond the written orders signed by Blaškić. Relevant for the purposes of this case is only the possible and reasonable inference that Dario Kordić was the political planner, instigator and co-author of a criminal plan and order[1013] leading, *inter alia*, to the massacre in Ahmići, thus establishing his criminal responsibility for the acts emanating from this general political plan. A reasonable trier of fact could infer from the hierarchy and leading regional political role of Kordić that the afore-mentioned crimes could not have been committed without his approval.

699. The Appeals Chamber notes that a clear distinction has to be made between

(A) the written orders by Col. Blaškić;

(B) the additional order to kill all Muslim military aged men, while civilians were not to be killed but expelled and the houses set on fire; and

(C) a further order that "were to be no living witnesses."

The Appeals Chamber concludes that in light of Witness AT's testimony and the entirety of the circumstantial evidence discussed before, a reasonable trier of fact could have concluded that the first two orders would not have been given without political approval, meaning that Kordić was criminally responsible for the order mentioned under (B). However, again in light of Witness AT's

[1012] Trial Judgement, para. 642.
[1013] Trial Judgement, para. 834.

testimony as to what he heard Ljubičić state during the second briefing at the Bungalow (not to be confused with the second meeting), that in fact the third order mentioned above in (C) was given by an unknown person, namely that there were to be "no living witnesses." Thus, a reasonable trier of fact could have, as the Trial Chamber did,[1014] come to the conclusion that Kordić was responsible for the crimes committed based on the order cited under (B).

700. On the basis of this evidence, the Appeals Chamber finds that a reasonable trier of fact could have concluded beyond reasonable doubt that Kordić, as the responsible regional politician, planned, instigated and ordered[1015] the crimes which occurred in Ahmići on 16 April 1993 and its associated hamlets Šantići, Pirići, and Nadioci.[1016] The Trial Chamber correctly regarded these three hamlets as being associated with Ahmići.

701. The Appeals Chamber therefore finds that a reasonable trier of fact could have concluded beyond reasonable doubt that the acts of Kordić formed part of a deliberate widespread and systematic attack.

702. In relation to the April 1993 attacks in Kiseljak, the Trial Chamber established Kordić's criminal responsibility in that it stated in a similar way:

> The attacks occurred two days after the attacks on the Muslim villages of the Lašva Valley and were part of the pattern of attacks on the Muslims of Central Bosnia. Blaškić would not have launched the attacks without political approval which the Trial Chamber accepts meant the approval of the local leadership in the person of Dario Kordić. The clear inference is that the latter was thus associated with the giving of orders to attack the villages, including Rotilj.[1017]

The Trial Chamber therefore inferred that Kordić was involved in the April 1993 attacks in Kiseljak from an order[1018] sent by Blaškić to the Ban Jelačić Brigade in Kiseljak on 19 April 1993,[1019] instructing the brigade to take Gomionica that night and stating that "the situation is generally under control and 'we have informed the leadership of the HZ H-B of everything. We are in constant contact with the leadership.'" The Trial Chamber recalled the Prosecution's submission in its final trial brief to the effect that "there was limited possibility of contact with Mate Boban given the communications difficulties relied on by the Defence and there is no document before the Trial Chamber on such a topic: therefore, the only leadership to whom Blaškić could have been referring

[1014] Trial Judgement, para. 631, read together with para. 834.
[1015] Trial Judgement, para. 834.
[1016] Trial Judgement, paras 505, 557.
[1017] Trial Judgement, para. 669.
[1018] Exh. Z733.
[1019] Note that the Trial Judgement, para. 668, states that the order was sent on 18 April 1993, whereas the document itself bears the date 19 April 1993.

was the local leadership, *i.e.*, Kordić."[1020] As far as the War Diary allegedly confirms this, there is no specific indication as to what the log entry entailed.

703. However, in light of the Appeals Chamber's finding above, that a reasonable trier of fact could have concluded that an order, in addition to the ones given in writing by Blaškić, was given to kill all Muslim men of military age, to expel civilians, and to set houses on fire, and that this order was approved at the meeting of the political leadership, the Appeals Chamber considers that a reasonable trier of fact could have concluded that Kordić's involvement was not limited to certain areas of Lašva Valley but included the crimes which occurred in the Kiseljak municipality, Gaćice, Večeriska/Donja Večeriska, and Očehnići in April 1993.

704. In relation to the crimes committed in June 1993 in Kiseljak proper, the Trial Chamber stated that Kordić's direct involvement was confirmed by the evidence of his presence in Kiseljak during the offensives.[1021] The Trial Chamber referred to the evidence of Witness Y and stated:

> [E]vidence of Dario Kordić's presence in Kiseljak during the June 1993 conflict was given by Witness Y who saw him that month in Kiseljak barracks. Witness Y's evidence was that on 14 June 1993 he was arrested in Topolje with other villagers and taken to Kiseljak barracks where they were all detained in a room in a building. Within two hours of his arrival there he was beaten. His head was bleeding and he was told to wash in a trough in the hall of the building. As he was washing he saw Dario Kordić coming out of the building. Kordić was 8-14 metres away. There were HVO soldiers around Kordić who came out first with others behind him. The witness spent three days in the barracks and was then transferred to the municipal building where he saw Kordić again 23 or 24 days later. On behalf of the Defence it was disputed that Mr. Kordić was in the barracks as alleged by the witness. However, the latter said that he had seen the accused there for about five seconds, time enough for the accused to take five or six steps. He had seen the accused many times in Kiseljak in 1992-1993, sometimes in uniform, black or camouflage, or with a gun in his belt and always accompanied and with bodyguards. He had also seen the accused many times on television: the first time when Kordić was making a speech.[1022]

The Trial Chamber examined the circumstances of Witness Y's identification of Kordić, stating:

> In considering this evidence the Trial Chamber bears in mind that it relates to an alleged identification of the accused by a witness. Such evidence must be approached with caution because of the ease with which even an honest and convincing witness may be mistaken. Thus it is necessary to look at the circumstances of the identification. The witness knew who the accused was and had seen him often before. He was, therefore, in a position to recognise the accused. His view of him was for more than a split second and he had the opportunity to make a firm identification. His evidence was not shaken in cross-examination. The Trial Chamber, therefore, accepts his evidence.[1023]

The Appeals Chamber therefore considers that the Trial Chamber analysed Witness Y's evidence carefully and that the Trial Chamber satisfied itself that this evidence could be relied upon. In addition, the Appeals Chamber considers that in planning, instigating and ordering[1024] the crimes

[1020] Trial Judgement, para. 668.
[1021] Trial Judgement, para. 726.
[1022] Trial Judgement, para. 724 (citing Witness Y, T. 11000-01, 11004-11, 11081-87, 11097-99).
[1023] Trial Judgement, para. 725 (footnotes omitted).
[1024] See Trial Judgement, para. 834.

which occurred in Ahmići and its associated hamlets on 16 April 1993, Kordić was aware of a substantial likelihood that other crimes would occur in furtherance of the general plan. As a result, the Appeals Chamber finds that Kordić also was responsible for the June 1993 offensives in Kiseljak.

705. The Appeals Chamber concludes that the acts of Kordić formed part of the widespread and systematic attacks that occurred in Kiseljak in April and June 1993.

706. In relation to the unlawful imprisonment of civilians in Kaonik, the Dubravica Elementary School, the Vitez SDK building, the Vitez Cinema, the village of Rotilj, the Kiseljak barracks, and the Kiseljak municipal building, the Appeals Chamber considers that the Trial Chamber inferred that Kordić was associated with the orders for detention and the ordering and coming into existence of these detention facilities. The Trial Chamber stated:

> […] that the unlawful confinement and detention of the Bosnian Muslims was part of the common design to subjugate them. As has been noted, the attacks on the towns and villages followed a pattern, beginning with the initial assault and culminating in the detention of the surviving Muslims. This happened with such regularity that it could have been the result of nothing except a common plan. The Trial Chamber is entitled to draw the inference that as political leader Dario Kordić was involved in this plan in the areas for which he held political responsibility. Consistent with its other findings, the Trial Chamber finds that Dario Kordić was associated with the orders for the detention of Bosnian Muslims and the ordering and coming into existence of the detention facilities in the Lašva Valley, i.e., Kaonik, the Vitez Cinema, Veterinary Station and SDK offices, Chess Club, Dubravica school and in Kiseljak (the barracks and municipal building and Rotilj). However, there is not sufficient evidence to connect Kordić with the attack on Žepče and confinement of Bosnian Muslims in Nova Trgovina and the Silos. Furthermore, there is no sufficient evidence that the accused had any connection with the conduct of the detention facilities or the inhuman treatment of the detainees. The camps were run by the military and the evidence is not such as to allow an inference to be safely drawn that Kordić, as a politician, was connected with the way in which they were run or in which the detainees were treated; or that the treatment of the detainees (as opposed to their detention) was part of the common plan or design.[1025]

707. The Appeals Chamber has already reversed the findings that the crimes of unlawful confinement of civilians and imprisonment were established in relation to the Chess Club and the Veterinary Station. As a result, these two locations need not be considered further.

708. In relation to Kaonik, the Appeals Chamber finds that, on the basis of the testimony of Witness J and Witness AC**,** considered together with other evidence showing Kordić's power in the Busovača area, a reasonable trier of fact could have concluded beyond reasonable doubt that Kordić was responsible for the orders for the detention of Bosnian Muslims in Kaonik.

709. In relation to the Vitez Cinema, the SDK building, the Dubravica Elementary School, the village of Rotilj, the Kiseljak barracks, and the Kiseljak municipal building, the Appeals Chamber recalls the Trial Chamber's finding that the attacks on the towns and villages culminated in

[1025] Trial Judgement, para. 802.

detentions, that this happened with regularity, and that this could only have been the result of a common plan. Again, the Appeals Chamber further considers that in planning, instigating and ordering the crimes which occurred in Ahmići and its associated hamlets on 16 April 1993, Kordić was aware of a substantial likelihood that other crimes would occur. As a result, the Appeals Chamber finds that Kordić was responsible for the detention of Bosnian Muslims and the establishment of the above-mentioned detention facilities.

710. The analysis of the above evidence demonstrates that Kordić was involved in the crimes in Busovača in January 1993; in Ahmići and its associated hamlets of Pirići, Nadioci, and Šantići, as well as in Gaćice, Večeriska/Donja Večeriska, and Očehnići in April 1993; in Kiseljak municipality in April and June 1993; and in the unlawful confinement in detention facilities from January to September 1993. The Appeals Chamber has also considered Kordić's role in the HVO takeovers of several municipalities in Central Bosnia and his active and increasing role in the political landscape prior to and during the conflict. On the basis of the foregoing, the Appeals Chamber considers that a reasonable trier of fact could have concluded beyond reasonable doubt that objectively, Kordić's acts were linked geographically and temporally to the armed conflict.

711. The Appeals Chamber now turns to the *mens rea* for all crimes against humanity: namely, the accused must know that there is a widespread or systematic attack on the civilian population and that his acts comprise part of that attack.[1026] In addition, for persecutions, a crime against humanity, the specific intent to discriminate on political, racial, or religious grounds must be proved.

712. Kordić submits that the Trial Chamber committed an error of fact occasioning a miscarriage of justice when it concluded that he had the requisite *mens rea* for any of the crimes of persecution with which he was charged.[1027]

713. The Prosecution responds that the Trial Chamber rightly inferred Kordić's specific intent from the whole of the evidence, in particular that relating to Kordić's actual involvement in the persecutory campaign against Bosnian Muslims in Central Bosnia as the top political leader at the time.[1028]

714. The Appeals Chamber has found that a reasonable trier of fact could have concluded that Kordić's acts formed part of the widespread and systematic attacks on the civilian population. The Appeals Chamber has reviewed the trial evidence in relation to Kordić's involvement in these attacks, and without further discussion, the Appeals Chamber agrees with the Trial Chamber's

[1026] *Tadić* Appeal Judgement, para. 248; *Kunarac et al.* Appeal Judgement, paras 99, 102.
[1027] Kordić Appeal Brief, Vol. I, p. 110.
[1028] Prosecution Response, para. 4.137.

implicit findings that Kordić knew that there were attacks on the civilian population, which were by nature widespread and systematic, and that his acts comprised part of these attacks.

715. The Appeals Chamber now turns to the specific intent to discriminate on political, racial, or religious grounds and wants to stress first that such a specific intent in general can only be inferred from objective facts and the general conduct of an accused seen in its entirety. Only on rare occasions it will be possible to establish such an intent on documents laying down a perpetrator's own *mens rea*.

716. The Appeals Chamber recalls that the Trial Chamber described Kordić's political involvement and proclivities as follows:

> Kordić began his political career in Busovača by becoming Secretary of the local branch of the HDZ (in September 1990) and then President from February 1991. He was part of the faction which sided with the HDZ of Croatia and President Tudjman. Meanwhile, after the 1990 elections, he was appointed by the HDZ to be Secretary for National Defence in the Busovača municipality.[1029]
>
> Kordić's career continued with his appointment, on 30 July 1991, as Co-ordinator of the Travnik Regional Community of the HDZ-BiH, responsible for calling and chairing its meetings. In August 1991 the Busovača HDZ provided for the functioning of the municipal organisation in wartime by the setting up of a Command, of which the President would be the Commander.[1030]

The Trial Chamber pointed out that

> [o]n 12 November 1991, the Joint Meeting of the Crisis Staffs of Herzegovina and Travnik Regional Communities, chaired by Mate Boban and Dario Kordić, was held. The two communities decided that the Croatian people in Bosnia and Herzegovina should institute a policy to bring about "our age-old dream, a common Croatian State" and should call for a proclamation of a Croatian *banovina* in Bosnia and Herzegovina as the "initial phase leading towards the final solution of the Croatian question and the creation of a sovereign Croatia within its ethnic and historical […] borders".[1031]

At a meeting on 27 December 1991 in Zagreb, Kordić said that

> the Croatian people of the Travnik region were ready to accede to the Croatian State "at all costs […] any other option would be considered treason, save the clear demarcation of Croatian soil in the territory of Herceg Bosna."[1032]

717. Further, as noted above, the Trial Chamber stated that at a January 1992 rally in Busovača, Kordić was to be seen speaking to a cheering, flag-waving crowd and he said that the rally "was proof that the Croatian people in Busovača are part of the united Croatian nation and that the HZ H-B, including Busovača, is 'Croatian land and that is how it will be.'"[1033]

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[1029] Trial Judgement, para. 468.
[1030] Trial Judgement, para. 469 (footnotes omitted).
[1031] Trial Judgement, para. 472(d) (emphasis in original).
[1032] Trial Judgement, para. 472(g).
[1033] Trial Judgement, para. 472(i).

718. The Appeals Chamber considers that such evidence demonstrates a hardline, nationalist stance on the part of Kordić, as well as a desire to achieve an ethnic Croatian state which would exclude other groups.

719. At paragraph 522 of the Trial Judgement, the Trial Chamber pointed out:

> On 18 August 1992 Colonel Tihomir Blaškić, who by this time had taken command of what was to become the Central Bosnia Operative Zone (CBOZ) of the HVO, ordered that swearing-in ceremonies for the HVO forces should take place. Dario Kordić was much in evidence at these ceremonies. In Busovača he spoke and reviewed the troops. In Novi Travnik he was escorted by soldiers and in a speech said that Novi Travnik would be a Croatian town. In Fojnica between 800 and 1,000 took an oath to defend their "homeland" at a ceremony in the football stadium: Kordić was among the guests of honour. In Travnik, Kordić and Koštroman addressed the troops: the text of a proposed speech states that those who do not wish to live in the Croatian provinces of HZ H-B are all enemies and must be fought with both political and military means. In Vitez, the gist of Kordić's speech was a statement to the Muslims of the Lašva Valley that this was Croat land and that they had to accept that this was Herceg Bosna.
>
> […]
>
> On 30 September 1992 Kordić, as Vice-President of HZ H-B, was present at a meeting of the Presidency of the Kakanj HVO, a neighbouring municipality to Vareš. The minutes of the meeting record Kordić as saying that the HVO was the government of the HZ H-B and what they were doing with the HZ H-B was the realisation of a complete political platform: they would not take Kakanj by force but "it is a question of time whether we will take or give up what is ours. It has been written down that Vareš and Kakanj are in HZ H-B. The Muslims are losing morale and then it will end with 'give us what you will'".

The Trial Chamber recalled the evidence of a witness who testified in *Blaškić* to the effect that Kordić

> called on the Croats to fight to the last man for the territory and send a message to Izetbegović that the HVO would fight for Herceg Bosna with their bodies and their souls: he was then given a military-style ovation and a fascist-style salute.[1034]

720. According to Witness M, "Kordić […] said at a meeting that the HVO would guarantee the security for the Bosniaks only if they recognised the lawfulness of the HVO."[1035] In relation to Kreševo, Witness E testified that Dario Kordić, as Vice-President of the HDZ in Central Bosnia, sent a long fax stating that the HVO was the only military force allowed and any other force would be treated as an occupying force.[1036]

721. The Trial Chamber further found at paragraph 829 of the Trial Judgement that Kordić:

> was a regional political leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority. (It is to be inferred that he did so intending to advance the policy and sharing the discriminatory intent from his active participation in the campaign.) The evidence on which the Trial Chamber relies in making this finding is of the accused's positions as Vice-President of the

[1034] Trial Judgement, para. 522, footnote. 869, citing Witness TW10, *Blaškić*, T. 1153-55.
[1035] Trial Judgement, para. 497.
[1036] Trial Judgement, para. 508.

> HDZ-BiH and President of the Busovača HDZ, his role in the HVO take-over and attack on Busovača and his role in the attacks in the Lašva Valley and Kiseljak and in the confinement of Muslims.

The Trial Chamber inferred Kordić's *mens rea* from, *inter alia*, his role during the events leading the conflict and on the eve of the conflict, as well as during the attacks.

722. The Appeals Chamber considers that on the basis of the evidence outlined above concerning Kordić's political activities and inclinations, his strongly nationalist and ethnical stance, and his desire to attain the sovereign Croatian state within the territory of Bosnia and Herzegovina at seemingly any cost, Kordić possessed the specific intent to discriminate required for the crime of persecutions.

(b) Conclusion

723. On the basis of the foregoing, the Appeals Chamber affirms the conviction under Count 1, persecutions, a crime against humanity, in relation to Kordić.

724. In this context, the Appeals Chamber recalls that Kordić, for good reasons, has withdrawn in part grounds of his appeal, namely

– whether the Trial Chamber has violated the principle of legality when applying Article 5(b) of the Statute to the conduct of Kordić;[1037]

– whether the Trial Chamber erred when finding that Bosnian Croats took over the local government in Central Bosnia;[1038]

– whether there was a common purpose or common design;[1039] and

– whether Article 5 of the Statute requires a state policy or plan.[1040]

[1037] Notice of Withdrawal of Certain of Dario Kordić's Grounds of Appeal, 31 March 2004.
[1038] Notice of Withdrawal of Certain of Dario Kordić's Grounds of Appeal, 31 March 2004.
[1039] Notice of Withdrawal of Amended Grounds of Appeal No. 3-F, 6 May 2004.
[1040] Notice of Withdrawal of Certain of Dario Kordić's Grounds of Appeal, 31 March 2004.

# VII. INDIVIDUAL CRIMINAL RESPONSIBILITY

## A. Prosecution's Second Ground of Appeal: The Trial Chamber erred in its application of Article 7(1) of the Statute in relation to Čerkez

725. The Trial Chamber found Čerkez guilty of several crimes discussed elsewhere in this Judgement. The Trial Chamber did not, however, find him criminally responsible for any of the crimes occurring in Ahmići on 16 April 1993, either during the initial attack or afterwards.[1041] The Prosecution submits that, as regards Ahmići, the Trial Chamber erred both in law and in fact, due to a misapplication of Article 7(1) of the Statute to the facts of the case[1042] and the alleged failure to consider all relevant evidence on the Trial Record (Prosecution's third ground of appeal).

### 1. Findings of the Trial Chamber

726. In relation to the involvement of Čerkez and the Viteška Brigade in the events in Ahmići on 16 April 1993, the Trial Chamber found that the Viteška Brigade "was in the thick of the fighting" and that Čerkez was in command of the Brigade. While the Trial Chamber held that the Viteška Brigade participated in operations in Vitez, Večeriska and Ahmići during 16 April 1993, it found that the Viteška Brigade took part in the operation in Ahmići on 16 April 1993, only later in the day and not during the initial assault.[1043]

727. As a result, the Trial Chamber was not satisfied beyond reasonable doubt that Čerkez bore

> any responsibility for the initial attack on Ahmići on 16 April which was the responsibility of the military police battalion, not under his command: there was no involvement of the Brigade in the initial attack and any involvement in the area was subsequent to the massacre.[1044]

728. The Trial Chamber discussed the involvement of Čerkez and the Viteška Brigade in the events in Ahmići on the basis of, *inter alia*, Čerkez's submission that Ahmići, Nadioci or any area other than Kruščica and Vraniska were never mentioned at a meeting of the Viteška Brigade in the headquarters of the Viteška Brigade in the evening of 15 April 1993. Instead, according to Čerkez, the sole task of the Brigade was to block the direction of a possible ABiH attack from the area of Kruščica and Vraniska.[1045]

729. The Trial Chamber considered, *inter alia*, the following Prosecution evidence:[1046]

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[1041] Counts 2, 5-6, 14, 15, 17, 19, 41-42 and 44 also comprise Ahmići, *cf.* Indictment, paras 38, 41, 43, 56, 58.
[1042] Prosecution Appeal Brief, para. 3.4.
[1043] Trial Judgement, para. 691.
[1044] Trial Judgement, para. 703; Prosecution Appeal Brief, para. 3.3.
[1045] Trial Judgement, para. 652.
[1046] Trial Judgement, para. 692.

(a) On 17 April 1993 Colonel Morsink, an ECMM Monitor, visited Vitez and spoke to Mario Čerkez. In his report Colonel Morsink described the situation in Vitez as "almost [a] full war going on" with shelling and small arms fire being heard all day. In his evidence, Colonel Morsink said that he met Mario Čerkez in his headquarters in the Cinema, although it was difficult to get to the building because of fighting in the streets and the many guards on the front of the building and inside it. The witness recollected his meeting with the accused as the meeting was concerned with who started the conflict. The witness asked Čerkez to stop the conflict but he replied that the Mujahedin from Zenica had to be stopped first; until then he could not stop the fighting and many of his soldiers were out of control.

(b) On 26 April 1993 Mario Čerkez issued an announcement as Brigade Commander, referring to a cease-fire agreement signed in Zagreb and "the heroic struggle of the soldiers and people on the defence lines in Krčevine, Nadioci [and] Pirići and all our defence areas […].

(c) On 4 May 1993 Mr. Payam Akhavan, at the time an investigator for the UNHCR, met Mario Čerkez in the Cinema and discussed the events in Ahmići with him. According to Mr. Akhavan's evidence about the meeting, Mario Čerkez said he was asleep that morning (16 April) but he was not surprised at the events because hostilities with the Bosnian Muslims had been anticipated. Colonel Stewart then arrived and told Mario Čerkez that it would be his responsibility to conduct a thorough investigation and discipline his subordinates for violations of international humanitarian law.[1047] Mario Čerkez said that chaos reigned on the morning of 16 April in the Vitez area but he did not deny atrocities had taken place. Mario Čerkez said that his troops were defending themselves against Muslim forces in an attack which they had not anticipated. At first Mario Čerkez was confrontational in demeanour but was more intimated when Colonel Stewart arrived and it appeared that Mario Čerkez may be held accountable. The witness was cross-examined about his notes of the meeting, where it was recorded that Čerkez said that HOS (a mixed Muslim and Croat force from Zenica) was present during hostilities in Ahmići. The notes continued:

"Ahmići – again HOS(?) – HVO did not do it."

The witness said that this was a description of what Čerkez said: the question mark was because the witness doubted the explanation.

(d) When taxed by Paško Ljubičić with allowing UNPROFOR into Ahmići on 16 April 1993, Čerkez said that it was not his fault but Bertović's; or that the explanation was that UNPROFOR went round the barricade.

### 2. Arguments of the Parties

730. The Prosecution argues that the following factual findings form the basis for the Trial Chamber's erroneous legal conclusion as to Čerkez's criminal responsibility for the attack pursuant to Article 7(1) of the Statute.

The Prosecution submits and Čerkez responds as follows:

(1) there was a well-organised and planned HVO attack on Ahmići as part of a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley.[1048] Čerkez responds that some kind of a plan

[1047] On 21 and 22 April 1993 Col. Blaškić had issued orders that the troops should comply with international humanitarian law: Ex. Z767, Z781; and in March, Blaškić had ordered brigade commanders to order an investigation of criminal and destructive conduct among the troops. This order was passed on to the 1st Battalion Commander by Mario Čerkez (Ex. Z553) and by the Battalion Commander (Ex. Z554). All other footnotes omitted.
[1048] Prosecution Appeal Brief, para. 3.8 (with reference to para. 642 of the Trial Judgement).

must have existed, but that the issue is whether the HVO plan incorporated criminal activities and that he did not know of its existence, even if such plan existed.[1049]

(2) the Trial Chamber has found that the underlying offences relating to, *inter alia*, Ahmići with respect to Counts 3-4 (unlawful attack on civilian objects [sic]), 7-13 (unlawful killings, murder, inhumane acts and treatment), and 38-39 (wanton destruction and plunder) were indeed committed.[1050] However, the Trial Chamber's findings on the responsibility for these crimes relate only to Kordić, which from the perspective of the Prosecution is erroneous.[1051] Čerkez responds that it is difficult to perceive a situation in which he could have committed the said underlying offences at the locations where neither he personally, nor the troops under his command, were present at the time of the commission of the crimes.[1052]

(3) Čerkez was the commander of the Viteška Brigade.[1053] Čerkez responds that he admitted from the outset that he was the commander of the Viteška Brigade from 24 March to 30 December 1993.[1054]

(4) the Viteška Brigade was sufficiently well organised and established to carry out the tasks allotted to it on 16 April 1993.[1055] Čerkez responds that the Viteška Brigade was not ready for a conflict with the ABiH, because it was established only in March 1993, and from the eve of the HVO-ABiH conflict up until mid-May 1993, the Viteška Brigade had only one battalion.[1056]

(5) the Trial Chamber has found that Čerkez participated in the planning of the attack on Ahmići by attending the second meeting in Blaškić's headquarters and by requesting – through Kraljević – an M 53 machine gun.[1057] Čerkez responds, *inter alia*, that there is no reliable evidence supporting that he attended the military commander's meeting in Blaškić's office, and that he might not have known of a criminal plan, even if such plan was created at the meeting.[1058] Čerkez states that he – alone – was summoned by Blaškić in the afternoon or late evening on 15 April 1993 and received an oral order (and later a written order during the night, Exh.

[1049] Čerkez Response Brief, para. 12, p. 15.
[1050] Prosecution Appeal Brief, para. 3.8.
[1051] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, paras 649 and 834.
[1052] Čerkez Response Brief, para. 18, p. 18.
[1053] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, paras 595-601.
[1054] Čerkez Response Brief, para. 19, p.18.
[1055] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, paras 599, 601.
[1056] Čerkez Response Brief, paras 19-20, referring to Čerkez Appeal Brief, pp 58 *et seq*.
[1057] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, para. 610.

Z676 [D60/2]).[1059] Čerkez denies that Kraljević, in his presence, requested an M 53 machine gun.[1060]

(6) Witness AT testified that a mini van from the Viteška Brigade transported policemen to the Bungalow.[1061] Čerkez responds that Josip Žuljević, who was in charge of transportation within the Command of the Brigade, had testified that the Viteška Brigade did not use passenger vans, while the military police did.[1062] The Prosecution further submits that the Trial Chamber found that Čerkez was involved in the implementation of the attack on Ahmići, because the Viteška Brigade was assigned all Muslim villages and hamlets with Muslim inhabitants, and would block the road from Vitez in order to prevent UNPROFOR from entering the Ahmići area.[1063] Čerkez opposes this assertion and argues, that even if Witness AT's testimony is partly true, it is not relevant to conclude about Čerkez's role in the HVO attack on Ahmići.[1064] Čerkez states that his troops were assigned to a precisely defined area of responsibility, *i.e.* to the southern part of the Vitez municipality, in order to prevent possible attacks from ABiH forces from the direction of Kruščica and Vraniska towards the centre of the town of Vitez, and that the Viteška Brigade was not able to carry out other tasks.[1065] Čerkez submits that UNPROFOR's UK battalion had at least three or four alternative routes for their patrolling between Ahmići and their base.[1066] Further, the Prosecution refers to the Trial Chamber's finding that the Military Police participating in the attack on Ahmići could communicate with the Viteška Brigade.[1067] Čerkez responds that the evidence could have been interpreted differently and that the communications system of the Viteška Brigade in the territory of the Vitez Municipality in April 1993 was anything but satisfactory.[1068]

(7) the Trial Chamber found that the Viteška Brigade was involved in the attack and ethnic cleansing of Ahmići.[1069] Čerkez responds that this finding of the Trial Chamber is erroneous due to a wrong interpretation of evidence. Additionally,

[1058] Čerkez Response Brief, para. 16.
[1059] Čerkez Response Brief, para. 22(b).
[1060] Čerkez Response Brief, para. 22(a).
[1061] T. 27598, 27601 (closed session).
[1062] Čerkez Response Brief, paras 26-29
[1063] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, paras 611-13, 620, 630.
[1064] Čerkez Response Brief, paras 22-29.
[1065] Čerkez Response Brief (confidential), para. 23(b) and (c). Čerkez also refers to D85/2.
[1066] Čerkez Response Brief, para. 24(b).
[1067] Prosecution Appeal Brief, para. 3.8(6), p. 25.
[1068] Čerkez Response Brief, para. 32.

Čerkez argues that there is no other corroborative evidence than the testimony of Witness AT supporting the finding that members of the Viteška Brigade were arresting men from Ahmići.[1070]

731. The Prosecution further submits that Čerkez's arguments set out in section C of his Response Brief should be dismissed: while Čerkez purportedly responds to "claims" made by the Prosecution in its second ground of appeal, he attacks the Trial Chamber's findings outside his own appeal brief, because the alleged "claims" are factual findings by the Trial Chamber.[1071]

732. In conclusion, the Prosecution argues that the above mentioned factual findings should have led the Trial Chamber to find Čerkez criminally liable under Article 7(1) of the Statute. In the Prosecution's submission, the evidence analysed by the Trial Chamber indicates, correctly construed, the following types of participation of Čerkez and the Viteška Brigade:

(a) participation in the military planning of the attack on Ahmići;

(b) providing significant assistance to the Military Police units involved in the attack by way of (i) providing means of transportation and (ii) preventing UNPROFOR from entering the Ahmići area; and

(c) performing physical acts of persecution by detaining Muslims in Ahmići.[1072]

733. Čerkez responds that evidence at trial allows for a safe inference that the Viteška Brigade was not involved in the attack on Ahmići in the morning of 16 April 1993.[1073] He argues that

(a) military planning is not by itself a criminal attack;

(b) the alleged assistance in providing military assistance in a military attack is not a criminal contribution; and

(c) performing alleged physical acts of persecution *ex post facto* could not picture anyone as a co-perpetrator in the initial crime.[1074]

[1069] Prosecution Appeal Brief, para. 3.8, referring to Trial Judgement, paras 626, 650, 654, 690-691, and 800-802.
[1070] Čerkez Response Brief, pp 32-38.
[1071] Prosecution Reply, paras 4.2-4.11.
[1072] Prosecution Appeal Brief, paras 3.9 and 3.15.
[1073] Čerkez Response Brief, p. 42.
[1074] Čerkez Response Brief, para. 38, p. 44.

734. The Prosecution submits that, in light of these "substantial contributions" of Čerkez and the Viteška Brigade to the persecutory attack on Ahmići, the fact that the Viteška Brigade did not directly intervene in the initial attack is immaterial for the purpose of Čerkez's criminal liability under Article 7(1) of the Statute.[1075] The Prosecution argues that Čerkez's criminal responsibility as a co-perpetrator for his participation in the attacks on Vitez, Stari Vitez and Donja Večeriska – found by the Trial Chamber to constitute a campaign of persecutions – should have been extended to the crimes committed in Ahmići; the finding that Čerkez does not bear criminal responsibility for the crimes committed in Ahmići contradicts the finding that the attack on Ahmići was part of a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims.[1076]

735. Alternatively, the Prosecution submits that Čerkez was criminally responsible for planning or for aiding and abetting the persecutory attack pursuant to Article 7(1) of the Statute.[1077] The Prosecution also submits that the Trial Chamber failed to consider the legal consequences of its finding that members of the Viteška Brigade intervened in the Ahmići operation after the initial attack by detaining Bosnian Muslims which should have been treated as the physical perpetration of persecutory acts.[1078]

### 3. Relief sought

736. The Prosecution therefore requests the Appeals Chamber to find Čerkez guilty as a co-perpetrator[1079] for the crimes committed in Ahmići as alleged in the Indictment. In his response, Čerkez requests the Appeals Chamber to dismiss the request of the Prosecution.[1080]

### 4. Discussion

737. The Appeals Chamber wants to clarify that it need not consider Čerkez's response in as far as he argues that findings of the Trial Chamber were unreasonable. The Prosecution accepted the findings of the Trial Chamber that are mentioned in the Prosecution's second ground of appeal and submitted that the Trial Chamber misapplied Article 7(1) of the Statute to these findings. Therefore, any argument by Čerkez that attacks the reasonableness of the Trial Chamber's findings is outside the scope of his response.

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[1075] Prosecution Appeal Brief, para. 3.16 (referring to Trial Judgement, para. 642).
[1076] Prosecution Appeal Brief, paras 3.17-3.19.
[1077] Prosecution Appeal Brief, paras 3.16-3.20.
[1078] Prosecution Appeal Brief, para. 3.26.
[1079] Prosecution Appeal Brief, para. 3.28.
[1080] Čerkez Response Brief, p. 90.

(a) The alleged criminal responsibility of Čerkez for crimes committed in the *initial* attack in Ahmići

(b) Čerkez's alleged participation in a campaign to persecute

738. The Appeals Chamber will first address the Prosecution's submission that the finding that the attack on Ahmići was part of a common design or plan – conceived and executed by the Bosnian Croat leadership – to ethnically cleanse the Lašva Valley of Muslims should have led to a finding that Čerkez also was criminally responsible for the crimes committed in Ahmići.[1081]

739. The Trial Chamber found "that there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims [and] the purpose of this campaign was the subjugation of the Bosnian Muslim population".[1082] The Trial Chamber also found that Čerkez played his part in the campaign of persecutions,[1083] and that the attack on Ahmići was part of this "common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the Lašva Valley of Muslims".[1084]

740. There is, however, no finding of the Trial Chamber that Čerkez shared the intent to commit the crimes that were part of the persecutory campaign. Neither did the Trial Chamber make a finding as to the awareness of Čerkez that the massacre committed during the initial attack on Ahmići was part of that campaign. The Trial Chamber held that he was a co-perpetrator in the campaign and that "the necessary *mens rea* may be inferred […] from his part in the campaign".[1085] This finding shows that the Trial Chamber found that Čerkez did not have the *mens rea* for the crimes committed during the initial attack in Ahmići, because the Trial Chamber held that he – or the Viteška Brigade – did not participate in the initial attack. Accordingly, the submission of the Prosecution that Čerkez should have been held criminally responsible for these crimes based on his participation in the persecutory campaign,[1086] fails.

741. The Appeals Chamber notes, however, that Čerkez may have incurred criminal responsibility as a co-perpetrator of the crimes committed during the initial attack on Ahmići independently of his alleged participation in the campaign.[1087]

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[1081] Prosecution Appeal Brief, para. 3.17.
[1082] Trial Judgement, para. 827.
[1083] Trial Judgement, para. 831.
[1084] Trial Judgement, para. 642. It appears that the Trial Chamber uses the terms "campaign", "plan" and "design" interchangeably.
[1085] Trial Judgement, para. 831 (emphasis added).
[1086] Prosecution Appeal Brief, para. 3.24.
[1087] *Cf.* submission made by the Prosecution in Prosecution Appeal Brief, para. 3.28.

742. Therefore, the Appeals Chamber will now turn to the question whether it was reasonable for the Trial Chamber to hold that the factual findings in relation to Čerkez and the Viteška Brigade with respect to Ahmići did not demonstrate that Čerkez had the *actus reus* of a co-perpetrator of persecutions committed in Ahmići during the initial attack on 16 April 1993, irrespective of his participation in a persecutory campaign.

(c) Čerkez's alleged co-perpetratorship of the crimes committed in the *initial* attack in Ahmići

(i) *Actus reus*

a. Did Čerkez participate in the military planning of the attack on Ahmići?

743. The Appeals Chamber will first consider whether a reasonable trier of fact could have concluded that Čerkez's participation in the second meeting in Blaškić's headquarters on 15 April 1993 did not constitute Čerkez's *actus reus* as a co-perpetrator of the crimes committed in the initial attack in Ahmići.

744. The Trial Chamber found in paragraph 610 of the Trial Judgement:

> However, there is direct evidence that the HVO planned an attack for the next day at a series of meetings that afternoon and evening. The evidence was given by Witness AT, himself a senior member of the HVO IV Battalion Military Police. According to the witness the first meeting was a meeting of the political leadership: it took place in Colonel Blaškić's office at the Hotel Vitez, lasted one and a half hours and Dario Kordić was present at it. The witness was not present himself but saw some of those who did attend, i.e., Ivan Šantić, Pero Skopljak and Zoran Marić. He was told about it by Paško Ljubičić (the Commander of the IV Battalion Military Police) while it was going on: Paško Ljubičić said that it was a meeting of the political leadership and Kordić was present. There was then a second meeting (also lasting about one and a half hours) in Blaškić's office, attended by amongst others, Paško Ljubičić, Ante Slišković, Mario Čerkez and Darko Kraljević. During the meeting Paško Ljubičić came to the witness's office in the Hotel Vitez and told him that at the previous meeting a decision had been made that in the morning an attack would be launched against the Muslims (the reason being that a report had been intercepted saying that the Muslims would attack in the morning); and that directions of attack were being determined for the units that were to take part.

745. The Appeals Chamber has already found elsewhere in this Judgement that a reasonable trier of fact could have found that the evidence given by Witness AT establishes that Čerkez was present at the second meeting in Blaškić's headquarters on 15 April 1993.

746. The Trial Chamber only held that Ljubičić told Witness AT what had been decided during a previous meeting – presumably the first meeting on 15 April 1993 –, namely "that in the morning an attack would be launched against the Muslims (the reason being that a report had been

intercepted saying that the Muslims would attack in the morning)".[1088] Accordingly, this finding does neither make a reference to an imminent attack against Bosnian Muslim civilians in general, nor to an unlawful attack on Ahmići in particular. The Appeals Chamber recalls the Prosecution's submission that "if Article 7(1) had been applied correctly, the Trial Chamber would inevitably have concluded […] on the facts as found, that the Appellant had been involved in the attack on Ahmići".[1089] The Trial Chamber did not find that an order to kill all Muslim men of military age, to spare the civilians, expel them and destroy their houses was given at the second meeting, *i.e.* in the meeting Čerkez attended.

