

**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-04-82-T  
Date: 10 July 2008  
Original: English

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**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr Hans Holthuis

**Judgement of:** 10 July 2008

**PROSECUTOR**

v.

**LJUBE BOŠKOSKI  
JOHAN TARČULOVSKI**

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*PUBLIC*

**JUDGEMENT**

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**The Office of the Prosecutor:**

|                    |                    |
|--------------------|--------------------|
| Mr Dan Saxon       |                    |
| Ms Antoinette Issa | Ms Meritxell Regue |
| Ms Joanne Motoike  | Ms Nisha Valabhji  |
| Mr Gerard Dobbyn   | Mr Matthias Neuner |

**Counsel for the Accused:**

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškosi  
Mr Antonio Apostolski and Ms Jasmina Živković for Johan Tarčulovski

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## I. INTRODUCTION

1. The Indictment charges the Accused, Ljube Boškoski and Johan Tarčulovski, with crimes committed between 12 and 15 August 2001 against ethnic Albanians from Ljuboten village in the northern part of the former Yugoslav Republic of Macedonia (“FYROM”).<sup>1</sup> These acts are alleged to have occurred during an armed conflict that, as alleged, began in January 2001 and continued until at least late September 2001, between the Security Forces of FYROM, *i.e.*, the army and police, on the one hand,<sup>2</sup> and the ethnic Albanian National Liberation Army (“NLA”) on the other. It should be noted that this case is the only one before this Tribunal concerning allegations arising out of the situation in FYROM in 2001.

2. The Indictment alleges that on 12 August, the village of Ljuboten came under a combined attack by police led by Johan Tarčulovski and the army of FYROM. In the course of the attack, six Ljuboten residents are alleged to have been shot by police. It is alleged, further, that 13 ethnic Albanian residents were seriously beaten at Adem Ametovski’s house on 12 August, that 10 of the remaining men of the original group of 13 were marched to the police checkpoint at the Braca house, and that they were subjected to beatings on their way to and at this checkpoint. It is alleged that these men were further physically and mentally abused at Mirkovci police station. One of the men is alleged to have died due to the cruel treatment that he received. It is alleged, further, that on 12 August, at least 90 male civilian residents from Ljuboten were arrested at Buzalak checkpoint while they were fleeing from the village with their families, and that from this checkpoint, they were transported and detained at several police stations and also, in some cases, at Skopje Court II and Skopje City Hospital. It is alleged that the men detained at these various locations were further beaten. Further, the Indictment alleges that at least 14 houses in the village were set on fire by the police commanded by Johan Tarčulovski. On the basis of these allegations, the Indictment charges the Accused with three counts of violations of the laws or customs of war, namely murder, cruel treatment and wanton destruction, under Article 3 of the Statute.

3. Ljube Boškoski, Minister of the Ministry of Interior (“MoI”) of FYROM from May 2001 until November of 2002 is charged with individual criminal responsibility under Article 7(3) of the Statute. It is alleged that as a superior, he is criminally responsible for the crimes of regular and reserve police, including special police units; that is for both the commission of crimes by those

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<sup>1</sup> The Chamber recognizes that by resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State provisionally referred to for all purposes within the United Nations as “The former Yugoslav Republic of Macedonia”, pending settlement of the difference that had arisen over its name.

<sup>2</sup> At times in the evidence and in this Judgement, references to Macedonian Security Forces do not distinguish the police from the army, both of which are elements of the Macedonian Security Forces. Depending on the context, a reference to Macedonian Security Forces may include both the police and army, or only one of these elements.

police as well as for the acts or omissions of those police, which aided and abetted prison guards, hospital personnel and civilians to commit the crimes charged in the Indictment. He is alleged to have exercised *de jure* and *de facto* control over the police that participated in the charged crimes and to have had knowledge of the crimes committed by his subordinates in Ljuboten, which was obtained, *inter alia*, by his observations of property damage and mistreated detainees close to the scene of the attack in the afternoon of 12 August, meetings with participants in the attack on 12 August, internal police reports, public media reports, reports of international organisations produced within days and weeks of the crimes, and meetings with international representatives and journalists. It is alleged that he was aware of the preparation for and the involvement of the police led by Johan Tarčulovski in the Ljuboten attack on 12 August. Further, it is alleged that from 12 August 2001 until May 2002 (the date on which the Prosecutor of the ICTY notified the Macedonian authorities of her decision to take primacy of, *inter alia*, the case of Ljuboten), Ljube Boškoski had a duty as a superior to investigate the crimes committed and to impose punitive measures on the perpetrators, and that he did not do so. It should be noted that Ljube Boškoski is thus not charged with the commission of the crimes alleged, or with failing to prevent such crimes from occurring, but rather for failing to punish the perpetrators of the alleged crimes.

4. Johan Tarčulovski, at the material time a police officer acting as an Escort Inspector in the President's Security Unit in the Ministry of Interior, is charged with individual criminal responsibility pursuant to Article 7(1) of the Statute for his participation in a joint criminal enterprise ("JCE"), between 10 and 12 August 2001, the purpose of which is alleged to have been to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, which was not justified by military necessity, a crime under Article 3 of the Statute. It is alleged that he worked in concert with both known and unknown JCE members within FYROM regular and reserve police, who were under his command within the MoI. It is alleged that Johan Tarčulovski participated in the JCE with the knowledge of its illegal objectives by, *inter alia*, selecting individuals to form the unit of regular and reserve police that took part in the attack, seeking and gaining logistical, material and fire support for the attack from the most senior police and army commanders based in the area of Ljuboten, determining the timing, method, manner, goals and targets of the attack, and by ordering, using his position of authority, the regular and reserve police in the unit to attack Ljuboten. The crimes charged in the Indictment are alleged to have been within the objective of the JCE, or the natural and foreseeable consequences of the execution of the object of the JCE. Further, Johan Tarčulovski is charged with individual criminal responsibility under Article 7(1) for ordering, planning, instigating and aiding and abetting the charged crimes. The Indictment does not charge Ljube Boškoski with participation in the alleged JCE together with Johan Tarčulovski. Neither

does the Indictment allege the participation of the army of FYROM in the criminal purpose of the alleged JCE. The Indictment concerning the events on 12 August is limited to the acts of the police.

5. Ljube Boškoski and Johan Tarčulovski have each entered pleas of Not Guilty to the counts with which they are charged.

6. In May 2002, the Prosecutor of the Tribunal informed the Macedonian authorities of her decision to assume primacy of, *inter alia*, the allegations concerning the activities of the Macedonian forces against ethnic Albanian civilians in FYROM in 2001, including alleged crimes in Ljuboten.<sup>3</sup> Pursuant to Rule 9(iii) and 10 of the Rules, on 5 September 2002, the Prosecutor submitted a request for deferral.<sup>4</sup> By a decision of 4 October 2002, a Trial Chamber<sup>5</sup> formally requested the Government of FYROM to order its national courts to defer, *inter alia*, the Ljuboten investigation,<sup>6</sup> and to forward the result of the investigation as well as a copy of court records and the judgements of its national courts, if any, to the Office of the Prosecutor of the Tribunal in The Hague.<sup>7</sup>

7. It is noted that from early 2001, there was an international presence of, *inter alia*, the OSCE, KFOR and NATO in FYROM. On 13 August, the Ohrid Framework Agreement was signed by the Government of FYROM and ethnic Albanian representatives, in an attempt to end the violence that had pervaded FYROM in 2001. Operation “Essential Harvest”, led by NATO, was carried out in August and September 2001 in order to disarm what were described as ethnic Albanian rebels.

8. While the alleged events are discussed in detail in the relevant sections of the Judgement, the Chamber records here its finding that on 12 August 2001 Ljuboten village was the subject of an attack during an operation of the police supported by the Macedonian army. Six male ethnic Albanian Ljuboten residents were shot dead in the course of that operation. One other ethnic Albanian resident died the following day as a result of severe mistreatment on 12 August. During that day, many residents of the village were held at a nearby police checkpoint where the men, who were separated from the women and children, were mistreated by the police. After the operation in Ljuboten ceased in the early afternoon, a large number of ethnic Albanian men from the village were transferred to police stations not far from Ljuboten, where they were mistreated by police and

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<sup>3</sup> Exhibit P391, *In Re: The Former Yugoslav Republic of Macedonia*, “Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia”, 5 September 2002, paras 3, 6-7.

<sup>4</sup> Exhibit P391, paras 1, 21.

<sup>5</sup> Judge Liu Daqun (presiding), Judge El Mahdi and Judge Oric.

<sup>6</sup> The FYROM government was also formally requested to order its national courts to defer all its investigations and prosecutions with regards to the “NLA leadership case”, the “Mavrovo Road Worker” case, the “Lipkovo Water Reserve” case, and the “Neprošteno” case, Exhibit 1D218, p 19, para 1.

others. In the course of the attack, houses in Ljuboten were set on fire by the police using gasoline or other incendiary materials. The seven dead residents were buried in Ljuboten but, in 2002, their bodies were exhumed and autopsies performed to establish, where possible, the injuries sustained and the cause of death.

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<sup>7</sup> Exhibit 1D218, Case No. IT-02-55-MISC.6, *In Re: The Republic of Macedonia*, “Decision on the Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia”, 4 October 2002, p 19, paras 1-2 of the Disposition.



## II. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

9. Article 21(3) of the Statute guarantees the presumption of innocence to which each accused is entitled. This presumption places on the Prosecution the onus of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the entire trial. In respect of each of the three counts charged, against each of the two Accused, the standard to be met for a conviction to be entered is that of proof beyond reasonable doubt.<sup>8</sup> Accordingly, the Chamber has determined in respect of each of the counts charged, against each of the Accused, whether it is satisfied beyond reasonable doubt, on the basis of the whole of the evidence, that every element of that crime and the forms of liability charged in the Indictment have been established. In so doing, in respect of some issues, it has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether another inference also reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.<sup>9</sup>

10. The Chamber would emphasise that the mere admission of evidence in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it.

11. In the present case the Chamber received evidence from a number of witnesses then residents of the village of Ljuboten where the events charged in the Indictment are alleged to have taken place. The Chamber observed an obvious tendency of these witnesses to speak as if with one voice, especially with respect to matters such as whether there were NLA members in the village, the circumstances in which certain deaths occurred, and the identity of the Macedonian forces who entered the village on 12 August 2001. This left the Chamber with a clear impression that, before coming to the Tribunal, these witnesses had been prepared so that they gave pre-determined evidence with respect to some issues. The Chamber is also mindful of the relevance of group values, honour and family loyalty to the cultural background of witnesses with ethnic Albanian roots.<sup>10</sup> The Chamber, therefore, has not been able to accept their evidence as fully convincing in some respect. In other matters there was much divergence between some witnesses, although in this respect the divergence did not appear to be founded in dishonesty, but in differences of observation or recollection. In these matters the Chamber has treated the evidence with reservation.

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<sup>8</sup> Rule 87(A) of the Rules provides, in its relevant part: “[...] A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt.”

<sup>9</sup> *Čelebići Appeals Judgement*, para 458.

<sup>10</sup> *See* Exhibit 2D109.

12. Further, many members of the Macedonian police and army who were involved in or were present at the events alleged in the Indictment, or related events, who gave evidence before the Tribunal, left the Chamber with the clear impression that they were seeking in their evidence to distance themselves from any wrongdoing by Macedonian forces or to exculpate their own behaviour or the conduct of the police or army. Because of this the Chamber has not been able to accept some of this evidence as truthful or reliable.

13. In the course of the evidence of some witnesses, especially former or current employees of the Ministry of Interior or of other Macedonian public institutions, it became apparent that on certain issues their oral evidence before the Chamber was materially different from what the witness had said in a prior statement given to the Prosecution. The nature of the changes and the witnesses' explanation left the Chamber satisfied that in most cases the explanation offered for the difference was not genuine and that the oral evidence before the Chamber was not true. The Chamber formed the view in many cases of this nature that when the witness came to give evidence before the Tribunal, the witness was concerned with the effect on his or her career perceived by the witness if the account given in the prior statement was maintained.

14. The Chamber also observed that the evidence of some Defence witnesses, former or current employees of the Ministry of Interior, in particular some who had been subordinated to Ljube Boškoski, appears to have been influenced by a sense of loyalty to their former superior or by the perceived effect of their evidence on their employment and career opportunities in the Ministry.

15. There is significant variation in the evidence about some issues. The timing of material events on 12 August 2001 is particularly affected by this difficulty. It is not surprising that there should be variation about time which was not itself of great interest to those involved as the events of the day unfolded. Hence, there is much scope for witnesses to be honestly mistaken or uncertain about timing. In the case of some witnesses, however, in particular some army and police witnesses, the nature of their particular evidence, the manner in which they gave their evidence and in some cases, differences between their evidence and earlier reports or statements, gave rise to the clear impression that the timing of some events, including the order in which some events occurred, was being deliberately manipulated or obscured. Despite this, having regard to other evidence, the Chamber has been able to reach conclusions about the timing or the order of some material events, after having weighed but rejected other contrary or varying evidence.

16. In particular, by virtue of matters mentioned above, the Chamber has been persuaded it should reject or treat with circumspection the evidence of some army and police personnel about their supposed sightings of persons and events in Ljuboten on 12 August, the timing of some happenings, and the action of army units supposedly in response to happenings in Ljuboten. In

respect of these matters, and events on 10 and 11 August, there is much variation between the evidence of army witnesses, and conflict with earlier reports and statements. The Chamber is left with the clear impression that much of this evidence was contrived to provide legal justification for action by the army or to enhance the standing of the army for efficiency and effectiveness.

17. Further, as dealt with in more detail later in this decision, it was apparent from the content of their evidence, in some cases the manner in which it was given, earlier reports and statements of the witness, and also from the effect of contrary evidence which the Chamber found convincing, that a number of material army and police witnesses were adjusting their evidence to avoid the disclosure of the true nature of events in which they participated and to avoid the disclosure of their true role in some incidents. In short, these witnesses were seeking to protect themselves from the possibility of being charged with serious offences, whether in this Tribunal or elsewhere.

18. The Defence have raised a number of concerns with respect to the credibility of Prosecution witness Franz-Josef Hutsch. Mr Hutsch, a freelance journalist, but at the time also gathering military intelligence for another government,<sup>11</sup> testified before the Tribunal as a Prosecution witness. He said he visited Ljuboten on the dates material to the Indictment and that he was able to observe material events alleged to have occurred in the village and elsewhere.<sup>12</sup> While, if accepted this evidence would have been most material, for reasons explained below the Chamber is unable to accept that Franz-Josef Hutsch was in FYROM, or indeed present at Ljuboten, on 12 August or days following. It was Mr Hutsch's evidence that he was driving a white jeep with the letters TV written on it.<sup>13</sup> This is not a typical vehicle and should have stood out. However, there is no evidence of such a vehicle being seen at the police checkpoint he said he visited, or from the army positions above Ljuboten from where army personnel were observing the activities in and around the village. While he gave evidence that during the events of 12 August 2001 he crossed the village from east to west with his car following,<sup>14</sup> none of the Ljuboten residents and other observers of the events that day, who gave evidence, spoke of any sighting which could have confirmed Franz-Josef Hutsch's presence there. No travel or accommodation documents or receipts have been offered in

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<sup>11</sup> Franz-Josef Hutsch, T 2808-2810.