747. The Trial Chamber also found that Kraljević asked Witness AT on Čerkez's behalf and in Čerkez's presence "for an M-53 machine gun which Čerkez needed for Kruščica 'because it would be hard up there'", which was then arranged.[1090] The evidence, however, does not establish whether the weapon was to be used for criminal purposes or for lawful military tasks.

b. Was significant assistance provided to the Military Police units involved in the attack on Ahmići?

748. Witness AT testified that a mini van from the Viteška Brigade transported policemen to the Bungalow on 15 April 1993.[1091] This raises the question whether a reasonable trier of fact could have concluded that this act did not establish that Čerkez provided significant assistance to the Military Police for the attack on Ahmići.

749. The Trial Chamber did not make an explicit finding on Witness AT's evidence in relation to the mini van. The Appeals Chamber is aware of the Trial Chamber's statement that

> the fact that a matter is not mentioned in the Judgement does not mean that it has been ignored. All the evidence has been considered by the Trial Chamber and the weight to be given it duly apportioned.[1092]

However, the Appeals Chamber notes that

> the Prosecution's second ground of appeal raises an error of law by the Trial Chamber in the form of an incorrect application of Article 7(1) to the facts as found by the Trial Chamber in its Judgement.[1093]

[1088] Trial Judgement, para. 610, referring to T. 27592-93 (closed session).
[1089] Prosecution Appeal Brief, para. 3.5.
[1090] Trial Judgement, para. 611.
[1091] T. 27598; T. 27601 (closed session).
[1092] Trial Judgement, para. 20.
[1093] Prosecution Reply, para. 4.9 (emphasis added).

No finding has been made in the Trial Judgement as to the provision of the mini van. Therefore, this submission of the Prosecution will only be considered as an additional component of the Prosecution's third ground of appeal.[1094]

750. The Appeals Chamber also considered the Trial Chamber's finding that the Viteška Brigade was sufficiently well organised and established to carry out the tasks allotted to it on 16 April 1993. However, there is neither a finding nor evidence that tasks in relation to Ahmići were ever allotted to the Viteška Brigade, apart from the tasks discussed in this section.

751. The Appeals Chamber further examined whether the assignment of the Viteška Brigade to block the road from Vitez in order to prevent UNPROFOR from entering the Ahmići area did establish that Čerkez provided significant assistance to the Military Police units involved in the initial attack on Ahmići.[1095]

752. While the Trial Chamber's finding in paragraph 612 does not clearly identify whether the road was indeed blocked and, as a result, UNPROFOR prevented from entering the Ahmići area ("UNPROFOR would be prevented from entering the Ahmići area (the Viteška Brigade was to block the road from Vitez)"),[1096] the Trial Chamber's finding in paragraph 692(d) and the underlying evidence suggest that a road block was erected:

> When taxed by Paško Ljubičić with allowing UNPROFOR into Ahmići on 16 April 1993, Čerkez said that it was not his fault but Bertović's; or that the explanation was that UNPROFOR went round the barricade.[1097]

753. However, the Trial Chamber never clearly established – and the Trial Record does not provide sufficient evidence – whether the purpose of the road block was militarily justified or a preparatory or sheltering act for the crimes to be committed in Ahmići. In addition, insufficient evidence has been adduced to show conclusively that Čerkez knew about the – allegedly criminal – purpose of the road block. Čerkez's submission that the sole task of the Viteška Brigade was to block the direction of a possible ABiH attack from the area of Kruščica and Vraniska is an equally possible one.[1098] Apparently, the Trial Chamber correctly applied the principle *in dubio pro reo*; thus the Appeals Chamber cannot identify any error of fact in relation to the question at issue. In this context, the Appeals Chamber recalls that it only has to intervene "where the evidence relied on

[1094] The Prosecution has made this alternative submission in the Prosecution Appeal Brief, footnote 56.
[1095] Čerkez Response Brief, para. 24, p. 23.
[1096] Trial Judgement, para. 612 (emphasis added).
[1097] Witness AT, T. 27638 (closed session). See also T. 27599, 27607, 27758 (closed session). *Cf.* Trial Judgement, para. 630.
[1098] See Trial Judgement, para. 652.

by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of evidence is 'wholly erroneous'".[1099]

754. In relation to the Trial Chamber's finding that "short-wave radio was available for communications and participants could communicate among themselves and with Col. Blaškić and the Viteška Brigade",[1100] it is mere speculation whether short-wave radios were indeed used between the Viteška Brigade and the assailants for the purposes of the crimes committed during the attack on Ahmići.

c. Were physical acts of persecutions performed by arresting Muslims in Ahmići and other acts?

755. The Appeals Chamber will now consider the Trial Chamber's finding that "arrests were carried out by local HVO members belonging to the Viteška Brigade".[1101] This finding was based on the evidence given by Witness AT, and it becomes evident from his testimony that it was civilians that were arrested.[1102] Therefore, a reasonable trier of fact could have come to the conclusion that the evidence set out above establishes that members of the Viteška Brigade carried out arrests of civilians in Ahmići on 16 April 1993. It was, however, open to a reasonable trier of fact to find on the basis of Witness AT's testimony that the arrests were carried out after the initial attack in Ahmići.[1103]

756. The Appeals Chamber also considered the Prosecution's submission that Exh. Z673.7 established that the Viteška Brigade had a role in the attack and ethnic cleansing in Ahmići on 16 April 1993. The document, a report signed by Čerkez and issued at 10:00 a.m. on 16 April 1993, reads in relevant part:

> In the zone of responsibility of the "Viteška" brigade, there is ongoing fighting against the extreme part of the BiH Army in the city itself and in all other areas within the municipality […].
>
> Our forces are advancing in D. Večerinska [sic], which has all but "fallen", and in Ahmići, and Sivrino Selo and Vrhovine, as we have been informed, are offering us a truce. Our units have three (3) fallen soldiers, and we still do not have information on the number of wounded.[1104]

757. The Trial Chamber found that this document[1105] established "that the Viteška Brigade was in the thick of the fighting" and that it "took part in the operations in […] Ahmići during 16 April

[1099] See *supra* Law Governing Appellate Proceedings.
[1100] Trial Judgement, para. 613.
[1101] Trial Judgement, para. 626.
[1102] T. 27627 (closed session).
[1103] *Cf.* Trial Judgement, para. 626; Witness AT, T. 27627 (closed session).
[1104] Trial Judgement, para. 689(b).
[1105] Together with other documents set out in the Trial Judgement, para. 689

1993 (but only later in the day and not during the initial assault on Ahmići)".[1106] It was a reasonable finding to hold that this document did not establish Čerkez's *actus reus* as a participant in the execution of crimes committed in Ahmići. Asked by the Čerkez Defence, Josip Žuljević[1107] had testified that the reference in the document to "our forces" referred to "the entire Croat side", regardless of any specific unit.[1108] He also testified that Čerkez said at a meeting in the headquarters of the Viteška Brigade at around 9 or 10 a.m. on 16 April 1993 that

> in line with orders, oral orders issued by Blaškić, we make a maximum effort to collect as much information as possible from the territory of our municipality.[1109]
>
> The order [was] to collect all information and to convey this every two or three hours.[1110]
>
> We were then told that we should draw on our own acquaintances, friends, this and that person, that we should get in contact with all persons on duty. We tried with the Vitezovi and the military police to gather as much information as possible in order to compile a report with regard to this area.[1111]

Josip Žuljević also testified that Čerkez

> explicitly requested us to contact the other units too that were in the territory of the municipality of Vitez. And all other information, regardless of where they may come from, from civilians, locals, coordinators in villages, coordinators of village guards, et cetera.[1112]

It was possible for a reasonable trier of fact to find that this evidence establishes that members of the Viteška Brigade also had the task to gather information about the activities of units other than the Viteška Brigade for reports to be sent to Blaškić. According to Josip Žuljević, the written reports were sent every two or three hours to the commander of the Operative Zone.[1113] His testimony is supported by entries in the War Diary showing that Čerkez reported to Blaškić and others about the situation "in the field"[1114] on 16 April 1993 at 9:37 a.m., 12:07 p.m., 1:03 p.m., 1:10 p.m., 3:08 p.m. (2:50 p.m.), 3:50 p.m., 5:55 p.m., and 6:25 p.m..[1115] The entry at 5:55 p.m. reads as follows:

> We have received a list of defenders killed from the Vitez Brigade duty officer: Anto Franjić, Lovro Kolak, Ivo Žuljević, all three are members of the *Vitezovi*, Mirjan Šantić, Zlatko Ivanković, members of the regional police, Zoran Vidović – a civilian. There are quite a few lightly and seriously wounded.[1116]

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[1106] Trial Judgement, para. 691.
[1107] Head of Transport for the Viteška Brigade and member of the Viteška Brigade headquarter's staff, Čerkez Appeal Brief, p. 55.
[1108] T. 28164-66.
[1109] Josip Žuljević, T. 28162.
[1110] Josip Žuljević, T. 28163.
[1111] Josip Žuljević, T. 28163.
[1112] Josip Žuljević, T. 28162.
[1113] Josip Žuljević, T. 28163.
[1114] Exh. Z610.1, pp 72, 78.
[1115] Exh. Z610.1 (War Diary), pp 72, 78, 80, 87, 89, 94, 95.
[1116] Exh. Z610.1 (War Diary), p. 94.

Again, this entry can reasonably be interpreted in a sense that the Viteška Brigade did not only collect information about its own members, but also about members of other units. Thus, this evidence also supports the finding that a reasonable trier of fact could have found that the reference to "our forces" did not only relate to members of the Viteška Brigade.

758. By the same token, the Trial Chamber's finding that Exh. Z671.4 did not establish any role of the Viteška Brigade in the attack and ethnic cleansing in Ahmići is not unreasonable. It was open to a trier of fact to find that the reference that "the village of Ahmići has also been 70% done" does not establish that the Viteška Brigade was involved in criminal activities.

759. The Appeals Chamber also considered the Prosecution's submission that Exh. Z692.3 proved that the Viteška Brigade had a role in the attack and ethnic cleansing in Ahmići. This document, an order to the commander of the Viteška Brigade signed by Blaškić and issued at 10:35 a.m. on 16 April 1993, reads as follows:

> Regarding your report numbered 02-125-10/93 of 16-Apr-1993, do the following:
>
> 1. Completely take the villages of D. Vičerska [sic], Ahmići, Sivrino Selo and Vrhovine.
>
> 2. Personally inform me of the activities taken in the execution of this task.

760. This order was issued subsequently to report no. 02-125-10/93, *i.e*. Exh. Z673.7 which is discussed above. The Trial Chamber found that Exh. Z692.3, together with other documents, established that "the Viteška Brigade was in the thick of the fighting" and "took part in operations in Vitez, Večeriska and Ahmići during 16 April 1993 (but only later in the day and not during the initial assault on Ahmići)".[1117]

761. The Appeals Chamber notes that the order was given at 10:35 a.m., *i.e*. about five hours after the initial attack on Ahmići had started. Therefore, it is not unreasonable to hold that the words "completely take" in this context refer to activities that took place after the initial attack. Thus, it was possible for a trier of fact to find that Exh. Z692.3 did not establish Čerkez's *actus reus* as a co-perpetrator of crimes committed during the initial attack on Ahmići.

762. Finally, Exh. Z692.2, an order upon which the Trial Chamber's finding as to the Viteška Brigade's participation in the operation in Ahmići was partly based, was never admitted into evidence.[1118] Consequently, no finding can be based on this document.[1119]

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[1117] Trial Judgement, paras 689, 691.
[1118] *Cf*. Appeals Hearing, T. 487-88; Prosecution Response, paras 10.19-20; *cf*. Čerkez Appeal Brief, para. 24.
[1119] The Prosecution also refers to Exhs Z673.6 and Z671.5. However, none of the documents includes any direct information on the situation in Ahmići on 16 April 1993, see Trial Judgement, para. 689(e), (f).

763. The Appeals Chamber also considered the Trial Chamber's reference to Exh. Z1406.1, a report of Miroslav Tuđman, the Director of the Croatian Intelligence Service (HIS), to his father, the then Croatian President Franjo Tuđman. This report, dated 21 March 1994, blames the Jokers for the attack on Ahmići and mentions as the cause for the attack the death of three HVO soldiers at the hands of the MOS and the death of Brigadier Totić's escort. The report explicitly exonerates Čerkez: "It could be said with certainty that Mario Čerkez was not involved in the massacre in the village of Ahmići and did not have any influence on the events themselves."[1120] Although the Trial Chamber made no explicit finding about its reliance on the report, it can be inferred from paragraphs 641/642 and 702/703, read together, that the findings were in a reasonable way partly based on this report.

(ii) Conclusion as to the alleged *actus reus* of Čerkez as co-perpetrator of crimes committed during the *initial* attack in Ahmići

764. The Trial Chamber reasonably found that the Viteška Brigade's assignment to block the road from Vitez or any other evidence discussed above did not establish the *actus reus* of Čerkez as a co-perpetrator of crimes committed during the initial attack on Ahmići. Thus, the Trial Chamber correctly found that Čerkez did not incur criminal responsibility as a co-perpetrator of these crimes.

(d) Čerkez's alleged criminal responsibility as a planner or aider and abettor

765. In relation to the Prosecution's alternative submission that Čerkez's acts constituted planning of, or aiding and abetting to, a persecutory attack on Ahmići, the Appeals Chamber finds that the Trial Chamber did not err in failing to hold Čerkez responsible as a planner or aider and abettor of the initial attack in Ahmići. As he did not know of the crimes that were about to be committed in the initial attack on 16 April 1993 in Ahmići, such criminal responsibility fails.

(e) The alleged criminal responsibility of Čerkez for crimes committed *after* the initial attack in Ahmići

(i) Čerkez's alleged participation in a campaign to persecute

766. The Appeals Chamber now turns to the Trial Chamber's finding that the arrests of Bosnian Muslim civilians were carried out by local HVO members of the Viteška Brigade *after* the initial phase of the attack on Ahmići.[1121] It has to be examined whether a reasonable trier of fact could

[1120] Exh. Z1406.1, referred to in Čerkez Response Brief, para. 35, p. 40.
[1121] *Cf.* Trial Judgement, para. 626. The Trial Chamber's findings on Čerkez's criminal liability do not list Ahmići among the locations in which unlawful detention was found to be committed, Trial Judgement, paras 801, 836(b).

have found that these arrests[1122] did not constitute the *actus reus* of Čerkez for his participation in persecutory acts.

767. The Appeals Chamber will first address the Prosecution's submission that the Trial Chamber's finding that members of the Viteška Brigade intervened in the Ahmići operation after the initial attack through "detaining" Bosnian Muslim civilians constituted an element of the, in the words of the Prosecution, "joint criminal design" – conceived and executed by the Bosnian Croat leadership – to ethnically cleanse the Lašva Valley of Bosnian Muslims, and that this should have led to a finding that Čerkez was criminally responsible for the crimes committed in Ahmići.[1123]

768. This could only be the case if Čerkez knew about the persecutory campaign. The relevant finding of the Trial Chamber is that Čerkez's "*mens rea* may be inferred […] from his part in the campaign."[1124] The Trial Chamber also found that Čerkez did not participate in the initial attack on Ahmići. The question is whether the arrests carried out by local HVO members of the Viteška Brigade after the initial attack could objectively constitute a part in the campaign and whether the mental element of the crime of persecutions on the part of Čerkez can be inferred from them.

769. "Arrests" of civilians are not mentioned as part of the campaign. Furthermore, insufficient evidence has been adduced to establish whether arrests of civilians in Ahmići were followed by detention and, if so, how long the detention lasted to render it unlawful. As no crime has been established, the Appeals Chamber need not discuss any mental element. Therefore, it was possible for a reasonable trier of fact to implicitly conclude that the arrests that were carried out by local HVO members belonging to the Viteška Brigade in Ahmići do not constitute any criminal responsibility of Čerkez for any crimes committed in Ahmići.[1125]

#### 5. Conclusion

770. The Prosecution's second ground of appeal is rejected.

### B. Prosecution's Third Ground of Appeal: Misapprehension of Relevant Evidence Indicating the Presence of Viteška Brigade members during the Attack in Ahmići

771. The Prosecution submits that in case the Appeals Chamber does not find Čerkez guilty for the crimes committed in Ahmići on the facts as found by the Trial Chamber – thus dismissing the

[1122] Contrary to the submission of the Prosecution, the Trial Chamber's finding is on "arrests", not "detentions", Trial Judgement, para. 626.
[1123] Prosecution Appeal Brief, para. 3.17.
[1124] Trial Judgement, para. 831.
[1125] See Trial Judgement, para. 836.

Prosecution's second ground of appeal[1126] – the Appeals Chamber should find that the Trial Chamber erred in fact in its determination that Čerkez did not bear criminal responsibility under Article 7(1) and/or 7(3), because the Trial Chamber failed to accept the evidence on the active presence of members of the Viteška Brigade during the attack in Ahmići.[1127]

772. Čerkez responds that he does not bear any criminal responsibility for the crimes committed during the initial attack on Ahmići on 16 April 1993.[1128]

1. Findings of the Trial Chamber

773. As stated previously, in relation to Čerkez's and the Viteška Brigade's involvement in the events in Ahmići on 16 April 1993, the Trial Chamber found that the Viteška Brigade "was in the thick of fighting" but took part in the operation in Ahmići on 16 April 1993 only later in the day and not during the initial assault.[1129]

774. As a result, the Trial Chamber was not satisfied beyond reasonable doubt that Čerkez bore

> any responsibility for the initial attack on Ahmići on 16 April which was the responsibility of the military police battalion, not under his command: there was no involvement of the Brigade in the initial attack and any involvement in the area was subsequent to the massacre.[1130]

775. The Trial Chamber discussed the question of Čerkez's and the Viteška Brigade's involvement in the events in Ahmići on the basis of, *inter alia*, Čerkez's submission that Ahmići, Nadioci or any area other than Kruščica and Vraniska were never mentioned at the meeting in the headquarters of the Viteška Brigade in the evening of 15 April 1993.

776. The Appeals Chamber has already discussed the Prosecution evidence.[1131]

2. Arguments of the Parties

777. The Prosecution alleges that the Trial Chamber failed to adequately consider relevant *viva voce* and documentary evidence establishing the participation of members of the Viteška Brigade in the persecutory attack in Ahmići and its environs – Šantići, Nadioci, Pirići – on 16 April 1993. In the Prosecution's view, this misapprehension of evidence constitutes an error of fact occasioning a miscarriage of justice.[1132] The Prosecution submits in particular that conclusive evidence before the

[1126] Prosecution Appeal Brief, para. 3.51.
[1127] Prosecution Appeal Brief, para. 6.1.
[1128] Čerkez Response Brief, pp 90-91.
[1129] Trial Judgement, para. 691.
[1130] Trial Judgement, para. 703.
[1131] Trial Judgement, para. 692.
[1132] Prosecution Appeal Brief, paras 3.33-34.

Trial Chamber establishes the "active presence" of Nenad Šantić,[1133] Ivica Semren,[1134] Draženko Vidović,[1135] and Ivica Delić[1136] as members of the Viteška Brigade during the attack.[1137] The Prosecution argues that such "active presence" of members of the Viteška Brigade is further established by HVO documents about the killing of Viteška Brigade soldier Franjo Vidović in Ahmići, and the wounding of Viteška Brigade soldiers Nikola Omazić and Ivica Kristo in Pirići, all happening on 16 April 1993.[1138]

778. In relation to Čerkez's alleged criminal responsibility, the Prosecution submits that the evidence indicating the "active presence" of members of the Viteška Brigade in Ahmići and its environs at the relevant time, and their active involvement in the persecutory campaign would have, at the very least, supported a finding of guilt under Article 7(3) of the Statute in relation to Counts 2, 5 and 6, 14, 15, 17 through 19, 40 through 42, and 44 of the Indictment.[1139]

779. Čerkez responds that there is no sufficient evidence to conclude that the above mentioned persons committed a crime on or about 16 April 1993 in Ahmići at a time when they were subordinated to him, and that consequently no criminal liability can be attached to him on the basis of the above mentioned evidence.[1140] He argues that his criminal responsibility under Article 7(3) of the Statute is limited to crimes committed by his direct subordinates.[1141] He also argues that no crimes committed by members of the Viteška Brigade were recorded in the territory where the Viteška Brigade operated.[1142] He asserts that he implemented disciplinary measures available to him, but that according to the regulations of the former SFRY and the Republic of Bosnia and Herzegovina, the Military Police and the Military judicial institutions were the only institutions assigned to investigate, process and punish perpetrators of crimes committed by soldiers, not the Brigade's commanders and other higher or lower commanders.[1143]

### 3. Discussion

780. The Appeals Chamber now turns to an examination of the evidence referred to by the Prosecution in order to establish whether a reasonable trier of fact could have concluded that this evidence does not prove that one or several members of the Viteška Brigade were involved in

[1133] Prosecution Appeal Brief, para. 3.35.
[1134] Prosecution Appeal Brief, paras 3.36-3.37.
[1135] Prosecution Appeal Brief, para. 3.38.
[1136] Prosecution Appeal Brief, paras 3.39-3.40.
[1137] Prosecution Appeal Brief, para. 3.34.
[1138] Prosecution Appeal Brief, para. 3.41.
[1139] Prosecution Appeal Brief, paras 3.31, 3.46, 3.50.
[1140] Čerkez Response Brief, paras 60, 63, 69, 71 (confidential).
[1141] Čerkez Response Brief, para. 74.
[1142] Čerkez Response Brief, para. 76.
[1143] Čerkez Response Brief, paras 77-78.

crimes committed in Ahmići and attributed to Čerkez under Articles 7(1) and 7(3) of the Statute. For the sake of clarity, the submissions of the Parties relating to each piece of evidence are set out in connection with the Appeals Chamber's findings.

(a) Nenad Šantić

781. The Prosecution submits that Nenad Šantić[1144] was a local commander in the Ahmići/Šantići area and a member of the Viteška Brigade, reporting directly to Čerkez.[1145] In response, Čerkez argues that the evidence the Prosecution is referring to does not establish that it relates to the same person called Nenad Šantić, and he argues that no sufficient evidence has been adduced to support the conclusion that a person named Nenad Šantić committed a crime on or about 16 April 1993 in Ahmići at the time when such person was under Čerkez's control or his subordinate.[1146] The Appeals Chamber notes that the Trial Chamber only found that Nenad Šantić was "the local HVO Commander" in Šantići.[1147]

782. The Prosecution submits that Nura Pezer stated that Nenad Šantić was the commander of the HVO in the village of Šantići in the days and weeks preceding the attack and that she saw him during the attack in Šantići on 16 April 1993. The Appeal Chamber notes, however, that Nura Pezer testified that she could not recognise anyone of the assailants during the attack on Ahmići.[1148]

783. Other witnesses gave also evidence in relation to Nenad Šantić:

- Witness AC stated that "the survivors [of the massacre in Ahmići] all testified that the operation [*i.e.* the massacre in Ahmići] was headed by Nenad Šantić, that he was in one of the houses in Šantići, and those who survived were taken for interrogation by him".[1149]

- Witness U testified that Nenad Šantić was the HVO commander in Šantići[1150] and that Heleg Munib told him that Nenad Šantić "was to blame for everything. He had planned everything and that everything started from him".[1151] Witness U further testified that he

[1144] The Trial Judgement only refers to Nenad Šantić in footnote 912, referring to the evidence of Witness U who saw Nenad Šantić in Šantići, in late October 1992, Witness U, T. 10220-23. This does not have any relevance in relation to the attack in Ahmići on 16 April 1993.
[1145] Prosecution Appeal Brief, para. 3.35.
[1146] Čerkez Response Brief (confidential), paras 55-60.
[1147] Trial Judgement, footnote 912.
[1148] T. 15455-57.
[1149] T. 12586. See also T. 12646.
[1150] When Witness U was asked whether Nenad Šantić was the HVO commander in Šantići and "the one in Šantići who was working the most or taking the most actions against the Muslims in Šantići", he replied "Yes. Yes. It was Nenad Šantić", T. 10219-21, 10230-31.
[1151] T. 10209.

had seen HVO soldiers in Šantići on 16 April 1993. When asked whether he had some information what unit or brigade they were part of, he replied that Bruno Šantić from Donja Rovna told him that they belonged to the Busovača Brigade.[1152]

– Witness F testified that when she was taken to be shot with others at the bank of the Lašva River on the morning of 19 April 1993 after having fled from the attack on Ahmići, she was brought to Nenad Šantić who was standing in front of his house with Drago Josipović and had a white belt on his jacket. Nenad Šantić told the men who were with Witness F to "take them to the shop", where all the survivors were.[1153]

– Abdullah Ahmić stated that "in the village of Žume in Šantići, [the local commander] was Nenad Šantić".[1154] He also stated that in May or June 1993, a large number of people who had fled from Ahmići after the massacre told him in Zenica that Nenad Šantić was in Ahmići on 16 April 1993.[1155] The Appeals Chamber notes that the witness did not state whether he had heard that Nenad Šantić was in Ahmići on 16 April 1993 during the initial attack or only later on that very day.

– In answering the question whether people under Čerkez's command were engaged in any activities that were not justified, Džemal Merdan stated that "the most grievous were the events in Ahmići and in Stari Vitez".[1156] Later on, he stated that "I think that [Anto Krizanović and Nenad Šantić] were in the chain of command under the command of Mario Čerkez in the Vitez area".[1157] The Appeals Chamber finds that Džemal Merdan expressed some doubt when he said "I think", after having earlier referred to Franjo Nakić as the deputy of Tihomir Blaškić and Filip Filipović as the commander of the HVO brigade in Travnik with the words "I know for sure".[1158]

784. The Prosecution further submits that the following documentary evidence shows that Nenad Šantić was a perpetrator in the Ahmići massacre.[1159] Čerkez responds that the documents do not sufficiently clarify the identity of the said person.[1160]

[1152] T. 10230-31. The commander of the Busovača Brigade on 16 April 1993 was Grubešić, see Exh. D356/1/Tab 31.
[1153] T. 3666-67, 3689-91, 3705, referred to in Prosecution Appeal Brief, para. 3.35, footnote 77.
[1154] T. 3607.
[1155] T. 12646.
[1156] T. 12706.
[1157] T. 12710-11.
[1158] T. 12710-11.
[1159] Prosecution Appeal Brief, para. 3.35.
[1160] Čerkez Response Brief (confidential), para. 60.

– Exh. Z245 is a handwritten agreement between the HVO-Šantići and representatives of the Muslim people of Ahmići concluded at the house of Nenad Šantić on 22 October 1992. In the document it was agreed that the Muslim inhabitants of Ahmići make a list of weapons and submit them to the HVO. The HVO would establish a mixed unit of Croats and Muslims for the purpose of defending the area against the Serbs. The signatures of the agreement are illegible.

– Exh. Z535 is a report signed by Marijan Skopljak, Head of Defence Office in Vitez, of 12 March 1993. According to the report, Nenad Šantić is proposed to the temporary home guard command.

– Exh. Z885.1, a Milinfosum of 4 May 1993, mentions Nenad Šantić, Ivan Livančić, Christo Zako and Vlado Krezenač as "4 individuals who were purportedly implicated in the massacre", mentioning "Co 1 Cheshire" as a source.

– Exh. Z887.2, a handwritten memo of 5 May 1993 by Witness Lt.-Col. Stewart, states that Thomas Osorio and Payam Akhavan had told him that Nenad Šantić, Ivan Livančić, Christo Zako and Vlado Krezenač were present at the Ahmići massacre.

– Exh. Z1009.1, a report of the Republic of Bosnia and Herzegovina Defence Staff of the municipality of Vitez – Crime Suppression Service – dated 2 June 1993, includes information about Nenad Šantić and his participation in the attack on Ahmići and Žume, stating that "together with the *Jokers*, the *Vitezovi* and the regional HVO police his unit participated in the attack on the villages of Ahmići and Žume".[1161]

– Exh. Z2809 is a document of the HVO 92nd Home Guard Regiment "Viteška" dated 14 November 1994, certifying that Nenad Šantić witnessed the wounding of Ilija Ante Livančić on 19 April 1993. The document does not explicitly state in which village the wounding occurred.

– Exh. Z2809.1, an HVO document dated 4 July 1994 and signed by Franjo Bošnjak and Čerkez, certifies Nenad Šantić's membership in the HVO Viteška Brigade and the circumstances of his death on 15 June 1993 "while carrying out a combat assignment on the orders of the competent commander".

[1161] Exh. Z1009.1, p. 3.

785. The Appeals Chamber will now determine whether a reasonable trier of fact could have concluded that the evidence set out above does not prove that members of the Viteška Brigade participated in the initial attack on Ahmići in a way attributable to Čerkez.

786. In relation to the identity of Nenad Šantić, the Appeals Chamber finds that it would have been unreasonable for a trier of fact to conclude that the evidence set out above does not establish that the person the Prosecution is referring to as Nenad Šantić was a local HVO commander in Šantići. The testimonies of Witness AC, Witness U, Abdullah Ahmić, and Džemal Merdan as well as Exhs Z245, Z535, Z885.1, Z887.2, 1009.1, and Z2809.1 make reference to a person called Nenad Šantić in a very similar geographical and temporal scope. Furthermore, references in the above mentioned evidence identify Nenad Šantić as a person having a commanding position in the HVO within this limited geographical and temporal scope. This evidence shows that it refers to the same person called Nenad Šantić.

787. The Appeals Chamber further finds that no reasonable trier of fact could have found that the evidence set out above does not prove that Nenad Šantić participated in the initial attack in Ahmići. The fact that Witness AC, Witness U, Abdullah Ahmić and Exhs Z885.1 and Z887.2 refer to hearsay evidence does not alter this finding. The Appeals Chamber has previously found that the probative value of hearsay evidence is usually less than the weight given to the testimony of a witness who testified under oath and was cross-examined.[1162] However, the strong circumstantial proof of the hearsay evidence on the present issue, as well as the evidence given by Džemal Merdan and in Exh. Z1009.1, renders a finding to the contrary unreasonable.

788. The Appeals Chamber finds, however, that a reasonable trier of fact could have come to the conclusion that the evidence set out above does not prove that Nenad Šantić was a member of the Viteška Brigade under Čerkez's command at the time of the initial attack in Ahmići. The majority of the evidence set out above does not refer to the issue of whether Nenad Šantić was a member of the Viteška Brigade at the relevant time. In relation to Džemal Merdan's testimony, the Appeals Chamber recalls that he expressed some doubt when he testified about the command relationship between Čerkez and Nenad Šantić. In this context, Witness U's testimony that Bruno Šantić from Donja Rovna told him that HVO soldiers Witness U had seen in Šantići on 16 April 1993 belonged to the Busovača Brigade, can be seen as an indication that other HVO units than the Viteška Brigade were active in Šantići on that day. Additionally, although Exh. Z2809.1 establishes that Nenad Šantić was at the time of his death a member of the Viteška Brigade, a reasonable trier of fact could have found that this document does not prove that Nenad Šantić was a member of the

Viteška Brigade under the command of Čerkez at the time of the initial attack on Ahmići, *i.e.* in the morning of 16 April 1993.

(b) Ivica Semren and Draženko (Ivica) Vidović

789. The Prosecution submits that Nura Pezer saw Ivica Semren and Draženko (Ivica) Vidović during the attack on 16 April 1993 in Šantići.[1163] The Appeals Chamber notes, however, that while Nura Pezer stated that she had seen Ivica Semren in uniform in the village in the days before the attack,[1164] she testified that she could not identify soldiers who participated in the attack on Šantići.

790. The Prosecution submits the evidence given by Witness U who testified that after the killing of his father and brother in the morning of 16 April 1993 in Šantići he recognised Ivica Semren in the village, who was masked but "easily recognizable", and Draženko (Ivica) Vidović.[1165] The Appeals Chamber holds, however, that Witness U did not give further testimony on what Ivica Semren and Draženko (Ivica) Vidović were doing at that time, nor did he testify in relation to the question of Ivica Semren's membership in the Viteška Brigade.

791. Ivica Semren gave evidence that he was not a member of the Viteška Brigade as of 8 April 1992, but of the village guards.[1166] He stated that when he joined the village guards in Šantići in 1992, the commander of the village guards was Nenad Šantić.[1167] Ivica Semren further testified that he was in his family home in Šantići in the morning of 16 April 1993 when strong explosions and gunfire were heard. He stated that he was staying inside the house after having moved his mother and two sisters to a nearby house around 5:45 a.m. He also stated that he had an old M48 rifle from the Second World War. At the time he went outside, there was no shooting around – "perhaps an occasional gunshot or two could be heard from afar" –, and he was wounded by a sniper in his leg between around 1:00 and 1:30 p.m.[1168]

792. In addition to the testimonies of witnesses set out above, the Prosecution also relies on three HVO certificates in order to establish that Ivica Semren was participating in the initial attack on Ahmići as a member of the Viteška Brigade:

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[1162] *Aleksovski* Appeal Decision on Admissibility of Evidence, paras 15 *et seq*. See also *Blaškić* Appeal Judgement, para. 656, footnote 1374.
[1163] Prosecution Appeal Brief, para. 3.36.
[1164] T. 15455-57.
[1165] T. 10208-09. Ivica Semren himself affirmed that he was highly recognizable due to his red hair and slim figure as a young man, T. 25805. The Appeals Chamber notes that Witness U uses the nickname "Zuti", while Ivica Semren said that he was called "Zuco": Ivica Semren, T. 25809.
[1166] T. 25803 (quoted in Prosecution Appeal Brief, footnote 90).
[1167] T. 25794-95 (quoted in Prosecution Appeal Brief, footnotes 88-89).
[1168] T. 25794-95 and 25803-05 (quoted in Prosecution Appeal Brief, footnotes 87-90).

– Exh. Z687[1169] is a certificate issued by the Viteška Brigade on 29 June 1994, stating that Ivica Semren was a member of the Brigade since 8 April 1992 and describing the circumstances of his wounding on 16 April 1993 in Ahmići. The Appeals Chamber notes that the document does not specify at which time on 16 April 1993 Ivica Semren was wounded. The Appeals Chamber also notes the testimony of Stipo Čeko, an officer responsible for logistics in the Viteška Brigade,[1170] who stated that the municipal council of Vitez took the initiative to form the Viteška Brigade in early March 1993;[1171] this evidence raises doubt in relation to the documentary evidence according to which Ivica Semren was a member of the Viteška Brigade since 8 April 1992.

– Exh. Z687.1[1172] is a certificate of an incident resulting in a casualty, issued on 22 January 1996 by the 92nd Vitez Home Guard Regiment and stating that Ivica Semren was a member of the HVO 92nd Vitez Home Guard Regiment 'Viteška' from 8 April 1992 and wounded on 16 April 1993 in the "Ahmići area […] during an attack by MOS/Muslim Armed Forces/ forces on our defence line". Pursuant to the certificate, this happened while Ivica Semren was "performing military duty on the first line of defence". The Appeals Chamber notes that with respect to the relationship between the 92nd Home Guard Regiment and the Viteška Brigade, Witness Stipo Čeko testified that the Viteška Brigade did not have authority over the village guards until 16 April 1993 in the afternoon.[1173]

– Exh. Z687.2[1174] is a certificate issued on 29 February 1996 by the same Regiment. It states that Ivica Semren was wounded on 16 April 1993 in the Šantići area, when "MOS […] opened fire at soldiers wounding the above-named in the left upper leg". Pursuant to the certificate, Ivica Semren was at that time on military duty on the first line of defence.

793. In relation to Draženko (Ivica) Vidović, the Prosecution also refers to Exh. Z1437.4, a report issued on 18 July 1994 by the First Battalion Command of the HVO. This report states that Draženko (Ivica) Vidović, a member of the 3rd Company, was wounded by MOS members at 3:30

[1169] Prosecution Appeal Brief, para. 3.36, footnote 84, ERC No. 00826940 (note that there is another Exh. Z687 with ERC No. 00741867).
[1170] T. 23430-31.
[1171] T. 23472.
[1172] Prosecution Appeal Brief, para. 3.36, footnote 84.
[1173] "[G]eneral mobilisation was declared on the 16th sometime in the afternoon, and then call-up papers were sent out. Men who were on the village guards and who were not actively engaged anywhere in this way became members of the Viteška Brigade. So, that is to say, that from the 16th onwards, all became members of the Viteška Brigade. Until the, there was only one battalion numbering about 300 men in the Viteska Brigade", Witness Stipo Čeko, T. 23489-90.
[1174] Prosecution Appeal Brief, para. 3.36.

p.m.. on 16 April 1993 in the area of Šantići. The report further states that Ivica Semren witnessed the wounding. The Appeals Chamber notes that pursuant to the report the wounding took place in the afternoon on 16 April 1993, *i.e.* after the initial attack on Ahmići.

794. The Appeals Chamber finds that a reasonable trier of fact could have concluded that neither Exhs Z687, Z687.1 and Z687.2 nor the other aforementioned evidence prove that Ivica Semren and Draženko (Ivica) Vidović took part in the initial attack on Ahmići, or that Ivica Semren was a member of the Viteška Brigade at that time.

(c) Ivica Delić

795. The Prosecution submits that Exh. Z505, a list of the HVO Novi Travnik dated 27 February 1993, demonstrates that Ivica Delić was a member of the S. Tomasević Brigade, the predecessor of the Viteška Brigade.[1175] Čerkez responds that Witness Zlatko Sentić testified that his service composed the list and that it "is a list of soldiers engaged during the last month, that is soldiers engaged in military tasks."[1176]

796. The Prosecution also submits the following testimony of Witness AT in relation to the preparatory stage of the attack on Ahmići:

> a local commander from Nadioci came from the Bungalow, Delić, I don't know his first name. I know his brother's name is Ljuban. And he said that he had been told from the command to go to the Bungalow and everything else would be explained to him there. And that's what happened.[1177]

797. The Prosecution further quotes Abdullah Ahmić who testified that

> I recognised two guys from Nadioci by sight. I think the name of one of them is Delić. He was rather - was strongly built and middle-aged, and the other one was also middle-aged and had a long neck. They were torching a house, and around there were another four or five soldiers. They had a canister filled with gasoline.[1178]

In addition to this part of Abdullah Ahmić's testimony, the Appeals Chamber notes that the witness was asked later on:

> The man Delić, did you know him as a member of any military group or not?

Abdullah Ahmić replied:

> Yes, I think he was a member - at least I saw him among the reserve police members before the war.[1179]

[1175] Prosecution Appeal Brief, para. 3.39.
[1176] Zlatko Sentić, T. 23028-29.
[1177] T. 27612 (closed session).
[1178] T. 3569-70.
[1179] T. 3571.

798. The Appeals Chamber notes that a comparison of the birth date of the person called "Delić Anto Ivica" as set out in Exh. Z505 – 24 April 1970, *i.e.* 22 years old on 16 April 1992 – does not appear to coincide with Abdullah Ahmić's description of the person called "Delić" ('middle-aged'). The Appeals Chamber finds that a reasonable trier of fact could have come to the conclusion that Exh. Z505, Witness AT's testimony, and the testimony of Abdullah Ahmić do not prove that Ivica Delić was a member of the Viteška Brigade at the time of the initial attack on Ahmići on 16 April 1993, nor that he actively took part in it.

(d) Did Čerkez provide significant assistance to the Military Police units involved in the attack on Ahmići?

799. The Prosecution argues that Čerkez provided significant assistance to the Military Police for the attack on Ahmići by providing means of transportation, relying on the evidence of Witness AT who had testified that a mini van from the Viteška Brigade transported policemen to the Bungalow on 15 April 1993.[1180] Josip Žuljević had stated that the Viteška Brigade did not have passenger vans, while the Military Police did.[1181] The Trial Chamber did not make an explicit finding on the evidence above.

800. The Trial Chamber found that Witness AT "did tell the truth about the preparations for the Ahmići attack, including the meetings at Hotel Vitez and the subsequent briefings".[1182] Taking this into account and taking into consideration the Appeals Chamber's own assessment of Witness AT's testimony, the Appeals Chamber finds that a reasonable trier of fact could have come to the conclusion that the Viteška Brigade provided a mini van to the Military Police for the transfer of military policemen to the Bungalow.

801. It has already been stated, however, that it was reasonable for the Trial Chamber to find that Čerkez did not know that crimes were to be committed in Ahmići.

(e) Documentary evidence

802. The Prosecution also relies on further documentary evidence allegedly establishing the presence of other Viteška Brigade soldiers during the attack on Ahmići. In particular, the Prosecution submits that the following HVO certificates establish the wounding of Nikola Omazić, a soldier of the Viteška Brigade:[1183]

[1180] T. 27598,27601.
[1181] Čerkez Response Brief, paras 26-29.
[1182] Trial Judgement, para. 630.
[1183] Prosecution Appeal Brief, para. 3.41.

– Exh. Z67,[1184] a document of the Central Bosnia OS Command of the HVO on the forming of the Alpha Force Reconnaissance-Sabotage Group on 6 April 1992.

– Exh. Z505,[1185] a "List of the HVO members Novi Travnik for the Unit: 1. Platoon of the 1. Troop of II. Battalion", issued on 27 February 1993, mentioning as no. 17 on p. 15[1186] the name of Nikola Anto Omazić, a deputy captain and platoon commander.

– Exh. Z686,[1187] a certificate on unit membership and circumstances of wounding of Nikola (Ante) Omazić, issued by the HVO Command of the 92nd Home Guard Regiment, signed by Franjo Bošnjak and Čerkez as the Commander of the 92nd Home Guard Regiment, dated 27 June 1994. It confirms that Nikola (Ante) Omazić had been a member of the Viteška Brigade since 16 April 1993, and that he was wounded on 16 April 1993 in Pirići in fighting with the Muslims while he was "carrying out combat duties by order of the competent commander". The Appeals Chamber notes, however, that the certificate does not indicate whether Nikola (Ante) Omazić was wounded during the initial attack on Ahmići.

– Exh. Z808[1188] is a list of the Viteška Brigade Command dated 24 April 1993, signed by Zvonimir Čilić and listing "Omazić Nikola" as a wounded soldier of the Viteška Brigade under no. 59. The Appeals Chamber notes, however, that this document does not state when and where Nikola Omazić was wounded.

– Exh. Z957.1,[1189] a document of the HVO, Vitez Brigade Command, signed by Zvonimir Čilić and dated 20 May 1993, lists "Nikola Tone Omazić", Private, as no. 6 on p. 3 as wounded in Pirići on 16 April 1993. The Appeals Chamber notes that neither the rank nor the father's name correspond to Nikola Anto Omazić mentioned in Exh. Z505 or Nikola Ante Omazić mentioned in Exh. Z686. Furthermore, Exh. 957.1 does not indicate whether the persons mentioned in the list were wounded during the initial attack on Ahmići on 16 April 1993.

– Exh. Z1299.2,[1190] an unsigned document of the Viteška Brigade of 12 November 1993 listing wounded members of the Brigade, mentions "Omazić Tone Nikola"[1191] as

[1184] Quoted in Prosecution Appeal Brief, para. 3.41.
[1185] Quoted in Prosecution Appeal Brief, para. 3.41.
[1186] Exh. Z505A, p. 33, no. 17.
[1187] Prosecution Appeal Brief, para. 3.41.
[1188] Trial Judgement, footnote 1097.
[1189] Prosecution Appeal Brief, para. 3.41.
[1190] Prosecution Appeal Brief, para. 3.41.

wounded on 16 April 1993 in Pirići. The list also mentions "Semren Ivica Ivica" (no. 57) and "Vidović (Ivica) Draženko" (no. 59) as wounded on 16 April 1993 in Ahmići. The list does not indicate whether they were wounded during the initial attack on Ahmići.

803. The Appeals Chamber finds that a reasonable trier of fact could have come to the conclusion on the documents set out above that Nikola Omazić was not wounded during the initial attack in Ahmići on 16 April 1993.

804. Similarly, the Appeals Chamber finds that Exhs Z808, Z957.1, and Z1299.2 do not indicate whether Franja Ivica Vidović and Ivica Kristo were wounded during the initial attack on Ahmići on 16 April 1993.

#### 4. Conclusion

805. The Appeals Chamber finds that a reasonable trier of fact could have come to the conclusion that the afore-mentioned *viva voca* evidence and the documentary evidence do not prove that soldiers of the Viteška Brigade under the command of Čerkez participated in the initial attack on Ahmići on 16 April 1993. Thus, it was reasonable to come to the conclusion of acquittal. Therefore, the third ground of appeal of the Prosecution is rejected.

### C. **Čerkez's responsibility**

806. Turning now to Čerkez's second ground of appeal, he submits that the Trial Chamber did not prove beyond reasonable doubt that he as the commander planned, instigated, ordered or aided and abetted any crime for which he was charged.[1192] Čerkez submits that the Trial Chamber erred in finding that he, as the commander of the Viteška Brigade, was responsible under Article 7(3) of the Statute for the crimes that he was charged with because the Trial Chamber failed to establish the elements required for command responsibility pursuant Article 7(3) of the Statute. Čerkez also argues that the Trial Chamber failed to establish that he had effective control over the subordinates that committed the crimes since it was not proven that they were members of the Viteška Brigade and therefore under his control.[1193] Under this ground of appeal Čerkez submits both legal and factual errors. Čerkez requests the Appeals Chamber to reverse or revise the Trial Judgement's findings and to acquit him on all counts.[1194]

[1191] The Appeals Chamber again notes that the father's name does not correspond to Nikola Anto Omazić mentioned in Exh. Z505.
[1192] Čerkez Appeal Brief, para. 6, p. 27.
[1193] Čerkez Appeal Brief, para. 14, pp 45-48.
[1194] Amended Grounds of Appeal, p. 4.

807. The Prosecution submits that Čerkez's submissions are unclear and that Čerkez conflates elements of aiding and abetting under Article 7(1) of the Statute with those of superior responsibility under Article 7(3) of the Statute.

808. After having dealt with the general grounds of appeal, the Appeals Chamber will under the heading "Responsibility" discuss Čerkez's responsibility in relation to the specific counts.

### 1. Alleged errors relating to the criminal plan

809. Čerkez argues that the there was insufficient evidence for the Trial Chamber to conclude that there existed an HVO plan to attack on 16 April 1993.[1195] Čerkez argues that there was evidence supporting a completely different conclusion, namely that the ABiH attacked the HVO.[1196] Čerkez argues that the Trial Chamber based its conclusion of the existence of a HVO plan to attack solely on Witness AT's testimony and no other direct evidence was introduced to support Witness AT's testimony.[1197] This is an issue that has already been discussed and rejected by the Appeals Chamber.[1198]

810. Čerkez further challenges the Trial Chamber's findings in paragraphs 621 and 610-613 of the Trial Judgement claiming that they are not supported. He submits that the Trial Chamber failed to assess the evidence that supported a possible conclusion that the HVO's action followed a militarily justifiable plan. In support of his submission, he relies on the following arguments supported by references to exhibits: i) on the eve of the conflict, a series of incidents were recorded that clearly showed a tense situation, and that the ABiH was preparing for offensive action; ii) the ABiH had from 15-17 April 1993 completely taken control of Zenica (the largest city in the region) and brought new forces to the area; iii) the ABiH made significant movements of its troops in the Vitez area on the eve of the conflict; iv) the ABiH had a significant number of forces stationed in Stari Vitez and Kruščica; v) Witness AT confirms that, on 15 April 1993, Blaškić was expecting an ABiH attack based on intercepted ABiH radio messages; vi) it would have been illogical for Blaškić to issue an offensive operation in a situation where the ABiH was superior; and vii) Prosecution witness John Elford confirmed that the ABiH and the HVO encircled each other in "different layers". Čerkez submits that when this evidence is compared with the findings in paragraphs 619, 621, 630 and 631 of the Trial Judgement, it is shown that the Trial Chamber's findings do not meet the requirement of the beyond reasonable doubt standard and that different conclusions were possible; however, the different conclusions were not reasonably discussed and rejected by the Trial

[1195] Čerkez Appeal Brief, para. 5,p. 42
[1196] Čerkez Appeal Brief, para. 5, p. 42.
[1197] Čerkez Appeal Brief, para. 6, p. 42.
[1198] Section IV.E.2.(b).

Chamber. The possible conclusions Čerkez suggests include that: i) the ABiH was in full military readiness and not unprepared as the Trial Chamber concluded in paragraph 619; ii) the ABiH units were deployed in the relevant areas (*i.e.* Vitez and the surrounding villages) and not exclusively facing the Serbs as the Prosecution maintained; iii) ABiH units were operating under secret orders on the 15-16 April 1993; iv) on the 16 April 1993, ABiH and HVO forces were involved in fierce fighting and the ABiH was not, as the Trial Chamber found in paragraph 642 of the Trial Judgement, taken completely by surprise.[1199]

811. The Prosecution responds that the Trial Chamber did not only base its conclusion on Witness AT's evidence, but on a thorough analysis of all relevant orders. It submits that the Trial Chamber in paragraphs 619-620 of the Trial Judgement carefully analyzed the movement of HVO troops at the relevant time and the different attacks performed on 16 April 1993, as well as a series of orders issued by Blaškić which, the Trial Chamber established, followed "the sequence of Witness AT's evidence." The Prosecution submits that the Trial Chamber concluded that the evidence points to "a well-organised and planned HVO attack upon Ahmići", and a similar conclusion applies to the attacks on Vitez and Večeriska and in relation to the 18 April attacks. The Prosecution submits that there was abundant evidence enabling the Trial Chamber to conclude that a criminal plan did exist and was executed by the HVO forces.[1200]

812. At the outset, the Appeals Chamber wishes to recall that whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant, as is the issue of whether the "other side" was taken by surprise. The issue at hand is whether the way the military action was carried out was criminal or not. A participation in criminal acts was not established.

813. Čerkez's appeal insofar is dismissed.

(a) Čerkez's appeal relating to his *mens rea* and knowledge of the HVO criminal plan

814. Čerkez submits that there was insufficient evidence for the Trial Chamber to find beyond reasonable doubt that he knew of the HVO criminal plan and thereby shared the *mens rea*.[1201] Čerkez argues that he did not know of the existence of a plan (or part of the plan) that included the committing of crimes, if it is at all true that such a plan existed in the first place.[1202]

815. The Prosecution submits that the Trial Chamber's conclusion on Čerkez's participation in the offensive plan was based not only on Witness AT's testimony but also on "the documentary

[1199] Čerkez Appeal Brief, para. 16, pp 48-49.
[1200] Prosecution Response, paras 10.7-10.8.
[1201] Čerkez Appeal Brief, paras 5-22, pp 42-52.
[1202] Čerkez Appeal Brief, para. 5, p. 42.

evidence concerning events of 16 April and the entries in the Duty Officer's Log [War Diary]."[1203] The Prosecution submits that the documentary evidence includes, *inter alia*, reports of combat progress in the field, and particularly the War Diary's mention of Čerkez's name several times in the 16 April 1993 entries: his reporting from the field, receiving instructions or asking for help.[1204] The Prosecution argues that on the basis of this evidence it was appropriate and reasonable for the Trial Chamber to reach its conclusion that Čerkez knew of the plan.[1205] The Prosecution further submits that the Trial Chamber is not obliged to articulate all its reasoning in reaching particular findings. The Trial Chamber carefully considered Čerkez's position and, in light of the evidence, no reasonable Trial Chamber would have reached a different conclusion.[1206]

816. Čerkez replies that the evidence cited by the Prosecution is not sufficient to establish his knowledge of the alleged existence of the plan, and that part of the evidence is twofold and may establish the conclusions offered by the Defence.[1207] Čerkez further submits that although he generally agrees with the methodology adopted by the International Tribunal regarding the consideration of evidence, and he acknowledges that a matter that is not mentioned in the Trial Judgement has not been ignored,[1208] the Trial Chamber must provide reasons relating to crucial arguments of the Defence or on evidence that may be interpreted in several ways.[1209]

817. As discussed above, the Trial Chamber described the plan as follows:

> The Trial Chamber finds, on overwhelming evidence, that there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb. It took the form of the most extreme expression of persecution, i.e., of attacking towns and villages with the concomitant destruction and plunder, killing, injuring and detaining Bosnian Muslims. The Trial Chamber has already held that the allegations relating to the encouragement and promotion of hatred, etc., and the dismissal of Bosnian Muslims from employment do not amount to persecution for the purposes of this case or, in the case of the latter allegation, at all. The purpose of this campaign was the subjugation of the Bosnian Muslim population. All this, in the Trial Chamber's view, has been comprehensively proved and thus all the elements of the underlying offence made out. The defence case that these events amounted to a civil war in which the Bosnian Croats were on the defensive, and themselves subject to persecution, is rejected. For these purposes, as has been pointed out, the fact that individual atrocities were committed against Bosnian Croats is for these purposes irrelevant although they may be the subject of other criminal proceedings. (It is inherent in the above finding that there existed a common plan or design in the Bosnian Croat leadership to conduct this persecution.) However, as the Trial Chamber has found, the abuse and inhuman treatment of the detained Muslims (and using them as hostages and human shields and for trench-digging) was not part of the common plan or design.[1210]

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[1203] Prosecution Response, para. 10.10, quoting Trial Judgement, para. 703.
[1204] Prosecution Response, para. 10.11.
[1205] Prosecution Response, para. 10.12.
[1206] Prosecution Response, para. 10.15-10.16.
[1207] Čerkez Reply Brief, paras 41-42.
[1208] Trial Judgement, para.20.
[1209] Čerkez Reply Brief, para. 46.
[1210] Trial Judgement, para. 827 (footnotes omitted).

818. However, the Trial Chamber made no finding that Čerkez knew of this plan. This finding would have been required in order to find Čerkez responsible for the entirety of the plan. Instead, the Trial Chamber limited Čerkez's responsibility geographically to the places for which it considered that Čerkez had responsibility or participated by engaging the Viteška Brigade in the fighting and inferred his *mens rea* from his participation in the attacks.[1211]

819. In relation to the attacks on towns and villages and the associated crimes, the Trial Chamber found that :

> in those cases where Čerkez participated in attacks as Commander of the Viteška Brigade, he committed the crimes associated with them, intending to commit the crimes. His responsibility as Commander of the Brigade was as a co-perpetrator in crimes which he committed. As a result the Trial Chamber finds the accused, Mario Čerkez, liable under Article 7(1) on the following counts:
>
> (a) Count 5 (unlawful attacks on civilians) and Count 6 (unlawful attacks on civilian objects), Count 14 (murder), and Count 15 (wilful killing), Count 17 (inhumane acts), Count 19 (inhuman treatment) in relation to the following locations Vitez, Stari Vitez, Stari Vitez and Večeriska-Donja Večeriska; and Count 41 (wanton destruction not justified by military necessity) and Count 42 (plunder of public or private property) in relation to the following locations: Vitez, Stari Vitez and Donja Večeriska[.][1212]

820. In relation to detention and inhuman treatment in the detention centres, the Trial Chamber found:

> that Mario Čerkez was responsible, as Commander of the Viteška Brigade, for the unlawful detention and inhuman treatment of the detainees in the Vitez detention facilities, i.e., the Cinema, Chess Club, SDK building and Veterinary Station. […] However, the Trial Chamber accepts that Kaonik camp was not part of Čerkez's responsibility, and that Dubravica school was also outside it, as the evidence establishes that it was under the control of the Vitezovi and not the Viteška Brigade. Accordingly, the Trial Chamber finds that Mario Čerkez had no responsibility for these last two facilities.[1213]

821. In relation to the crimes occurring in the detention centres, the Trial Chamber found that "the abuse and inhuman treatment of the detained Muslims (and using them as hostages and human shields and for trench-digging) was not part of the common plan or design."[1214] However, the Trial Chamber made no distinction between the crimes it had found to be outside the plan and those within it.

> The Trial Chamber finds that in those cases where Čerkez participated in attacks as Commander of the Viteška Brigade, he committed the crimes associated with them, intending to commit the crimes. His responsibility as Commander of the Brigade was as a co-perpetrator in crimes which he committed. As a result the Trial Chamber finds the accused, Mario Čerkez, liable under Article 7(1) on the following counts:
>
> […]

[1211] Trial Judgement, para. 831.
[1212] Trial Judgement, para. 836.
[1213] Trial Judgement, para. 801.
[1214] Trial Judgement, para. 827.

(b) on Count 29 (imprisonment), Count 30 (unlawful confinement of civilians), Count 31 (inhuman treatment), Count 33 (taking civilians as hostages) and Count 35 (inhuman treatment) in relation to the following locations: Vitez Cinema Complex, Veterinary Station, SDK offices and Chess Club;[1215]

822. The Appeals Chamber therefore considers that the Trial Chamber did not find that Čerkez had the *mens rea* in relation to the plan in its entirety. The Trial Chamber inferred the requisite *mens rea* in relation to the crimes committed by the forces sent by Čerkez. The participation was the basis for inferring his *mens rea*. Geographically it therefore limited his liability to Vitez/Stari Vitez and Donja Večeriska/Večeriska, where the Trial Chamber found that the Viteška Brigade was responsible for the attack, and to the detention centres for which it found Čerkez responsible.

823. The Appeals Chamber therefore finds that Čerkez's appeal in this part is misconceived since the Trial Chamber nowhere based his responsibility on a finding that he had the intent or awareness for the entire plan. The Trial Chamber only found that he had the requisite *mens rea* in relation to parts of the plan where it found that the Viteška Brigade was involved. The Appeals Chamber finds that Čerkez's appeal in this part is without merit. It is rejected.

### 2. Alleged errors of law

#### (a) The scope of command responsibility

824. Čerkez raises several issues relating to the scope of command responsibility. He submits that responsibility under Article 7(3) only arises where and when the superior had a legal obligation to act.[1216] Čerkez cites Article 28(1) of the Rome Statute as an interpretative tool. Čerkez further submits that command responsibility under Article 7(3) of the Statute is limited to acts committed by official members of the defendant's command,[1217] that is, subordinate soldiers who formally answer to the defendant.[1218] The Defence contends that he cannot be held accountable for criminal acts in Ahmići, Pirići, Donja Večeriska or Gaćice since Čerkez was officially the commander of the Viteška Brigade and none of his subordinate troops were present in these regions. Similarly, the Defence believes that the Trial Chamber's findings of liability for illegal imprisonment should be set aside as a matter of law since none of the troops formally under his command imprisoned Bosnian Muslims.[1219]

[1215] Trial Judgement, para. 836.
[1216] Čerkez Appeal Brief, para. 2, p. 23.
[1217] Čerkez Appeal Brief, para. 4, p. 24.
[1218] Čerkez Appeal Brief, para. 8, p. 29.
[1219] Čerkez Appeal Brief, paras 7-8, 13, pp 27-29, 32-33.

825. Furthermore, Čerkez argues that command responsibility is limited geographically to a defendant's "zone of responsibility."[1220] He contends that, as a matter of law, he cannot be held liable for criminal acts committed outside of this zone, for example, in Stari Vitez, Večeriska, Donja Večeriska, Nadioci, Perići and Šantići.[1221]

826. The Prosecution, citing numerous cases, counters that neither limitation proposed by Čerkez exists in the International Tribunal's jurisprudence, and submits that command responsibility extends to those under the *de facto* or *de jure* effective control of the defendant. It further states that such control can extend beyond direct subordinates of the defendant and crimes committed beyond the geographic "zone of responsibility" of the defendant, so long as the other elements of command responsibility are established.[1222]

827. The Appeals Chamber notes that Čerkez accepts the International Tribunal's case law, according to which there are three elements that have to be proved in order to establish responsibility under Article 7(3) of the Statute:

> (1) the relationship of superiority and subordination between the alleged commander and perpetrator of the crime;
>
> (2) the mental element, or knowledge of the superior that his or her subordinate had committed or was about to commit the crime;
>
> (3) the failure of the superior to prevent the commission of the crime or punish the perpetrator.[1223]

828. The Appeals Chamber further notes that the Trial Chamber, when discussing Čerkez's responsibility for the detention crimes, held: "[t]he Trial Chamber also accepts that a Brigade Commander is responsible for what happens to prisoners in his area of responsibility."[1224] Čerkez was held responsible for everything taking place in his "area of responsibility".[1225] Whether effective control existed will be discussed below. As a matter of law, the Trial Chamber was correct not to limit command responsibility either geographically or to direct subordinates.

829. Čerkez's argument that the Trial Chamber erred in finding that the three elements were established in the present case is an alleged error of fact, which will be dealt with below. The Appeals Chamber dismisses Čerkez's first legal argument.

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[1220] Čerkez Appeal Brief, para. 7, p. 28.
[1221] Čerkez Appeal Brief, para. 12, p. 32.
[1222] Prosecution Response, paras 8.7-8.9.
[1223] Čerkez Appeal Brief, para. 4, p. 24.
[1224] Trial Judgement, para. 801.
[1225] Trial Judgement, para. 801.

(b) Causative relationship

830. Čerkez also submits that in order to convict an accused of a crime it is necessary to prove a causative relationship between the acts of the perpetrator and the consequences the acts produce. Thus, certain consequences must be the direct result of the acts or omissions of an accused, *e.g.* there should be a link of causation between the superior's failure to prevent and the commission of the crime by his subordinate.[1226]

831. The Prosecution rejects Čerkez's suggestion and submits that there is no requirement of causality as a separate element of the doctrine of command responsibility in the jurisprudence of the International Tribunal. The Prosecution notes that Čerkez does not bring any authority to support his arguments and that the Trial Chamber held explicitly that a requirement of causation as a separate element was not necessary.[1227]

832. In *Blaškić*, the Appeals Chamber found that it does not consider "that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. Once again, it is more a question of fact to be established on a case by case basis, than a question of law in general."[1228] The Appeals Chamber, accepting this approach, dismisses Čerkez's second legal argument.

(c) Standard to apply to circumstantial evidence

833. Čerkez argues that a commander's failure to prevent or punish is a question of fact and therefore must be established beyond reasonable doubt by direct evidence.[1229]

834. The Appeals Chamber finds that the standard of proof to be applied from the point of view of a trier of fact is beyond a reasonable doubt, and the burden of proof lies on the Prosecution as the accused enjoys the benefit of the presumption of innocence. The Prosecutor, however, can meet this burden and satisfy the reasonable doubt standard through inferences, as already discussed elsewhere in this Judgement. Thus, to the extent that Čerkez requests the Appeals Chamber to overturn his conviction because the Trial Chamber relied on indirect evidence, the appeal is dismissed.

[1226] Čerkez Appeal Brief, para. 11, pp 31-32.
[1227] Prosecution Response, para. 8.11.
[1228] *Blaškić* Appeal Judgement, para. 77.
[1229] Čerkez Appeal Brief, para. 4, p. 26.

(d) Self-Defence

835. Čerkez simply asserts that the Prosecutor must show that "the accused [could] have acted without danger to himself."[1230]

836. The Prosecution mentions the argument without developing arguments to refute it.[1231]

837. The Trial Chamber was clearly cognizant of the self-defence arguments, having devoted a portion of its decision to this issue.[1232] It held that while the Statute does not mention the availability of self-defence, "'Defences' […] form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it."[1233]

838. The existence or the scope of self-defence under international law and the Statute is an issue the Accused must demonstrate. Its absence is not an element of a crime that the Prosecution must prove beyond reasonable doubt. The Appeals Chamber therefore rejects this argument.

3. Alleged errors of fact

(a) Introduction

839. Čerkez argues that the Trial Chamber did not find beyond responsible doubt the elements required for responsibility under Article 7(3) of the Statute. The elements are:

(i) the existence of a superior-subordinate relationship;

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[1234]

840. The basis of the superior-subordinate relationship is the power of the superior to control the actions of his subordinates. The *Čelebići* Trial Chamber concluded that:

> it is necessary that the superior have [sic] effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.[1235]

[1230] Čerkez Appeal Brief, para. 11, p. 32.
[1231] Prosecution Response, para. 8.7.
[1232] Trial Judgement, paras 448-452.
[1233] Trial Judgement para. 449.
[1234] *Čelebići* Trial Judgement, para. 346; *Blaškić* Appeal Judgement, para. 72.

841. In answering Čerkez's argument that there is no evidence that his subordinates committed any crimes, the Appeals Chamber will first discuss which units were under Čerkez's command and where these units were deployed. The Appeals Chamber will then discuss the required elements in relation to each count.

(b) Alleged error concerning units in relation to which Čerkez had a superior relationship

842. At the outset, the Appeals Chamber notes that Čerkez is not appealing or denying that he commanded the Viteška Brigade. Čerkez submits that his responsibility is limited to crimes, if any, allegedly committed by members of the Viteška Brigade.[1236] Čerkez notes that the "Vitezovi", the Jokers, the Military Police and/or other HVO units were not under the Viteška Brigade commanding officer and these units did not receive orders from him and that he had no power to issue orders preventing crimes of these units or to punish perpetrators who were not under his command. Čerkez submits that there is no evidence to support the allegation that his subordinates, the members of the Viteška Brigade, committed the alleged crimes.[1237] Čerkez submits that he was responsible as a commander and consequently liable under Article 7(3) only insofar as he had effective control, *i.e.* only for acts of the Viteška Brigade. Čerkez consequently submits that he had no obligations with respect to units not under his command or effective control and cannot be held responsible for failing to prevent crimes committed by such units.[1238] Čerkez therefore argues that the Trial Chamber erred in finding him guilty for command responsibility for such crimes.[1239]

843. The Trial Chamber held in its summary finding on Article 7(3) of the Statute that:

> The Trial Chamber is satisfied that Mario Čerkez knew of the impeding attacks on those towns [Vitez, Stari Vitez and Donja Večeriska] by those troops under his command, that he failed to take the necessary measures to prevent those attacks, and that he failed to punish those who were responsible for the attacks. The Chamber therefore finds Mario Čerkez liable under Article 7 (3) in respect of the attacks by the Viteška Brigade on the three locations and the associated killings and injuries (Counts 5-6, 14-15. 17 and 19), imprisonment and other detention offences (Counts 29-31, 33 and 35). Plunder (Count 42) and destruction (Counts 41 and 44).[1240]

This finding indicates that the Trial Chamber found Čerkez responsible under Article 7(3) of the Statute for the acts of the Viteška Brigade. The Trial Chamber did not specify in the Trial Judgement which unit committed the various crimes. First, the Appeals Chamber will discuss which units the Trial Chamber found Čerkez to be the *de jure* or *de facto* commander of. The Appeals Chamber understands that the Trial Chamber held Čerkez as a superior of the Viteška

[1235] *Čelebići* Trial Judgement, para. 378.
[1236] Čerkez Appeal Brief, para. 11, pp 31-32.
[1237] Čerkez Appeal Brief, para. 10, p. 31.
[1238] Čerkez Appeal Brief, para. 11, pp 31-32.
[1239] Čerkez Appeal Brief, paras 11-14, pp 32-33.
[1240] Trial Judgement, para. 843.

Brigade. However, the Trial Chamber's finding in relation to detention crimes (Counts 29, 30, 31, 33 and 35) is confusing on this point, since it appears to find that Čerkez supervised the police in the Vitez Cinema. The Trial Chamber's finding was:

> the Trial Chamber also accepts the evidence of Witness G that Čerkez was supervising the activities of the police [Military Police] and notes that it would not be surprising [sic] for a Brigade Commander to take charge of the prisoners detained in his own headquarters. With regard to trench-digging the Trial Chamber accepts the evidence of Witness AT. The Trial Chamber also accepts that a Brigade Commander is responsible for what happens to prisoners in his area of responsibility.[1241]

844. This finding is ambiguous, since it is not clear whether the Trial Chamber considers Čerkez to have a superior relationship required for command responsibility over the military police. The Appeals Chamber will consider Čerkez's appeal in this regard and clarify his relationship to the different units.

845. With regard to the Military Police, the Appeals Chamber clarifies that the Military Police unit in question was commanded by Anto Kovač (a.k.a. Žabac), which operated in the Vitez Cinema Building where Čerkez also had his headquarters. The Trial Chamber's finding gives the impression that the Trial Chamber found that Čerkez was supervising the military police. However, the Trial Chamber held in paragraph 701 of the Trial Judgement that

> Zvonko Vuković, Commander until January 1993, testified that he organised the IV Battalion Military Police, which numbered about 600 men in total, into five companies responsible for five main areas in Central Bosnia; a small platoon of the IV Battalion Military Police, comprised of about 20 men, secured the headquarters of the Viteška Brigade and were based at the Cinema hall. Yet the military police was not subordinate to the Viteška Brigade, and was only called "brigade police" because they were responsible for the security of the Brigade. However, the military police sometimes discharged duties typical of regular military units. The IV Battalion Military Police, for example, intervened in a number of situations when the front line was in peril. Colonel Blaškić would issue an order to Marinko Palavra (Commander of the IV Battalion Military Police from August 1993) to use the military police in such combat activities, and Palavra in turn would command the police. Mario Čerkez was not authorised to issue such orders and no brigade commander had such authority; all had to seek the authority of Colonel Blaškić before issuing combat orders to the military police. (Furthermore, neither Colonel Blaškić nor Mario Čerkez had the authority to order investigations into criminal offences.) The military police did not come under the direct control of the Viteška Brigade until August 1993.[1242]

846. This finding was made in the context of considering Čerkez's role in relation to the 4th Battalion Military Police generally and to the attack on Ahmići. The Appeals Chamber considers that reading paragraphs 801 and 710 of the Trial Judgement together, it is clear that Čerkez did not have *de jure or de facto* command over the military police stationed in the Vitez Cinema.

847. With regard to the "Vitezovi", the Trial Chamber found "Čerkez commanded Vitez as a whole but orders for the "Vitezovi" were issued by Darko Kraljević: Čerkez would not give orders

[1241] Trial Judgement, para. 801.
[1242] Trial Judgement, para. 701 (footnotes omitted, emphasis added).

to the Vitezovi".[1243] The Appeals Chamber therefore considers that the Trial Chamber correctly did not find that Čerkez had a superior-subordinate relationship to the "Vitezovi" and cannot be held liable under Article 7(3) of the Statute for their actions.

848. With regard to the Jokers, the Trial Chamber made no finding as to Čerkez's relation to this unit and the Appeals Chamber therefore considers that Čerkez cannot be found to have responsibility for this unit.

849. In conclusion, the Appeals Chamber considers that the only unit in relation to which Čerkez should be considered a superior is the Viteška Brigade.

(c) Alleged errors relating to the areas of deployment of the Viteška Brigade

850. Čerkez argues that the Viteška Brigade was not involved in the fighting on 16 April 1993 in three locations: Vitez, Stari Vitez and Donja Večeriska. He argues that:

i) the Viteška Brigade did not have the size to cover these areas on that date,

ii) his staff was responsible for "gathering" information from the battlefield, and that from the fact they reported on a particular place the Trial Chamber cannot conclude that the Viteška Brigade was involved in the fighting, and

iii) the Trial Chamber's findings in paragraphs 689-691 and paragraph 703 are in error because the Trial Chamber relied on document Z692.2 which was not admitted into evidence;[1244] that the evidence contained in the documents cited in paragraph 689 (b), (d), (e) and (f) of the Trial Judgement, are an insufficient basis upon which to conclude that the Viteška Brigade was in the thick of the fighting; and that the document mentioned in paragraph 689 (c) of the Trial Judgement is a forgery.[1245]

851. First, Čerkez alleges that the Trial Chamber erred in finding that the Viteška Brigade had the manpower to cover the areas as found by the Trial Chamber on 16 April 1993 and challenges the Trial Chamber's finding in paragraph 601 of the Trial Judgement, which was drawn from the findings in paragraphs 594-600. The Trial Chamber found:

> that the Brigade was sufficiently well organised and established to carry out the tasks allotted to it on 16 April 1993.

[1243] Trial Judgement, para. 597.
[1244] Čerkez Appeal Brief, para 24(a), p. 53.
[1245] Čerkez Appeal Brief, para. 24(c), p. 56.

Čerkez argues there is no evidence to support the Trial Chamber's finding in paragraph 596 that "[t]he Viteška Brigade consisted of a number of battalions", but claims that it only had one battalion. The Trial Chamber did not cite a particular reference for the finding that the Viteška Brigade had several battalions but relied on Witness Col. Duncan in the remainder of the paragraph in question. Čerkez argues that Witness Duncan only came to the Vitez area in May 1993 and therefore his evidence is not relevant with respect to the Viteška Brigade's organisation in mid-April 1993.[1246] Čerkez refers the Appeals Chamber to Witness Bertović. Witness Bertović stated that in mid-March 1993, he was appointed to the position of commander of the 1st Battalion of the newly established Viteška Brigade.[1247] He said that in the night of 15 to 16 April 1993 his task was to block a Muslim attack which was expected to come from the direction of Kruščica and Vraniska[1248] and made clear in cross-examination that the Viteška Brigade only consisted of the one battalion under his command;[1249] he estimated in re-examination that it would have taken at least three strong battalions to carry out the order dated 6 April 1993 (Exh. Z692.3) to completely take the villages of Donja Večeriska, Ahmići, Sivrino Selo and Vrhovine.[1250]

852. The Prosecution responds that two international observers, Baggesen and Morsink, gave evidence that the Viteška Brigade had several battalions.[1251] These witnesses were not referred to by the Trial Chamber, but in the Prosecution's submission, as part of the Trial Record, they support the Trial Chamber's finding. The Prosecution submits that there was sufficient evidence for the Trial Chamber to conclude in paragraph 601 of the Trial Judgement that "the picture of disorganisation and confusion presented by the Defence is not correct and that the Brigade was sufficiently well organised and established to carry out the tasks allotted to it on 16 April 1993".[1252]

853. In reply, Čerkez submits that Witness Baggesen testified that he did not know the strength of the Viteška Brigade and that Witness Baggesen referred to Exh. Z553, which is an order issued in March 1993.[1253] Čerkez submits that this exhibit is from before Witness Baggesen arrived in Bosnia and Herzegovina and that there is no other document that supports the finding that the Viteška Brigade had more that one battalion until May 1993. He further submits that Witness Baggesen stated that the ECMM received military information from UNPROFOR. Čerkez also

[1246] Čerkez Appeal Brief, para. 26(a), pp 58-59.
[1247] T. 25832.
[1248] T. 25863.
[1249] T. 25905.,25957-58, 25993.
[1250] Footnote 1393 of the Trial Judgement, referring to Exh. Z692.3 and T. 25997.
[1251] Prosecution Response, para. 10.35.
[1252] Prosecution Response, para. 10.36-10.39. In reply, see Čerkez Reply Brief, paras 80-83.
[1253] Čerkez Reply Brief, para. 77(a) and (b), pp 39-40.

submits that Witness Morsink testified that he "assumed" that the Viteška Brigade had three to four Battalions.[1254]

854. It is true that Witness Col. Duncan only arrived in Bosnia and Herzegovina on 5 May 1993 and on 11 May 1993 took over after Col. Stewart for the British troops stationed in Central Bosnia.[1255] The Appeals Chamber agrees with Čerkez that, based on Witness Duncan, no reasonable trier of fact could have found that "[t]he Viteška Brigade consisted of a number of battalions". Witness Duncan testified that "a number of brigades […] defended the Lašva Valley."[1256] His testimony does not relate to the Viteška Brigade specifically. Further, Witness Duncan did not mention the Viteška Brigade in his testimony when he was describing the HVO organisation in the Lašva Valley.[1257] In cross-examination, he even stated that he did not know the number of brigades the HVO had; he further stated that the organisation of the HVO at the level of Čerkez was not of interest to him and that it was a level handled by his liaison officers.[1258]

855. Witness Morsink testified that it was his assumption that Čerkez was responsible for the area, due to the fact that Čerkez had never, in his discussions with Morsink, denied that specific areas were outside of his control, simply that he had lacked control over certain people.[1259] When questioned about the structure of the Viteška Brigade, Morsink testified that he had not learnt in detail about the structure of the Viteška Brigade, but had the impression that certain commanders were subordinates of Čerkez.[1260] When specifically questioned about the number of battalions or companies that were within the Viteška Brigade, Morsink replied that he did not know exactly how many, and that at the time he had assumed that it was comprised of three or four battalions.[1261]

856. Witness Baggesen testified that he had no knowledge about the specific structure of the brigades, and that this was information which fell into UNPROFOR's area of expertise.[1262] Witness Baggesen testified further that an order of Čerkez, dated 18 March 1993, was addressed to "1st Battalion Commander", and that an order of 19 March 1993 was addressed to "one of his subordinate commanders", the "1st Battalion of the Viteška Brigade".[1263] However, Witness Baggesen only confirmed what the orders stated and did not add anything.

[1254] Čerkez Reply Brief, para. 77(d).
[1255] T. 9714-9715.
[1256] T. 10536.
[1257] T. 9718-19.
[1258] T. 10536-37.
[1259] T. 8250.
[1260] T. 8252.
[1261] T. 8259, 8265.
[1262] T. 7790.
[1263] T. 7576

857. The Appeals Chamber considers that Witness Morsink's testimony, according to which he assumed that the Viteška Brigade had several battalions, is insufficient for a reasonable trier of fact to have concluded that the Viteška Brigade had several battalions. The Appeals Chamber further finds that Witness Baggesen's testimony is not helpful in this respect. The Appeals Chamber considers that the orders do not relate to 16 April 1993, and only support that the Viteška Brigade had a first battalion. It is true that the existence of a "first" battalion could be indicative of the existence of several. However, the Trial Chamber did not discuss the testimony of Witness Bertović, that this first was at the same time the only battalion**.** Therefore, no reasonable trier of fact could have found that the Viteška Brigade had several battalions merely based on Witness Baggesen's evidence.