<sup>12</sup> In particular, he testified that he observed the events in Ljuboten on 12 August from early in the morning until late in the day from an elevation between Ljuboten and the neighbouring village of Ljubanci, T 2693-2700; Exhibit P307. He noted in his notebook all the events he observed and noted these on a group, T 2693-2694. In court during his testimony he marked on a map certain places and activities he observed on 12 August, T 2695-2696; 2699-2700; Exhibit P307. He was later present at a police checkpoint and observed ethnic Albanians being mistreated there, T 2748-2753. He also entered the village in the afternoon, and had conversations with a group of policemen, including the Accused Johan Tarčulovski and a man he later found out was the commander of the special police unit Lions, T 2756; 2760; 2769-2778; 6484. In the evening he saw the Accused Ljube Boškoski and a man who, a few years later he understood was Bučuk, the owner of a private security agency alleged to have been involved in the events in Ljuboten, in the restaurant of the hotel in Skopje where he was staying, T 2785-2786.

<sup>13</sup> Franz-Josef Hutsch, T 2692-2693.

<sup>14</sup> Franz-Josef Hutsch, T 2760.

support of his evidence that he had travelled to FYROM and stayed there for some days before and after 12 August 2001. It was also the evidence of Mr Hutsch that during his stay in FYROM and in particular on 12 August 2001 he was assisted by others—in particular, two interpreters<sup>15</sup>—yet no such persons were called to give evidence and Mr Hutsch directly refused in evidence to identify these people, on the basis that to do so would expose them to risk.<sup>16</sup> Whether that may be so or not, the fact remains that no other witness has been called who confirms in any way the presence of Mr Hutsch in FYROM or in Ljuboten on 12 August 2001. Even more tellingly, there is no record of Franz-Josef Hutsch’s presence in FYROM on 12 August. According to FYROM records he entered the country on 19 August and he left on 31 August 2001.<sup>17</sup> Thus there is no record of his entry into FYROM that would have enabled him be in the country on 12 August 2001. There is also evidence suggesting that he did not register in the hotel in Skopje, at which he said he was staying on 12 August until 10 days after that date.<sup>18</sup> When challenged about this in cross-examination it was suggested by Mr Hutsch the records of his stay had been removed. He cited what he said was a similar situation when records of another hotel had been changed to remove any evidence of the stay of a person named El-Masri.<sup>19</sup> That proposition remains untested and unconfirmed. However, some effort was made to support the account of Mr Hutsch on the basis that the foreign guest register of his hotel, for the period 23 May 2001 to 8 March 2002, appeared less used and better preserved than the foreign guest register for the period 8 March 2002 to 1 March 2004.<sup>20</sup> There was an apparent difference of appearance, as suggested, but the explanation offered by the hotel owner, which pointed out that the better condition of the relevant register was due to its lesser use which was due to a change in the required manner of keeping the records.<sup>21</sup> This explanation was credible and undisputed. The hotel records themselves did not appear to have been tampered with. The Chamber also would note here that before Mr Hutsch gave evidence in this trial, his legal representative sought the assistance of the Office of the Prosecutor in relation to legal proceedings in Germany.<sup>22</sup> The circumstances opened the question whether Mr Hutsch’s evidence in this trial

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<sup>15</sup> Franz-Josef Hutsch, T 2692-2693; 6188.

<sup>16</sup> Franz-Josef Hutsch, T 2734.

<sup>17</sup> Igor Dimovski, T 10925-10926; Exhibit 2D111.

<sup>18</sup> Branislav Dimitrov, T 10311-10316; Exhibit 1D244.

<sup>19</sup> Franz-Josef Hutsch, T 6344. In re-examination Mr Hutsch testified that El-Masri was a German Lebanese citizen, who at some point in 2002-2003 was taken to Afghanistan to be questioned by the American intelligence services. According to Mr Hutsch, El-Masri spent two to three weeks at the Hotel Skopski Merak in Skopje. An EU investigative committee (presumably after the events) went to the hotel and, according to Hutsch, “they were introduced to a completely new set of staff; but, not only that, also the book, the registry, was presented to them, which no longer contained the name ‘El Masri,’ and they were clearly changed,” T 6488. Those matters were not confirmed or fully examined in the evidence before the Chamber in this trial.

<sup>20</sup> Exhibit P542.

<sup>21</sup> Branislav Dimitrov, T 10335-10337; 10355.

<sup>22</sup> These proceedings involved a civil lawsuit for damages initiated by Mr Hutsch arising from a news report which questioned the honesty of his work as a journalist. This article related to evidence given by Mr Hutsch as a defence witness in another case before this Tribunal, T 6132; Exhibit 1D241. In an article published as part of the settlement reached in these proceedings it is said that the then Prosecutor of this Tribunal wrote a letter to Mr Hutsch’s lawyer,

was motivated by self-interest, rather than disclosing the truth. This issue provides yet an additional reason for the Chamber to be unsatisfied with the veracity of Mr Hutsch's testimony. Having reviewed the above matters, the Chamber is unable to accept the evidence of Franz-Josef Hutsch that he was in Ljuboten, or FYROM, on 12 August 2001. The Chamber cannot rely on any of his evidence.

19. Despite the various matters affecting the evaluation of the evidence in this case, after having carefully reviewed and weighed all the evidence, the Chamber has been able to make findings on the facts of this case sufficient for it to be able to determine the guilt or innocence of each of the two Accused in respect of the charges in the Indictment. At times the Chamber has rejected evidence despite the presence of consistent evidence. At other times it has accepted evidence notwithstanding the presence of contradicting or inconsistent evidence. In each case the Chamber has acted in light of all the relevant evidence and only after very careful scrutiny of the witness and the evidence. The Chamber's reasons are more fully detailed in each case.

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at Mr Hutsch's lawyer's request, which referred to Mr Hutsch as a "well balanced and honourable witness' who should testify as a prosecutor (*sic*) witness against the war criminals of the Yugoslav conflict also in the future." (Franz-Josef Hutsch, T 6134; 6226; Exhibit 1D245) The article was published on 11 June 2007. Franz-Josef Hutsch commenced his evidence before the Chamber on 21 June 2007.

### III. CONTEXT

20. The former Yugoslav Republic of Macedonia (FYROM) is situated in the central Balkan Peninsula. At the time material to the events in this Judgement, it bordered to the north, the Federal Republic of Yugoslavia, to the east, Bulgaria, to the south, Greece, and to the west, Albania. The capital is Skopje.<sup>23</sup>

21. Until 1991, FYROM was a constituent republic of the Socialist Federal Republic of Yugoslavia.<sup>24</sup> On 8 September 1991, a referendum was held, the result of which was a vote for independence and subsequently, on 17 November 1991, the Parliamentary Assembly (“the *Sobranje*”) adopted the Constitution of FYROM.<sup>25</sup> The Republic was admitted as a member of the United Nations on 8 April 1993,<sup>26</sup> as the former Yugoslav Republic of Macedonia.<sup>27</sup>

22. The collapse of the Yugoslav federation in 1991, and subsequent events in the Balkans, brought economic and political strains to FYROM.<sup>28</sup> During this period, FYROM was affected by the UN embargo of Yugoslavia and was itself subject to a blockade by Greece,<sup>29</sup> whilst, in 1999, it accepted more than 300,000 ethnic Albanians from Kosovo, as a result of the crisis there.<sup>30</sup> By 2001, the unemployment rate is reported to have been at least 30% and the average income was only 300 Deutsche Mark per month.<sup>31</sup> Nevertheless, prior to 2001, FYROM did not directly experience the hostilities which affected other parts of the Balkans.