858. Čerkez further challenges the Trial Chamber's finding in paragraphs 600 and 601 of the Trial Judgement and the Prosecution's attempt to link particular persons to the Viteška Brigade. The Appeals Chamber agrees that the question of whether a particular person belonged to the Viteška Brigade may be relevant in the context of determining where the Viteška Brigade operated and whether the acts of a particular person can be attributed to Čerkez.

859. The Appeals Chamber concludes that no reasonable trier of fact could have found that the Viteška Brigade had "a number of" battalions in April 1993. However, it does not automatically follow that the Trial Chamber erred in finding that the Viteška Brigade was deployed in Vitez, Stari Vitez and Večeriska, which is the relevant matter for the determination of Čerkez's responsibility. The Appeals Chamber considers that a reasonable trier of fact could have found that the Viteška Brigade was sufficiently organised to carry out this limited task, the remaining question being what this task entailed.

860. Čerkez asserts that, on 15-16 April 1993, Blaškić issued an order to the Viteška Brigade to prevent possible attacks by the ABiH forces on the town of Vitez from the villages Vraniska and Kruščica.[1264] Čerkez submits that the evidence before the Trial Chamber does not show that the Viteška Brigade was involved in any military action in Vitez/Stari Vitez, and Večeriska/Donja Večeriska.[1265]

861. The Trial Chamber found that "there is clear evidence that Mario Čerkez, as Commander of the Viteška Brigade, participated in the attacks on Vitez/Stari Vitez and Večeriska/Donja Večeriska. This is to be inferred from his presence at the military meeting on 15 April 1993, the documentary

[1264] Čerkez Appeal Brief, p. 70.
[1265] Čerkez Appeal Brief, p. 71.

evidence concerning the events of 16 April 1993 and the entries in the Duty Officer's Log [War Diary]."[1266]

862. The Appeals Chamber will first consider the general evidence relating to Čerkez's participation in the meeting on 15 April 1993. It will then consider the orders and reports specific to Vitez and those specific to Večeriska/Donja Večeriska.

863. With regard to Čerkez's participation in the Second Meeting on 15 April 1993 is discussed in detail below. The Appeals Chamber considers that no conclusion can be drawn from the Trial Chamber's findings on the Second Meeting[1267] as to where the Viteška Brigade were deployed on 16 April 1993.

864. The Trial Chamber further relied on the documentary evidence, including the War Diary. Among the evidence are orders issued by Blaškić to the different units on 16 April 1993 as well as reports by Čerkez on the situation on the ground.

865. The Appeals Chamber considers that the Trial Chamber erroneously relied on document number Z692.2, because it was never admitted into evidence. The Prosecution submits that any error by the Trial Chamber in relying on this document is inconsequential as it is only one of the elements analysed by the Trial Chamber in paragraph 689. Further, the essence is contained in Exh. Z673.7, which establishes that there was an order addressed to Čerkez.[1268] The Appeals Chamber agrees with the Prosecution that Exh. Z673.7 establishes the same facts. Exh. Z673.7 is a report from Čerkez, delivered at 10:00 a.m. on 16 April 1993 to Blaškić.

866. The Appeals Chamber considers that the fact that Čerkez reported from a particular place does not automatically lead to the conclusion that the Viteška Brigade operated in that place. The Trial Chamber itself did not hold Čerkez responsible for crimes occurring in all the places he reported on. There are entries in the War Diary showing that Čerkez reported to Blaškić and others about the situation "in the field"[1269] on 16 April 1993 at 9:37 a.m., 12:07 p.m., 1:03 p.m., 1:10 p.m., 3:08 p.m. (2:50 p.m.), 3:50 p.m., 5:55 p.m., and 6:25 p.m.[1270] The entry at 5:55 p.m. reads as follows:

> We have received a list of defenders killed from the Vitez Brigade duty officer: Anto Franjić, Lovro Kolak, Ivo Žuljević, all three are members of the *Vitezovi*, Mirjan Šantić, Zlatko Ivanković,

[1266] Trial Judgement, para. 703.
[1267] Trial Judgement, para. 610.
[1268] Prosecution Response, para. 10.22.
[1269] Exh. Z610.1 (War Diary), pp 72, 78.
[1270] Exh. Z610.1(War Diary), pp 72, 78, 80, 87, 89, 94, 95.

> members of the regional police, Zoran Vidović – a civilian. There are quite a few lightly and seriously wounded.[1271]

This entry shows Čerkez reporting about killed soldiers in units which were found by the Trial Chamber not to be under Čerkez's command; for example the Vitezovi were found to be under the command of Darko Kraljević.[1272]

867. Exh. Z692.3 is an order from Blaškić to Čerkez at 10:35 a.m. on 16 April 1993, stating: "completely take the villages of Donja Večeriska, Ahmići, Sivrino Selo and Vrhovine".[1273] Čerkez argues that this order is a forgery.[1274] He argues that around 90 different orders issued by Blaškić were admitted into evidence in the present case and that Exh. Z692.3 is different. The Prosecution argues that Čerkez's argument must fail since he did not raise this issue at trial and only raises it for the first time on appeal. The Prosecution argues that Čerkez should be considered to have waived his right to raise the issue.[1275]

868. The Appeals Chamber finds that Čerkez cannot at this point raise issues relating to the admission of this document into evidence, as that was a matter that he should have raised at trial and failed to do. Therefore, the Appeals Chamber will not consider the issue of the admission of this document.

869. In relation to Donja Večeriska, Čerkez submits that the order dated 16 April 1993 at 10:35 a.m., Exh. Z692.3, mentions Donja Večeriska in the introductory paragraph, but not in the paragraphs where the Viteška Brigade is given orders. He further submits that he was not responsible for the Special Purpose Unit Tvrtko, which is mentioned in paragraph 4 of the order. In relation to Vitez/Stari Vitez, Čerkez argues that the Viteška Brigade was only operating in the areas designated to it and that it was only its headquarters that was situated in the centre of Vitez. Čerkez relies on Witnesses Bertović and Sajević and Exh. D85/2. He further argues that there is evidence which allegedly shows that: the HVO civilian police was ordered to secure vital facilities in Vitez;[1276] the Vitezovi received the order to cover Vitez, including Stari Vitez;[1277] the 4th Battalion of Military Police was ordered to cover the main road Ahmići-Nadioci;[1278] and that the N.Š. Zrinski was deployed on Mount Kuber.[1279]

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[1271] Exh. Z610.1(War Diary), p. 94.
[1272] Trial Judgement, para. 597.
[1273] Trial Judgement, para. 689(c).
[1274] Appeals Hearing, T. 488-90.
[1275] Prosecution Response, para. 10.29.
[1276] Čerkez Appeal Brief, p. 47, para. (b) refers to Exh. D343/1-8.
[1277] Čerkez Appeal Brief, p 74, para. (c) refers to Exh. D-343/1-7.
[1278] Čerkez Appeal Brief, p 77, para. (d) refers to Exh. D343/1-6.
[1279] Čerkez Appeal Brief, p. 78, para. (e) refers to Exh. D-92/1.

870. The Prosecution responds that Čerkez does not identify an error of the Trial Chamber but simply expresses disagreement with the Trial Chamber's findings.[1280] The Prosecution submits that none of the submissions of Čerkez are capable of successfully attacking the Trial Chamber's conclusions. The Prosecution submits that Exh. Z673.7 shows Čerkez reporting from Donja Večeriska and Exhs Z676, Z671.4, Z692.3 and Z673.7 support the Trial Chamber's findings as well as documentary evidence that soldiers of the Viteška Brigade were killed or wounded in Donja Večeriska on 16 and 17 April 1993.[1281] The Prosecution submits further that there was direct testimony of the involvement of the Viteška Brigade in Vitez and Stari Vitez.[1282]

871. The order from Blaškić to "the commander of the HVO brigade Vitez, Mr. M. Čerkez and P/N units Tvrtko, on 01.30 on 16 April 1993", Exh. D60/2 reads in its part relevant for Čerkez:

> 1. On the basis of the NGS HVO command and the assessment made, we expect enemy attack in the direction Kruščica – town center and Vranjska – town center with the probable goal, after carrying out the planned terrorist activities, of engaging open offensives against the HVO and destroying all that is Croatian. The enemy will probably use infantry units, but will direct G/S at the command headquarters and other HVO institutions.
>
> 2. The assignment of your forces is to occupy the defense region, blockade villages and prevent all entrances to and exits from the villages. In the event of open attack activity by the Muslims, neutralize them and prevent their movement with précised fire from P/N.
>
> Time of readiness at 05.30 hours on 16 April 1993.
>
> Combat formation"
>
> Blockade forces (observation, ambush, [illegible handwritten word])
>
> Search forces
>
> Forces for offensive activity
>
> 3. In front of you are the forces of the IV. Battalion VP, behind you are your forces, to the right of you are the forces of the unit N.Š. Zrinski, and to the left of you are the forces of the civilian police.
>
> 4. Personally responsible to me for the execution of the given assignment is the commander of the HVO brigade Vitez, Mr. M. Čerkez. […]

872. Exh. D343.1/7 is an order by Col. Blaškić to the commander of the Vitezovi unit to operate in Vitez/Stari Vitez on 16 April 1993, stating that "the forces of the 1st battalion of HVO Vitez brigade [Viteška Brigade] will hold the defence positions in front of you".[1283]

[1280] Prosecution Response, para. 10.53.
[1281] Prosecution Response, paras 10.56-10.58.
[1282] Prosecution Response, para. 10.59.
[1283] Exh. 343.1/7.

873. The Trial Chamber made no finding that Čerkez was responsible for the Special Purpose Unit Tvrtko.

874. With regard to direct evidence of the involvement of the Viteška Brigade in Donja Večeriska/Večeriska, Witness V testified that among the HVO soldiers operating in Donja Večeriska were his Croat neighbours. Witness V gave the names of eight HVO soldiers.[1284] However, the evidence is not helpful as to the unit to which they belonged. Exh. Z957.1 is a list of "killed, wounded and missing member of our units" prepared by Zvonimir Čilić, Assistant Commander of the Viteška Brigade. Among the killed in Donja Večeriska on 16 April 1993 are two persons which were also mentioned by Witness V. The Trial Chamber did not find that these two persons listed on Exh. 957.1 and mentioned in Witness V's testimony were the same, and the Appeals Chamber will make such a finding, since Exh. Z957.1 was never put to Witness V and not relied on by the Trial Chamber.

875. Furthermore, Col. Watters testified that he met with Čerkez in the Vitez Cinema to discuss cease-fire agreements.[1285] This evidence does not support that the Viteška Brigade was operating in Vitez/Stari Vitez. The testimony of Anto Breljaš, a member of the Vitezovi, states that the Vitezovi and the Viteška Brigade were in charge of the operation in Stari Vitez on 16 April 1993.[1286] The part of Witness Kalco's testimony where he states that the Vitezovi (Dario Kraljević's unit) and Mario Čerkez were in charge of the attack on Stari Vitez relates to October 1992 and not April 1993.[1287]

876. Čerkez argues that following the initial orders from Blaškić, the Viteška Brigade, on 17 April 1993, received the order to hold the frontline dividing the two forces and that this task was gradually implemented until 24 April 1993.[1288] The Prosecution submits that Čerkez has not identified an error committed by the Trial Chamber.[1289] The Appeals Chamber notes that the Trial Chamber made no finding as to Čerkez's involvement in the fighting or the Viteška Brigade's involvement following 16 April 1993 and that no responsibility was associated with the actions of the Viteška Brigade at another time.

877. Based on the totality of the evidence – the reporting from Donja Večeriska and the two orders on 16 April 1993 at 1:30 a.m. and 10:35 a.m. relating to Donja Večeriska – the Appeals

[1284] T. 10380-88.
[1285] T. 5698.
[1286] T. 11714-16.
[1287] T. 15949-55.
[1288] Čerkez Appeal Brief, para. 35, pp 83-85.
[1289] Prosecution Response, paras 10.64-10.65; Čerkez Reply Brief, para. 100.

Chamber concludes that a reasonable trier of fact could have found that the Viteška Brigade was involved in the fighting in Donja Večeriska on 16 April 1993.

878. Based on the totality of the evidence – the orders, reports and the evidence by Witness Anto Breljaš – the Appeals Chamber concludes that a reasonable trier of fact could have found that the Viteška Brigade was involved in the fighting in Stari Vitez/Vitez on 16 April 1993. The Appeals Chamber further notes that participating in the fighting as such is not a crime. Čerkez responsibility is discussed below.

(d) Alleged errors relating to Čerkez's alleged participation in the second meeting on 16 April 1993 and what was decided at that meeting

879. Čerkez further submits that the Trial Chamber, in paragraphs 611-613 of the Trial Judgement, describes the first meeting held on 15 April 1993 as a meeting of the HVO's political leadership, and that the Trial Chamber makes no finding that Čerkez knew of this meeting. Čerkez submits that he did attend a meeting with General Blaškić but that this meeting was not with the other commanders, as the Trial Chamber found.[1290] Čerkez argues that the fact that Witness AT saw him on 15 April 1993 in Blaškić's headquarters may be true since he was summoned to a meeting, but that it was a private meeting, which is also supported by Prosecution's evidence.[1291] Čerkez argues that as commander of the Viteška Brigade, he received precise orders from General Blaškić referring to his limited zone of responsibility and had no reason to be acquainted with the entire plan (regardless of the nature of the plan), and that the order he received was justifiable and legal in view of the circumstances.[1292] It is Čerkez's submission that there is no evidence to establish his knowledge, and that knowledge of the existence of the criminal plan is the decisive fact.[1293]

880. With regard to which evidence the Trial Chamber relied on, the Appeals Chamber notes that the Prosecution submits that the Trial Chamber based its conclusion not only on Witness AT's testimony but also on "the documentary evidence concerning events of 16 April and the entries in the Duty Officer's Log [the War Diary]."[1294] The Prosecution submits that the documentary evidence includes, *inter alia*, reports of combat progress in the field. The Appeals Chamber notes that the War Diary mentions Čerkez's name several times on 16 April 1993. Examples of entries are "Slavko M called Mario Č to make contact with the MTD", "M. Čerkez ordered to block the

[1290] Čerkez Appeal Brief, para. 19, p. 50.
[1291] Čerkez Appeal Brief, para. 19, p. 51.
[1292] Čerkez Appeal Brief, para. 20, p. 51.
[1293] Čerkez Appeal Brief, para. 22, p. 52.
[1294] Prosecution Response, para. 10.10, quoting Trial Judgement, para. 703.

shooting on the fire station building in Vitez", "M. Miletić called M. Čerkez to call the SB OZ. Asking for the Colonel's report for features 1 and 2 from Mario". The Appeals Chamber considers that these entries are clear evidence of Čerkez's participation in the military attacks on 16 April 1993 and that he was in close and regular contact with the headquarters and Col. Blaškić. However, in the view of the Appeals Chamber, none of the entries supports the finding that Čerkez had the intent to commit crimes.

881. The Appeals Chamber considers that, in addition to the inferences that may be drawn from Čerkez's participation in the attacks on Donja Večeriska and Stari Vitez, the Trial Chamber placed emphasis on his participation in the second meeting on 15 April 1993. The Appeals Chamber will now consider whether a reasonable trier of fact could have found that Čerkez was present at the second meeting, and if so, what he could reasonably have known by virtue of being present.

882. Čerkez argues that the Trial Chamber erred in finding that he was present in this second meeting in Col. Blaškić's office on 15 April 1993.

883. The Trial Chamber found that "[t]here was then a second meeting (also lasting about one and a half hours) in Blaškić's office, attended by amongst others, Paško Ljubičić, Ante Slišković, Mario Čerkez and Darko Kraljević."[1295] Witness AT testified that he himself saw these persons attend the meeting.[1296]

884. Čerkez argues that an entry in the War Diary supports his claim that he was not present in the meeting. The War Diary, indeed, does not mention Čerkez on that particular day, and lists other units to be called to a meeting at 5"30 p.m. on 15 April 1993. However, the fact that the meeting with the participants as found by Trial Chamber is not mentioned in the War Diary does not necessarily mean that the meeting did not take place and that Čerkez did not attend it. Furthermore, the meeting Čerkez claims to have had with Blaškić is not mentioned in the War Diary either. The Appeals Chamber is of the view that the Trial Chamber explained in great detail why it relied on Witness AT, and the Appeals Chamber upheld this finding elsewhere in this Judgement. The Appeals Chamber considers that a reasonable trier of fact could have found beyond reasonable doubt that Čerkez was present in the second meeting based solely on Witness AT's testimony.

885. The next issue is whether Čerkez's knowledge of the crime to be committed could have been inferred beyond reasonable doubt from his presence at the second meeting.

[1295] Trial Judgement, para. 610.
[1296] T. 27592.

886. Čerkez submits that in paragraphs 611-613 of the Trial Judgement, the Trial Chamber concludes that there was a series of meetings and that Čerkez was present at the second of these meetings. He further submits that while the Trial Chamber accepted that the meeting Čerkez attended was a "military" meeting, it did not use this adjective to describe the next three meetings.[1297] He argues that it is only at the two briefings (meetings four and five) in the Bungalow where only members of the 4th Battalion Military Police were present, that the criminal elements of the plan were mentioned for the first time as an element of the HVO's offensive plan, thereby transforming a militarily justifiable plan into an impermissible criminal operation.[1298]

887. The Trial Chamber's findings in paragraphs 610 and 631 in relation to the Second Meeting are unclear. The Trial Chamber held that Paško Ljubičić was present at the Second Meeting and that during that meeting Paško Ljubičić informed Witness AT.[1299] The issue is what the Trial Chamber found was discussed during the Second Meeting. It appears that the Trial Chamber makes no findings as to what was discussed during the Second Meeting. It held that Paško Ljubičić told Witness AT what had been decided during the previous meeting (which presumably is the First Meeting). Further, Witness AT gave evidence that Paško Ljubičić said that "an attack would be launched against the Muslims (the reason being that a report had been intercepted saying that the Muslims would attack in the morning)".[1300] It was said that "the Muslims would attack in the morning" and the reasonable conclusion is that the reference to Muslims in this context is the Muslim forces (ABiH) and that the HVO were to attack them before they were attacked. The Trial Chamber finds that at the Fourth Meeting in the Bungalow, Paško Ljubičić said an order had been issued "to attack at 5:30 a.m. and all Muslims men of military age were to be killed while civilians were not to be killed, but expelled and the houses set on fire".[1301]

888. The Appeals Chamber considers that the Trial Chamber made no finding as to what was decided or said at the Second Meeting, the only one attended by Čerkez. It therefore did not find that Čerkez knew of the order that "all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire."[1302]

(e) Alleged errors relating to Čerkez's knowledge of the crimes

889. Čerkez submits that he did not know and could not have known the fate of the Bosnian Muslims in Ahmići, Pirići, and Donja Večeriska on 16 April 1993, or of those in Gaćice on 20 April

[1297] Čerkez Appeal Brief, para. 8, p. 43.
[1298] Čerkez Appeal Brief, para. 8 p. 43.
[1299] T. 27592-93.
[1300] Trial Judgement, para. 610.
[1301] Trial Judgement, para. 613.
[1302] Trial Judgement, para. 613.

1993 because his unit was not even present in any of these places, nor in any of the places where he is alleged to have committed crimes.[1303] Čerkez agrees that he could be held responsible for an omission as well, and for not preventing or not punishing the perpetrators. However, he argues that this applies only to those subordinate to him. As the commander of the Viteška Brigade, he was not in a position to issue orders preventing members of other units, not under his command, from committing crimes. Moreover, this was not his duty pursuant Articles 86 and 87 of Additional Protocol I.[1304]

890. First, the Appeals Chamber will examine the Trial Chamber's findings with regard to Article 7(3) of the Statute. The Trial Chamber held:

> The Chamber refers to its previous finding that, as commander of the Viteška Brigade, Mario Čerkez participated in the attacks on Vitez, Stari Vitez and Večeriska; as commander, he exercised *de jure* and *de facto* control over the members of his brigade.[1305]
>
> The Chamber is satisfied that Mario Čerkez knew of the impending attacks on those towns by those troops under his command, that he failed to take the necessary measures to prevent those attacks, and that he failed to punish those who were responsible for the attacks. The Chamber therefore finds Mario Čerkez liable under Article 7(3) in respect of the attacks by the Viteška Brigade on the three locations and the associated killings and injuries (Counts 5 - 6, 14 - 15, 17 and 19), imprisonment and other detention offences (Counts 29 – 31, 33 and 35), plunder (Count 42) and destruction (Counts 41 and 44).[1306]

891. Apart from the findings that Čerkez "knew of the impeding attacks on those towns by those troops under his command and that he failed to punish those who were responsible for the attacks,"[1307] the Trial Judgement does not specify Čerkez's knowledge of specific crimes. The Appeals Chamber has not been able to identify any other finding relevant to the requisite that Čerkez knew or "had reason to know" about concrete crimes. The Appeals Chamber considers that the Trial Chamber's findings are impermissibly vague and fall short of the requisite clarity and reasoning expected of any trial judgement. The Trial Chamber, however, implicitly found that the elements required for responsibility under Article 7(3) of the Statute were established since it found Čerkez guilty. The Appeals Chamber will therefore determine below in relation to the relevant counts whether a reasonable trier of fact could have found Čerkez responsible under Article 7(3) of the Statute.

[1303] Čerkez Appeal Brief, para. 7, p. 27.
[1304] Čerkez Appeal Brief, para. 11, p. 32.
[1305] Trial Judgement, para. 842.
[1306] Trial Judgement, para. 843.
[1307] Trial Judgement, para. 843.

## 4. Responsibility

### (a) Attacks on towns and villages

892. Čerkez submits that there was insufficient evidence for the Trial Chamber to conclude that the Viteška Brigade was involved in the alleged crimes in Donja Večeriska, Vitez and Stari Vitez.[1308] Čerkez further submits that no crimes were committed on the locations for which he was responsible during the period April 1992 to September 1993.[1309] The Appeals Chamber has considered his appeal relating to general issues of responsibility above and concluded that Čerkez was the superior of the Viteška Brigade and that this brigade was deployed on 16 April 1993 in, *inter alia*, Donja Večeriska, Stari Vitez, and Vitez proper. The Appeals Chamber further concluded that the Trial Chamber made no finding, in relation to each incident, as to whether Čerkez knew or had reason to know of his subordinate's behaviour and whether he prevented or punished it. The Appeals Chamber will therefore consider the evidence in relation to each count.

#### (i) Večeriska/Donja Večeriska

893. The Appeals Chamber has reversed the Trial Chamber's finding with regard to unlawful attack on civilians (Count 5); murder (Count 14); wilful killing (Count 15); inhumane acts (Count 17); inhuman treatment (Count 19); plunder of public or private property (Count 42). Čerkez is therefore acquitted under Article 7(1) and 7(3) for Counts 5, 14, 15, 17, 19, and 42 in relation to Donja Večeriska.

894. The three counts for which the Appeals Chamber will consider Čerkez's responsibility are unlawful attack on civilian objects (Count 6),[1310] wanton destruction not justified by military necessity (Count 41),[1311] and wilful damage to institutions dedicated to religion or education (Count 44).

895. With regard to wilful damage to institutions dedicated to religion or education (Count 44), the Trial Chamber found Čerkez guilty only in relation to Article 7(3) of the Statute.[1312] The Prosecution correctly concedes that Čerkez should not have been found guilty under Article 7(3) of the Statute for destruction of institutions dedicated to religion or education in Donja Večeriska.[1313]

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[1308] Čerkez Appeal Brief, paras 32-33, p. 80.
[1309] Čerkez Appeal Brief, para. 34, p. 83.
[1310] Charged in the Indictment, para.41.
[1311] Charged in the Indictment, para. 56.
[1312] Trial Judgement, para. 843. There is no finding of Čerkez's responsibility under Article 7(1) of the Statute.
[1313] *Prosecutor v. Kordić and Čerkez*, Decision on Defence Motions for Judgement of Acquittal, Case No.: IT-95-14/2-T, 6 April 2000, para. 29 and Disposition.

896. As regards Counts 6, 41, the Appeals Chamber found that the Viteška Brigade under the Command of Čerkez was tasked in the order of 1:30 a.m. on 16 April 1993 to attack Donja Večeriska. There are no findings or evidence presented that the Viteška Brigade was involved in the fighting in Donja Večeriska between 18 and 21 April 1993, the time-frame within which the unlawful attack or wanton destruction occurred.

897. Therefore, the Appeals Chamber considers that no reasonable trier of fact could have found beyond reasonable doubt Čerkez responsible as a co-perpetrator (committing) for Count 6 (unlawful attack on civilian objects)[1314] and 41 (wanton destruction not justified by military necessity)[1315] occurring in Donja Večeriska.

898. The Appeals Chamber considers that the Trial Chamber did not establish that the crimes in Donja Večeriska had been committed by the Viteška Brigade. Therefore, no reasonable trier of fact could have found Čerkez responsible beyond reasonable doubt under Article 7(3) of the Statute for these crimes.

899. The Appeals Chamber reverses the remaining convictions of the Trial Chamber and acquits Čerkez for Counts 6, 41 and 44.

(ii) Vitez/Stari Vitez

900. In relation to Vitez/Stari Vitez, the Appeals Chamber overturned all the Trial Chamber's findings that the crimes were established. Čerkez is acquitted both under Article 7(1) and 7(3) of the Statute in relation to Vitez/Stari Vitez, for Counts 5, 6, 14, 15, 17, 19, 41, 42 and 44.

(b) Detention related crimes – Counts 29, 30, 31, 33 and 35

(i) Introduction

901. The Trial Chamber's finding in relation to Čerkez's responsibility under Article 7(3) of the Statute for Counts 29, 30, 31, 33 and 35 is confusing because it concluded upon findings which were not charged in the Indictment. Namely, the Trial Chamber held Čerkez guilty in relation to Vitez, Stari Vitez and Večeriska/Donja Večeriska,[1316] but the Indictment does not charge Čerkez with responsibility under Article 7(3) of the Statute for these counts in relation to these places.[1317] Furthermore, at the Status Conference on 6 May 2004, the Prosecution stated that it does not dispute that the Trial Chamber made no factual findings related to the involvement of forces under

[1314] Charged in the Indictment in para. 41.
[1315] Charged in the Indictment in para. 56.
[1316] Trial Judgement, paras 800, 836(b), 843.

Čerkez's responsibility in Stari Vitez and Večeriska/Donja Večeriska.[1318] Since Čerkez was not indicted under Article 7(3) of the Statute for imprisonment (Count 29), unlawful confinement (Count 30), inhuman treatment (Count 31), taking civilians as hostages (Count 33), and inhuman treatment (human shields) (Count 35) in relation to Vitez, Stari Vitez and Večeriska/Donja Večeriska, the Appeals Chamber reverses the Trial Chamber's finding and acquits Čerkez accordingly.

(ii) The Chess Club (Counts 29, 30 and 31)

902. The Appeals Chamber has accepted Kordić's ground of appeal and has reversed the Trial Chamber's findings that the crimes of imprisonment and unlawful confinement of civilians in relation to the Chess Club are established (Counts 29 and 30). Accordingly, Čerkez cannot be held responsible and the Appeals Chamber acquits Čerkez of these charges in relation to the Chess Club, reversing the respective convictions.

903. In relation to inhuman treatment, the Trial Chamber found that Witness L was "beaten up and threatened with a knife by a guard".[1319] The Trial Chamber erroneously attributed this incident to the witness's detention at the Chess Club, when in fact the witness testified that it had occurred at Kaonik.[1320] Therefore this incident cannot serve as a basis for a finding that inhuman treatment occurred in the Chess Club. In addition, the Trial Chamber found that "no visits were allowed." Whether the Trial Chamber considered "no visits" as constituting the crime of inhuman treatment is not clear. Lacking a more definitive finding by the Trial Chamber, the Appeals Chamber concludes that "the finding of no visits" does not suffice to support the count of inhuman treatment.[1321] Further, the Appeals Chamber has not been able to identify other evidence that could support a finding that inhuman treatment occurred as charged in the Indictment.

904. Čerkez cannot be held responsible for a crime committed in a place for which he was not charged in the Indictment. The Appeals Chamber therefore reverses the conviction and acquits Čerkez of inhuman treatment (Count 31) in relation to the Chess Club .

(iii) The Vitez Cinema

a. Imprisonment and unlawful confinement (Counts 29 and 30)

[1317] Indictment, paras 50-54.
[1318] Status conference on Appeal, T. 163-64.
[1319] Trial Judgement, para. 779.
[1320] T. 6869-70.
[1321] Especially considering Witness L was detained for one day, T. 6868; Witness G: "we stayed there a day and a night" T. 3908; Witness Edib Zlotrg gave evidence that he was there for "a couple of days", T. 1680.

905. The Appeals Chamber found based on the evidence given by Kadir Džidić that there were civilian detainees of 17 years and over 65 years, and it has upheld the Trial Chamber's finding of unlawful confinement and imprisonment (Counts 29 and 30).

906. The Trial Chamber found that the Vitez Cinema was guarded by the HVO soldiers in uniform, some being members of the military police.[1322] For this conclusion the Trial Chamber relied on Witnesses L, AC and S. Witness L testified that the Cinema was guarded by "Vitez Brigade police" commanded by Mr. Anto Kovač, a.k.a Žabac. Witness AC testified that the Cinema was guarded by the HVO military police from Vitez (naming Anto Kovač (Žabac) and Zlatko Nakić as members of this unit),[1323] that it was the Military Police that compiled lists of the detainees in the Cinema, and transported him between the different detention centres. Witness S testified that when visiting the Cinema, it was guarded by HVO soldiers but the witness was not asked to identify the unit.[1324] In analyzing this evidence, it appears that the responsible unit was the Military Police under the command of Anto Kovač (Žabac). The Appeals Chamber has dealt with Čerkez's appeal in relation to the Military Police and has found that Čerkez did not have *de jure* or *de facto* command over it.

907. The Trial Chamber referred to a report from Čerkez to Col. Blaškić on 16 April 1993, contained in Exh. Z671.5, which stated that[1325]:

> the town is "clean" and "we have about 50 Muslims in the cellar of the Brigade Police Station.

It is unclear to which building the "Brigade Police Station" refers. The evidence of Witness Morsink is that when he had asked Čerkez why they had detained women and children at all, Čerkez replied that it was difficult to select soldiers and civilians taking part in the actual fighting and that when they found out that only the males in a certain age were a threat, they released the women and children.[1326] It is clear that Čerkez knew that Muslim civilians were detained on 16 April 1993. The Trial Chamber found that Čerkez already on 22 April 1993 sent to the ICRC and ECMM a list of detainees who were sick or aged over 60, or under 16 detained in the Cinema, and ordered them to be released.[1327]

908. In relation to the arrest of the detainees, Witness Kadir Džidić testified that he was arrested "by Slaven Kraljević and another soldier, whose last name I later heard was Krizanac" and that he was taken to a café where Darko Kraljević was located. The Trial Chamber found that Darko

[1322] Trial Judgement, para. 777.
[1323] T. 12593.
[1324] See T. 7950.
[1325] Trial Judgement, para. 689(f).
[1326] T. 8277.

Kraljević was the Commander of the "Vitezovi,"[1328] and that Čerkez was not in a command position over the "Vitezovi".[1329] The Appeals Chamber notes that the evidence does not support that Čerkez ordered any arrests.

909. The headquarters of the Viteška Brigade was at the Vitez Cinema, the location where the civilians were being detained. The unit responsible for detaining the civilians, the Military Police, under Žabac, was reported as also providing security to the Headquarters of the Viteška Brigade. Čerkez knew that civilians were being detained there, provided a register of detained civilians to Col. Morsink, and he gave the order for civilians to be released, which was obeyed. The evidence however does not support a finding that Čerkez or the Viteška Brigade was arresting people or that they were guarding the detainees.

910. The Appeals Chamber considers that a reasonable trier of fact could have found beyond reasonable doubt Čerkez responsible as a co-perpetrator (committing) under Article 7(1) of the Statute for the imprisonment (Count 29) and unlawful confinement (Count 30) in the Vitez Cinema, thus excluding concurrent responsibility under Article 7(3) of the Statute.

b. Inhuman treatment, Count 31 (Čerkez)

911. With regard to responsibility under Article 7(1) of the Statute, the Appeals Chamber considers that Čerkez's power to release detainees does not mean that he is responsible for the treatment of the detainees.

912. The Appeals Chamber finds that there is not sufficient evidence to conclude that a reasonable Trial Chamber could have concluded that Čerkez committed, ordered, or instigated the crime of inhuman treatment in the Vitez Cinema. The Appeals Chamber thus acquits Čerkez under Article 7(1) of the Statute.

913. With regard to responsibility under Article 7(3) of the Statute, the Appeals Chamber has already discussed Čerkez's relationship to the Military Police Unit in the Cinema Building in Vitez commanded by Anto Kovač, (a.k.a. Žabac) and found that no reasonable trier of fact could have found that Čerkez had effective control over the Military Police in the Cinema.

914. For the same reasons, Čerkez cannot be held responsible for the fact that "[p]risoners were beaten during their stay"[1330] and that "Witness AC was severely beaten with wooden and metal

[1327] Trial Judgement, para. 788 (v), referring to Exh. Z781.2.
[1328] Trial Judgement, para. 655(c).
[1329] Trial Judgement, para. 597.

objects just prior to his release on 16 May 1993".[1331] The fact that Anto Kovač (a.k.a. Žabac) witnessed the incident and that Witness AC reported it to Ivan Šantić, who was the Mayor of Vitez, does not establish that Čerkez knew or had reasons to know of the mistreatment.

915. The Trial Chamber held that "[p]risoners were taken out to dig trenches and some did not return",[1332] including Almir Gudjun[1333], and that "Witness L, when detained in the Cinema, was forced to dig trenches in the Vraniska and Rijeka areas near Vitez. He recognised some of the guards as coming from the same areas. He saw Mario Čerkez there once in a while, as well as at the Cinema."[1334] Even though the crimes are established, the Appeals Chamber will not discuss these incidents in detail as the evidence does not demonstrate which units or persons were involved in the incidents. Therefore they are not attributable to Čerkez.

916. The Trial Chamber further found that:

> A local Vitez television crew was present and was told by Dr. Thibolt, the Croat manager of the centre, that nobody had complained of mistreatment, however, Witness S had the impression that the prisoners were terrified. One prisoner had a broken arm and another a broken jaw.[1335]

With regard to these injuries of Šerif Čaušević and the unknown detainee, the evidence does not establish to which unit the perpetrator belonged, and therefore the Appeals Chamber will not enter into details of these incidents.

917. In footnote 1665 of the Trial Judgement, the Trial Chamber refers to Exh. Z1199.3 and states that "the only evidence directly connecting Mario Čerkez with the work platoons is an order of their establishment in September 1993, signed by the Chief of the Vitez Defence Office, with what looks like Čerkez's signature on the back according to Gordana Badrov." The Appeals Chamber notes that this exhibit is not an order that work platoons were to be established in September 1993 as held by the Trial Chamber, but a report signed by Marijan Skopljak, Chief of the HVO Defence Office, stating that

> on 16 April 1993 the Defence Office activated the previously formed established work platoons and assigned them to engineering fortification and arrangement of the first defence lines. The work platoons (units that were mobilized by the Vitez Municipal Defence Office are comprised of members of the Croatian population who have been categorised as unfit for military service and the remaining part is comprised of members of the Roma and Muslim ethnic groups.[1336]

[1330] Trial Judgement, para. 777.
[1331] Trial Judgement, para. 777, footnote 1616.
[1332] Trial Judgement, para. 777.
[1333] T. 4022-4023. See also Exh. Z2229.
[1334] Trial Judgement, para. 788(x), referring to T. 6865-68.
[1335] Trial Judgement, para. 778.
[1336] Exh. Z1199.3.

The exhibit does not establish that the persons taken to perform this work were detained in the Cinema or any other place, neither does it show Čerkez's responsibility.

918. Witness Buffini, an OC Liaison Officer for the British Military,[1337] testified that Muslim detainees were taken to dig trenches, that there were rumours and accusations circulating concerning the trench-digging, most of the accusations concerned the HVO, and that Ms. Podbielski, representing the ICRC, made these accusations directly to Mr. Čerkez and Mr. Nakić and other local commanders who were present at the ECMM meetings.[1338] The Appeals Chamber is of the view that the evidence of Witness Buffini concerns a rumour of trench-digging in general, which cannot be used in relation to trench-digging of detainees from the Vitez Cinema or from any other place attributable to Čerkez. Witness Buffini gave evidence that Čerkez had denied the allegations that the HVO was involved in acts which were in contradiction with the Geneva Conventions.[1339] The Appeals Chamber concludes that based on this testimony, a reasonable trier of fact could find that Čerkez was put on notice that there might have been trench-digging incidents that were not in accordance with the Geneva Conventions. However, from the testimony of Witness Buffini, it is not clear when these meetings were held, in particular whether it was in the timeframe of the Indictment. Witness Buffini further testified that he and Witness Morsink had investigated a report from a local ABiH commander in Kruščica of two bodies that had been recovered after about 22 days in the open and had been brought back to a small village. Witness Buffini and Morsink did not see the actual bodies but were shown a video tape displaying bodies that had been severely mistreated.[1340] The evidence does not indicate anything about the circumstances of the death of the two or the time or place.[1341] The Appeals Chamber concludes that there is lack of evidence surrounding the deaths and that they cannot be linked to trench-digging or to the Vitez Cinema. In any event they cannot be attributed to Čerkez.

919. Witness Buffini also gave evidence that he and Witness Morsink pursued an investigations of the complaints of the HVO's use of people for trench-digging and human shields. He and Witness Morsink asked Čerkez if he would take them to the locations so that they could check the complaint. After a general discussion with Čerkez, they were not escorted but instead visited the location themselves. Witness Buffini stated: "all we saw were freshly dug trenches which had been

[1337] T. 9304.
[1338] T. 9335-9536.
[1339] T. 9335-9536.
[1340] T. 9397-9398.
[1341] T. 9335-9536.

done within 24 hours or so of our visit, but we saw no prisoners and no civilians in the area at all."[1342]

920. The Appeals Chamber concludes that based on this evidence no reasonable trier of fact could reasonably find that Čerkez was responsible under Articles 7(1) and 7(3) of the Statute and therefore acquits Čerkez of inhuman treatment, Count 31 in the Vitez Cinema.

(iv) The Veterinary Station

a. Imprisonment, Count 29 and unlawful confinement, Count 30

921. The Appeals Chamber already held that the crime of unlawful confinement and imprisonment are not established in relation to the Veterinary Station and reversed the Trial Chamber's finding in this part. The Appeals Chamber thus acquits Čerkez of imprisonment (Count 29) and unlawful confinement (Count 30) in relation to the Veterinary Station.

b. Inhuman treatment, Count 31

922. With regard to the inhuman treatment the Trial Chamber found, based on the testimony Fuad Zećo, that "detainees were taken to dig trenches at Krušćica and that two were killed [Jusuf Ibraković and Nesib Hurem]."[1343] This is how the witness described the selection procedure for the trench-digging:

> The HVO solders would come to the building of the veterinarian station, and they would ask Željko Matković to supply them with 10-15 prisoners so that they could take them off. They asked for physically stronger men.[1344]

The Trial Chamber relied on Witness TW17 (based on transcripts from the *Blaškić* trial) in relation to trench digging and the Cinema.[1345] The same witness also describes trench-digging from the Veterinary Station being conducted under circumstances where they were exposed to gunshots and that they were supervised by HVO soldiers from Novi Travnik.[1346] Witness TW17 was mobilized in the TO and therefore not a civilian.[1347]

923. With regard to responsibility under Article 7(1) of the Statute, the Appeals Chamber reiterates that the evidence does not support that Čerkez had any influence over how the detainees

[1342] T. 9342-43.
[1343] T. 6516.
[1344] T. 6517.
[1345] *Blaškić, T.* 2720-21.
[1346] *Blaškić, T.* 2704-20.
[1347] *Blaškić, T.* 2687.

were treated while in detention. The Appeals Chamber holds that the Trial Chamber could have reasonably concluded there was not sufficient evidence presented that Čerkez committed, ordered, instigated or aided and abetted any of the aforementioned crimes.

924. With regard to responsibility under Article 7(3) of the Statute, the Trial Chamber made no findings on – and the evidence does not demonstrate – the involvement of the Viteška Brigade or any other unit over which Čerkez had effective control.[1348]

925. With regard to the trench-digging incident he described, Witness TW17 testified that it was supervised by HVO units from Novi Travnik. No finding was made by the Trial Chamber that Čerkez was responsible for HVO units from Novi Travnik. Neither has the Appeals Chamber found any link between HVO units from Novi Travnik and Čerkez. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that Čerkez was responsible for crimes allegedly committed by HVO Units from Novi Travnik.

926. The Appeals Chamber therefore acquits Čerkez of responsibility under Articles 7(1) and 7 (3) of the Statute for inhuman treatment (Count 31) in the Veterinary Station.

(v) The SDK building

a. Imprisonment, Count 29 and unlawful confinement, Count 30

927. The Appeals Chamber upheld the Trial Chamber's finding that unlawful detention and confinement (Counts 29 and 30) were established.

928. The Appeals Chamber has in relation to the Vitez Cinema discussed Čerkez's authority to release. Witness Mirsad Ahmić gave the evidence that on 26 April 1993, he was brought back to the SDK building and a few days later he was registered before release at the Cinema building by Ms Badrov.[1349] Witness Mirsad Ahmić testified that she had an HVO patch on her uniform but did not clarify which unit she belonged to. However, Ms. Badrov was also a witness in the present case and she testified that she was working in the personnel department of the Viteška Brigade and assisted in the organisation (administrative position).[1350] The Appeals Chamber considers that Čerkez's authority to release extended to the SDK building.

[1348] The evidence of Fuad Zećo stated that the soldiers who picked up the detainees for trench-digging were HVO soldiers. No further questions were asked as to which unit of the HVO were involved. Čerkez was not found by the Trial Chamber to have responsibility for all HVO units and following Čerkez appeal it has been clarified that he only had effective control over the Viteška Brigade.
[1349] T. 13796-802.
[1350] T. 26289

929. The Appeals Chamber finds that a reasonable trier of fact could have found that Čerkez was responsible under Article 7(1) of the Statute as a co-perpetrator for imprisonment (Count 29) and unlawful confinement (Count 30), however not concurrently responsible under Article 7(3) of the Statute.

b. Inhuman treatment, Count 31

930. With regard to inhuman treatment of detainees taken from the SDK building – Mirsad Ahmić, who was taken to dig for five days at Kratine and the detainees who were threatened with an axe and had to work day and night – the Appeals Chamber finds that based on the evidence, no reasonable trier of fact could have found that Čerkez had any link to, or influence over, how the detainees were treated. Further, the Trial Chamber did not find which units or persons were in charge of the detention facility or which units took prisoners for trench-digging. The evidence has not established that any of the responsible units were linked to Čerkez.

931. The Appeals Chamber finds that no reasonable trier of fact could have found beyond reasonable doubt that Čerkez was responsible under Articles 7(1) and 7(3) of the Statute in relation to inhuman treatment (Count 31) in the SDK building, and thus acquits Čerkez.

(vi) Taking civilians as hostages, Count 33

932. The Trial Chamber found Čerkez responsible under Articles 7(1) and 7(3) of the Statute for taking civilians as hostages, a grave breach of the Geneva Conventions recognised by Article 2(b) of the Statute.[1351]

933. The Trial Judgement is unclear as to which factual finding the Trial Chamber considered constituted the hostage situation for which Čerkez was responsible. The Trial Chamber listed four situations were, in its view, civilian prisoners were taken hostage. These were:

> (a) Prisoners from Gaćice (247 civilians) were taken to the HVO headquarters in Hotel Vitez and kept there for some hours as hostages in case of ABiH shelling.
>
> (b) Dr. Muhammad Mujezinović was asked by Mario Čerkez to set up a Commission from 300 detainees held in the basement of the Vitez cinema to call upon the ABiH to stop attacking or all prisoners held in Vitez would be killed.
>
> (c) The detainees at the Dubravica school were told that the ground around the school had been mined and should the ABiH attack the detainees would be blown up along with the building.

[1351] Trial Judgement, paras 836, 843.

> (d) The people in the Stari Soliter building in Novi Travnik were prevented from leaving and were used as leverage by the HVO in negotiations; the same was true of the population of besieged Stari Vitez, according to Major Mark Bower.[1352]

934. The Appeals Chamber notes that the incident described above in paragraphs (a) and (d) relate to Hotel Vitez in Vitez and the Stari Soliter in Novi Travnik, for which no charge relating to Čerkez can be found in the Indictment. The Appeals Chamber notes that Čerkez was already acquitted by the Trial Chamber in relation to the Dubravica Elementary School. The Appeals Chamber therefore considers that the only remaining incident which could serve as the basis for Čerkez's responsibility is the incident described above by Witness Dr. Muhammad Mujezinović in paragraph 784(b).

935. The Appeals Chamber also notes that, in the part where the Trial Chamber discussed the role of Čerkez, it only referred to the incident described above by Witness Dr. Muhammad Mujezinović. The Trial Chamber found on paragraph 788 of the Trial Judgement:

> (viii) On 19 April 1993, according to Dr. Mujezinović, Mario Čerkez told him that the ABiH had broken through the front line at Dubravica: the witness had to ring the 3rd Corps Commander and say that there were 2,223 prisoners and that if the Muslim advance continued on Vitez he would order the killing of the prisoners. The witness did so and the Commander agreed to halt the advance.[1353] He was cross-examined about his witness statement of 1995, in which he said that Ivica Šantić and Pero Skopljak threatened that, if the ABiH attacked, they would kill the people in the basement plus 2,323 prisoners. The witness attributed the difference to poor translation: he never said it.[1354]

936. Čerkez's responsibility for this crime is interlinked with the question of whether the crime was established, since a threat is an element of the crime and in this case the threat was found by the Trial Chamber to have been made by Čerkez. The Appeals Chamber notes that the Trial Chamber found that Witness Mujezinović testified that Mario Čerkez threatened to order the killing of the 2,323 detainees if the ABiH continued their advance on Vitez. The Trial Chamber also held that when it was put to the witness that he had said in a previous statement from 1995 that the threat had been made by Ivica Šantić and Pero Skopljak and not by Čerkez, and the witness said that he had not said so, stating that the mistake must be due to poor translation.

937. The Trial Chamber further relied on Witness G, who describes how a Muslim delegation from the basement of the Vitez Cinema Building requested to meet with representatives of the Croats. The Muslim delegation first met with Boro Jozić and Zvonimir Čilić. Witness G further testified that "since Boro Jozić and Mr. Zvonimir Čilić did not have any political or military

[1352] Trial Judgement, para. 784 (footnotes omitted).
[1353] T. 2199-2200.
[1354] T. 2343-46.

authority, we asked that the meeting and talk be attended by someone of greater competence; that is Mr. Pero Skopljak and Mr. Ivan Šantić."[1355]

938. The Appeals Chamber considers that no reasonable trier of fact could find beyond reasonable doubt that it was Čerkez who threatened. The only witness testifying to that effect had in a previous statement held that two other persons had in fact made the threats and that the testimony of Witness G also states that present at the meeting were Ivica Šantić and Pero Skopljak. Further, Witness G who also participated in the meetings made no reference to Čerkez or of a threat to kill the prisoners. Finally, the Appeals Chamber notes that the Trial Chamber did not refer to Witness L and Witness Kadir Džidić in relation to this incident (even though the Trial Chamber had relied on them extensively in relation to the detention). Both of these witnesses described the meetings the Muslim delegation had with the Croat side and that none of them refers to Čerkez, but stated that Pero Skopljak and Ivica Šantić were the individuals in charge of the negotiating. The Witnesses also describe that the negotiations ended up with a joint statement, announced by Dr. Muhammad Mujezinović on the Muslim side.[1356]

939. The Appeals Chamber further notes that the Trial Chamber did not discuss the required elements for Article 7(3) responsibility. The two persons present on the HVO side during the negotiations were Ivica Šantić and Pero Skopljak. The Trial Chamber has made no finding that Čerkez had *de jure* or *de facto* control over these two persons. In fact, none of them were in the same chain of command as Čerkez. Ivica Šantić was described as the president of the HVO municipality (civilian side) and Pero Skopljak was the head of the HDZ.[1357] Therefore, the Appeals Chamber acquits Čerkez under both Articles 7(1) and 7(3) of the Statute for taking civilians as hostages (Count 33), reversing the Trial Chamber's conviction.

(vii) Inhuman treatment (human shields), Count 35

940. The Trial Chamber found Mario Čerkez guilty of inhuman treatment (human shields) under Article 7(1) and 7(3) of the Statute. Answering a letter of the Pre-Appeal Judge, the Prosecution filed on 14 May 2004, the "Prosecution's Notice Regarding Conviction of Mario Čerkez for Count 35 in the Judgement of the Trial Chamber", whereby the Prosecution (correctly) informed the Appeals Chamber that "there appear to be no factual findings in the Trial Chamber's Judgement regarding the use of human shields". Accordingly, the Appeals Chamber reverses the Trial Chamber's finding that the crime was established and acquits Čerkez of inhuman treatment (human shields), Count 35.

[1355] T. 3903-04.

(c) Persecutions (a crime against humanity), Count 2

(i) Alleged error in finding that there was a widespread or systematic attack

941. Čerkez submits that he was found guilty under Count 2 – persecution – and that the Indictment included the municipalities of Vitez, Novi Travnik and Busovača. Čerkez asserts that there was insufficient evidence to find that he committed any offences in the areas of Busovača and Novi Travnik.[1358]

942. The Prosecution responds that Čerkez is found guilty only in relation to Stari Vitez, Vitez and Donja Večeriska under Count 2 (persecutions).[1359]

943. Čerkez submits that there was insufficient evidence for the Trial Chamber to conclude that there was a widespread or systematic persecution on ethnic or religious grounds. He submits that violence became a *modus vivendi*, because neither the central nor the local government could function.[1360] He further submits that there were efforts from both sides to maintain peace and that the "ethnically qualified incidents" were the result of lack of government and not the result of the HZ HB's political plan.[1361] Čerkez contends that the Trial Chamber erred in finding that "the HVO launched attacks against the Muslim population in the Lašva Valley based on political, racial and religious grounds, which were results of the discriminatory policy oriented towards civilians and originated from a widespread or systematic policy based on national, political and religious grounds – in other words, that the HVO's attack was motivated on or initiated with discriminatory intent of the perpetrators."[1362] Čerkez submits that the evidence does not clearly show that it was unquestionably a case of widespread or systematic attack against the civilian population since it was primarily a conflict between two armed forces.[1363]

944. The Appeals Chamber has already considered similar arguments in the context of Kordić's appeal relating to persecutions and found that a reasonable trier of fact could have found that elements common to Article 5 of the Statute (crimes against humanity), namely a widespread or systematic attack, are established. The Appeals Chamber therefore also dismisses Čerkez's appeal in this part on the basis that it was reasonable to regard the crimes seen from his point of view, as being in any event systematic..

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[1356] Witness Kadir Džidić, T. 4023-25, 4027-29; Witness L, T. 6903-04.
[1357] Witness L, T. 6903-04, 6907.
[1358] Čerkez Appeal Brief, para. 40, p. 90.
[1359] Prosecution Response, para. 10.72.
[1360] Čerkez Appeal Brief, para. 41, p. 90.
[1361] Čerkez Appeal Brief, para 41, p. 90.
[1362] Čerkez Appeal Brief, para. 46, p. 93.
[1363] Čerkez Appeal Brief, para. 46, p. 93.

(ii) Alleged error in finding that Čerkez acted with discriminatory intent

945. Čerkez argues that there is no evidence leading to the conclusion that he acted with discriminatory intent for persecution and he advances evidence relating to the time prior to 16 April 1993.[1364] Čerkez submits that he did not have the required discriminatory intent since the Trial Chamber did not distinguish civilians from soldiers that were killed or wounded during the conflict and that the civilians were not targeted.[1365] He argues that the HVO attacks were not persecutory but rather that the HVO was attacking another army.

946. The Prosecution responds that the Trial Chamber found Čerkez guilty under Count 2 – persecution – for his participation, as Commander of the Viteška Brigade, in the attacks on Vitez, Stari Vitez and Donja Večeriska in April 1993 and that therefore no response is required in relation to this time period.[1366] The Prosecution responds that the Trial Chamber "found that the evidence clearly pointed to organised HVO attacks in Vitez, Stari Vitez and Večeriska."[1367] The Prosecution submits that "evidence presented by the Prosecution and relied on by the Trial Chamber showed that in Vitez municipality alone 172 Muslims were killed and 5000 expelled, 420 buildings were destroyed as well as two mosques, two Muslim seminaries and two schools."[1368] It is further submitted that based on this evidence, taken in conjunction with Čerkez's involvement, the Trial Chamber held that the necessary *mens rea* of Čerkez is to be inferred from his part in the campaign which consisted of commanding the troops involved in the attacks on Vitez, Stari Vitez and Donja Večeriska.[1369] The Prosecution further responds that Čerkez's assertions are not substantiated and do not meet the required standard of review to show that the findings of the Trial Chamber are unreasonable.

947. The Appeals Chamber agrees with the Prosecution that the Trial Chamber found Čerkez responsible solely for persecutions for acts committed in April 1993 and therefore Čerkez's appeal relating to other time periods needs no further discussion.

948. Furthermore, the Appeals Chamber notes that the Trial Chamber did not make an explicit finding as to Čerkez's discriminatory intent. It found however that "[t]he accused played his part in that campaign by commanding the troops involved in some of the incidents. As such he was a co-perpetrator; and that he had the necessary *men rea* may [sic] be inferred, also in his case, from his

[1364] Čerkez Appeal Brief, paras 42-43.
[1365] Čerkez Appeal Brief, para. 44; Čerkez Reply, para. 106.
[1366] Prosecution Response, para. 10.74.
[1367] Prosecution Response, para. 10.75, referring to Trial Judgement para. 649.
[1368] Prosecution Response, para. 10.75, referring to Trial Judgement, para. 646.
[1369] Prosecution Response, para. 10.75, referring to Trial Judgement, para. 831.

part in the campaign."[1370] Thereby it implicitly found that all the elements of persecutions were satisfied.

949. Before considering whether Čerkez had the requisite *mens rea*, the Appeals Chamber notes that unlawfully detaining is the *actus reus* relevant for Čerkez's conviction of persecutions. Čerkez was found responsible as a co-perpetrator under Article 7(1) of the Statute for imprisonment in the SDK buildings and Vitez Cinema in Vitez, during the period 16 April to 22 April 1993. The Appeals Chamber notes that these acts, whether considered in isolation or in conjunction, must constitute the crime of persecutions of a gravity equal to the crimes listed in Article 5 of the Statute[1371] and holds that the acts constituting imprisonment satisfy this requirement.

950. The Trial Chamber found that Čerkez's acts occurred at the "high point of persecution".[1372] Further, the detainees in the SDK buildings and the Vitez Cinema were solely Bosnian Muslims. The Appeals Chamber therefore is satisfied that it was reasonable to find that Čerkez knew that the detainees were Muslims and that they were detained because they were Muslims. It becomes evident that a specific ethnic group is discriminated against in such a situation where all the detainees belong to this group while the guards belong to another ethnic group. Furthermore, in Čerkez's position it would have been highly unlikely for him to be ignorant of the ongoing discrimination against the Muslim detainees. Rather, by knowingly committing his acts he manifested the intent to discriminate against them.

951. The Appeals Chamber has considered the context of the factual findings of the Trial Chamber and agrees that Čerkez shared the discriminatory intent.

(iii) Conclusion

952. In conclusion, the Appeals Chamber therefore upholds the Trial Chamber's finding that Čerkez is responsible as a co-perpetrator for persecutions, a crime against humanity punishable under Articles 5(h) and 7(1) of the Statute in relation to the Vitez Cinema and the SDK building in the second half of April 1993.

[1370] Trial Judgement, para. 831.
[1371] See previous case-law, *Krnojelac* Appeal Judgement, paras 119, 221.
[1372] Trial Judgement, para. 831.

## D. **Kordić's Responsibility**

### 1. Introduction

953. The Appeals Chamber notes that Kordić raised generally that the Trial Chamber erred in finding that he culpably participated in the crimes and had the necessary *mens rea*. He has further raised specific grounds relating to Novi Travnik, Busovača, and Kiseljak. Kordić has also appealed that he was "associated with the giving of orders for detention" and "the order of and coming into existence of the detention facilities in the Lašva Valley," which is considered below.

### 2. Novi Travnik

954. With regard to wanton destruction not justified by military necessity, Count 38 and plunder of public or private property, Count 39, the Appeals Chamber upheld the Trial Chamber's finding that the crimes are established in Novi Travnik between 19 and 26 October 1992.[1373] The Trial Chamber did not include Novi Travnik in its finding on persecutions.

955. Kordić submits that he was only present as a politician not as a military leader in Novi Travnik.[1374] The Prosecution responds that the Trial Chamber relied on corroborative documentary evidence and witness testimonies to determine Kordić's military involvement.[1375] Kordić replies that the Trial Chamber found that he had a clear role leading the fighting in Novi Travnik, but never clarified what that role was.[1376]

956. The Trial Chamber considered the Prosecution's allegation that Dario Kordić was directly involved in the fighting in Novi Travnik, where he was acting as Commander of the HVO, as well as Kordić's contention that, he was not in command of the military operations since they were under the command of Vlado Jurić; that the ABiH and not the HVO initiated the attack; and that Kordić was not considered important enough to be included in subsequent cease-fire negotiations.[1377] The Trial Chamber held that "in a CBOZ report on the situation in Novi Travnik, dated 21 October 1992, over the names Blaškić and Kordić, it is stated that 'while defence operations are being conducted … Dario Kordić and I are in Novi Travnik continuously leading the military operations with deep knowledge of the situation and by keeping all the forces under control'".[1378] The Trial Chamber concluded that it:

[1373] Trial Judgement, paras 805, 808.
[1374] Kordić Appeal Brief, Vol. I, p. 114.
[1375] Prosecution Response, para. 5.20.
[1376] Kordić Reply Brief, p. 61.
[1377] Trial Judgement, para. 529.
[1378] Trial Judgement, para. 528(d)(iii).

> accepts the evidence of Colonel Stewart, supported, as it is, by the documentary evidence and finds that Dario Kordić had a clear role leading the HVO in the fighting in Novi Travnik.[1379]

957. The Appeals Chamber finds that Kordić has not shown that the Trial Chamber erred in finding that Kordić was involved in the fighting in Novi Travnik. With regard to Kordić's *mens rea*, the Trial Chamber did not find that the attack on Novi Travnik was part of the persecutory campaign,[1380] but only found in general terms that "in those cases where Kordić participated in the HVO attacks he intended to commit the crimes associated with them and did so".[1381] The Appeals Chamber considers that the fact that Kordić participated in, and was associated with the giving of orders does not mean that he also had the requisite *mens rea* for these crimes. Leading military operations does not equate with involvement in crimes. The Appeals Chamber considers that the Trial Chamber's finding that Kordić intended the crimes associated with the attack was a finding no reasonable trier of fact could have made. The Appeals Chamber therefore reverses the Trial Chamber's finding that Kordić was guilty under Article 7(1) of the Statute for wanton destruction not justified by military necessity (Count 38) and plunder (Count 39) for Novi Travnik in October 1992. Kordić is thus acquitted of these charges.

### 3. Busovača

958. In relation to Busovača, the Appeals Chamber reversed the Trial Chamber's findings that inhumane acts, Count 10, and inhuman treatment, Count 12, were established. Kordić is therefore acquitted of these charges in relation to Busovača.

959. With regard to unlawful attack on civilians (Count 3), unlawful attack on civilian objects (Count 4); wilful killing (Count 8); murder (Count 7); wanton destruction not justified by military necessity (Count 38) and plunder of public or private property (Count 39), the Trial Chamber's findings on the crimes as such were upheld. The Appeals Chamber will now discuss Kordić's responsibility for these crimes.

960. Kordić argues that his role at the time that the civil war was developing between the Muslims and the Bosnian Croats was only that of a political leader.

961. The relevant finding of the Trial Chamber as to the role of Kordić was:

> Dario Kordić was implicated in the attack on Busovača as a leader exerting both political and military authority. The Trial Chamber draws this inference from the evidence of the audio-tape, the documentary evidence and the evidence of the accused's use of an HQ and his control over the roads. The Trial Chamber is satisfied that there is no truth in the evidence put forward by the

[1379] Trial Judgement, para. 527.
[1380] See Trial Judgement, para. 827.
[1381] Trial Judgement, para. 834.

Defence that the accused played no military part in the conflict and was simply helping his people.[1382]

962. The audio-tape referred to above consists of the tape recording of a telephone conversation between Col. Blaškić and Kordić. The witness who gave evidence concerning this intercept said that it took place on 23 or 24 January 1993.[1383] The label on the tape refers to "24.01.93" and the Trial Chamber found that the Prosecution's contention that the conversation took place that day at a time when Blaškić was in Kiseljak and Kordić was in Busovača, would be consistent with the events at Kaćuni.[1384] The Trial Chamber found that the recording demonstrates more than mere bravado, as submitted by the Defence, and shows Kordić participating in the conduct of military affairs and, seemingly, enjoying it.[1385] The Trial Chamber also relied on documentary evidence showing that Kordić gave various orders and made various requests for the use of artillery in late January and early February 1993, *inter alia:*

963. Exh. Z447.1, is a statement, dated 8 February 1993, from the CBOZ Chief of Artillery referring *inter alia* to: (1) a telephonic request by "Col. Kordić […] at about 2000 hours" on 26 January 1993 that artillery (a NORA M-84) be directed against specific tanks; (2) a request by "Colonel Kordić" on 28 January 1993 that specific targets be "processed with the 107mm VBR" artillery piece; (3) a request by "Colonel Kordić" on 4 February 1993 "at 1215 hours" that "Dusina and the village of Merdani be processed with the VBR" artillery piece; (4) the use of a 128mm VBR on two occasions "at the order of Colonel Dario Kordić." In the War Diary there is an entry on 29 January 1993 that "Kordić called and asked for artillery fire to be opened on the region of Bešići." Exh. Z439.2 is an order from Col. Blaškić, dated 4 February 1993 at 12:40 p.m., to fire 107mm VBR rockets "on the village of Dusina" in response to an ABiH attack, and "on the basis of an oral order by Colonel Dario Kordić."

964. On 24 January 1993, at a press conference at Busovača, Kordić warned the Muslim population "Do not play with fire. If you attack any other municipalities not only will there be no Bosnia and Herzegovina left but there will be no Muslims left",[1386] as well as oral evidence showing that he had a military headquarters in Busovača, in which he was seen acting as commander on 4 February 1993,[1387] and that he had control over roads and roadblocks in the area.[1388]

[1382] Trial Judgement, para. 586.
[1383] Trial Judgement, para. 577, footnote 1038 referring to Edin Husić.
[1384] Trial Judgement, para. 577.
[1385] Trial Judgement, para. 578.
[1386] Exh. Z427.1 (UNPROFOR Report).
[1387] Trial Judgement, para. 581-582 referring to testimonies of Major Jennings and Col. Stewart.
[1388] Trial Judgement, para. 583.

965. As to Kordić's argument that in any case, there is no credible evidence that would link him to the commission of crimes, the relevant finding of the Trial Chamber is as follows:

> The Trial Chamber finds that in those cases where Kordić participated in the HVO attacks he intended to commit the crimes associated with them and did so. His role was as political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes. In making this finding the Trial Chamber relies on the evidence already referred to in relation to persecution. As a result the Trial Chamber finds the accused Dario Kordić liable under Article 7(1) on the following counts:
>
> (a) Count 3 (unlawful attacks on civilians) and Count 4 (unlawful attacks on civilian objects), Count 7 (murder) and Count 8 (willful killing), Count 10 (inhumane acts ) and Count 12 (inhuman treatment) in relation to […] Busovača (January 1993).[1389]

966. Furthermore, the Trial Chamber held at paragraph 829 of the Trial Judgement:

> The evidence on which the Trial Chamber relies in making [its] finding [related to persecution] is of the accused's positions as Vice-President of the HDZ-BiH and President of the Busovača HDZ, his role in the HVO take-over and attack on Busovača and his role in the attacks in the Lašva Valley and Kiseljak and in the confinement of Muslims.

967. Kordić does not substantiate his argument that the evidence in question was not reliable.

968. The Appeals Chamber has found that a reasonable trier of fact could have concluded that numerous civilians were targeted and killed in the town of Busovača in January 1993 and that murder as a crime against humanity, as well as the crime of unlawful attack on civilian objects, were committed in this town in January 1993. The Appeals Chamber refers further to the Trial Chamber's findings as to the role of Kordić in the campaign of persecution, including his role in the HVO takeover of municipalities, including Busovača, and his role in the events leading to the conflict, and on the eve of the conflict. The Appeals Chamber recalls that the Trial Chamber's finding that "the recording demonstrates more than mere bravado and shows Dario Kordić participating in the conduct of military affairs and, seemingly, enjoying it"[1390] was a finding a reasonable trier of fact could have made.[1391]

969. The Appeals Chamber finds that a reasonable trier of fact could have concluded that Kordić also intended the crimes associated with the attack to be committed and that his own acts were clearly linked to the armed conflict and formed part of the widespread and systematic attack that occurred in Busovača in January 1993. The attack also occurred in the context of the HVO takeover of Busovača, as discussed by the Trial Chamber in paragraphs 494-498 of the Trial Judgement. As the Appeals Chamber has already discussed, Kordić's role in the persecution was his political activities and his public speeches. According to the Trial Chamber, the attack in

[1389] Trial Judgement, para. 834.
[1390] Trial Judgement, para. 578.
[1391] Section VI.D.1(a)(iii).

Busovača was "the first really serious conflict in the war between Bosnian Croats and Muslims".[1392] The attack was directed against Muslim civilians and civilian objects and aimed at the civilian population: Muslim civilians were killed, expelled, and their property destroyed. It was the Trial Chamber's finding that Kordić as a political leader with military influence was involved in the planning and ordering of these crimes. The Appeals Chamber concludes that the Trial Chamber's finding that Kordić had the requisite *mens rea* for these crimes was reasonable.

970. The Appeals Chamber therefore upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilians (Count 3), unlawful attack on civilian objects (Count 4); murder (Count 7); wilful killing (Count 8); wanton destruction not justified by military necessity (Count 38) and plunder of public or private property (Count 39) in Busovača in January 1993.

### 4. Lašva Valley, April 1993

971. Kordić argues that there was no explicit finding that he had the requisite *mens rea* for these crimes.[1393] Kordić argues that the fighting in these areas, between the Hotel Vitez and Stari Vitez (an ABiH stronghold), represented typical fighting in built-up areas with collateral impact on properties and persons, and that there was no evidence that he participated, or was otherwise complicit, in it.[1394] Kordić further argues that, contrary to Ahmići, no massacres took place in the three surrounding villages, but, rather, they were caught up in the general fighting in mid-April 1993. He argues further that the Trial Chamber points to organised HVO attacks with regards to the villages in question, which by itself does not constitute war crime.[1395]

972. The Prosecution responds that the Trial Chamber substantiated its conclusion that the evidence clearly pointed to organised HVO attacks in these areas, and that the underlying offences were established.[1396] The Prosecution responds that the three villages were part of the Ahmići area and intertwined with Ahmići proper, as admitted by Čerkez himself; the orders related to Ahmići therefore applied to them.[1397] Furthermore, this attack was to be seen as part of a wider attack on Vitez and the Muslim villages of the Lašva Valley.[1398] It argues further that Kordić's conviction

[1392] Trial Judgement, para. 565.
[1393] Appeals Hearing, T. 264.
[1394] Kordić Appeal Brief, Vol. I, p. 116.
[1395] Kordić Appeal Brief, Vol. I, p. 115
[1396] Prosecution Response, para. 5.23.
[1397] Prosecution Response, para. 5.21.
[1398] Prosecution Response, para. 5.23.

was based on his role in a campaign and not on his involvement in the day-to-day operations of the attacks.[1399]

973. The Appeals Chamber notes that the Trial Chamber did not make an explicit finding that Kordić had the requisite *mens rea*. The Trial Chamber only found "that in those cases where Kordić participated in the HVO attacks, he intended to commit the crimes associated with them and did so. His role was a political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes."[1400]

974. The Appeals Chamber notes that the Trial Chamber held in relation to persecutions that

> there was a campaign of persecution throughout the Indictment period in Central Bosnia (and beyond) aimed at the Bosnian Muslims. This campaign was led by the HDZ-BiH and conducted through the instruments of the HZ H-B and the HVO and orchestrated from Zagreb.[1401]

The Appeals Chamber concluded that there was persecutions in Busovača in January 1993, in the Lašva Valley in April 1993, and in Kiseljak in June 1993, and deemed it not to be necessary to identify the main orchestrators of this campaign. Only the responsibility of Kordić is relevant for the Appeals Chamber. It considers that following the meeting on 15 April 1993, a general plan existed to expel the Muslim civilians and to destroy civilian houses, a plan which had no military justification, but was aimed at the civilian population.

975. At the meeting on 15 April 1993, the order to attack at 05:30 a.m. and the order that "all Muslim men of military age were to be killed while the civilians were not to be killed, but expelled and the houses set on fire" were discussed, and the Trial Chamber found at paragraph 631 of the Trial Judgement that Kordić was present at the meeting of politicians which authorised the 16 April 1993 attack; that he thus participated as the senior regional politician in the planning of the military operation and attack against Ahmići (and other Lašva Valley villages), an operation which was aimed at "cleansing" these areas of Muslims.

976. The Appeals Chamber considers that this general plan included the whole of the Lašva Valley and that the crimes explicitly discussed were to kill military aged men, expel civilians, and destroy houses. For these crimes Kordić had direct intent. Kordić approved the general plan knowing that these crimes would be committed, and with the awareness of the substantial likelihood that other crimes such as killings of civilians**,** unlawful detention of civilians, and plunder would be

[1399] Prosecution Response, paras 5.24-5.26.
[1400] Trial Judgement, para. 834.
[1401] Trial Judgement, para. 827.

committed in the execution of this general plan.[1402] Planning with such awareness has to be regarded as accepting these crimes.

### 5. Kiseljak municipality

#### (a) April 1993

977. Kordić argues that he was not convicted in relation to Stupni Do because the Trial Chamber concluded that he did not have control of Kiseljak, and since he did not have control in October 1993 over a specific limited operation, he could not have had control over the municipality during the April attack and the June offensives. He also relies on the testimony of Brigadier Wingfield-Heyes that Kiseljak was cut off from the Lašva Valley.

978. The Prosecution responds that there is a clear difference with the Stupni Do case: Kordić's conviction for the attacks on Kiseljak arose from his active participation in the common design to cleanse the Lašva Valley of Muslims.[1403]

979. The Appeals Chamber finds that the fact that Kordić was acquitted for Stupni Do does not affect his conviction for the attacks in Kiseljak municipality in April 1993 and dismisses Kordić's arguments in this part.

980. With regard to the April 1993 attacks in Kiseljak municipality, the Trial Chamber found that "Blaškić would not have launched the attacks without political approval which the Trial Chamber accepts meant the approval of the local leadership in the person of Dario Kordić. The clear inference is that the latter was thus associated with the giving of orders to attack the villages, including Rotilj."[1404]

981. The Appeals Chamber is of the view that the Trial Chamber's presumption that the reference to the fact that "we have informed the leadership of the HZ H-B of everything"[1405] leads to the conclusion that Kordić must have approved the order, is in itself insufficient for a reasonable trier of fact to find that Kordić is criminally responsible. Kordić's responsibility for the crimes committed in Kiseljak municipality in connection with the HVO military attack on 18 April 1993 emanates from the Trial Chamber finding that Kordić was at the meeting of politicians which authorised the 16 April 1993 attacks, and that he thus participated as the senior regional politician in

[1402] Trial Judgement, para. 377.
[1403] Prosecution Response, para. 5.35.
[1404] Trial Judgement, para. 669.
[1405] Trial Judgement, para. 668 (footnotes omitted).

the planning of the military operation and attack against Ahmići (and the other Lašva Valley villages), an operation which was aimed at "cleansing" these areas of Muslims.

982. The fact that the crimes started only on 18 April 1993 in Kiseljak Municipality was not of importance for the Trial Chamber. The Appeals Chamber is of the view that a reasonable trier of fact could have found that the crimes in Kiseljak municipality were committed in furtherance of the planning and criminal orders approved by Kordić at the First Meeting on 15 April 1993. The Appeals Chamber considers that Kordić; by approving the general criminal plan discussed on the 15 April 1993 meeting, acted with the awareness that there was a substantial likelihood that the criminal conduct would be repeated in the following attacks by the HVO in the Lašva Valley. The Appeals Chamber thus finds that Kordić was guilty under Article 7(1) of the Statute for planning the crimes committed in Kiseljak municipality in April 1993. This finding is applicable on the crimes committed in Rotilj, the town of Kiseljak, Svinjarevo, Gomionica, Višnjica, Polje Višnjica, Behrići, and Gromiljak.

(b) June 1993

983. With regard to the June offensives in Kiseljak municipality – Tulica and Han Ploča-Grahovci – the Trial Chamber found that:

> these offensives were another manifestation of the HVO design to subjugate the Muslims of Central Bosnia. As with the offensives against the villages of the same municipality in April 1993, the Trial Chamber is satisfied that the attacks would not have been launched without the approval of the local political leadership in the person of Dario Kordić. The fact of his direct involvement in the case is confirmed by the evidence of his presence in Kiseljak during the offensive. It is therefore, inferred that he was associated with the giving or [sic] orders to attack these villages, including Tulica and Han Ploča/Grahovci.[1406]

984. The Trial Chamber did not identify any order issued for these offensives, neither did it identify any other evidence that supported that Kordić was associated with the attack. The Trial Chamber discussed Kordić's presence in Kiseljak in June, which is based on the evidence of Witness Y. The Trial Chamber found that:

> evidence of Dario Kordić's presence in Kiseljak during the June 1993 conflict was given by Witness Y who saw him that month in Kiseljak barracks. Witness Y's evidence was that on 14 June 1993 he was arrested in Topolje with other villagers and taken to Kiseljak barracks where they were all detained in a room in a building. Within two hours of his arrival there he was beaten. His head was bleeding and he was told to wash in a trough in the hall of the building. As he was washing he saw Dario Kordić coming out of the building. Kordić was 8-14 metres away. There were HVO soldiers around Kordić who came out first with others behind him. The witness spent three days in the barracks and was then transferred to the municipal building where he saw Kordić again 23 or 24 days later. On behalf of the Defence it was disputed that Mr. Kordić was in the barracks as alleged by the witness. However, the latter said that he had seen the accused there for about five seconds, time enough for the accused to take five or six steps. He had seen the accused many times in Kiseljak in 1992-1993, sometimes in uniform, black or camouflage, or with a gun in

[1406] Trial Judgement, para. 726.

his belt and always accompanied and with bodyguards. He had also seen the accused many times on television: the first time when Kordić was making a speech.[1407]

985. Based on this discussion, the Appeals Chamber considers that the Trial Chamber took great care in evaluating the credibility of Witness Y.[1408]

986. The Appeals Chamber considers that Kordić, by participating in the planning during the First Meeting and by approving the orders for the general criminal plan in April 1993, also had the awareness of the substantial likelihood and accepted that crimes would occur in Kiseljak municipality in June 1993. The Appeals Chamber therefore finds that a reasonable trier of fact could have found Kordić guilty under Article 7(1) of the Statute for planning and ordering the crimes established in Kiseljak municipality in June 1993.

### 6. Findings in relation to the different places

#### (a) Merdani

987. The Appeals Chamber reversed the Trial Chamber's finding that wanton destruction not justified by military necessity, Count 38, was established in relation to Merdani. Kordić is therefore acquitted of this charge.

#### (b) Lončari

988. The Appeals Chamber reversed the Trial Chamber's finding that plunder, Count 39, occurred in Lončari. Kordić is thus acquitted of this charge in relation to Lončari.

#### (c) Očehnići

989. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering wanton destruction not justified by military necessity (Count 38) in Očehnići.

#### (d) Večeriska/Donja Večeriska

990. The Appeals Chamber already reversed the Trial Chamber's findings that unlawful attack on civilians (Count 3); murder (Count 7); wilful killing (Count 8); inhumane acts (Count 10); inhuman

[1407] Trial Judgement, para. 724, citing Witness Y, T. 11000-01, 11004-11, 11081-87, 11097-99.
[1408] The Trial Chamber held at para. 725 of the Trial Judgement that: "In considering this evidence the Trial Chamber bears in mind that it relates to an alleged identification of the accused by a witness. Such evidence must be approached with caution because of the ease with which even an honest and convincing witness may be mistaken. Thus it is necessary to look at the circumstances of the identification. The witness knew who the accused was and had seen him often before. He was, therefore, in a position to recognise the accused. His view of him was for more than a split

treatment (Count 12); plunder of public or private property (Count 39) were established in Večeriska/Donja Večeriska. Kordić is thus acquitted of these charges.

991. The two counts for which the Appeals Chamber will consider Kordić responsibility are Count 4 (unlawful attack on civilian objects) and Count 38 (wanton destruction not justified by military necessity).

992. The Appeals Chamber found above that no reasonable Trial Chamber could have found beyond reasonable doubt that this first round of destruction that occurred in Donja Večeriska on 16 and 17 April 1993 was directed at civilian objects. However, in light of Witness V's testimony that further destruction occurred between 18 and 21 April 1993, at a time when Muslim forces had left the village for Grbavica, having run out of ammunition and civilians and unarmed TO members took refuge at the BritBat Compound in Divjak, the Appeals Chamber found that a reasonable Trial Chamber could have concluded that civilian objects were deliberately targeted in the second round of destruction.