23. The last elections to be held to the *Sobranje*, prior to 2001, were in October and November 1998.<sup>32</sup> The total membership in the *Sobranje* was 120, comprised of 85 directly elected representatives and 35 taken from party lists.<sup>33</sup>

24. The 1998 elections returned the following parties (in order of number of members of the *Sobranje*) – the Internal Macedonian Revolutionary Organisation – Democratic Party for Macedonian Unity (“VMRO-DPMNE”), the Social Democratic Alliance of Macedonia (“SDSM”) (former Communist), the Party of Democratic Prosperity (“PDP”) (ethnic Albanian), the Party of Democratic Prosperity for Albanians (“DPA”) (ethnic Albanian), the Democratic Alternative

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<sup>23</sup> Exhibit P45, p 13.

<sup>24</sup> Exhibits P43, p 4; P44 p 4; *see also* Exhibit P402, p 9; Exhibit P45, p 21.

<sup>25</sup> Exhibits P45, p 21; P43, p 5.

<sup>26</sup> Exhibits P45, p 21; P43, P 4; P44, p 4.

<sup>27</sup> Exhibit P44, p 4.

<sup>28</sup> Exhibits 2D101, para 43 - 45; P45, p 58.

<sup>29</sup> Exhibit 2D101, para 48.

<sup>30</sup> Exhibits P43, p 5; P45, p 56.

<sup>31</sup> Exhibit P45, p 57 (Speech given by President Trajkovski to EU summit, 3 March 2001).

<sup>32</sup> Exhibit P45, p 25.

<sup>33</sup> Exhibit P45, p 25.

“DA”) (centrist coalition partner of the VMRO-DPMNE), the Liberal Party (“LP”), the Liberal Democratic Party (“LDP”), the New Democracy (“ND”), and the Socialist Party and the Union of Romas of the FYROM.<sup>34</sup> The Internal Macedonian Revolutionary Organisation – True Macedonian Reform Option (“VMRO-VMRO”) broke away from the VMRO-DPMNE in 2000 and was a separate party during the period covered by the Indictment.<sup>35</sup>

25. At the beginning of January 2001, the President of FYROM was President Boris Trajkovski.<sup>36</sup> The head of the Macedonian government was Prime Minister Ljupčo Georgievski.<sup>37</sup> Both men were members of the VMRO-DPMNE.<sup>38</sup> In May 2001, a new cabinet was formed.<sup>39</sup> In this reshuffle, the Accused, Ljube Boškoski, also a member of the VMRO-DPMNE,<sup>40</sup> was promoted from the position of State Secretary of the Ministry of Interior to the post of Minister of the Interior.<sup>41</sup> In accordance with the Macedonian Constitution,<sup>42</sup> Ljube Boškoski then became a participant in the Security Council, the body charged with consideration of matters relating to the security and defence of FYROM.

26. In 2000, the population of FYROM was estimated to be over two million people.<sup>43</sup> The population was composed of a variety of national and ethnic groups. According to the 1994 census, the largest group, defining themselves as Macedonians, constituted 66.6% of the population.<sup>44</sup> The second largest group, which represented 22.7% of the population, consisted of ethnic Albanians.<sup>45</sup> Other ethnic groups include Turks, Roma, Serbs and Vlachs.<sup>46</sup> In religious terms, 67% of the population defined themselves as Macedonian Orthodox Christians, whilst 30% considered themselves to be Muslims.<sup>47</sup> The remaining 3% were noted as having “other” affiliations.<sup>48</sup>

27. In 2001, in addition to representation by the PDP and DPA in the *Sobranje*,<sup>49</sup> ethnic Albanians occupied positions in the Government.<sup>50</sup> Nonetheless, ethnic differences were a major source of political tension. Many members of the ethnic Albanian community regarded what they

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<sup>34</sup> Exhibits P321, pp 15 -18; P45, p 26.

<sup>35</sup> Exhibits P321, p 17; P45, p 26.

<sup>36</sup> Exhibit P321, p 7.

<sup>37</sup> Exhibit P321, occupied the position from 30 November 1998, p 7.

<sup>38</sup> Exhibit P321, p 7.

<sup>39</sup> Exhibit P466, para 239.

<sup>40</sup> Exhibits P43, p 4; P321 p 10.

<sup>41</sup> Exhibits P43, p 4; P321, p 10; P402, p 22.

<sup>42</sup> Exhibit P91, Article 86(2).

<sup>43</sup> Exhibit P45, p 12.

<sup>44</sup> Exhibits P43, p 5; P44, p 4; P45, p 12.

<sup>45</sup> Exhibits P43, p 5; P44, p 4; P45, p 12.

<sup>46</sup> Exhibits P45, p 12; P43, p 5; P44, p 4; P45, p 47.

<sup>47</sup> Exhibit P45, p 12.

<sup>48</sup> Exhibit P45, p 12.

<sup>49</sup> Exhibit P321, p 18; Viktor Bezruchenko, T 6510; Nazim Bushi, T 5767-5768; M092, T 5746.

<sup>50</sup> Exhibits P321, pp 7-14; 2D101, para 37; Gzim Ostreni, T 7624; Nazim Bushi, T 5764-5765.

saw to be the under-representation of ethnic Albanians in the military and police as a major grievance.<sup>51</sup> Members of ethnic minorities constituted no more than 8.7% of the law enforcement officers of the Ministry of Interior.<sup>52</sup>

28. The precise date of the formation of the NLA is unknown. However, as early as 22 January 2001, an organization calling itself the NLA took responsibility for an attack on a police station.<sup>53</sup> In May of 2001, leaders of the NLA and of Albanian political parties issued a declaration which set out a number of common, agreed positions of leading NLA figures, the "Prizren Agreement", concerning the need "to reform the Republic of Macedonia in the way that it becomes a democratic state of all citizens and all the national communities."<sup>54</sup> The NLA was created, according to a number of witnesses in this case, as a result of more than a decade of dissatisfaction by the ethnic Albanian population with their status as a minority in FYROM.<sup>55</sup> According to witnesses, the origin of this discontent was the Constitution of 1991, which excluded ethnic Albanians from state institutions such as, *inter alia*, the army and the police.<sup>56</sup> This created unrest amongst the ethnic Albanians who feared the creation of a "one-nation" state.<sup>57</sup> The spill-over effect of the war in Kosovo that had ended in 1999, and the influx of more than 300,000 refugees from Kosovo into Macedonia, undoubtedly fed this unrest and served to expedite the creation of the NLA.

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<sup>51</sup> Exhibits P45, p 47; 2D101, para 38; Nazim Bushi, T 5767.

<sup>52</sup> Exhibit P45, p 47.

<sup>53</sup> Exhibit 1D256, p 3, ICG Balkans Report 109, dated 5 April 2001 (ERN 1D00-6438).

<sup>54</sup> Exhibit P560, "The Declaration of the Albanian Leaders in Macedonia Regarding the Reforming and Peace Process in the Republic of Macedonia", Prizren, dated 22 May 2001; *see also* Gzim Ostreni, T 7871-7873; *see also* Exhibit P520, Communique number 6 (undated) setting out NLA goals.

<sup>55</sup> Nazim Bushi, T 5579; Gzim Ostreni, Exhibit P497, para 16.

<sup>56</sup> Gzim Ostreni, Exhibit P497, para 16.

<sup>57</sup> Gzim Ostreni, Exhibit P497, para 16.



## IV. EVENTS IN LJUBOTEN AND ITS SURROUNDINGS

### A. Events of 12 August 2001 and the following days

29. The events that form the basis of the present Indictment are alleged to have occurred in the village of Ljuboten, its surroundings and thereafter in Skopje, on Sunday, 12 August 2001 and on the following two days.

30. The village of Ljuboten is situated a few kilometres to the north of the city of Skopje on the slopes of Mount Skopska Crna Gora.<sup>58</sup> The village is located at an elevation of approximately 600 metres<sup>59</sup> and offers a good vantage point of the city of Skopje.<sup>60</sup> An old road above Ljuboten connects the area of Kumanovo with the nearby Kosovo border.<sup>61</sup> The location of the village was viewed by many as strategically important for the NLA.<sup>62</sup> In 2001 Ljuboten had a population of approximately 3,000 people.<sup>63</sup> While the majority of Ljuboten's residents were ethnic Albanians, there was also a group of ethnic Macedonians living there, primarily in the north-western part of the village, near to the adjoining village of Ljubanci, which was essentially occupied by ethnic Macedonians.<sup>64</sup> Most of the population of Ljuboten were involved in agriculture.<sup>65</sup> The village had both an Orthodox Church and a Mosque.