993. The Appeals Chamber is of the view that a reasonable trier of fact could have concluded beyond reasonable doubt that the unlawful destruction committed in Donja Večeriska was committed in furtherance of the order approved by Kordić at the 15 April meeting to set Muslim houses on fire in the Lašva Valley villages. The Appeals Chamber thus upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilian objects (Count 4) and wanton destruction not justified by military necessity (Count 38) in Večeriska/ Donja Večeriska from 18 to 21 April 1993.

(e) Gaćice

994. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering wanton destruction not justified by military necessity, Count 38, in Gaćice on 20 April 1993.

(f) Vitez/Stari Vitez

995. The Appeals Chamber overturned the Trial Chamber's findings that Counts 3, 4, 7, 8, 10, 12, 38, and 39, in relation to Vitez/Stari Vitez and Count 43 in relation to Stari Vitez were established. Kordić is therefore acquitted of these charges.

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second and he had the opportunity to make a firm identification. His evidence was not shaken in cross-examination. The Trial Chamber, therefore, accepts his evidence."

(g) Ahmići

996. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilians (Count 3); unlawful attack on civilian objects (Count 4); murder (Count 7); wilful killings (Count 8); inhumane acts (Count 10); inhuman treatment (Count 12), wanton destruction not justified by military necessity (Count 38) and plunder of public or private property (Count 39), destruction or wilful damage to institutions dedicated to religion or education (Count 43) in Ahmići.

(h) Šantići

997. The Appeals Chamber notes that it has reversed the Trial Chamber's finding that inhumane acts (Count 10) and inhuman treatment (Count 12) occurred in Šantići. Kordić is thus acquitted of these charges.

998. However, the Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilians (Count 3); unlawful attack on civilian objects (Count 4), murder (Count 7), wilful killings (Count 8), and wanton destruction not justified by military necessity (Count 38) in Šantići.

(i) Pirići, Nadioci

999. The Appeals Chamber notes that it has reversed the Trial Chamber's finding that unlawful attack on civilian objects (Count 4); inhumane acts (Count 10); inhuman treatment (Count 12); wanton destruction not justified by military necessity (Count 38) were established. Kordić is thus acquitted of these charges in relation to Pirići, Nadioci.

1000. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilians (Count 3); murder (Count 7); and wilful killings (Count 8) in relation to Pirići, Nadioci.

(j) Rotilj

1001. The Appeals Chamber notes that it has reversed the Trial Chamber's finding that unlawful attack on civilian objects (Count 4) and wanton destruction not justified by military necessity (Count 38) occurred in Rotilj. Kordić is thus acquitted of this charge.

1002. The Appeals Chamber upholds the Trial Chamber's findings that Kordić is guilty under Article 7(1) of the Statute for planning and ordering unlawful attack on civilians (Count 3), murder

(Count 7), wilful killings (Count 8), inhumane acts (Count 10); inhuman treatment (Count 12), and plunder (Count 39) in April 1993 in Rotilj.

(k) Town of Kiseljak

1003. The Appeals Chamber overturned the Trial Chamber's finding that wanton destruction not justified by military necessity (Count 38), and plunder (Count 39), were established in April 1993, thus Kordić is acquitted of these charges.

(l) Svinjarevo, Gomionica, Višnjica, Polje Višnjica, Behrići, Gromiljak

1004. The Appeals Chamber overturned the Trial Chamber's finding that plunder (Count 39) was established in April 1993 in Svinjarevo. Kordić is acquitted of this charge.

1005. The Appeals Chamber however upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) of the Statute for planning and ordering wanton destruction not justified by military necessity (Count 38) in April 1993 in Svinjarevo, Gomionica, Višnjica, Polje Višnjica, Behrići, Gromiljak and plunder of public or private property (Count 39) in April 1993 in Gomionica.

(m) Tulica

1006. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty pursuant to Article 7(1) of the Statute for planning and ordering murder (Count 7); wilful killings (Count 8); inhumane acts (Count 10); inhuman treatment (Count 12), wanton destruction not justified by military necessity (Count 38), and plunder (Count 39) in June 1993 in Tulica.

(n) Han Ploča-Grahovci

1007. The Appeals Chamber notes that it reversed the Trial Chamber's findings that inhumane acts (Count 10), inhuman treatment (Count 12) were established and thus acquits Kordić of these charges in relation to Han Ploča-Grahovci.

1008. However, the Appeals Chamber upholds the Trial Chamber's findings that Kordić is guilty under Article 7(1) of the Statute for planning and ordering murder (Count 7), wilful killings (Count 8), wanton destruction not justified by military necessity (Count 38), plunder (Count 39), and destruction or wilful damage to institutions dedicated to religion or education (Count 43) in June 1993.

## 7. Detention crimes

### (a) Alleged error in finding that Kordić was associated with orders for the detention of Bosnian Muslims and "the ordering and coming into existence of the detention facilities" in the Lašva Valley

1009. Kordić argues that the Trial Chamber erred in concluding that he was associated with orders for the unjustified and arbitrary detention of Muslims during periods of fighting. He submits that this association is an inference drawn from the mere fact that he was a political leader. He claims that this inference fails to meet the burden required for a conviction of the crime of detention. In support of his argument he cites the Commentary to the Geneva Convention IV, part IV, Section 1, Article 147.[1409]

1010. The Prosecution responds that the Trial Chamber rightly found that the Bosnian Muslims were systematically subjected to arbitrary imprisonment for which there was no justification and that this unlawful confinement was part of the common design to subjugate them. Consistent with its previous findings as to Kordić's active and intentional participation in this common criminal design it concluded that he was associated with the orders for the detention and coming into existence of the detention facilities in the area.[1410]

1011. The Trial Chamber held that Kordić participated in the common plan by being "associated with the orders for the detention of Bosnian Muslims and the ordering and coming into existence of the detention facilities in the Lašva Valley".[1411] The Trial Chamber does not, in this part, specify which orders it refers to. In relation to Kaonik prison, it found that "an order, purportedly over Dario Kordić's name and dated 3 February 1993 postpones an exchange of prisoners for 48 hours".[1412] Further, when describing the defence case, the reference is made to defence Exhs 365/1 tab 1 and 7, and 363/1.

1012. The Appeals Chamber notes that the order dated 3 February 1993 does not mention Kaonik and furthermore the order does not state where the prisoners to be exchanged were detained. Since the place of detention is unknown, the Appeals Chamber finds that this order does not link Kordić to any of the places of detention listed in the Indictment. The Trial Chamber further relied on Witness J and Witness AC, mentioned in footnote 1701 of the Trial Judgement as follows: "Witness J's evidence was that Zlatko Aleksovski (the Commander of Kaonik camp) told him in January 1993 that he could not release prisoners unless the paper was signed by Kordić" and "Witness AC

[1409] Kordić Appeal Brief, Vol. I, pp 120-121.
[1410] Prosecution Reply Brief, paras 5.40-5.47.
[1411] Trial Judgement, para. 802.

said that when he was in Kaonik in May 1993 a guard told him that Kordić had to approve the release or transfer or [sic] prisoners".

1013. The Appeals Chamber revisited Witness J's testimony:

> Q. Thank you. Now a few more words about the events concerning your stay in Kaonik. You said that Mr. Aleksovski, as the commander, said that he needed a permit, a certificate to be signed by either Mr. Kordić or Mr. Slisković to release anybody from the prison? A. Yes. Well, it wasn't a permit; it was --they were people that were to go out digging, and they had to have a paper allowing this. Q. So a list, or something like that? A. No, sir, not as a list. Quite simply, we were distributed into work platoons, and when requested from a particular department, 30 people were asked for digging purposes, Aleksovski did not allow this because he told the man, when he gave him the piece of paper -- I don't know what was written on the paper, but he said that Mr. Kordić or Slisković had not signed the paper and that he could not let the men go. Q. Did you see that particular paper, the document? A. Well, I was four or five metres away. I just saw a piece of paper. What was written on it, I do not know. Q. So you were standing at that distance, but you heard the words they uttered? A. Yes. Some 20 of us were lined up there. Q. Did you ever see, while you were in Kaonik, a document, a paper, signed by Mr. Kordić? A. Well, we were prisoners, for heaven's sake. Q. Did you ever see Mr. Kordić in Kaonik? A. No.[1413]

The evidence of Witness J is not, as described by the Trial Chamber, that Aleksovski required Kordić's approval to release prisoners but that he needed Kordić's approval in order to take prisoners out for trench-digging. Kordić was acquitted by the Trial Chamber for trench-digging (inhuman treatment) and this is therefore not an issue before the Appeals Chamber. However, this testimony shows that Kordić had influence over the detention in Kaonik.

1014. The evidence of Witness AC is that he was detained in the Vitez Cinema and was moved by the Military Police to Kaonik together with several other persons in April 1993.[1414] His evidence was:

> Q. But do you know from whom did this military police receive the instructions to transfer you to Kaonik? Secondly, from whom did Kaonik receive instructions to set you free? A. We got that information during our stay in Kaonik, where one Marko -- that is what other HVO members in the camp called him -- said that Dario Kordić was behind our transfer to Kaonik, and that we would possibly be released or exchanged if Dario Kordić approved such a move. Q. So it was following authorisation with a guard of the camp that you and other detainees received that information? A. Yes.[1415]

1015. The Appeals Chamber notes that the persons Witness AC testified to having been detained and released together with, are the same persons listed in Exh. 363/1. This exhibit is a certificate of release signed by Zlatko Aleksovski, the Commander of Kaonik, listing 16 persons being released on 14 May 1993 on an order of Col. Blaškić.

[1412] Trial Judgement, para. 798.
[1413] T. 4644-45.
[1414] Several of these have testified in the present case.
[1415] T. 12608-609.

1016. The Appeals Chamber finds that Kordić is partly correct in stating that the Trial Chamber has not identified any order for detention to which he was associated. This however, does not automatically affect Kordić's responsibility for the unlawful detention and imprisonment, since both Witness AC and Witness J testified about Kordić's control over the detention facilities in Kaonik. Furthermore, read in context, the Trial Chamber found that additionally and more generally "[t]he prosecution case is that Dario Kordić ordered and planned these crimes relating to detention, as may be inferred from his role as political leader in Central Bosnia."[1416] The Trial Chamber found:

> that the unlawful confinement and detention of the Bosnian Muslims was part of the common design to subjugate them. As has been noted, the attacks on towns and villages followed a pattern, beginning with the initial assault and culminating in the detention of the surviving Muslims.[1417]

The Trial Chamber held that

> This happened with such regularity that it could have been the result of nothing except a common plan.[1418]

The Trial Chamber inferred

> that as political leader Dario Kordić was involved in this plan in the areas for which he held political responsibility. Consistent with its other findings, the Trial Chamber finds that Dario Kordić was associated with the orders for the detention of Bosnian Muslims and the ordering and coming into existence of the detention facilities in the Lašva Valley, i.e., Kaonik, the Vitez Cinema, Veterinary Station and SDK Offices, Chess Club, Dubravica school and in Kiseljak (the barracks and municipal building and Rotilj).[1419]

Thus, the Trial Chamber reasonably considered that the detentions formed part of the preconceived plan.

(b) Alleged error relating to Kordić's *mens rea* for the detention crimes

1017. Kordić argues that there was no express finding that he had the requisite *mens rea* for the detention crimes.[1420]

1018. The Appeals Chamber notes that the Trial Chamber did indeed not make any explicit finding that Kordić had the requisite *mens rea*. The Trial Chamber found however, in paragraph 834 of the Trial Judgement, that "in those cases where Kordić participated in the HVO attacks he intended to commit the crimes associated with them and did so."[1421] The Trial Chamber further

[1416] Trial Judgement, para. 798.
[1417] Trial Judgement, para. 802.
[1418] Trial Judgement, para. 802.
[1419] Trial Judgement, para. 802.
[1420] Appeals Hearing, T. 264.
[1421] Trial Judgement, para. 834.

found that Kordić was liable for these crimes under Article 7(1) of the Statute. It thereby implicitly found that he had the requisite *mens rea* for each of the crimes. As seen above, the Trial Chamber found that Kordić had participated in the crimes either by being associated with the orders for detention or the orders for "the coming into existence of the detention facilities" or by being associated with the orders to attack the different villages.

1019. As discussed above, the Trial Chamber relied on orders indicating that Kordić **was** responsible for the orders for detention at Kaonik; his *mens rea* was thus inferred from his willing participation. In relation to detention the Trial Chamber found that Kordić "participated as the senior regional politician in the planning of the military operation and attack against Ahmići (and the other Lašva Valley villages), an operation which was aimed at 'cleansing' these areas of Muslims."[1422] The Trial Chamber did not find that Kordić explicitly approved unlawful detention at the meeting on 15 April 1993. It found however, that the detention crimes occurred with such regularity that they had to be part of a preconceived plan, no doubt as part of the general goal to ethnically cleanse these areas at any cost.

1020. The Appeals Chamber notes that the detentions in the Vitez Cinema, SDK building, Dubravica Elementary School and Rotilj occurred as part of the attacks on Vitez municipality and Kiseljak municipality. The Appeals Chamber considers that Kordić approved the attacks with the awareness of the substantial likelihood that other crimes, including unlawful detention, would occur. Therefore, the Appeals Chamber finds that a reasonable trier of fact could have found that Kordić had the requisite *mens rea* for the detention crimes occurring in the Vitez Cinema, SDK building, Dubravica Elementary School and in Rotilj. Kordić thereby had the requisite *mens rea* for planning pursuant to Article 7(1) of the Statute.

1021. With regard to the Kiseljak municipal building, the unlawful detention occurred in June 1993 and in the Kiseljak barracks, the unlawful detention occurred between 30 April and 21 June 1993. Again Kordić's involvement and *mens rea* can be inferred from his approval at the 15 April 1993 meeting of the attack in Kiseljak in April 1993 as well as from his participation in the crimes committed in June. The approval of this general plan is a clear expression of his general intent.

(c) The Chess Club and the Veterinary Station in Vitez

1022. The Appeals Chamber has already reversed the Trial Chamber's findings that the crimes of unlawful confinement of civilians (Count 21) and imprisonment (Count 22) in relation to the Chess

[1422] Trial Judgement, para. 631.

Club and the Veterinary Station were established. The Appeals Chamber therefore acquits Kordić of Counts 21 and 22 in relation to the Chess Club and the Veterinary Station.

(d) The SDK building, the Vitez Cinema, and the Dubravica Elementary School

1023. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) for planning imprisonment (Count 21) and unlawful confinement (Count 22) in the SDK building, Vitez Cinema and Dubravica Elementary School in April 1993.

(e) The Kaonik detention centre

1024. The Trial Chamber held that civilians were detained in Kaonik on two occasions, " first, after the HVO attack on the municipality in January 1993 [that is the Busovača attack] and, secondly, after the attacks in the Lašva Valley in April 1993."[1423] Kordić was found above to be involved both in the January and April attacks in Busovača. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty under Article 7(1) for planning imprisonment (Count 21) and unlawful confinement (Count 22) in Kaonik from January 1993 to May 1993.

(f) Rotilj village, the Kiseljak municipal building and the Kiseljak barracks

1025. The Trial Chamber made no findings as to Kordić's direct participation in the crimes nor that he was associated with the orders for the detention of Bosnian Muslims. The Appeals Chamber has above upheld the finding that Kordić approved the general criminal plan at the First Meeting on 15 April 1993, with the awareness of the substantial likelihood that unlawful detention would occur in the furtherance of it.

1026. The Appeals Chamber upholds the Trial Chamber's finding that Kordić is guilty pursuant to Article 7(1) of the Statute for planning and ordering imprisonment (Count 21) and unlawful confinement (Count 22) in Rotilj from 18 April to September 1993; in the Kiseljak municipal building in June 1993 and in the Kiseljak barracks during the period 30 April to 21 June 1993.

[1423] Trial Judgement, para. 774.

# VIII. FACTUAL FINDINGS WITHOUT CHARGES

1027. The Appeals Chamber notes that the Trial Chamber's findings in relation to Čerkez's responsibility under Article 7(3) of the Statute for Counts 29, 30, 31, 33 and 35 were based on acts which were not charged in the Indictment. The Trial Chamber found Čerkez guilty in relation to Vitez, Stari Vitez and Večeriska,[1424] but the Indictment does not charge Čerkez with responsibility under Article 7(3) of the Statute for Stari Vitez and Donja Večeriska in relation to these counts.[1425] Furthermore, at the Status Conference on 6 May 2004, the Prosecution stated that it does not dispute that the Trial Chamber made no factual findings related to the involvement of forces under Čerkez's responsibility in Stari Vitez and Večeriska/Donja Večeriska.[1426]

1028. The Appeals Chamber further considers in relation to Kordić that the Trial Chamber made findings that in Novi Travnik, Bosnian Muslims were detained in Stojkovići camp from 18-30 June 1993 and that after the attack on Kreševo men were put in a hangar and the women and children in the elementary school and were there from July to September 1993.[1427] However, the Appeals Chamber notes that Kordić was not charged with crimes in these places and the Appeals Chamber therefore has to ignore these findings as they cannot serve as a basis for a conviction. Because it is discussed in the Trial Judgement, the Appeals Chamber cannot exclude that these findings had an impact on the sentence. In favour of the Accused the Appeals Chamber will take this into account when discussing the sentence meted out by the Trial Chamber.

[1424] Trial Judgement, paras 800, 836(b), 843.
[1425] Indictment, paras 50-54.
[1426] Appeals Hearing, T. 163-164.
[1427] Trial Judgement, para. 797.

# IX. CUMULATIVE CONVICTIONS

1029. The Appeals Chamber notes that in his submissions on appeal, Kordić brought the issue of cumulative convictions to the attention of the Appeals Chamber. In his opinion, a conviction under Count 1 (persecutions, a crime against humanity under Article 5(h) of the Statute) accumulated with Counts 7 (murder, a crime against humanity under Article 5(a) of the Statute), 10 (other inhumane acts, a crime against humanity under Article 5(i) of the Statute) and 21 (imprisonment, a crime against humanity under Article 5(e) of the Statute) is impermissible.[1428]

1030. Čerkez, by contrast, did not raise the issue of cumulative convictions during his submissions on appeal, and made arguments only in relation to his concurrent conviction pursuant Articles 7(1) and 7(3) of the Statute, stating that the Trial Chamber's findings were "not in accordance with the jurisprudence of this Tribunal."[1429] The Appeals Chamber notes that this is not a question of cumulative convictions, but rather a question of concurrence between two modes of responsibility as already discussed above.

1031. In addition to these instances as pleaded, the jurisprudence of the International Tribunal accepts that "there are situations where the Appeals Chamber may raise questions *proprio motu* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal."[1430] The Appeals Chamber's role as the final arbiter of the law applied by the International Tribunal means that it must give the Trial Chambers guidance in their interpretation of the law.[1431] As such, the Appeals Chamber will consider the jurisprudence of the International Tribunal on cumulative convictions, and its application to this case.

## A. **The settled jurisprudence on cumulative convictions**

1032. Whether the same conduct violates two distinct statutory provisions is a question of law.[1432] In *Čelebići*, the Appeals Chamber articulated a two-pronged test to be applied to the question of

[1428] Appeals Hearing, T. 265. Kordić relied on the *Krstić* Appeal Judgement, paras 230-233.
[1429] Appeals Hearing, T. 447, 504.
[1430] *Krnojelac* Appeal Judgement, para. 6.
[1431] *Krnojelac* Appeal Judgement, para. 7.
[1432] *Kunarac et al.* Appeal Judgement, para. 174.

cumulative convictions, which has been consistently followed by the International Tribunal[1433] and the International Criminal Tribunal for Rwanda.[1434] It held that:

> reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that 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. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[1435]

1033. When applying the *Čelebići* test, what must be considered are the legal elements of each offence, not the acts or omissions giving rise to the offence. What each offence requires, as a matter of law, is the pertinent inquiry. The Appeals Chamber will permit multiple convictions for the same act or omission where it clearly violates multiple distinct provisions of the Statute, where each statutory provision contains a materially distinct element not contained in the other(s), and which element requires proof of a fact which the elements of the other statutory provision(s) do not.[1436] The cumulative convictions test serves twin aims: ensuring that the accused is convicted only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality.

1034. The Appeals Chamber now turns to the question of the permissibility of cumulative convictions with regard to the specific crimes at issue in this case when applying the above test.

### 1. The law applicable to cumulative convictions under Articles 2, 3 and 5

1035. With regard to cumulative convictions under Article 2 (grave breaches of the Geneva Conventions of 1949) and Article 3 (violations of the laws or customs of war) of the Statute, the Appeals Chamber has specifically held that wilful killing under Article 2(a) of the Statute contains a materially distinct element not present in the crime of murder under Article 3 of the Statute,[1437] namely that the victim be a protected person, an element which requires proof of a fact not required by the elements of murder under Article 3. The definition of a protected person includes and goes

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[1433] See *e.g., Jelisić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, paras 387-388; *Kunarac et al.* Appeal Judgement, para. 176.
[1434] See *Musema* Appeal Judgement, paras 358-370. In *Musema*, the Appeals Chamber held that convictions for genocide under Article 2 of the Statute and for extermination as a crime against humanity under Article 3 of the Statute, based on the same set of facts, are permissible under the *Čelebići* test. *Ibid.*, paras 369-370.
[1435] *Čelebići* Appeal Judgement, paras 412-3.
[1436] *Kunarac et al.* Appeal Judgement, para. 173. Whether the same conduct violates two distinct statutory provisions is a question of law, *ibid*., para. 174.

beyond what is meant by an individual taking no active part in the hostilities, which is the terminology of the Geneva Conventions.[1438] Since murder under Article 3 of the Statute does not contain an element in addition to the elements of wilful killing under Article 2, application of the second prong of the *Čelebići* test is required, namely to uphold the conviction under the more specific provision. Because wilful killing under Article 2 contains an additional element, it is the more specific provision. Thus, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed as impermissibly cumulative.[1439]

1036. By contrast, the Appeals Chamber has recognised that convictions for the same conduct under Article 3 (laws or customs of war) and Article 5 (crimes against humanity) of the Statute are permissible.[1440] Following the *Čelebići* test, the Appeals Chamber has consistently held that crimes against humanity constitute crimes distinct from violations of the laws or customs of war in that each contains an element not present in the other:[1441]

> Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible.[1442]

It is therefore settled law that cumulative convictions under Articles 3 and 5 are permissible.[1443]

1037. Applying the reasoning above, convictions under Articles 2 and 5 are also permissibly cumulative. While 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. Thus, cumulative convictions for inhuman treatment (under Article 2(b) of the Statute) and other inhumane acts (under Article 5(i) of the Statute) are permissible, as are cumulative convictions for unlawful confinement of civilians (under Article 2(g) of the Statute) and imprisonment (under Article 5(e) of the Statute).

1038. The question of whether convictions for murder (under Articles 3 and 5(a) of the Statute respectively) and for wilful killing (Article 2(a) of the Statute) are permissible, was considered by

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[1437] Article 3 of the Statute incorporate Common Article 3(1)(a) of the Geneva Conventions, which prohibits "murder of all kinds".
[1438] *Čelebići* Appeal Judgement, paras 422–423.
[1439] *Čelebići* Appeal Judgement, para. 423.
[1440] *Kunarac et al.* Appeal Judgement, para. 176; *Kupreškić et al.* Appeal Judgement, para. 387; *Jelisić* Appeal Judgement, para. 82.
[1441] *Kupreškić et al.* Appeal Judgement, para. 388; *Jelisić* Appeal Judgement, para. 82; *Kunarac et al.* Appeal Judgement, para. 176.
[1442] *Jelisić* Appeal Judgement, para. 82.
[1443] See, *e.g., Vasiljević* Appeal Judgement, para. 145.

the Trial Chamber in this case. It found that the offences under Articles 2 and 5 each contain an additional element not required by the other (thereby permitting cumulative convictions) but that the Article 3 offence does not contain an additional required element and is, accordingly, subsumed.[1444] The Appeals Chamber agrees that while cumulative convictions under Articles 3 and 5 are permissible,[1445] in circumstances where such convictions would result in an impermissibly cumulative conviction with Article 2, the Article 3 crime must fall away.

2. The law applicable to *intra*-Article 5 convictions

1039. It has previously been held in *Krnojelac, Vasiljević,* and *Krstić,* that *intra*-Article 5 convictions under the Statute for persecutions as a crime against humanity with other crimes against humanity found in that Article, are impermissibly cumulative. In *Vasiljević* and *Krstić,* the Appeals Chamber stated that the appellant could not be convicted both for murder and persecutions under Article 5(a) and (h) of the Statute, on the basis of the same acts.[1446] It was reasoned that where a charge of persecutions is premised on murder and is proven, the Prosecution need not prove an additional fact in order to secure the conviction for murder because the offence is subsumed by the offence of persecutions, which requires proof of a materially distinct element of discriminatory intent in the commission of the act.[1447] Similarly, the Appeals Chamber in these cases, as well as in *Krnojelac*, held that convictions for persecutions under Article 5(h) and for other inhumane acts under Article 5(i) on the basis of the same conduct are impermissibly cumulative "since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts."[1448]

1040. The Appeals Chamber considers that cogent reasons warrant a departure from this jurisprudence[1449] as an incorrect application of the *Čelebići* test to *intra*-Article 5 convictions. These cases are in direct contradiction to the reasoning and proper application of the test by the Appeals Chambers in *Jelisić, Kupreškić, Kunarać, and Musema.* As stated above, 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

[1444] Trial Judgement, para. 820.
[1445] *Jelisić* Appeal Judgement, para. 82.
[1446] *Vasiljević* Appeal Judgement, para. 146; *Krstić* Appeal Judgement, para. 231.
[1447] *Krstić* Appeal Judgement, para. 231-232.
[1448] *Krnojelac* Appeal Judgement, para. 188; *Vasiljević* Appeal Judgement, para. 146; *Krstić* Appeal Judgement, para. 231.
[1449] *Aleksovski* Appeal Judgement, paras 107, 109.

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.

1041. The first pair of *intra*-Article 5 cumulative convictions at issue in this case is 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. The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of murder under Article 5 of the Statute: the requirement of proof that an act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. Murder, by contrast, requires proof that the accused caused the death of one or more persons, regardless of whether the act or omission causing the death discriminates in fact or was specifically intended as discriminatory, which is not required by persecutions. Thus, cumulative convictions on the basis of the same acts under Article 5 of the Statute are permissible in relation to these crimes.

1042. The second pair of *intra*-Article 5 cumulative convictions at issue in this case is persecutions and other inhumane acts as a crime against humanity under Article 5(i) of the Statute. The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of other inhumane acts under Article 5 of the Statute: the requirement of proof that an act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. Other inhumane acts, by contrast, require proof that the accused caused serious bodily or mental harm to the victim(s), regardless of whether the act or omission causing the harm discriminates in fact or was specifically intended as discriminatory, which is not required by persecutions. Thus, cumulative convictions on the basis of the same acts are permissible in relation to these crimes under Article 5 of the Statute.

1043. Finally, the third pair of *intra*-Article 5 cumulative convictions at issue in this case is persecutions and imprisonment as a crime against humanity under Article 5(e) of the Statute. The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of imprisonment under Article 5 of the Statute: the requirement of proof that an act or omission discriminates in fact *and* proof that the act or omission was committed with specific intent to discriminate. On the other hand, the offence of imprisonment requires proof of the deprivation of the liberty of an individual without due process of law, regardless of whether the deprivation of liberty discriminates in fact or was specifically intended as discriminatory, which is not required by persecutions. Thus, cumulative convictions on the basis of the same acts are permissible in relation to these crimes under Article 5 of the Statute.

## B. **Cumulative convictions in this case**

1044. The Appeals Chamber now turns to applying the settled jurisprudence on cumulative convictions to the convictions at issue in this case. On the basis of the foregoing analysis, the Appeals Chamber dismisses Kordić's argument, raised in the Appeals Hearing, that his conviction under Article 5 of the Statute for persecutions (Count 1), was impermissibly cumulative with his convictions under Article 5 for murder (Count 7), other inhumane acts (Count 10), and imprisonment (Count 21). Likewise, the Appeals Chamber finds that Čerkez's convictions under Article 5 of the Statute for persecutions (Count 2) and imprisonment (Count 29) were not impermissibly cumulative.

# X. ALLEGED ERRORS IN SENTENCING

## A. **Kordić**

### 1. Kordić's sixth ground of appeal

1045. The Trial Chamber convicted Kordić for 12 Counts of the Indictment and imposed a single sentence of 25 years imprisonment.

#### (a) Submissions of the Parties

1046. Kordić submits that the Trial Chamber erroneously overlooked his substantial mitigating evidence, and that he should not receive a higher sentence than four years.[1450] He argues that the Trial Chamber should have considered (i) that he became involved in politics as a result of his concern for the JNA and Bosnian Serb actions in 1991-1992; (ii) that his primary motivation was to assist his community; (iii) his pre-war good character and his good reputation during and after the war; (iv) the fact that he had no prejudice against citizens of other nationalities;[1451] (v) the fact that he voluntarily stepped down from political office when indicted and surrendered voluntarily in spite of supporting his close family; (vii) his exemplary behaviour as a detainee during his detention;[1452] and (viii) that he was and is a highly religious[1453] family man.[1454]

1047. The Prosecution responds that Kordić fails to show how the Trial Chamber's failure to take into account the alleged circumstances led to a discernible error in the exercise of its sentencing decision.[1455] The Prosecution argues that Kordić's political primary motivation is insignificant when considered against the extreme gravity of the offences of which he was charged,[1456] and that the Trial Chamber was entitled to ascribe little or no weight to his character and reputation given the gravity of his conduct.[1457] It also fails to see the purport of Kordić's submission that he had no prejudice against citizens of other nationalities in view of his conviction for persecutions and the fact that the clear targets of the other crimes for which he was convicted were Bosnian Muslims.[1458]

#### (b) Discussion

##### (i) The convictions against Kordić

[1450] Kordić Amended Grounds of Appeal, p. 10, para. 2; Kordić Appeal Brief, p. 128.
[1451] Kordić Appeal Brief, Vol. I, p. 128; Appeals Hearing, T. 323-330.
[1452] Kordić Appeal Brief, Vol. I, p. 128.
[1453] Appeals Hearing, T. 323, 329.
[1454] Appeals Hearing, T. 321-22.
[1455] Prosecution Reply Brief, para. 7.5.
[1456] Prosecution Reply Brief, para. 7.8.

1048. The Trial Chamber convicted Kordić pursuant to Article 7(1) of the Statute for Counts 1 (persecutions), 3 (unlawful attack on civilians), 4 (unlawful attack on civilian objects), 7 (murder), 8 (wilful killing), 10 (inhumane acts), 12 (inhuman treatment), 21 (imprisonment), 22 (unlawful confinement of civilians), 38 (wanton destruction not justified by military necessity), 39 (plunder of public or private property), and 43 (destruction or wilful damage to institutions dedicated to religion or education). In determining the sentence, the Trial Chamber found that:

> Dario Kordić has offered no mitigation of these offences; and there is none. The Trial Chamber considers that the overall criminality of the accused can best be reflected in a single sentence. Dario Kordić is sentenced to twenty-five years' imprisonment.

1049. The Appeals Chamber has carefully revised the findings of the Trial Chamber and has accepted several of Kordić's grounds of appeal, overturning some of his convictions. However, the Appeals Chamber has found him guilty pursuant to Article 7(1) of the Statute under various **c**ounts.[1459]

(ii) The Trial Chamber's alleged error in exercising its sentencing discretion

1050. When determining Kordić's sentence, the Trial Chamber took into consideration, *inter alia*, references made in the Kordić Final Trial Brief

> to the fact that he is a family man with no criminal record, who surrendered voluntarily to the International Tribunal and whose behaviour in the United Nations Detention Unit has been described as excellent.[1460]

1051. The Appeals Chamber notes that Kordić's submissions with respect to his motivation to become engaged in politics, his pre-war good character and his good reputation during and after the war were not expressly discussed by the Trial Chamber. Under the Statute and the Rules of the International Tribunal, each Trial Chamber is required to take into account any mitigating circumstances.[1461] The Appeals Chamber is not satisfied, however, that the Trial Chamber committed a discernible error in failing to explicitly address the above mentioned factors. While the Trial Chamber's consideration of Kordić as a family man refers to his alleged pre-war good character, he does not demonstrate that his motivation to become engaged in politics did warrant mitigation in the light of the seriousness of the offences of which the Trial Chamber found him guilty.

[1457] Prosecution Reply Brief, para. 7.13.
[1458] Prosecution Reply Brief, para. 7.16.
[1459] See the Disposition *infra*.
[1460] Trial Judgement, para. 845.
[1461] *Cf.* Article 24(2) of the Statute and Rule 101(B)(ii) of the Rules.

1052. Similarly, the Trial Chamber's convictions and the seriousness of the offences demonstrate that the Trial Chamber did not err in failing to address Kordić's alleged**ly** good reputation during and after the war. The same applies to Kordić's submission that he had no prejudice against citizens of other nationalities: as the Trial Chamber correctly convicted him for persecutions and other crimes committed against Bosnian Muslims, the Appeals Chamber agrees with the Trial Chamber's assessment in not discussing at all manifestly ill-founded submissions.

1053. The Trial Chamber considered Kordić's voluntary surrender and his behaviour in the United Nations Detention Unit. The jurisprudence of the International Tribunal shows that both factors have to be considered in mitigation of sentence.[1462] It must be recalled, however, that the weight given to each mitigating circumstance is a matter of discretion vested to the Trial Chamber. The Appeals Chamber does not see a discernible error in the Trial Chamber's finding that in light of the gravity of the crimes and the position of Kordić as a political leader, his voluntary surrender and his comportment during detention do not warrant mitigation.

1054. The Appeals Chamber notes that the Trial Chamber did not expressly refer to the fact that Kordić voluntarily stepped down from his political office when he was indicted. The Appeals Chamber is, however, satisfied that the Trial Chamber implicitly did take into account these factual circumstances of Kordić's post-crime conduct when it considered "that he surrendered voluntarily to the International Tribunal".[1463]

1055. With respect to the question of whether Kordić's convictions comprised the forcible transfer and/or expulsion of Bosnian Muslim civilians, the Appeals Chamber applies the same reasoning, *mutatis mutandis*, as made in relation to Čerkez's convictions.

(c) Conclusions

1056. Kordić's sixth ground of appeal is rejected. Nevertheless, the Appeals Chamber later has to discuss whether allowing in part some of his grounds of appeal warrants a reduction of the sentence.

2. Prosecution's fourth ground of appeal

1057. According to the Prosecution, the Trial Chamber erred in exercising its sentencing discretion by imposing upon Kordić a sentence that fails to reflect the inherent gravity of his criminal

[1462] For voluntary surrender, *cf. Blaškić* Appeal Judgement, para. 701 (with further references); for comportment in detention, *cf. ibid.*, para. 696 (with further references).
[1463] Trial Judgement, para. 845.

conduct.[1464] Kordić responds that the Prosecution has failed to show an abuse of discretion in the Trial Chamber's decision to impose the sentence.[1465]

(a) Submissions of the Parties

1058. The Prosecution submits that the sentence of 25 years' imprisonment is manifestly inadequate in relation to (i) the magnitude, scope – geographic and temporal – and extremely grave nature of the offences,[1466] the attacks being committed against defenceless civilians;[1467] (ii) Kordić's position, powers and responsibilities as the highest Bosnian Croat political leader in Central Bosnia at the time;[1468] and (iii) the sentence of 45 years' imprisonment passed by the International Tribunal against Blaškić for substantially similar conduct.[1469] The Appeals Chamber has to note in this context that this submission was made before it handed down its judgement in the case referred to.

1059. Kordić responds that the Prosecution fails to point out any fact that can lead to a conclusion that there has been a discernible error in the Trial Chamber's exercise of discretion.[1470] He also argues that the Prosecution attempts to "revisit the Article 7(3) 'command responsibility' issue through the back door" as the Prosecution decided not to expressly appeal the exoneration of Kordić from the Article 7(3) of the Statute charges.[1471]

1060. The Prosecution replies that Kordić attacks the Trial Chamber's factual findings under the guise of responding to the Prosecution's arguments that the Trial Chamber gave insufficient weight to Kordić's position, powers and responsibilities, and that they be disallowed by the Appeals Chamber.[1472]

(b) Alleged error in imposing a manifestly inadequate sentence

1061. Article 24(2) of the Statute requires a Trial Chamber to take into account, *inter alia*, the gravity of the crime when determining the sentence. The Appeals Chamber agrees with the finding in *Kupreškić et al*. that

> the sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular

[1464] Prosecution Appeal Brief, paras 4.1-4.3.
[1465] Kordić Response Brief, p. 45.
[1466] Prosecution Appeal Brief, paras 4.9-4.34; Prosecution Reply, paras 4.76, 6.1.
[1467] Appeals Hearing, T. 579-80.
[1468] Prosecution Appeal Brief, paras 4.35-4.63; Appeals Hearing, T. 580-84.
[1469] Prosecution Appeal Brief, paras 4.64-4.75; Appeals Hearing, T. 584-85.
[1470] Kordić Response Brief, pp 21-24.
[1471] Kordić Response Brief, pp 40-43.
[1472] Prosecution Reply, para. 3.2, 3.28-34.

> circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.[1473]

1062. The Appeals Chamber will now address the Prosecution's submission that the Trial Chamber erred in the exercise of its sentencing discretion by imposing a sentence that failed to reflect the gravity of Kordić's criminal conduct.

1063. At the outset, it is important to note that the Prosecution does not argue that the Trial Chamber erred in failing to take into account factors that would have called for a longer sentence. Instead, the Prosecution argues that the Trial Chamber, on the basis of its own factual findings, erred in its exercise of discretion and rendered a manifestly inadequate sentence. Therefore, the Appeals Chamber has to determine whether the Trial Chamber erred in giving undue weight to the gravity of the crimes. In doing so, the Appeals Chamber will consider Kordić's arguments in response only insofar as they do not venture outside the proper scope of a response. They are disregarded insofar as they appear to illegitimately attack the factual findings of the Trial Chamber in this context.[1474]

1064. In general, references to sentences meted out in other judgements, in particular those still under appeal, are of limited authority. However, an overview of the International Tribunal's cases which were either decided on appeal or where no appeal was filed from the Trial Chamber Judgement shows that Kordić's sentence was not disproportionate. The Appeals Chamber recalls its finding in *Jelisić*

> that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules.[1475]

1065. The Appeals Chamber considers that the Trial Chamber did not venture outside its scope of discretion in rendering a sentence of 25 years of imprisonment. The Prosecution has not shown that the Trial Chamber handed down a sentence which did not reflect the gravity of Kordić's conduct. Thus, the Prosecution did not demonstrate that this sentence was manifestly inadequate.

(c) Conclusion

1066. The Prosecution's fourth ground of appeal is rejected.

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[1473] *Kupreškić et al*. Trial Judgement, para. 852.

[1474] *Cf*., *e.g*., Kordić's assertion that "the Trial Chamber […] stretched and strained in its Judgement to construct a theory of Article 7(1) culpability on Kordić's part, relying principally upon the attenuated speculations of BritBat and ECMM witnesses, and also upon the completely uncorroborated hearsay of a convicted murderer and acknowledged liar", Kordić Response Brief, p. 40.

[1475] *Jelisić* Appeal Judgement, para. 96.

### 3. The adequate sentence for Kordić

1067. The Appeals Chamber has allowed in part some of the grounds of appeal– however never in relation to counts in their entirety, but limited to certain locations only – and has at the same time rejected the Prosecution's fourth ground of appeal. However, the Appeals Chamber finds that the grounds of appeals granted in part do not warrant revising Kordić's sentence. The picture of the criminal conduct has not changed that substantially that an intervention of the Appeals Chamber is justified or warranted. The fact that the Appeals Chamber took into account that findings of the Trial Chamber on the uncharged detention of Bosnian Muslim civilians in Novi Travnik in June 1993 and in Kreševo between July and September 1993 might have had an impact on the sentence imposed by the Trial Chamber, does not alter this conclusion.[1476]

## B. **Čerkez**

### 1. Čerkez's and the Prosecution's fifth ground of appeal

1068. The Trial Chamber convicted Čerkez on 15 counts of the Indictment and imposed a single sentence of 15 years' imprisonment.

1069. The Trial Chamber convicted Čerkez pursuant to Article 7(1) and (3) of the Statute for Counts 2 (persecutions), 5 (unlawful attack on civilians), 6 (unlawful attack on civilians objects), 14 (murder), 15 (wilful killing), 17 (inhumane acts), 19 (inhuman treatment), 29 (imprisonment), 30 (unlawful confinement of civilians), 31 (inhuman treatment), 33 (taking civilians as hostages), 35 (inhuman treatment), 41 (wanton destruction not justified by military necessity), 42 (plunder of public or private property), and 44 (destruction of wilful damage to institutions dedicated to religion or education).

1070. The Appeals Chamber has significantly reversed the findings of the Trial Chamber and has granted several of Čerkez's grounds of appeal, overturning most of the convictions. However, the Appeals Chamber has found him guilty pursuant to Article 7(1) of the Statute for Counts 1 (persecutions), 29 (imprisonment), and 30 (unlawful confinement of civilians) in relation to the Vitez Cinema and the SDK building.

1071. Therefore, the Appeals Chamber need not discuss the submissions of the Parties requesting an increase (Prosecution) or reduction (Čerkez) of the sentence, in particular whether the Trial Chamber committed a discernible error when determining the sentence; instead, the Appeals Chamber will itself find the adequate sentence for the remaining convictions.

[1476] See Chapter VIII.

## 2. The adequate sentence for Čerkez

1072. The Appeals Chamber is being called upon to mete out a sentence *de novo*.[1477] Thus, instead of reversing the sentence of the Trial Chamber, the Appeals Chamber will substitute its own reasoned sentence for that of the Trial Chamber on the basis of its own findings, a function which the Appeals Chamber can perform without remitting the case to a Trial Chamber.[1478]

### (a) The applicable purposes of sentencing

1073. The relevant provisions when determining a sentence are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. In imposing a sentence, the Appeals Chamber has consistently held that the following purposes of sentencing shall be considered: (i) individual and general deterrence concerning an accused and, in particular, commanders in similar situations in the future; (ii) individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced; (iii) retribution; (iv) public reprobation and stigmatisation by the international community; and (v) rehabilitation.[1479]

1074. In relation to retribution and deterrence, the Appeals Chamber stated in *Čelebići* that

> the Appeals Chamber (and the Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution.[1480]

#### (i) Retribution

1075. It is important to state that retribution should not be misunderstood as a way of expressing revenge or vengeance.[1481] Instead, retribution should be seen as

> an objective, reasoned and measured determination of an appropriate punishment which properly reflects the […] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.[1482]

Therefore, retribution has to be understood in the more modern sense of "just deserts", as expressed already in *Erdemović*:

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[1477] *Cf. Blaškić* Appeal Judgement, para. 726 (with further references).
[1478] *Cf. Blaškić* Appeal Judgement, para. 726 (with further references).
[1479] *Blaškić* Appeal Judgement, para. 678 (with further references).
[1480] *Čelebići* Appeal Judgement, para. 806 (footnotes omitted).
[1481] *Cf. Aleksovski* Appeal Judgement, para. 185.
[1482] *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, para. 80 (emphasis in original).

> The Trial Chamber also adopts retribution, or "just deserts", as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the guilt of the accused.[1483]

(ii) Deterrence

1076. Both individual and general deterrence serve as important goals of sentencing.

1077. Individual deterrence aims at the effect of a sentence upon an accused, which should be adequate to dishearten him from re-offending once he has served his sentence and has been released.

1078. General deterrence, however, refers to a sentence's effect to dissuade other potential perpetrators from committing the same or a similar crimes. In the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society.

It is important to note, however, that this sentencing factor must not be given "undue prominence" when determining a sentence.[1484]

(iii) Rehabilitation

1079. The sentencing purpose of rehabilitation aims at the reintegration of the offender into society. The Appeals Chamber recalls its finding in *Čelebići* that

> although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.[1485]

In the light of the gravity of many of the crimes under the International Tribunal's jurisdiction, the weight of rehabilitative considerations may be limited in some cases.[1486] This is consistent with the International Tribunal's settled jurisprudence that the gravity of the crime is the most important factor in determining the sentence. It would violate the principle of proportionality and endanger

[1483] *Erdemović* 1996 Sentencing Judgement, para. 65.
[1484] *Čelebići* Appeal Judgement, para. 801.
[1485] *Čelebići* Appeal Judgement, para. 806 (emphasis in original; footnote omitted), referring to Article 10(3) ICCPR; *General Comment* 21/44 U.N.GAOR, Human Rights Committee, 47th Sess., para. 10, UN Doc. CCPR/C/21/Rev.1/Add.3(1992); Article 5(6) ACHR.
[1486] *Cf. Blaškić* Trial Judgement, para. 782.

the pursuit of other sentencing purposes if rehabilitative considerations were given undue prominence in the sentencing process.

(iv) Individual and general affirmative prevention

1080. One of the most important purposes of a sentence imposed by the International Tribunal is to make it abundantly clear that the international legal system is implemented and enforced. This sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.[1487]

1081. The reprobation or stigmatisation associated with a sentence is closely related to the purpose of affirmative prevention. Similarly, putting an end to impunity for the commission of serious violations of international humanitarian law refers to affirmative prevention. As the Trial Chamber held in *Kupreškić et al.*,

> another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international justice.[1488]

Thus, both stigmatising the offender's conduct and ending impunity serve the same goal pursued by affirmative general prevention: to reassure the public that the legal system has been upheld and to influence the public not to violate this legal system.

1082. The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a "just cause". Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to

[1487] "Public reprobation and imposition of punishment is, according to this theory, a useful and necessary means to demonstrate the continued validity of the norm and to prevent imitation of the offender's conduct by others", Thomas Weigend, *Sentencing and Punishment in Germany*, in: Tonry and Frase (eds.), Sentencing and Sanctions in Western Countries (Oxford, Oxford University Press), p. 209.
[1488] *Kupreškić et al*. Trial Judgement, para. 848.

demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent)[1489] in relation to the crimes under the International Tribunal's jurisdiction.

1083. All the above mentioned sentencing purposes constitute the matrix in which the proportionate sentence is meted out, based on the sentencing factors as provided for in Article 24 of the Statute and Rule 101 of the Rules.

(b) Article 24 of the Statute and Rule 101 of the Rules

1084. In imposing a sentence, it is, *inter alia*, the following factors that have to be taken into consideration: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the crime(s) or the totality of the accused's 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.[1490]

(c) The general practice regarding prison sentences in the courts of the former Yugoslavia

1085. The Appeals Chamber and Trial Chambers have repeatedly held that while the sentencing practices in the former Yugoslavia have to be considered when determining the appropriate sentence, they are not binding upon the International Tribunal.[1491] In *Kunarac et al.*, the Trial Chamber made the following finding, recently upheld in the *Blaškić* Appeal Judgement:[1492]

> Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provision of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.[1493]

The Appeals Chamber does not see any reason to depart from this jurisprudence.

1086. The Appeals Chamber notes that Articles 141 through 156 of Chapter XVI of the Criminal Code of the SFRY of 1976/77 regulated the general aspects of criminal law and some specific offences, such as genocide and war crimes perpetrated against the civilian population. Such crimes were punishable with imprisonment of a minimum of five years or the death penalty. The latter

[1489] Black's Law Dictionary, 7th Ed., p. 1647.
[1490] Cf. *Blaškić* Appeal Judgement, para. 679.
[1491] *Blaškić* Appeal Judgement, paras 681-82, referring to *Čelebići* Appeal Judgement, paras 813, 816; *Kunarac et al.* Appeal Judgement, para. 377; *Jelisić* Appeal Judgement, paras 116-117.
[1492] *Blaškić* Appeal Judgement, para. 682; *Krstić* Appeal Judgement, para. 260.

could be substituted by punishment of imprisonment for a term of 20 years pursuant to Article 38(2) of the Criminal Code of the SFRY.[1494]

(d) Specific considerations of the Appeals Chamber on the sentences

1087. The individual guilt of each Accused limits the range of the sentence. Other goals and functions of a sentence can only influence the range within the limits that are defined by the individual guilt.

1088. The discussion of the relevant sentencing factors has identified the following aggravating circumstances that were proved beyond reasonable doubt: (i) the Accused's position as a middle-ranking HVO commander; and (ii) the fact that among the victims of these offences were young and elderly people and women.

1089. The Appeals Chamber notes that persecutions constitutes the most severe crime for which Čerkez is convicted. In this context, the Appeals Chamber recalls that where an aggravating circumstance is at the same time an element of a crime, *e.g*. the discriminatory intent in the crime of persecutions, it cannot constitute an aggravating factor for purposes of sentencing.

1090. The following mitigating circumstances were proved on the balance of probabilities: (i) the Accused's voluntary surrender to the International Tribunal; (ii) the fact that he did not have a prior criminal record; and (iii) his personal and family circumstances.[1495] Opposed to the timeframe in the Indictment, his criminal responsibility is limited to a relatively short period of time (approximately 14 days).

1091. The Appeals Chamber took particularly into consideration his extraordinarily good behaviour when detained in the UNDU, as expressed in the letter of Tim McFadden, Chief of Detention, on 18 May 2004.[1496] The letter states, *inter alia*, that Čerkez "managed to keep in touch with his family and contributes positively to their lives by keeping abreast of developments and participating in important family decisions". The Appeals Chamber finds that the letter shows Čerkez's good rehabilitative prospects.

[1493] *Kunarac et al*. Trial Judgement, para. 29.
[1494] *Cf*. generally Sieber Report, Vol. 1, pp 29-35.
[1495] *Cf*. "Mario Čerkez's Submission of Facts Regarding Matters of Sentencing", 4 May 2004, in the form it was admitted on 19 May 2004; Appeals Hearing, T. 573-74.
[1496] Exh. DAC 5.

### 3. Conclusion

1092. For the foregoing reasons, the Appeals Chamber sentences Čerkez to 6 years of imprisonment.

## XI. DISPOSITION

For the foregoing reasons,

**THE APPEALS CHAMBER**

**PURSUANT** to Article 25 of the Statute and Rule 117 of the Rules;

**NOTING** the respective written submissions of the parties and the arguments they presented at the hearing of 17, 18, and 19 May 2004;

**SITTING** in open session;

**WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL:**

**NOTES** that the Prosecution's first ground of appeal has become moot as it has been withdrawn;

**REJECTS** the Prosecution's remaining four grounds of appeal;

**WITH RESPECT TO KORDIĆ'S GROUNDS OF APPEAL:**

**REJECTS** Kordić's first, second, fifth and sixth grounds of appeal;

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in Novi Travnik in October 1992, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 38 and 39;

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Busovača in January 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 10 and 12, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 4 (unlawful attack on civilian objects, a violation of the laws or customs of war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war) and 39 (plunder of public or private property, a violation of the laws or customs of war);

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in Vitez and Stari Vitez in April 1993, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 3, 4, 7, 8, 10, 12, 38, 39 and 43 (Stari Vitez);

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in the Vitez Veterinary Station and the Vitez Chess Club, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 21 and 22;

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Večeriska/Donja Večeriska in April 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 3, 7, 8, 10, 12, and 39, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 4 (unlawful attack on civilian objects, a violation of the laws or customs of war) and 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war);

**REJECTS** the ground of appeal concerning his responsibility for crimes committed in Ahmići in April 1993, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 4 (unlawful attack on civilian objects, a violation of the laws or customs of war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 10 (inhumane acts, a crime against humanity), 12 (inhuman treatment, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war), 39 (plunder of public or private property, a violation of the laws or customs of war) and 43 (destruction or wilful to institutions dedicated to religion or education, a violation of the laws or customs of war);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Nadioci and Pirići in April 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 4, 10, 12, and 38, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 7 (murder, a crime against humanity) and 8 (wilful killing, a grave breach of the Geneva Conventions of 1949);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Šantići in April 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 10 and 12, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 4 (unlawful attack on civilian objects, a violation of the laws or customs of

war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949) and 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Rotilj in April through September 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 4 and 38, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 3 (unlawful attack on civilians, a violation of the laws or customs of war), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 10 (inhumane acts, a crime against humanity), 12 (inhuman treatment, a grave breach of the Geneva Conventions of 1949), and 39 (plunder of public or private property, a violation of the laws or customs of war), and 21 (imprisonment, a crime against humanity), 22 (unlawful confinement of civilians, a grave breach of the Geneva Conventions of 1949);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Han Ploča-Grahovci in June 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 10 and 12; **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war), 39 (plunder of public or private property, a violation of the laws or customs of war) and 43 (destruction or wilful damage to institutions dedicated to religion or education, a violation of the laws or customs of war);

**REJECTS** the ground of appeal concerning his responsibility for crimes committed in Tulica in June 1993, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 7 (murder, a crime against humanity), 8 (wilful killing, a grave breach of the Geneva Conventions of 1949), 10 (inhumane acts, a crime against humanity), 12 (inhuman treatment, a grave breach of the Geneva Conventions of 1949), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war) and 39 (plunder of public or private property, a violation of the laws or customs of war);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in the town of Kiseljak in April 1993, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war), 39 (plunder of public or private property, a violation of the laws or customs of war);

**REJECTS** the ground of appeal concerning his responsibility for crimes committed in the Kiseljak municipal building (June 1993), the Kiseljak barracks (April through June 1993), Kaonik (January through May 1993), Vitez Cinema (April 1993), SDK building (April 1993) and the Dubravica Elementary School (April 1993), **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 21 (imprisonment, a crime against humanity) and 22 (unlawful confinement of civilians, a grave breach of the Geneva Conventions of 1949);

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in Svinjarevo in April 1993, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under Count 39, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity) and 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war);

**REJECTS** the ground of appeal concerning his responsibility for crimes committed in Gomionica in April 1993, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity), 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war), and 39 (plunder of public or private property, a violation of the laws or customs of war);

**REJECTS** the ground of appeal concerning his responsibility for crimes committed in Očehnići, Behrići, Gromiljak, Polje Višnjica, Višnjica and Gaćice in April 1993, **AND AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 1 (persecutions, a crime against humanity) and 38 (wanton destruction not justified by military necessity, a violation of the laws or customs of war);

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in Merdani in January 1993, **AND REVERSES** his conviction pursuant to Article 7(1) of the Statute under Count 38;

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in Lončari in April 1993, **AND REVERSES** his convictions pursuant to Article 7(1) of the Statute under Count 39; and

**REVERSES** all his remaining convictions under Count 1; and

**AFFIRMS** the sentence of 25 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has spent in detention for the purposes of this case; and

**ORDERS**, in accordance with Rule 103(C) and Rule 107 of the Rules, that Dario Kordić is to remain in the custody of the International Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served;

**WITH RESPECT TO ČERKEZ'S GROUNDS OF APPEAL:**

**REJECTS** Čerkez's first, third and fifth ground of appeal;

**ALLOWS** Čerkez's ground of appeal concerning his responsibility for crimes committed in Večeriska/DonjaVečeriska and Stari Vitez in April 1993, and **REVERSES** his convictions pursuant to Articles 7(1) and 7(3) of the Statute under Counts 5, 6, 14, 15, 17, 19, 41, 42 and 44;

**ALLOWS**, in part, Čerkez's ground of appeal concerning his responsibility for crimes committed in Vitez in April 1993, and **REVERSES** his convictions pursuant to Article 7(1) and 7(3) of the Statute under Counts 5, 6, 14, 15, 17, 19, 33, 35, 41, 42, and 44;

**ALLOWS** the ground of appeal concerning his responsibility for crimes committed in the Vitez Chess Club and the Vitez Veterinary Station, and **REVERSES** his convictions pursuant to Articles 7(1) and 7(3) of the Statute under Counts 29, 30 and 31;

**ALLOWS,** in part, the ground of appeal concerning his responsibility for crimes committed in the Vitez Cinema and the SDK building, and **REVERSES** his conviction pursuant to Articles 7(1) and 7(3) of the Statute under Count 31;

**ALLOWS**, in part, the ground of appeal concerning his responsibility for crimes committed in the Vitez Cinema and the SDK building in April 1993, **REVERSES** his convictions pursuant to Article 7(3) of the Statute in relation to Counts 29 and 30, and **AFFIRMS** his convictions pursuant to Article 7(1) of the Statute under Counts 2 (persecutions, a crime against humanity), Count 29 (imprisonment, a crime against humanity) and Count 30 (unlawful confinement of civilians, a grave breach of the Geneva Conventions of 1949);

**REVERSES** all his remaining convictions under Count 2 and all convictions pursuant to Article 7(3) of the Statute;

**IMPOSES** a new sentence of 6 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has spent in detention; and finally

**RULES** that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules.

Dated this seventeenth day of December 2004,
At The Hague,
The Netherlands

| Wolfgang Schomburg<br>Presiding | Fausto Pocar | Florence Ndepele Mwachande Mumba |
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| Mehmet Güney | Inés Mónica Weinberg de Roca |
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Judge Inés Mónica Weinberg de Roca appends a separate opinion.

Judge Wolfgang Schomburg and Judge Mehmet Güney append a joint dissenting opinion on cumulative convictions.

**[Seal of the International Tribunal]**

# XII. SEPARATE OPINION OF JUDGE WEINBERG DE ROCA

1. I agree with the findings and disposition of the Appeals Chamber. I nevertheless wish to explain how my views differ from those of the Appeals Chamber in relation to the standard and methodology of appellate review.

2. In the section entitled "The Law Governing Appellate Proceedings" the Appeals Chamber has reproduced the standard and methodology of appellate review articulated in the *Blaškić* Appeal Judgement, from which I dissented.[1] It nevertheless appears from the substance of the Judgement that the Appeals Chamber avoids the limitations proposed by this approach. In this case, the Appeals Chamber admits that it has had "to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial."[2] The Appeals Chamber took this approach despite its holding that to examine the entire trial record would be *ultra vires* the appellate function. This thorough review of the trial record permits me to agree with the findings reached by the Appeals Chamber in this case, notwithstanding my concerns about the standard and methodology of review set out in the Judgement.

## 1. Standard of Review

### (a) Errors of Law

3. The standard of review of errors of law set out by the Appeals Chamber suggests that whenever the Appeals Chamber corrects an error of law it must apply this standard to the evidence contained in the trial record in order to "determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence, before that finding is confirmed on Appeal."[3] This approach accords no deference to the factual findings already made by the Trial Chamber. In my opinion, when applying a corrected legal standard, the Appeals Chamber should first look to the findings made by the Trial Chamber because in many instances the Trial Chamber will already have made the factual findings necessary to satisfy the corrected legal standard. The Appeals Chamber should only determine whether it is satisfied beyond a reasonable doubt as to the Appellant's guilt on the basis of a corrected legal standard when the Trial Chamber has not already made sufficient findings to satisfy that test. In reviewing the record, the Appeals Chamber should also rely, to the extent possible, on the Trial Chamber's findings on related matters such as the credibility and reliability of evidence.

[1] Judgement, paras 13-24; *Blaškić* Appeal Judgement, Partial Dissenting Opinion of Judge Weinberg de Roca.
[2] Judgement, para. 387.
[3] Judgement para. 17.

(b) Errors of Fact

4. I agree with the Appeals Chamber that the standard of review for errors of fact is one of reasonableness, which requires the Appeals Chamber to ask whether the conclusion of guilt beyond a reasonable doubt is one which a reasonable trier of fact could have reached.[4] Where no additional evidence has been admitted on appeal, my views do not diverge from those of the Appeals Chamber.

2. Methodology of Review

5. The Appeals Chamber holds that "[i]t is only the impugned judgement and the submissions of the parties, both including references to the trial record, that is before an Appeals Chamber."[5] Although Rule 109 clearly states that the Record on Appeal is the trial record, the Appeals Chamber explains that this Rule does not oblige the Appeals Chamber to review the entire trial record on its own initiative. On the contrary, the Appeals Chamber considers that it would be acting *ultra vires* if it were to do so.[6]

6. This approach, and its explanation, presents a departure from the established jurisprudence of this Tribunal. As the Appeals Chamber has previously explained in a number of cases, "[t]he fact that the Trial Chamber did not mention a particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration."[7] Moreover, in this particular case, the Trial Chamber specifically indicated that it considered *all* of the evidence, not only the evidence mentioned or referred to in the Trial Judgement. The Trial Chamber explained:

> In its discussion the Trial Chamber will only deal with such evidence as is necessary for the purposes of the Judgement. It will, thus, concentrate on the most salient parts and briefly summarise (or not mention at all) much of the peripheral evidence. A vast amount of detail has been presented in this case (too much, in the view of the Trial Chamber). The fact that a matter is not mentioned in the Judgement does not mean that it has been ignored. All the evidence has been

[4] Judgement paras 18-20.
[5] Judgement, footnote 12.
[6] Judgement, footnote 12.
[7] *Milošević* Appeal Decision Concerning the Presentation and Preparation of the Defence Case, para. 7; *Čelebići* Appeal Judgement, para. 481 ("The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the Judgement in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings."); *Kupreškić et al.* Appeal Judgement, para. 458 ("[F]ailure to list in the Trial Judgement, each and every circumstance placed before [the Trial Chamber] and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question."); *Musema* Appeal Judgement, para. 19 ("In addition, the Appeals Chamber of ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.").

considered by the Trial Chamber and the weight to be given it duly apportioned. However, only such matter as is necessary for the purposes of the Judgement is included in it.[8]

7. In adopting this methodology, the Appeals Chamber has misconceived the role of the parties in an adversarial system. An adversarial system does not require, as suggested by the Appeals Chamber, that appellate judges only look at those portions of the record put forward by the parties on appeal. On the contrary, it is well established in adversarial legal systems that an appellate court may affirm a trial judgement for any ground substantiated by the record.[9] In doing so, the appellate court is simply relying on the trial record with which the appellate court is presumed to be familiar. The correctness of a trial judgement cannot depend only on the adversarial skills of the parties or on the evidence in the record cited by them. The methodology suggested by the Appeals Chamber leads to the untenable conclusion that an Appeals Chamber could overturn a correct factual finding made by a Trial Chamber merely because the responding party failed to cite to the evidence in the record supporting the judgement.

8. Limiting appellate review by isolating the references advanced by the parties or cited in the Judgement impairs an appellate judge's ability to assess the reasonableness of the factual finding. Instead of preventing a trial *de novo*, as suggested by the Appeals Chamber, this approach actually creates a re-trial based on a partial record as defined by the parties. This limited review of the record does not permit the Appeals Chamber to determine whether a reasonable trier of fact could have reached the impugned factual finding on the basis of the evidence before it because the Appeals Chamber is only looking at a subset of that evidence.

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[8] Trial Judgement, para. 20.

[9] *See, for example*, *R. v. Molodowic*, [2000] 1 S.C.R. 420 (Supreme Court of Canada), para. 1 ("In embarking on the exercise mandated by s. 686(1)(*a*)(i) of the *Criminal Code*, the reviewing court must engage in a thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict was a reasonable one."); *R. v. Yebes*, 1987 2 S.C.R. 168 (Supreme Court of Canada), para. 25 ("The function of the Court of Appeal, under s. 613(1)(*a*)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence."); *R. v. Sheppard*, [2002] 1 S.C.R. 869 (Supreme Court of Canada), para. 22 ("Few would argue, however, that failure to discharge this jurisprudential function [to give reasons for decisions] necessarily gives rise to appellate intervention. […] Poor reasons may coincide with a just result.), para. 28 (finding that the mandate of the appellate court is to determine the correctness of the trial decision and that the functional test for measuring the sufficiency of the trial judge's reasons includes an assessment of whether the record explains the trial judge's decision); *See also*, *Lee v. Kemna*, 534 U.S. 362, 391 (United States Supreme Court)(per Kennedy, Scalia, and Thomas JJ., dissenting on other grounds)("It is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record."); *Hernandez v. Starbuck*, 69 F.3d 1089 (United States Court of Appeals 10th Circuit), 1093-1094 (recognizing "the court of appeals' 'freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.' This broad power to affirm extends beyond the counter-arguments raised by the appellee; it includes any ground for which there is record to support conclusions of law. Once the appellant alleges the district court erred, we have a duty to assess the validity of the appellant's allegations. This duty arises in part out of our relationship with the district court, and we may not neglect it simply because an appellee fails to defend adequately the district court's decision. To do so would open the door to a perverse jurisprudence by which properly decided district court decisions could be reversed. ") (citations omitted).

9. This methodology also prevents the Appeals Chamber from accurately determining whether the error was one which occasioned a miscarriage of justice as required by Article 25(1)(b) of the Statute. A miscarriage of justice has been defined by this Tribunal as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[10] It is impossible for the Appeals Chamber to know whether there is a lack of evidence on an essential element of a crime, if the Appeals Chamber is prohibited from reviewing the totality of the record.

10. For these reasons, I do not agree with the standard or methodology of review set out in this Judgement. I concur with the Appeals Chamber in the result.

Done in English and French, the English text being authoritative.

Dated this seventeenth day of December 2004,
At The Hague,
The Netherlands.

Inés Mónica Weinberg de Roca

**[Seal of the International Tribunal]**

[10] *Kunarac et al.* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 37.

# XIII. JOINT DISSENTING OPINION OF JUDGE SCHOMBURG AND JUDGE GÜNEY ON CUMULATIVE CONVICTIONS

1. While we agree with the Appeals Chamber's decision on the sentences in general, we respectfully disagree with the decision of the majority that a conviction for persecutions, a crime against humanity pursuant to Article 5 of the Statute, can be cumulated with another conviction under Article 5 of the Statute, if both convictions are based on the same criminal conduct. We believe that the decisions of the Appeals Chamber in *Krnojelac*, *Vasiljević*, and *Krstić*, according to which *intra*-Article 5 convictions for persecutions with other crimes against humanity found in that Article are impermissibly cumulative, are based on a correct application of the *Čelebići* test. Therefore, we fail to see any cogent reason[1] allowing for a departure from this jurisprudence.[2]

2. As indicated in the *Čelebići* test itself, care is needed in its application, since cumulative convictions create a risk[3] of prejudice to the accused. It must be noted, however, that "on the other hand, multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct",[4] in particular describing meticulously the infringement of the protected legal values underlying the convictions. For a precise description of the convicted person's full culpability in the disposition, it is necessary to expressly identify the underlying conduct on which the crime of persecutions has been based.[5]

3. Multiple convictions for the same criminal conduct are only permitted in cases where the same conduct clearly violates multiple distinct provisions of the Statute: that means that each statutory provision contains a materially distinct element not contained in the other(s), and which requires proof of a fact which the elements of the other statutory provision do not.[6] Whether the same conduct violates two distinct statutory provisions is a question of law.[7] While we agree with the *Čelebići* test, we note, however, that *intra*-Article 5 convictions were not under appeal in that case.

4. The crucial part of the *Čelebići* test is the notion of "materially distinct element". Thus, it has to be determined *in abstracto* whether murder as a crime against humanity requires a "materially distinct element" that is distinct from persecutions as a crime against humanity.

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[1] *Cf. Aleksovski* Appeal Judgement, para. 107.
[2] This jurisprudence has also recently been followed by Trial Chambers in *Naletilić and Martinović*, *Stakić*, *Simić et al.*, and *Brdanin*.
[3] *Cf. Kunarac et al.* Appeal Judgement, para. 169, referring to *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 1248 (1996).
[4] *Kunarac et al*. Appeal Judgement, para. 169 (footnote omitted).
[5] *Cf. Vasiljević* Appeal Judgement, Disposition: "persecution, a crime against humanity (murder and inhumane acts)"; *cf.* also *Krnojelac* Appeal Judgement, Disposition: "(persecution) based on forced labour imposed upon the non-Serb detainees".

5. The *actus reus* of a murder is characterized by the unlawful killing of a person. The *actus reus* of persecutions is characterized, *inter alia*, by a denial or infringement upon a fundamental right laid down in international customary or treaty law.[8] If one limits the comparison of both provisions to the plain wording, one might say at first glance that both definitions are distinct from each other. However, the question is – according to the *Čelebići* test – whether they are *materially* distinct. Therefore, it has to be determined whether both murder and persecutions require "proof of a fact not required by the other". While the *mens rea* of persecutions is such an element which requires proof of a fact not required by murder – namely, the discriminatory intent –, there is no such *materially* distinct element in murder which is not required by persecutions: the murder of a person *is* a denial of a person's fundamental right to life.[9]

6. To take another approach: The crime of persecutions has to be seen as an empty hull: in fact, it is a residual category designed to cover all possible underlying offences of persecutions. Thus, to merely take the wording of the definition and convict the accused for a denial of a fundamental right is not what a criminal court can do, as it would be impermissibly vague. Instead, one has to ask: what is the fundamental right that has been denied. In the present case, the answer is: the fundamental right to life. It is only by incorporating this element in persecutions that the empty hull amounts to persecutions, a crime against humanity.

7. Finally, this also meets the last element of the *Čelebići* test which reads: "an element is materially distinct from another if it requires proof of a fact not required by the other":[10] the proof of an act of murder is also required for the proof of the denial of the fundamental right to life.

8. This approach ensures that the accused is only convicted cumulatively if two or more crimes infringed two or more distinct legal values protected in statutory provisions, this being the distinguishing element and rationale for allowing cumulative convictions or not.

9. It is on the reasons set out above that the prohibition of cumulative *intra*-Article 5 convictions was based in cases where there is no materially distinct element in the respective crimes, an

[6] *Kunarac et al.* Appeal Judgement, para. 173.
[7] *Kunarac et al*. Appeal Judgement, para. 174.
[8] See *Krnojelac* Appeal Judgement, para. 185.
[9] Similarly, the intent to commit an unlawful killing is not *materially* distinct from the intent to commit a denial of the fundamental right to life as an act of persecutions.
[10] *Čelebići* Appeal Judgement, para. 412.

approach followed by the Appeals Chamber since *Prosecutor v. Kunarac et al*.[11] and *Prosecutor v. Krnojelac*.[12]

10. As for the question of cumulative convictions for persecutions and murder, the Appeals Chamber held in *Vasiljević* that

> the Trial Chamber found that persecution under Article 5(h) of the Statute […] requires the materially distinct elements of a discriminatory act and a discriminatory intent and is therefore *more specific* than murder as a crime against humanity under Article 5(a) of the Statute […]. The Appeals Chamber finds the Appellant guilty of aiding and abetting […] the crime of persecution under Article 5(h) of the Statute *by way of* murder of the five Muslim men […].[13]

This was affirmed in *Krstić* where the Appeals Chamber found that

> where the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure the conviction for murder […] as well. The proof that the accused committed persecution through murder […] *necessarily* includes proof of murder or inhumane acts under Article 5. These offenses become subsumed within the offence of persecution.[14]

11. In *Krnojelac*, the Trial Chamber held – affirmed by the Appeals Chamber – that *intra*-Article 5 convictions for imprisonment and persecutions – both crimes against humanity – are impermissibly cumulative, and that where persecutions take the form of imprisonment, the former subsumes the latter.[15]

12. In the same case, the Appeals Chamber held that "the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts. The possibility of multiple convictions based on the same facts is thus eliminated".[16]

13. For good reasons and in particular in order to give guidelines for the Trial Chambers, the *Aleksovski* test establishes a high threshold for departing from a settled jurisprudence (and at the same time from an opinion apparently shared by the majority of Judges of this Tribunal):

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law'.[17]

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[11] *Kunarac et al*. Appeal Judgement, paras 179-185.
[12] *Krnojelac* Trial Judgement, paras 438, 503 and 534, affirmed in the *Krnojelac* Appeal Judgement (see para. 41 and the Disposition).
[13] *Vasiljević* Appeal Judgement, paras 146-147 (emphases added), and Disposition.
[14] *Krstić* Appeal Judgement, para. 232 (emphasis in original).
[15] *Krnojelac* Trial Judgement, paras 438, 503 and 534, affirmed in the *Krnojelac* Appeal Judgement (see para 41 and the Disposition in relation to persecutions and imprisonment as crimes against humanity).
[16] *Krnojelac* Appeal Judgement, para. 188, and Disposition in relation to inhumane acts and persecutions.
[17] *Aleksovski* Appeal Judgement, para. 108.

As the settled jurisprudence is in line with the *Čelebići* test, there is no cogent reason to depart from this jurisprudence based on an allegedly wrongful application of the test. It should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case.

Done in English and French, the English text being authoritative.

Dated this seventeenth day of December 2004,
At The Hague,
The Netherlands

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|---|---|
| Wolfgang Schomburg | Mehmet Güney |

**[Seal of the International Tribunal]**

# XII. ANNEX A: PROCEDURAL BACKGROUND

## A. History of the Trial

1093. Dario Kordić, Mario Čerkez and four other accused, including Tihomir Blaškić, were indicted on a joint indictment which was confirmed by Judge McDonald on 10 November 1995.[18] Warrants of arrest were issued the same day, addressed to the Republic of Croatia, the Federation of Bosnia and Herzegovina, and the Republic of Bosnia and Herzegovina.[19]

1094. Subsequent to the voluntary surrender of Blaškić to the International Tribunal in April 1996, proceedings against him were separated from the joint proceedings against Kordić and Čerkez. Kordić and Čerkez surrendered voluntarily to the International Tribunal only on 6 October 1997.

1095. Initial appearances were held on 8 October 1997. Kordić and Čerkez pleaded not guilty to the charges contained in the original indictment. In September 1998 the indictment was amended. Again, Kordić and Čerkez pleaded not guilty in a further appearance held on 14 October 1998. In November 1998 the case was transferred to a Trial Chamber comprised of Judge May, presiding, Judge Bennouna and Judge Robinson.

1096. The trial commenced on 12 April 1999 and was closed on 15 December 2000. The Trial Judgement was rendered on 26 February 2001.[20]

1097. In the course of the proceedings 240 sitting days were held. Altogether, 241 witnesses testified: 122 for the Prosecution, 117 for the Defence, and two Court witnesses. 4,665 trial exhibits were produced: 2,721 by the Prosecution, 1,643 by the Defence, and one Court exhibit. The transcript pages ran to more than 28,500 pages.

## B. The Appeal

### 1. Notices of Appeal

1098. Both Kordić and Čerkez filed their Notices of Appeal on 12 March 2001.[21] The Prosecution filed its Notice of Appeal on 13 March 2001.[22]

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[18] Decision on the Review of the Indictment, 10 November 1995.
[19] Warrants of Arrest and Order for Surrender Against Mario Čerkez Sent to the Federation of Bosnia and Herzegovina, the Republic of Croatia and the Republic of Bosnia-Herzegovina, 10 November 1995; Warrants of Arrest and Order for Surrender Against Dario Kordić Sent to the Federation of Bosnia and Herzegovina, the Republic of Croatia and the Republic of Bosnia-Herzegovina, 10 November 1995.
[20] Available in B/C/S 14 June 2001.
[21] Accused Mario Čerkez's Notice of Appeal; Accused Dario Kordić's Notice of Appeal; both 12 March 2001.
[22] Prosecution's Notice of Appeal, 13 March 2000.

## 2. Assignment of Judges

1099. On 4 May 2001 the President of the International Tribunal issued an order assigning the following Judges to the Appeals Bench in this case: Judges Hunt, Vorah, Nieto-Navia, Pocar, and Judge Liu.[23] On 9 May 2001 the then Presiding Judge, Judge Hunt, designated himself as the Pre-Appeal Judge.[24]

1100. On 18 December 2001 the President of the International Tribunal issued an order assigning Judges Hunt, Güney, Gunawardana, Pocar, and Meron to sit on the Appeal.[25]

1101. On 18 June 2003 the President of the International Tribunal issued an order assigning Judge Weinberg de Roca to the case, and determining that the Bench be composed of Judges Meron, Pocar, Hunt, Güney, and Weinberg de Roca.[26]

1102. On 6 August 2003 the President of the International Tribunal issued an order assigning Judge Schomburg to replace Judge Hunt on this Bench.[27] On 10 September 2003 an additional order assigned Judge Mumba to replace Judge Meron.[28] On 5 October 2003 Judge Schomburg was designated Presiding Judge. On 6 October 2003 he issued an order assigning himself as the Pre-Appeal Judge.[29]

## 3. Counsel

1103. Counsel for the Prosecution were, in particular, Upawansa Yapa, Norman Farrell and Helen Brady.

1104. Initially, Counsel for the Appellant Kordić was only Mitko Naumovski. On 17 February 2003 the Appeals Chamber granted a motion[30] accepting Turner T. Smith, Jr. and Stephen M. Sayers as Co-Counsel.[31]

1105. Counsel for the Appellant Čerkez were Božidar Kovačić and Goran Mikuličić.

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[23] Ordonnance du Président Portant Affectation de Juges à la Chambre d'Appel, 4 May 2001; available in English 11 May 2001.
[24] Order Appointing a Pre-Appeal Judge, 9 May 2001.
[25] Order of the President on the Composition of the Appeals Chamber for a Case, 18 December 2001.
[26] Order Assigning a Judge to a Case Before the Appeals Chamber, 18 June 2003.
[27] Order of the President Replacing a Judge in a Case Before the Appeals Chamber, 6 August 2003.
[28] Order Replacing a Judge in a Case Before the Appeals Chamber, signed 9 September 2003, 10 September 2003.
[29] Order Designating a Pre-Appeal Judge, 6 October 2003.
[30] Motion for Leave to Have Turner T. Smith, Jr. and Stephen M. Sayers Appear, *Pro Haec Vice,* as Co-Counsel of Record for the Appellant and Respondent Dario Kordić, 14 February 2003.
[31] Order, 17 February 2003.