31. Because of activities of the NLA in this area, which was critically located between the nearby border with Kosovo to the north and the nearby capital city of Skopje to the south, the Macedonian army occupied positions on the mountain slopes in the mountainous region above Ljuboten and Ljubanci. These positions included those known as Smok, Bomba and Mecka,<sup>66</sup> the first two of which were in the location known as Malistena or Bregu-i-Rashiti,<sup>67</sup> a mountain slope north of Ljuboten, from where Ljuboten and the surrounding area could be seen. One of the army units had established a temporary command post in the adjoining village of Ljubanci.<sup>68</sup> Despite the presence of army units in the vicinity of Ljuboten, the Chamber records its specific finding, from all of the relevant evidence it has heard and seen, that the army did not enter the village on 12 August

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<sup>58</sup> Elmaz Jusufi, T 491.

<sup>59</sup> Exhibit P298.

<sup>60</sup> M037, T 858-859. See also Ismail Ramadani, T 1007.

<sup>61</sup> Ismail Ramadani, T 1007. See also M083, T 1420-1421.

<sup>62</sup> See M051, T 4198-4199; Exhibit 2D35, p 2.

<sup>63</sup> Peter Bouckaert, T 3028.

<sup>64</sup> 084, T 1518; Elmaz Jusufi, Exhibit P8.1, para 7.

<sup>65</sup> Elmaz Jusufi, T 560.

<sup>66</sup> Marijo Jurišić, T 3319; Exhibit P366.

<sup>67</sup> Macedonian army positions Smok and Bomba (see *infra*, paras 141; 142) were located in the area known as Malistena. (Exhibit P216; M088, T 1255)

<sup>68</sup> See *infra*, para 99.

2001.<sup>69</sup> However, there was limited firing from some army positions on targets in Ljuboten and surrounding areas that day, which will be discussed later in this Judgement.<sup>70</sup>

32. Because of NLA activities, a number of police checkpoints had also been set up on the roads in the area of Ljuboten.<sup>71</sup> The number of police officers normally deployed at each checkpoint ranged from 5 to 15.<sup>72</sup> There is evidence that at more than one checkpoint the usual numbers were reinforced on 12 August, which is consistent with a decision taken on 10 August 2001 at a planning meeting in Ljubanci.<sup>73</sup>

33. One police checkpoint was located on Ljubotenski Pat (or Ljuboten Road), a few kilometres from Ljuboten in the direction of Skopje.<sup>74</sup> This checkpoint was between a place known as Buzalak (which was closer to Ljuboten) and a place called Kodra-e-Zajmit (or Zamski Rid in Macedonian<sup>75</sup>) which was closer to Skopje.<sup>76</sup> The checkpoint was referred to by some as Buzalak and by others as Kodra-e-Zajmit.<sup>77</sup> The Chamber is satisfied that references to checkpoint Buzalak and checkpoint Kodra-e-Zajmit are references to this one location. It will refer to this checkpoint throughout this Judgement as Buzalak checkpoint. While on previous days there were nine policemen there, on 12 August, pursuant to an order, 11 policemen were deployed at Buzalak checkpoint.<sup>78</sup>

34. The checkpoint of “Kineski Zid”, or the Chinese Wall, or Braca’s house, was located between Ljuboten and Ljubanci, at the entrance to Ljuboten.<sup>79</sup> The checkpoint was on the road leading from Ljubanci to the village of Ljuboten past the junction of that road and a road which led to what was normally a children's holiday resort.<sup>80</sup> The name Chinese Wall relates to a big wall encircling the house near which the checkpoint was located. The house belonged to a man named Andreja Braca, a Croat.<sup>81</sup> Pursuant to an order from the Mirkovci police station on the night of 11

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<sup>69</sup> See also Marijo Jurišić, T 3319; Mitre Despodov, T 2597; Nikolče Grozdanovski, T 10455; M2D008, T 10574; M051, T 4137.

<sup>70</sup> See *infra*, paras 39; 42.

<sup>71</sup> Exhibit 1D182.

<sup>72</sup> Petre Stojanovski, T 9142-9143.

<sup>73</sup> See *infra*, para 111; footnote 496.

<sup>74</sup> Pursuant to an order from the Čair police station and concerning 10 August 2001, the duties of the nine police officers deployed at the Buzalak checkpoint included checking IDs, searching vehicles and their passengers, as well as their luggage. (Exhibit P544)

<sup>75</sup> Farush Memedi, T 2043.

<sup>76</sup> Farush Memedi, T 2044; Exhibit P267.

<sup>77</sup> Farush Memedi, T 2035, 2044. A witness also testified that the checkpoint located between Kodra-e-Zajmit and Buzalak was called Cezma-e-Rizvanit. (Ejup Hamiti, T 4441-4442) The Chamber accepts that the checkpoint referred to by this witness as Cezma-e-Rizvanit is the same checkpoint located on the main road from Ljuboten to Skopje which was referred to by witnesses as Buzalak and as Kodra e Zajmit. See also *Prosecutor v Boškovski and Tarčulovski*, Case No: IT-04-82/T, “Decision on Motion to Amend the Indictment”, 14 November 2007.

<sup>78</sup> Exhibits P492; P544.

<sup>79</sup> M052, T 8267-8268; M053 T 1987; Exhibits 2D26; P298.

<sup>80</sup> Mitre Despodov, T 2672; M083, T 1377-1380; Exhibit P225.

<sup>81</sup> M052, T 8280; M053, T 1913; M017, T 634-635; Exhibit P20; Elmas Jusufi, Exhibit P8.1, paras 32-33.

August 2001, six police officers were deployed at the Chinese Wall checkpoint.<sup>82</sup> No such order is in evidence regarding 12 August 2001. However, there were about 15 reserve police officers from the regular shift at that checkpoint.<sup>83</sup>

35. The Stranište (or Straište, or Straišta) checkpoint was set up on a hill above the village of Ljuboten, in the fields between Ljubanci and Ljuboten, some 200 metres from the junction of the road leading from Ljubanci to the village of Ljuboten and the road to the children's holiday resort.<sup>84</sup> It is close to the checkpoint at Braca's house. The checkpoint was roughly one kilometre as the crow flies from the Mosque at the centre of Ljuboten.<sup>85</sup> It offered a good view of the area.<sup>86</sup> Pursuant to an order of 11 August 2001, 11 police officers were deployed at the Stranište checkpoint on 12 August 2001.<sup>87</sup>

36. In addition, on the morning of 12 August 2001 a team of five further police officers, mostly reservists, from Mirkovci police station were in the area of Ljubanci and Ljuboten<sup>88</sup> in a Hermelin armoured personnel carrier ("APC") of the police.<sup>89</sup> The police officers were wearing camouflage uniforms,<sup>90</sup> which was usual at that time for police engaged in such duties. While some evidence would suggest this was later,<sup>91</sup> in the Chamber's finding by 0800 hours the patrol from Mirkovci arrived at Stranište checkpoint. At that time at Stranište checkpoint a person using the code-name "Rudnik", and understood to be the Accused Johan Tarčulovski,<sup>92</sup> at the time, a security officer in the security unit assigned to the wife of the then President of FYROM, Boris Trajkovski,<sup>93</sup> radioed Stranište checkpoint to advise that "colleagues" were about to enter the village of Ljuboten to conduct an action to destroy "terrorists". The purpose of this call was to alert the police at the checkpoint so that they would not mistake those "colleagues" conducting the action for "terrorists" and act against them.<sup>94</sup> The patrol from Mirkovci in the Hermelin APC stayed for a time at Stranište checkpoint from where there was a good view of Ljuboten close by, but later entered the village and, as will be discussed, materially assisted the "colleagues."

37. The Chamber finds from the evidence, which is discussed more fully later, that by 0800 hours on 12 August 2001 both the army positions and the police checkpoints in the vicinity of

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<sup>82</sup> M052, T 8308-8309; Exhibit P547.

<sup>83</sup> M052, T 8280; 8497.

<sup>84</sup> M052, T 8267-8268; 8305-8307; M083, T 1377-1380; Exhibits P225; P298.

<sup>85</sup> M037, T 765.

<sup>86</sup> M037, T 827.

<sup>87</sup> M052, T 8305-8307; Exhibit P546.

<sup>88</sup> M037, T 757-758; 762; Exhibit P34.

<sup>89</sup> M037, T 758.

<sup>90</sup> M037, T 759.

<sup>91</sup> M037, T 765.

<sup>92</sup> M037, T 779.

<sup>93</sup> See *infra*, para 537.

Ljuboten were all manned, in some cases with larger numbers of men than usual, and alerted that action was about to commence in Ljuboten. This finding is made despite many attempts in the evidence by both police and army personnel to suggest that they had not been aware of what was to follow and had no involvement with the actions or in the preparations for them.

38. Also by that time, a large unit of armed men was positioned near the entrance to Ljuboten from Ljubanci. This unit comprised uniformed members of the police reserve, but may possibly have included some persons armed, uniformed, equipped and functioning as though they were members of the police reserve but who had not been formally appointed or who were not entitled to be issued with arms under the applicable procedure. There is also evidence that this unit may have included members of a regular police special unit, but as discussed later, the Chamber is not persuaded that this was the case. This police unit was poised and ready to enter Ljuboten on foot along the roadway from Ljubanci. The evidence as to the number of these men varies, but in the Chamber's finding there were at least some 60-70 men.<sup>95</sup> On some views of the evidence it could have exceeded 100 men. As will be discussed later, the Accused Johan Tarčulovski was in charge of this police unit and was there with the men.<sup>96</sup> He was in contact with other police and army units in the area.<sup>97</sup>

39. At approximately 0800 hours on 12 August 2001 residents of Ljuboten and others heard shooting and shelling in the village.<sup>98</sup> These activities were then concentrated in the western part of the village, near the Orthodox Church.<sup>99</sup> A witness believed that the house of an ethnic Albanian, Jakup Myftari (Miftari), located in the south-western part of the village below the Orthodox Church was hit by a shell.<sup>100</sup> A shell, and then another, hit the barn of Dalip Murati, an ethnic Albanian, which was located in the south-western part of the village to the west of the Orthodox Church.<sup>101</sup> A witness suggested that this shelling may have come from Malistena<sup>102</sup> where there were army

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<sup>94</sup> M037, T 767-768.

<sup>95</sup> See *infra*, para 120.

<sup>96</sup> See *infra*, para 560.

<sup>97</sup> The Chamber notes in this respect that, as found elsewhere, radios were given to Johan Tarčulovski on 10 August 2001 (see *infra*, paras 113; 550).

<sup>98</sup> Elmaz Jusufi, Exhibit P8.1, para 22; M039, Exhibit P200.2, para 13; Osman Ramadani, Exhibit P197, para 28; M088, Exhibit P206, para 15; M092, Exhibit P215, para 12, M092, T 1293-1294; Farush Memedi, Exhibit P266, para 7; Cemuran Redžepi, Exhibit P372, para 7; Sedat Murati, Exhibit P405, para 16; Sedat Murati, T 4064; Ejup Hamiti, Exhibit P417, para 5. Some witnesses testified to hearing the sound of small arms fire (or automatic gunfire) before the shelling commenced (Osman Ramadani, Exhibit P197, para 28; M039, Exhibit P200.2, para 13; Sedat Murati, Exhibit P405, para 16; M092 Exhibit P215, para 12), while others testified that the shelling started immediately (M088, Exhibit P206, para 15).

<sup>99</sup> M017 noticed smoke arising near the Orthodox Church, T 695-696.

<sup>100</sup> Sedat Murati, Exhibit P405, paras 17, 5, 6; Sedat Murati, T 4063; 4064-4068; Exhibit P406.

<sup>101</sup> Sedat Murati, Exhibit P405, para 16, 17; Sedat Murati, T 4064-4068; Fatmir Kamberi, Exhibit P426, para 13. See also Ejup Hamiti, Exhibit P417, p 2. The barn of Dalip Murati's house was soon hit again by a shell which caused it to burn. (Fatmir Kamberi, Exhibit P426, para 14; Fatmir Kamberi, T 4607; M017, T 694-696)

<sup>102</sup> Fatmir Kamberi, Exhibit P426, para 13.

positions,<sup>103</sup> although this suggestion appeared to be conjectural rather than based on observation. A house located at the north-eastern border of Ljuboten was also hit by a shell.<sup>104</sup>

40. These events were observed from the neighbouring village of Radišani by Henry Bolton, an OSCE representative. At 0805 hours he heard a loud detonation and saw smoke rising near a white building close to the Orthodox Church. This was followed by two further detonations, close to each other in time. He believed that these detonations were caused by 120 millimetre mortars.<sup>105</sup> Some 15 to 20 minutes later he also saw 81 or 82 millimetre mortar fire coming from Macedonian army positions on the mountain slope southeast of Sveti Nikola monastery, which landed on “dead ground” in Ljuboten.<sup>106</sup> He thought that there were about 40 to 60 mortar detonations in Ljuboten that morning.<sup>107</sup>

41. The police patrol in the Hermelin APC left Stranište checkpoint to enter the village.<sup>108</sup> Before doing so, it met Johan Tarčulovski, who was wearing a camouflage uniform and had a mobile phone and a radio with him.<sup>109</sup> He had no weapons at that time.<sup>110</sup> Johan Tarčulovski was with a group of men who were wearing camouflage uniforms with no insignia on them.<sup>111</sup> They had automatic rifles and maybe two or three of them had pistols.<sup>112</sup> In the Chamber’s finding this was the police unit, led by Johan Tarčulovski, which at that time was waiting to enter the village. Johan Tarčulovski told the members of the Hermelin APC to wait for a while as there could be mortar fire. The witness assumed that Tarčulovski had received this information from the army.<sup>113</sup> Johan Tarčulovski and the group of men in camouflage uniforms then left. The Chamber accepts that this conversation took place in the morning of 12 August 2001. Despite some evidence that

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<sup>103</sup> Macedonian army positions Smok and Bomba (*see infra*, paras 141; 142) were located in the area known as Malistena. (Exhibit P216; M088, T 1255)

<sup>104</sup> Isni Ali, T 2019-2020. In his Rule 92*bis* statement the witness stated that his house was hit by a grenade (Isni Ali, Exhibit P263, para 7). In court, however, he gave evidence that his house was hit by a shell, T 2019-2020. Considering the extent of destruction caused to this house (Exhibit P412.39) the Chamber accepts Isni Ali’s evidence that the house was hit by a shell. It is also relevant that on 10 August 2001 a shell had landed very close to this house. (Isni Ali, Exhibit P263, para 3) Further, while in his Rule 92*bis* statement the witness stated that on 12 August 2001 his house was hit at about 1000 hours (Isni Ali, Exhibit P263, para 7) the Chamber accepts that the witness’s recollection of time was imprecise and that in fact this happened earlier, at about 0800 hours or shortly thereafter.

<sup>105</sup> Henry Bolton, T 1676; Henry Bolton, Exhibits P236.1, para 6; 1D21; 1D22.

<sup>106</sup> Henry Bolton, Exhibit P236.1, para 7.