### 4. Decision on re-trial

1106. The Prosecution submitted in its Appeal Brief that the matter should be remitted to a trial chamber[32] for a hearing limited to the evidence pertaining to the presence of the Viteška Brigade in Ahmići in relation to the attack on 16 April 1993.[33]

1107. The Appeals Chamber decided by majority[34] in the early stages of proceedings not to order a re-trial. The Appeals Chamber in the current composition of the Bench upheld this decision by majority. It has to be noted that the Judges in the case *Prosecutor v. Blaškić* found that a re-trial was not warranted and they did not decide on a rejoinder of the cases *Prosecutor v. Blaškić* and *Prosecutor v. Kordić and Čerkez.*[35]

### 5. Filing of the Appeal Briefs

1108. The Appeal Briefs were filed on 9 August 2001[36] by the Prosecution[37], Kordić,[38] and Čerkez.[39] On 13 August 2001, Čerkez filed a Corrigendum to his Appeal Brief.[40]

1109. The Respondent's Briefs were filed by Kordić on 10 September 2001[41], Čerkez on 13 September 2001,[42] and by the Prosecution on 1 October 2001.[43]

1110. Reply Briefs were filed by the Prosecution on 25 September 2001,[44] and both by Kordić and Čerkez on 30 October 2001.[45]

1111. Amended grounds of Appeal were filed by Kordić on 8 March 2002[46] and Čerkez on 11 March 2002.[47]

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[32] The Prosecution does not refer to the Trial Chamber in its original composition.
[33] Prosecution Appeal Brief, para. 6.1.
[34] In another composition.
[35] *Prosecutor v. Blaškić*, Decision on Evidence, 31 October 2003.
[36] The Pre-Appeal Judge had granted Čerkez's and Kordić's Motions to extend time for filing the Appeal Briefs in his Decision on Motions to Extend Time for Filing Appellant's Briefs of 11 May 2001. Kordić's and Čerkez's second Motions to extend time for filing the Appeal Briefs were denied in the Decision on Second Motions to Extend Time for Filing Appellant's Briefs of 2 July 2001.
[37] Prosecution's Appeal Brief; Book of Authorities for the Prosecution's Appeal Brief, both 9 August 2001.
[38] Briefs of Appellant Dario Kordić (Volume I publicly filed, Volume II filed under seal), 9 August 2001; on 15 August 2001, Kordić filed a Book of Authorities in relation to his Appeal Brief.
[39] Appellant Mario Čerkez's Brief, 9 August 2001; with Corrigendum, 13 August 2001.
[40] Appellant Mario Čerkez's Corrigendum of his 9 August 2001 Brief, signed 11 August 2001, 13 August 2001.
[41] Brief of Respondent Dario Kordić (Rule 112) (partly confidential), 10 September 2001.
[42] Čerkez Respondent Brief of Argument (partly confidential), 13 September 2001; with Corrigendum, 5 November 2001.
[43] Prosecution Response (confidential), 1 October 2001; Prosecution's Book of Authorities, 1 October 2001; Prosecution's Brief in Response, 5 October 2001.
[44] Prosecution's Reply Brief to Response Briefs of Čerkez and Kordić (confidential and public versions), 25 September 2001; Book of Authorities to Prosecution's Reply Brief, 25 September 2001.

1112. On 9 May 2002 in the decision on a motion by Kordić[48], Kordić was permitted to add ground 1-A to his amended grounds of Appeal and, due to the fact that in his motion Kordić had withdrawn the part of ground 1-D to which the Prosecution had objected, the remainder of ground 1-D was also permitted.[49]

1113. Kordić filed a supplement to his Appeal Brief[50] on 12 June 2002. On 26 June 2002 the Prosecution filed a brief responding to this supplement.[51]

1114. On 29 July 2002, Kordić filed corrected versions of his Appeal Brief (two volumes), his Respondent's Brief and his Reply Brief.[52] On 6 August 2002, the Prosecution issued a response to Kordić's corrected versions of all Appeal submissions as filed on 29 July 2002, asking the Appeals Chamber not to accept the refiled briefs as it was not clear for the Prosecution whether they contained substantial changes.[53] Kordić filed a Reply to the Prosecution's Response on 9 August 2002, submitting that only clerical errors had been rectified.[54] On 14 August 2002 the Prosecution filed a further response to Kordić's corrected versions of all appeal submissions, withdrawing its objections.[55]

1115. As a result of Pre-Appeal activities

- on 16 February 2004 the Prosecution withdrew its first ground of Appeal relating to persecutions, due to the fact that the underlying legal issue had been settled in the meantime by the jurisprudence of the Appeals Chamber;[56]

- on 31 March 2004 Kordić withdrew his amended grounds of Appeal 3-D, 3-E and 3-G;[57]

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[45] Reply Brief of Appellant Dario Kordić (redacted public version), 30 October 2001; Appellant Mario Čerkez's Brief in Reply to Prosecution's Consolidated Brief in Response to the Appeal Briefs of Dario Kordić and Mario Čerkez, 30 October 2001.
[46] Appellant Dario Kordić's Response to Order to File Amended Grounds of Appeal, 8 March 2002.
[47] Appellant Mario Čerkez's Brief Pursuant to 18 February 2002 Order to File Amended Grounds of Appeal, 11 March 2002.
[48] Appellant Dario Kordić's Motion for Leave to Add Amended Grounds of Appeal 1-A and 1-D as New Grounds of Appeal, 19 April 2002.
[49] Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 8.
[50] Supplement to Dario Kordić's Appellant's Brief, 12 June 2002. On 21 June 2002, Kordić filed a Book of Authorities Accompanying Supplement to Dario Kordić'as Appellant Brief.
[51] Prosecutor's Respondent's Brief to the "Supplement to Dario Kordić's Appellant's Brief", 26 June 2002.
[52] Brief of Appellant Dario Kordić Volume I – Publicly Filed; Brief of Appellant Dario Kordić – Volume II – (confidential); Brief of Respondent Dario Kordić, (partly confidential); Reply Brief of Appellant Dario Kordić – (confidential version); Reply Brief of Appellant Dario Kordić – (redacted public version), all on 29 July 2002.
[53] Prosecution's Response to the Appellant Dario Kordić's Corrected Versions of All Appeal Submissions as Filed on 29 July 2002, 6 August 2002.
[54] Dario Kordić's Reply to Prosecution's Response Dated 6 August 2002 to the Filing of Corrected Versions of His Appellate Briefs, 9 August 2002.
[55] Prosecution's Further Response to the Appellant Dario Kordić's Corrected Versions of all Appeal Submissions as Filed on 29 July 2002, 14 August 2002.
[56] Withdrawal of Prosecution's first ground of Appeal in "Prosecution's Appeal Brief" of 9 August 2001, 16 February 2004.

- on 6 May 2004 Kordić withdrew his amended ground of Appeal 3-F and his argument in footnote 226 of his Appeal Brief that the international character of an armed conflict is an element of crime under Article 3 of the Statute.[58]

6. Disclosure of exculpatory material during the appeals stage

1116. On 5 March 2003 the Prosecution filed a notice of its completion of reviews and disclosure pursuant to Rule 68 of the Rules, submitting a list of material that was disclosed to Kordić and Čerkez.[59] On 7 March 2003 the Prosecution filed a further notice regarding Rule 68 reviews and disclosure, submitting that additional material that was omitted from its previous notice had been disclosed to the Appellant.[60]

1117. On 10 March 2003, Kordić filed a Response to the Prosecution's Notice of completion of pending Rule 68 reviews and disclosure.[61] On the same date, Kordić filed a notice concerning the non-compliance of the Prosecution with its obligations under Rule 68 of the Rules.[62] On 14 March 2003, Kordić filed a "Supplemental Notice of Rule 68 Violation by the Prosecution.[63]"

1118. In the decision of 11 February 2004 the Appeals Chamber granted Kordić's notice in part and allowed Kordić to add arguments to his Appeal Brief addressing the importance and effect of the alleged Prosecution's non-disclosure of exculpatory evidence and dismissed the remaining part of the Appellant's Notice.[64] On 23 February 2004, Kordić filed a Supplemental Appeal Brief.[65]

1119. In its motions of 24 February 2004[66] and 1 March 2004[67], the Prosecution requested the Appeals Chamber to strike out portions of Kordić's Supplemental Appeal Brief. The Prosecution filed a response to Kordić's supplemental Appeal Brief on 8 March 2004.[68] On 30 March 2004

[57] Notice of Withdrawal of Certain of Dario Kordić's Amended Grounds of Appeal, 31 March 2004.
[58] Notice of Withdrawal of Amended Grounds of Appeal No. 3-F, 6 May 2004.
[59] Prosecution's Notice of Completion of Pending Rule 68 Reviews and Disclosure, 5 March 2003.
[60] Prosecution's Further Notice Regarding Rule 68 and Disclosure, 7 March 2003.
[61] Response to "Prosecution's Notice of Completion of Pending Rule 68 Reviews and Disclosure", 10 March 2003.
[62] Notice of Prosecution's Non-Compliance with its Obligations under Rule 68 and Application for Permission to Submit Additional Arguments on the Effect of the Prosecution's Rule 68 Violations, Pursuant to the Pre-Appeal Judge's 11 May 2001 and 2 July 2001 Decisions (confidential), 10 March 2003.
[63] Supplemental Notice of Rule 68 Violation by the Prosecution (confidential), 14 March 2003.
[64] Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004.
[65] Dario Kordić's Supplemental Appellant's Brief on the Importance and Effect of the Prosecution's Non-Disclosure of Important Exculpatory Evidence at Trial in Violation of its Obligations Under Rule 68 (confidential), 23 February 2004; on 1 March 2004, Kordić filed a Book of Authorities in support of this Brief.
[66] Prosecution's Motion for Extension of Time to Respond to "Dario Kordić's Supplemental Appellant's Brief on the Importance and Effect of the Prosecution's Non-Disclosure of Important Exculpatory Evidence at Trial in Violation of its Obligations Under Rule 68" (confidential), 24 February 2004.
[67] Prosecution's Further Motion to Strike Out Portions of Kordić's Supplemental Appellant's Brief and for Clarification of the Decision issued on 11 February 2004 (confidential), 1 March 2004.
[68] Prosecution's Response to Dario Kordić's Supplemental Appellant's Brief Regarding Rule 68 (confidential), 8 March 2004.

the Appeals Chamber in its decision on the Prosecution's two motions, *inter alia,* struck certain submissions from Kordić's Supplemental Appeal Brief, clarified the Appeals Chamber's decision of 11 February 2004, and ordered the Prosecution to file its response to the portions of the Supplemental Appeal Brief that had not been struck out and that were not already covered in the Prosecution's Response of 8 March 2004.[69] Accordingly, on 6 April the Prosecution filed a further response.[70] Kordić filed a corresponding reply on 13 April 2004.[71] The Prosecution then filed a motion to strike out portions of Kordić's reply.[72] This was followed by a response by Kordić on 3 May 2004.[73] On 11 May 2004 the Appeals Chamber issued a "Decision on Prosecution's Motion to Strike Out Portions of Kordić's Reply Filed 13 April 2004"'.[74]

### 7. Motions pursuant to Rule 115 of the Rules

1120. On 7 April 2003 Kordić filed a notice of his decision not to seek the admission of additional evidence.[75]

1121. On 7 April 2003 Čerkez filed a motion to admit additional evidence on Appeal, pursuant to Rule 115 of the Rules.[76] On 9 April 2003 Čerkez filed a supplemental application for admittance of one document as additional evidence on Appeal.[77] On 22 April 2003 Kordić filed submissions in relation to the motions filed by Čerkez.[78] On 12 May 2003 the Prosecution filed a response to the motions to admit additional evidence filed by Mario Čerkez on 7 April 2003 and 9 April 2003.[79] The Appeals Chamber decided on 26 March 2004 that the evidence put forward in

[69] Decision on Prosecution's 24 February and 1 March Motions to Strike Portions of Kordić's Supplemental Appellant's Brief (confidential), 30 March 2004.
[70] Prosecution's Further Response to Dario Kordić's Supplemental Appellant's Brief Regarding Rule 68, 6 April 2004.
[71] Reply to Prosecution's 6 April 2004 "Further Response to Dario Kordić's Supplemental Appellant's Brief Regarding Rule 68" (confidential), 13 April 2004.
[72] Prosecution's Motion to Strike Out Portions of Kordić's Reply Filed 13 April 2004, 22 April 2004.
[73] Dario Kordić's Response to Prosecution's Latest Motion to Strike Out Portions of Kordić's Reply (confidential), 3 May 2004.
[74] Decision on "Prosecution's Motion to Strike Out Portions of Kordić's Reply Filed 13 April 2004" (confidential), 11 May 2004.
[75] Appellant and Respondent Dario Kordić's Notice to Appeals Chamber of His Decision Not to Seek the Admission of "Additional Evidence" Under Rule 115 At This Time (confidential, *ex parte*), 7 April 2003.
[76] Mario Čerkez's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 April 2003.
[77] Mario Čerkez's Supplemental Application for Admittance of One Document as Additional Evidence on Appeal, 9 April 2003.
[78] Dario Kordić's Submissions in Relation to Motions Filed by Co-Accused, Mario Čerkez, for Admission of "Additional Evidence" Under Rule 115, 22 April 2003; Kordić's Amended Response to Čerkez's Motions for the Admission of "Additional Evidence" Under Rule 115, 22 April 2003.
[79] Prosecution's Response to the Motions to Admit Additional Evidence Filed by Mario Čerkez on 7 April 2003 and 9 April 2003, filed confidentially and partly *ex parte* (Annex B).

Čerkez's motion and the supplemental motion did not meet the requirements of Rule 115 of the Rules and therefore would not be admitted as additional evidence.[80]

1122. On 26 March 2004 Čerkez filed a notice of withdrawal of a motion pursuant to Rule 115 of the Rules, concerning the testimony of three additional witnesses.[81]

1123. On 26 March 2004 Čerkez filed an application pursuant to Rule 115 of the Rules for the admission of the transcript of witness BA2.[82] Having heard the parties,[83] in its decision of 16 April 2004 the Appeals Chamber rejected this motion.[84]

1124. On 3 December 2004, the Prosecution filed a motion pursuant to Rule 115 of the Rules, asking to admit additional evidence[85] – and on 6 December 2004, a Book of Authorities in relation to its motion.[86] On 7 December 2004, both Čerkez[87] and Kordić[88] filed responses to the Prosecution's motion. On 8 December 2004, the Prosecution filed a reply to the responses of Kordić and Čerkez.[89] On 17 December 2004, the Appeals Chamber rejected the Prosecution's motion.[90]

### 8. Access to material filed in *Prosecutor v. Blaškić*

1125. On 5 February 2002 Kordić filed a request for assistance to the Appeals Chamber in *Prosecutor v. Blaškić* to gain access to Appeal Briefs and non-public post-Appeal pleadings and hearing transcripts filed in *Prosecutor v. Blaškić*.[91] On 5 February 2002 Čerkez filed a "Notice of

[80] Decision on Appellant Mario Čerkez's Motion for Additional Evidence Pursuant to Rule 115, filed publicly and confidential *ex parte*, 26 March 2004.
[81] Čerkez's Notice of Withdrawal (confidential), 26 March 2004.
[82] Čerkez Rule 115 Application for Admission of Transcript of Witness BA2 (confidential), 26 March 2004.
[83] Prosecution's Response to Čerkez's Rule 115 Application for Admission of Transcript of Witness BA2, (confidential, *ex parte*), 5 April 2004; Čerkez's Reply to Prosecution's Response to Čerkez's Rule 115 Application for Admission of Transcript of Witness BA2 (confidential), 16 April 2004.
[84] Decision on Appellant Mario Čerkez's Rule 115 Application for Admission of Transcript of Witness BA2 (confidential), 16 April 2004.
[85] Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez (confidential), 3 December 2004. Public redacted version filed on 13 December 2004.
[86] Book of Authorities to Prosecution's Motion to Admit Additional Evidence filed on 3 December 2004, 6 December 2004.
[87] Mario Čerkez's Response to Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 6 December 2004 (confidential), 7 December 2004.
[88] Dario Kordić's Brief in Opposition to Prosecution's Motion to Admit Additional Evidence (confidential), 7 December 2004.
[89] Reply to Responses of Dario Kordić and Mario Čerkez to Prosecution's Additional Evidence Motion (confidential), 8 December 2004. Public Redacted version filed on 14 December 2004.
[90] Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004.
[91] Appellant Dario Kordić's Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić,* 5 February 2002.

joinder" in this request.[92] On 19 February 2002 the Prosecution filed a response.[93] On 28 February 2002 the Appellant Blaškić also filed a response.[94] On 16 May 2002 the Bench in *Prosecutor v. Blaškić* granted this request of Kordić and Čerkez.[95] It ordered the Registry to provide Kordić and Čerkez with access to the non-public post-trial submissions and Appeal Briefs, including motions on additional evidence on Appeal pursuant to Rule 115 of the Rules, filed in the *Blaškić* Appeal until the date of the issuing of the Appeals Chamber decision, with the exception of any submission related to the third motion pursuant to Rule 115 of the Rules.

1126. On 21 June 2002 Kordić filed a supplemental request for assistance to the Appeals Chamber in *Prosecutor v. Blaškić* to gain access to non-public post-Appeal pleadings and hearings transcripts filed in *Prosecutor v. Blaškić,*[96] requesting access to materials submitted by Blaškić in his third motion pursuant to Rule 115 of the Rules of 10 June 2002. On 21 June 2002 Čerkez filed a "Notice of joinder" in Kordić's supplemental request.[97] Having heard the parties,[98] the Bench in *Prosecutor v. Blaškić* on 16 October 2002 issued a decision denying Kordić and Čerkez's supplemental request.[99]

1127. In its decision of 25 February 2003,[100] the Appeals Chamber in *Prosecutor v. Blaškić* denied Kordić's[101] and Čerkez's[102] second supplemental request for access to confidential material

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[92] Appellant Mario Čerkez's Notice of Joinder in Dario Kordić's Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić,* 5 February 2002.
[93] Prosecutor's Response to Appellants Dario Kordić and Mario Čerkez's Joint "Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*", 19 February 2002.
[94] Appellant Tihomir Blaškić's Response to Joint Request of Dario Kordić and Mario Čerkez for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 28 February 2002.
[95] *Prosecutor v. Blaškić*, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić,* 16 May 2002.
[96] Appellant Dario Kordić's Supplemental Request for Assistance of Appeals Chamber in Gaining Access to a Non-Public Post-Appeal Pleadings and Hearings Transcripts Filed in the *Prosecutor v. Blaškić*, 21 June 2002.
[97] Appellant Mario Čerkez's Notice of Joinder in Appellant Dario Kordić's Supplemental Request for Assistance of Appeals Chamber in Gaining Access to a Non-Public Post-Appeal Pleadings and Hearings Transcripts Filed in the *Prosecutor v. Blaškić*, 21 June 2002.
[98] Prosecutor's Response to Appellant Dario Kordić's and Mario Čerkez's Joint "Supplemental Request for Assistance of Appeals Chamber in Gaining Access to a Non-Public Post-Appeal Pleadings and Hearings Transcripts Filed in the *Prosecutor v. Blaškić,* 28 June 2002; Appellant's Response to Dario Kordić's and Mario Čerkez's Supplemental Request for Assistance of Appeals Chamber in Gaining Access to a Non-Public Post-Appeal Pleadings and Hearings Transcripts Filed in the *Prosecutor v. Blaškić,* 2 July 2002.
[99] *Prosecutor v. Blaškić*, Decision on Appellants Dario Kordić and Mario Čerkez's Supplemental Request for Assistance in Gaining Access to Non-Public Post Trial Submissions, Appellate Briefs, and Hearing Transcripts Filed in the *Prosecutor v. Blaškić,* 16 October 2002.
[100] *Prosecutor v. Blaškić*, Decision on Dario Kordić and Mario Čerkez's Second Supplemental Request for Access to Confidential Material, 25 February 2003.
[101] Dario Kordić's Second Supplemental Request for Assistance of Appeals Chamber in Gaining Access to Non-Public Post Trial Pleadings and Hearing Transcripts Recently Filed in the *Prosecutor v. Blaškić,* 17 January 2003.

with respect to the submissions and rebuttal evidence related to the third motion pursuant to Rule 115 of the Rules.[103]

1128. On 26 May 2003 Kordić requested assistance of the Appeals Chamber in *Prosecutor v. Blaškić* in gaining access to Blaškić's fourth motion pursuant to Rule 115 of the Rules.[104] On 28 May 2003 Čerkez filed a "Notice of joinder."[105] The Prosecution filed a consolidated response on 3 June 2003[106], to which Kordić replied,[107] and Blaškić filed a response on 10 June 1993.[108] In the decision of 28 January 2004 the Bench in *Prosecutor v. Blaškić* granted the request with the exception of any submission related to Blaškić's third motion pursuant to Rule 115 of the Rules.[109]

### 9. Provisional release

1129. Čerkez filed a motion requesting provisional release pursuant to Rule 65 (I) of the Rules on 13 November 2003.[110] On 12 December 2003 the Appeals Chamber dismissed this request.[111]

1130. Kordić filed a motion requesting provisional release pursuant to Rule 65 (I) of the Rules on 2 April 2004.[112] On 19 April 2004 the Appeals Chamber dismissed this request.[113]

1131. The Appeals Chamber notes that no further motions requesting provisional release were filed.

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[102] Mario Čerkez's Notice of Joinder in Dario Kordić's Second Supplemental Request for Assistance of Appeals Chamber in Gaining Access to Non-Public Post Trial Pleadings and Hearing Transcripts Recently Filed in the *Prosecutor v. Blaškić,* 22 January 2003.
[103] See also: Prosecutor's Consolidated Response to Dario Kordić's Second Supplemental Request for Assistance of Appeals Chamber in Gaining Access to Non-Public Post Trial Pleadings and Hearing Transcripts Recently Filed in the *Prosecutor v. Blaškić* and to Mario Čerkez's Notice of Joinder, 24 January 2003; Appellant's [Blaškić's] Joint Response to Dario Kordić's Second Supplemental Request for Assistance of Appeals Chamber in Gaining Access to Non-Public Post-Trial Pleadings and Hearing Transcripts Recently Filed in *The Prosecutor v. Blaškić,* and to Mario Čerkez's Notice of Joinder, 27 January 2003.
[104] Dario Kordić's Request for Assistance of Appeal Chamber in Gaining Access to General Blaškić's Fourth Rule 115 Motion and Associated Documents, 26 May 2003.
[105] Mario Čerkez's Notice of Joinder in Dario Kordić's Request for Assistance of Appeal Chamber in Gaining Access to General Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 May 2003.
[106] Prosecutor's Consolidated Response to Dario Kordić's and Mario Čerkez's Request for Assistance of Appeals Chamber in Gaining Access to Blaškić's Fourth Rule 115 Motion, 3 June 2003.
[107] Dario Kordić's Reply in Support of his Request for Assistance of Appeals Chamber in Gaining Access to Blaškić's Fourth Rule 115 Motion, 6 June 2003.
[108] Appellant's Consolidated Response to Dario Kordić's and Mario Čerkez's Request for Assistance of Appeals Chamber in Gaining Access to Appellant's Fourth Rule 115 Motion, 10 June 2003.
[109] Decision on Dario Kordić's and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 January 2004.
[110] Mario Čerkez's Motion for Provisional Release, 13 November 2003.
[111] Decision on Mario Čerkez's Request for Provisional Release, 12 December 2003.
[112] Dario Kordić's Motion for Provisional Release on Compassionate Grounds, 2 April 2004.
[113] Decision on Dario Kordić's Request for Provisional Release, 19 April 2004.

## 10. Filings related to Čerkez's financial status

1132. On 9 December 2003 the Registry rendered a decision in relation to the financial status of Čerkez.[114] On 22 December 2003 Čerkez made a motion to the Appeals Chamber for review of this Decision.[115] The Appeals Chamber rendered its decision on 26 February 2004 and, *inter alia*, invited the Registry to review the decision of 9 December 2003 in the light of the Appeals Chamber's decision.[116] On 7 May 2004 the Registry revised its decision of 9 December 2004 accordingly.[117] The decision of 7 May 2004 was not appealed by Čerkez.

## 11. Release of Mario Čerkez

1133. On 2 December 2004, noting that on that day final deliberations had taken place, the Appeals Chamber had to order the immediate release of Mario Čerkez, based on its conclusion that the sentence is lower than the time Čerkez had already spent in UNDU.[118] On the same day, the Prosecution filed an urgent request to stay the order of the Appeals Chamber releasing Mario Čerkez.[119] On 3 December 2004, Mario Čerkez was released from UNDU. On the same day, Čerkez filed an urgent response to the Prosecution's request[120] and the Prosecution filed a reply to Čerkez's response.[121] On 6 December 2004, the Appeals Chamber dismissed the Prosecution's request.[122] By letter to the Registry of 6 December 2004, Mario Čerkez waived his right to be present at the delivery of the Judgement on 17 December 2004.[123]

## 12. Status conferences

1134. Status conferences in accordance with Rule 65 *bis* of the Rules were held on 22 June 2001, 18 October 2001, 19 February 2002, 14 June 2002, 11 October 2002, 7 February 2003, 6 June 2003,

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[114] Decision of the Registry in Relation to the Financial Status of the Accused (confidential, *ex parte*). On 16 December 2003 the Registry rendered confidentially and *ex parte* the Appendices to the Decision of the Registry in Relation to the Financial Status of the Accused.
[115] Mario Čerkez's Motion for Review of the Registrar's Decision in Relation to the Financial Status of the Accused (confidential, *ex parte*) 22 December 2003.
[116] Decision on "Mario Čerkez's Motion for Review of the Registrar's Decision in Relation to the Financial Status of the Accused" (confidential, *ex parte*), 26 February 2004
[117] Revised Decision of the Registry in Relation to the Financial Status of the Appellant (confidential, *ex parte*), 7 May 2004.
**[118]** Order to Release Mario Čerkez, 2 December 2004.
[119] Prosecution's Urgent Request to Stay the Order of the Appeals Chamber Releasing Mario Čerkez, 2 December 2004.
[120] Mario Čerkez's Urgent Response to the Prosecution's Urgent Request to Stay the Order of the Appeals Chamber Releasing Mario Čerkez, 3 December 2004.
[121] Prosecution's Reply to Response of Mario Čerkez on the Motion to Stay the Release Order of the Appeals Chamber, 3 December 2004.
[122] Decision on "Prosecution's Urgent Request to Stay the Order of the Appeals Chamber Releasing Mario Čerkez", 6 December 2004.
[123] Letter dated 6 December 2004, 7 December 2004.

15 October 2003, 13 February 2004, 6 May 2004, and 21 July 2004. All parties waived their right to have an additional status conference before the delivery of the Judgement.[124]

## 13. Appeals Hearing

1135. The Appeals Hearing was conducted on 17, 18 and 19 May 2004.

[124] Mario Čerkez's Waiver of Right Re: Rule 65*bis*(b) Status Conference, 11 October 2004; Dario Kordić's Notice of Waiver of Right to Rule 65*bis*(b) Status Conference, 12 October 2004; Prosecution Notice Regarding Status Conference, 19 October 2004.

# XIII. ANNEX B: 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* Appeal Decision on Admissibility of Evidence")

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

**BLAŠKIĆ**
*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to its Reliability, 21 January 1998 ("*Blaškić* Decision on Hearsay")

*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 the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* Decision on Production of Material, Suspension or Extension of the Briefing Schedule")

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

**BRĐANIN**
*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement) – under appeal -

**"ČELEBIĆI"**
*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 ("*Čelebići* Decision on Request to Reopen the Prosecution's Case")

*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

*Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

**ERDEMOVIĆ**
*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* 1996 Sentencing Judgement")

**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-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement") – under appeal -

**HADŽIHASANOVIĆ, ALAGIĆ AND KUBURA**

*Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanovic et al.* Appeal Decision on Jurisdiction in Relation to Command Responsibility")

**JELISIĆ**

*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

**JOKIĆ**

*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement") – under appeal -

**KRNOJELAC**

*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-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 and 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 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

**Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, PAPIĆ AND ŠANTIĆ**

*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, 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 Šantić*, 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") – under appeal -

**MARTIĆ**
*Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Decision, 8 March 1996 ("Martić Decision")

**MILOŠEVIĆ**
*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Appeal Decision Concerning the Presentation and Preparation of the Defence Case")

**MILUTINOVIĆ, ŠAINOVIĆ AND OJDANIĆ**
*Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić,* Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Appeal Decision on Joint Criminal Enterprise")

**NALETILIĆ AND MARTINOVIĆ**
*Prosecutor v. Mladen Naletilić and Vinko Martinović,* Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić and Martinović* Trial Judgement") – under appeal -

**M. NIKOLIĆ**
*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Momir Nikolić* Sentencing Judgement") – under appeal -

**OBRENOVIĆ**
*Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement")

**B. SIMIC, M. TADIĆ, ZARIĆ**
*Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić,* Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgement") – under appeal -

**STAKIĆ**
*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement") – under appeal -

**STRUGAR, JOKIĆ AND KOVAČEVIĆ**
Prosecutor v. Pavle Strugar, Miodrag Jokić and others, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002 ("*Strugar et al.* Appeal Decision")

**TADIĆ**
*Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on Jurisdiction")

*Prosecutor v. Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996 ("*Tadić* Decision on Hearsay")

*Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement")

*Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

**VASILJEVIĆ**

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement")

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

**KAYISHEMA AND RUZINDANA**
*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement ")

**MUSEMA**
*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

**RUTAGANDA**
*Prosecutor v. Georges Anderson Nderubunwe Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

3. Decisions Related to Crimes Committed During World War II

Flick Case, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. VI, p. 3 ("*Flick* Case")

Hostages Case, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p. 759 ("*Hostages* Case")

IG Farben Case, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. VIII, p. 1 ("*IG Farben* Case")

Krupp Case, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol.IX, p. 1 ("*Krupp* Case")

Pohl Case, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. V, p. 195 ("*Pohl* Case")

4. Other Decisions

(a) ICJ

*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Report 1996, p. 66 ("*Nuclear Weapons* Case")

*Nicaragua v. United States* - Case Concerning the Military and Paramilitary Activities in and against Nicaragua, Judgement of 27 June 1986, ICJ Report 1986, p. 14 ("*Nicaragua* Case")

(b) Domestic cases

BGH NJW 2004, 2316 = BGHSt 49, Decision No. 22 (to be published) [17. 6. 2004, 5StR 115/03 - Landgericht Hamburg - ]

BGHSt 3, pp. 213-215 [14. 10. 1952, 2StR 306/52 - Landgericht Frankenthal - ]

*R. v. M. (C.A.)* [1996] 1 S.C.R. 500 (Supreme Court of Canada)

*Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 1248 (1996)

## B. **List of Other Legal Authorities**

### 1. Books, Edited Volumes and Collections

Fleck, Dieter, ed., The handbook of humanitarian law in armed conflicts, Oxford University Press, 1995

Lee, Roy S., ed., The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, 2001

Pictet, Jean, ed., Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), International Committee of the Red Cross, 1958 ("Commentary to Geneva Convention IV")

Sandoz, Yves, Swinarski, Christoph, and Zimmermann, Bruno, eds., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, Martinus Nijhoff Publishers, 1987 ("Commentary on the Additional Protocols")

Tonry, Michael H. and Frase, Richard S., eds., Sentencing and Sanctions in Western Countries, Oxford University Press, 2001

### 2. Dictionaries

Black's Law Dictionary, 7th Edition (St. Paul, West Group, 1999)

### 3. Other Legal Authority

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 ("Report of the Secretary-General")

Security Council Resolution 827 (1993), S/3217, 25 May 1993

Sieber, Ulrich, The Punishment of Serious Crimes: a comparative analysis of sentencing law and practice, filed on 12 November 2003, in its final version including Country Reports (the latter on CD-Rom) ("Sieber Report")

## 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 |
| ACHR | American Convention on Human Rights of 2 November 1969, 1144 U.N.T.S. 123 |
| Additional Protocol I | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 |
| Additional Protocol II | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 |
| a.k.a. | also known as |
| 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. |
| B/C/S | The Bosnian/Croatian/Serbian languages |
| BGH | Bundesgerichtshof (German Federal Supreme Court) |
| BGHSt | Amtliche Sammlung der Entscheidungen des Bundesgerichtshofs in Strafsachen (Official Publication of Decisions of the German Federal Supreme Court in criminal matters) <accessible through website: http://www.bundesgerichtshof.de> |
| BiH | Bosnia and Herzegovina (consisting of two entities: the Republika Srpska and the Federation of Bosnia and Herzegovina, and the Brčko District) |
| *Blaškić*, T. | Transcript page from hearings at trial in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T 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. |
| Bungalow | Former restaurant in Nadioci, near Ahmići |
| CBOZ | Central Bosnia Operative Zone |
| Čerkez Appeal Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appellant Mario Čerkez's Brief, filed 9 August 2001 |
| Čerkez Defence | Counsel for Mario Čerkez |
| Čerkez Reply Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appellant Mario Čerkez's Brief in Reply to Prosecution's Consolidated Brief in Response to the Appeal Brief of Dario Kordić and Mario Čerkez, filed 30 October 2001 |

| | |
|---|---|
| Čerkez Response Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Respondent Mario Čerkez's Brief of Argument, filed 13 September 2001 |
| *cf.* | [Latin: *confer*] Compare |
| Control Council Law No. 10 | Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, of 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) |
| Croatia | Republic of Croatia |
| Defence | The Accused and/or the Accused's counsel |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention of Human Rights), 213 U.N.T.S. 221 |
| ECMM | European Community Monitoring Mission |
| Exh. | Exhibit |
| Exhs | Exhibits |
| Federation of Bosnia and Herzegovina | Entity of BiH |
| Geneva Convention III | Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135 |
| Geneva Convention IV | Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949, 75 U.N.T.S. 287 |
| Geneva Conventions | Geneva Conventions I to IV of 12 August 1949 |
| Hague Convention IV | The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907, 187 C.T.S. 227, 1 Bevans 631 |
| Hague Convention IX | The 1907 Hague Convention (IX) Concerning Bombardment By Naval Forces in the Time of War of 18 October 1907, 205 C.T.S. 345, 1 Bevans 631 |
| Hague Regulations | Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907 |
| HDZ | Croatian Democratic Union |
| HDZ-BiH | Croatian Democratic Union of Bosnia and Herzegovina |
| HOS | Croatian Defence Forces (military wing of the Croatian Party of Rights) |
| HR H-B | Croatian Republic of Herceg-Bosna |
| HV | Army of the Republic of Croatia |
| HVO | Croatian Defence Council (army of the Bosnian Croats) |
| HZ H-B | Croatian Community of Herceg-Bosna |
| ibid. | [Latin: *ibidem*] in the same place |
| ICCPR | International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966. Entry into force on 23 March 1976, 999 U.N.T.S. 171 |

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|---|---|
| ICJ | International Court of Justice |
| 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 |
| ICTY | 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 |
| Indictment | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Amended Indictment, filed 2 October 1998 (dated 30 September 1998) |
| *inter alia* | Among other things |
| International Tribunal | see ICTY |
| JNA | Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia) |
| Jokers | Unit within the 4th Battalion of the Military Police |
| Kordić Amended Grounds of Appeal | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appellant Dario Kordić's Response to Order to File Amended Grounds of Appeal, 8 March 2002 |
| Kordić Appeal Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Brief of Appellant Dario Kordić, Volume I – Publicly Filed and Volume II – Filed under Seal, filed 9 August 2001; re-filed 29 July 2002 |
| Kordić Defence | Counsel for Dario Kordić |
| Kordić Reply Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Reply Brief of Appellant Dario Kordić, filed 30 October 2001; re-filed in confidential and redacted public version on 29 July 2002 |
| Kordić Response Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Brief of Respondent Dario Kordić, filed 10 September 2001; re-filed partly confidentially 29 July 2002 |
| Kordić Supplemental Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Supplement to Dario Kordić's Appellant's Brief, filed 12 June 2002 |
| Milinfosum | Military Information Summary |
| MP 4th Battalion | 4th Battalion of the Military Police |
| MUP | Ministry of the Interior Police |
| NJW | Neue Juristische Wochenschrift |
| Nuremberg Charter | Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis ("London Agreement") of 8 August 1945, 82 U.N.T.S. 279 |

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|---|---|
| Nuremberg Principles | Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission at its second session in 1950 |
| Original Indictment | *Prosecutor v. Dario Kordić, Tihomir Blaškić, Mario Čerkez, Ivica Šantić, Pero Skopljak, Zlatko Aleksovski*, Case No. IT-95-14/2, Indictment, filed 3 November 1995 (confirmed 10 November 1995) |
| p. | Page |
| pp | Pages |
| para. | Paragraph |
| paras | Paragraphs |
| Prosecution | Office of the Prosecutor |
| Prosecution Appeal Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Prosecution's Appeal Brief , filed 9 August 2001 |
| Prosecution exhibits | Exhibits tendered by the Prosecutor and admitted into evidence by the Chamber |
| Prosecution Response (confidential) | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Prosecution's Consolidated Brief in Response to the Appeal Briefs of Dario Kordić and Mario Čerkez, filed on 1 October 2001 |
| Prosecution Response | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Prosecution's Consolidated Brief in Response to the Appeal Briefs of Dario Kordić and Mario Čerkez, filed on 3 October 2001 |
| Prosecution Reply | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Consolidated Reply Brief to "Brief of Respondent Dario Kordić" and "Respondent Mario Čerkez' Brief of Argument", filed 25 September 2001 |
| Prosecution Pre-trial Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Prosecutor's Pre-trial Brief, filed 25 March 1999 |
| Prosecution Response to Kordić Supplemental Brief | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Prosecutor's Respondent's Brief to the "Supplement to Dario Kordić's Appellant's Brief", filed 26 June 2002 |
| Prosecution Supplemental Response | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Prosecution's Supplementary Respondent's Brief, filed 26 April 2002 |
| Prosecution Final Trial Brief | *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-T), Prosecutor's Closing Brief, filed on 13 December 2000 |
| Rules | Rules of Procedure and Evidence of the ICTY |
| SDA | Party of Democratic Action |
| SFRY | *Former*: Socialist Federal Republic of Yugoslavia |
| SIS | HVO Security and Information Service |
| Status Conference on Appeal, T. | Transcript page from status conference on appeal of 6 May 2004 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. |

| | |
|---|---|
| Statute | Statute of the International 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. 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. |
| TO | Territorial Defence |
| Tokyo Charter | Charter of the International Military Tribunal for the Far East of 19 January 1946, 4 Bevans 20 (as amended, 26 April 1946, 4 Bevans 27) |
| Trial Judgement | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 |
| U | Ustaša. In the Bosnian war it was name that Bosnian Muslims and Serbs used for the Croats. It is a reference to the name of the nationalist and separatist government in Croatia during World War II. |
| UN | United Nations |
| UNDU | United Nations Detention Unit for persons awaiting trial or appeal before the ICTY |
| 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) |
| War Diary | Duty Officer's Log Book (Exhibit 610.1) |
| Z1517 (Inside Cover) | Exhibit admitted into evidence on 29 July 1999, Photograph taken on 22 or 24 April 1993 |