<sup>107</sup> Henry Bolton, T 1676; Henry Bolton, Exhibit P236.1, para 9.

<sup>108</sup> There is evidence that the Hermelin APC patrol at Stranište checkpoint was instructed by the head of OVR Čair to enter and patrol the village, possibly to find “terrorist” (M037, T 774; M052, T 8289; 8570) and that it could have been after 1100 hours that this occurred (M053, T 1911; 1986; M052, T 8277). In these respects this evidence appeared to the Chamber to be contrived to protect some witnesses from responsibility for events in Ljuboten. The Chamber accepts from other evidence especially as to activities of the Hermelin APC in the village, that it entered the village much earlier and actively supported the police unit in the village.

<sup>109</sup> M037, T 778.

<sup>110</sup> M037, T 868.

<sup>111</sup> M037, T 776; 817. The evidence as to the size of the group varies. M037 could only suggest 20, 30 or maybe 40 people. Other witnesses saw more. In the Chamber’s finding there were some 60 to 70.

<sup>112</sup> M037, T 778.

this happened later in the morning, considering other evidence as to the events that took place in the village on that day and the Chamber's inability to accept as truthful aspects of the evidence of the witnesses who dealt with these events, because of self-interest,<sup>114</sup> the Chamber finds that this conversation took place earlier, at around 0800 hours.

42. There is some unsatisfactory evidence of earlier small arms fire in Ljuboten,<sup>115</sup> but the more satisfactory body of evidence persuades the Chamber that at about 0800 hours, after some opening mortar and other fire from army units, the police led by Johan Tarčulovski entered Ljuboten. Intensive shooting coming from the vicinity of the Orthodox Church was heard<sup>116</sup> as it did so. In the Chamber's finding this was firing by the police. The Chamber is also persuaded that, as will be discussed below, the Hermelin APC entered the village soon after Tarčulovski's unit and supported the police.<sup>117</sup>

43. About 0800 hours on 12 August 2001, but apparently shortly after the events just described, Elmaz Jusufi, an ethnic Albanian resident of Ljuboten, his wife Zenep Jusufi and his cousin Muzafer Jusufi heard a loud explosion coming from right outside Elmaz Jusufi's house which was located slightly to the north-east of the Orthodox Church.<sup>118</sup> Elmaz and Zenep Jusufi's son, Rami Jusufi, who was also in the house, ran to the front door and tried to close it.<sup>119</sup> At that moment intensive shooting started from outside the front of the house. Rami Jusufi was hit in the stomach. There were two bullet wounds to his body. The shots came from the corner of the house, from a distance of about 10 or 15 metres from the door.<sup>120</sup> Bullets also struck the house. The washing machine in the bathroom alone was hit by 12 bullets.<sup>121</sup> The attackers kicked the front door of the house but did not enter.<sup>122</sup> Before leaving Elmaz Jusufi's house the attackers poured gasoline on Elmaz Jusufi's car which was parked in the front yard and on some construction material stored in the yard and set the car and the construction material on fire.<sup>123</sup>

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<sup>113</sup> M037, T 779.

<sup>114</sup> *See supra*, para 15.

<sup>115</sup> Sporadic shooting coming from the mountain slope above the village was heard earlier than 0800 hours. (M039, Exhibit P200.2, para 13) *See also* M083, T 1428.

<sup>116</sup> Fatmir Kamberi, Exhibit P426, para 12.

<sup>117</sup> The Chamber does not accept the evidence of M037 suggesting that the patrol waited for more than an hour at Stranište checkpoint and only entered the village when the policemen saw no firing from the army positions for some time. (M037, T 780)

<sup>118</sup> Elmaz Jusufi, T 528-529; Elmaz Jusufi, Exhibit P8.1, para 22; Elmaz Jusufi, Exhibit P8.2, paras 17-18; Zenep Jusufi, T 443; Muzafer Jusufi, Exhibit P389, para 5. The explosion appears to have occurred to force open the high metal gate from the street into the walled front yard of the home.

<sup>119</sup> Elmaz Jusufi, T 572; Elmaz Jusufi Exhibit P8.1, para 24; Zenep Jusufi, T 407.

<sup>120</sup> Elmaz Jusufi, T 572; Elmaz Jusufi, Exhibit P8.1, para 24.

<sup>121</sup> Elmaz Jusufi, T 598; Elmaz Jusufi, Exhibit P8.1, para 25; Zenep Jusufi, T 410.

<sup>122</sup> Elmaz Jusufi, T 594; Elmaz Jusufi, Exhibit P8.1, para 25; Zenep Jusufi, T 472.

<sup>123</sup> Elmaz Jusufi, Exhibit P8.1, para 26; Muzafer Jusufi, Exhibit P389, para 5.

44. These events at Elmaz Jusufi's house occurred over about 10 minutes.<sup>124</sup> After the attackers left, Elmaz Jusufi and Muzafer Jusufi moved Rami Jusufi away from the door where he had been shot, to a room inside the house. Rami Jusufi died there less than an hour later from the bullet wounds.<sup>125</sup> Rami Jusufi was buried on the following day in the yard of a daughter of Elmaz Jusufi.<sup>126</sup> He was buried in the clothes he was wearing when he died.<sup>127</sup>

45. After leaving Elmaz Jusufi's house the attackers continued down the same street, setting houses on fire by using gasoline.<sup>128</sup> The house of Qenan Jusufi, who was Elmaz Jusufi's brother, the house and stable of Xhabir Jusufi, together with the animals there, as well as the houses of Sabit Jusufi, Nazmir Jusufi and Agim Jusufi, were set on fire and burned.<sup>129</sup> In the Chamber's finding, the police also set on fire the houses of Xhevshet Jusufovski<sup>130</sup> and Alim Duraki.<sup>131</sup> The attackers also threw a hand grenade into each of two unidentified houses which caused damage in these houses.<sup>132</sup> As these events occurred residents of Ljuboten observed smoke rising from the western or north-western part of the village where the houses of the Jusufi families were located.<sup>133</sup>

46. Elmaz Jusufi described the men who attacked his house as a group of about 20 policemen wearing uniforms and bullet-proof vests and armed with AK-47 automatic rifles.<sup>134</sup> Some of them were wearing face-masks but he considered he could recognise by their voices individuals among them.<sup>135</sup> Earlier that morning, before his house was attacked, he thought at about 0730 hours, he had heard the noise of trucks and what he believed were APCs outside the gate of his house and

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<sup>124</sup> Muzafer Jusufi, Exhibit P389, para 5.

<sup>125</sup> Zenep Jusufi, T 448; Elmaz Jusufi, T 588; Muzafer Jusufi, Exhibit P389, para 6.

<sup>126</sup> Elmaz Jusufi, T 533; Elmaz Jusufi, Exhibit P8.1, para 42; Fatmir Kamberi, Exhibit P426, para 19.

<sup>127</sup> Elmaz Jusufi, T 541. After a month he was reburied. (Elmaz Jusufi, Exhibit P8.1, para 42)

<sup>128</sup> Elmaz Jusufi, Exhibit P8.1, paras 26, 27.

<sup>129</sup> Elmaz Jusufi, Exhibit P8.1, paras 27, 8. See also Fatmir Kamberi, Exhibit P426, para 20; Mamut Ismaili, T 1344-1345; Mamut Ismaili, P219.1, para 4; Exhibit P222. Witnesses saw the houses of Qenan Rashiti, Jusuf Rashiti and Sabit Rashiti located in the same area burning. (Ćemuran Redžepi, Exhibit P372, para 8) There is evidence that the Jusufi family used to be called Rashiti (Zenep Jusufi, T 488). The Chamber accepts that the references to the Rashitis are in fact references to the Jusufis.

<sup>130</sup> On 13 August 2001, Fatmir Kamberi observed that Xhevshet Jusufovski's house had burnt down; Exhibit P426, para 20. The house of Xhevshet Jusufovski is located between the houses of Nazmir Jusufi and Agim Jusufi, (Exhibit P427) which were set on fire by police on 12 August 2001. The evidence of the police's presence near the house of Xhevshet Jusufovski and their setting fire to the neighbouring houses, coupled with the evidence of damage to this house, persuade the Chamber that the police set fire to this house as well.

<sup>131</sup> On 13 August 2001, Fatmir Kamberi observed that the house of Alim Duraki had burnt down; Exhibit P426, para 20. On the previous day, Kamberi had observed smoke coming from the neighbourhood in which this house was located; Fatmir Kamberi, T 4555-4556; Exhibit P427. Police were observed in the vicinity of Duraki's house on the morning of 12 August 2001; Nikolče Grozdanovski, T 10420; 10494; Exhibit 2D88.

<sup>132</sup> Elmaz Jusufi, Exhibit P8.1, para 30.

<sup>133</sup> M088, T 1190-1191; Exhibit P208; Exhibit P210; Aziz Redžepi, Exhibit P432, para 8.

<sup>134</sup> Elmaz Jusufi, Exhibit P8.1, para 23.

<sup>135</sup> Elmaz Jusufi, Exhibit P8.2, para 20; Elmaz Jusufi, T 539-540. Elmaz Jusufi mentioned in particular Dime Acevski and Dušan Kruškarov, who were ethnic Macedonians he knew from the village of Ljuboten. (Elmaz Jusufi, Exhibit P8.1, para 23)

voices speaking Macedonian. He considered he was able to recognize three of these voices.<sup>136</sup> The Chamber accepts that Elmaz Jusufi heard the sound of vehicles and voices speaking Macedonian. While it also accepts his belief that he could identify persons by their voices, the Chamber is well conscious that such an identification is entirely unreliable unless the voices of the persons speaking are distinctive and well known to the listener. The evidence does not suggest either of these matters in respect of these four persons and, therefore, the Chamber is not able to accept these identifications as reliable, nor does it accept as accurate Elmaz Jusufi's time estimate. Muzafer Jusufi observed that the attackers "were wearing different types of uniforms."<sup>137</sup> M088 who was observing the events from a distance saw police officers in dark uniforms in this area at approximately the time the house of Elmaz Jusufi was attacked.<sup>138</sup>

47. Elmaz Jusufi also gave evidence that after the police had left his house an APC stopped in front of his house and three policemen climbed from the vehicle to the roof of his house, and then to the balcony, from where they opened fire to the valley.<sup>139</sup> The Chamber accepts that this APC was the Hermelin APC with the patrol from Mirkovci police station, which had entered the village a little after the police unit.

48. Two men in camouflage uniforms wearing masks were also seen by the slaughter house, which was located near the Orthodox Church in the western part of the village. They were preparing a Zolja missile for firing.<sup>140</sup> The Zolja is a hand held infantry missile. Dalip Murati's house was approximately 100 metres from the slaughter house.<sup>141</sup> Later that day a witness saw an unexploded Zolja grenade embedded in the wall of Dalip Murati house.<sup>142</sup> A loud sound of an explosion coming from Dalip Murati's house had been heard after the two men were seen. Shortly after this explosion was heard witnesses saw Dalip Murati badly injured in the stomach area.<sup>143</sup> He died a few minutes later.<sup>144</sup> However, before these events, as detailed in this Judgement, two army mortar shells had landed on the barn of Dalip Murati's house, setting it on fire. It is not able to be determined from the evidence whether the explosion of Dalip Murati's house was caused by another army shell or a Zolja missile. The evidence as to the timing of these events is also too imprecise to support any conclusion.

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<sup>136</sup> Elmaz Jusufi identified these as Dime Acevski, his uncle Sime, and Stojan Petrovski, ethnic Macedonians he knew from Ljuboten. (Elmaz Jusufi, Exhibit P8.1, paras 17, 19)

<sup>137</sup> Muzafer Jusufi, Exhibit P389, para 5.

<sup>138</sup> M088, T 1192.

<sup>139</sup> Elmaz Jusufi, Exhibit P8.1, para 29.

<sup>140</sup> Sedat Murati, Exhibit P405, paras 24-25.

<sup>141</sup> Sedat Murati, Exhibit P405, para 24.

<sup>142</sup> Sedat Murati, Exhibit P405, para 25.

<sup>143</sup> Sedat Murati, Exhibit P405, paras 26-28.

<sup>144</sup> Fatmir Kamberi, Exhibit P426, para 16. Dalip Murati's death is not charged in the Indictment.



49. Some time after the shooting at Elmaz Jusufi's house, men in camouflage uniforms wearing masks and carrying automatic weapons were seen in the Elezaj neighbourhood of Ljuboten, on the road to Raštak.<sup>145</sup> They were following a Hermelin APC which stopped very close to Harun Redžepi's house.<sup>146</sup> They set Harun Redžepi's house on fire by throwing gasoline bottles.<sup>147</sup> The house of Harun Redžepi burned that morning.<sup>148</sup> Next to Harun Redžepi's house were other houses belonging to the Redžepi<sup>149</sup> (or Rexhepi) family and houses belonging to the Lutfiu family.<sup>150</sup> Avdulla Redžepi's house and Qamuran (Ćemuran) Redžepi's house (where Ismet Redžepi (Rexhepi or Rexhepovski) the father of Qamuran (Ćemuran) also lived<sup>151</sup>) as well as the barn of Shabi Lutfiu, were also set alight and started burning.<sup>152</sup> A sound similar to the sound of gas being released from gas cylinders was heard shortly before the houses started burning.<sup>153</sup> The houses of Mitat Lutfiu and Qamuran Lutfiu which were across the street from the Redžepis houses,<sup>154</sup> were also set on fire that morning,<sup>155</sup> and also the nearby house of Nazim Murtezani.<sup>156</sup> In the Chamber's finding, from this and other evidence discussed later, these houses were set on fire by the police unit described earlier as it moved through the village.

50. Mortar shells had fallen on Ljuboten on 10 August 2001.<sup>157</sup> Because of this many of Ljuboten's residents had sought shelter in the basements of houses.<sup>158</sup> In the morning of 12 August some 10 persons, all of whom were male, were sheltering in the basement of Adem Ametovski's house, which was located in the upper part of Ljuboten, on the road towards the village of Raštak.<sup>159</sup> They had been there since the night of 10 August 2001.<sup>160</sup> Female members of their

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<sup>145</sup> Aziz Redžepi, Exhibit P432, para 2; *see* Exhibit P410 and Exhibit P411, IMG ID nos. 195, 196, 211, 212.

<sup>146</sup> Aziz Redžepi, Exhibit P432, para 10.

<sup>147</sup> Aziz Redžepi, Exhibit P432, paras 10-11; Ćemuran Redžepi, Exhibit P372, para 8.

<sup>148</sup> Aziz Redžepi, Exhibit P432, para 11; Ćemuran Redžepi, T 3555.

<sup>149</sup> The Chamber accepts that references to Redžepi, Rexhepi, and Redžepovski are in fact references to the same name.

<sup>150</sup> Aziz Redžepi, Exhibit P432, para 2; *see* Exhibit P410 and Exhibit P411, IMG ID no's. 195, 196, 211, 212.

<sup>151</sup> Aziz Rexhepi, T 4652. *See also*, Ćemuran Redžepi, Exhibit P372, p 1.

<sup>152</sup> Ćemuran Redžepi, Exhibit P372, paras 8, 9; Ćemuran Redžepi, T 3525-3526; Exhibit P375; Aziz Redžepi, Exhibit P432, para 11.

<sup>153</sup> Aziz Redžepi, Exhibit P432, para 11.

<sup>154</sup> Exhibit P433.

<sup>155</sup> Farush Memedi, Exhibit P266, para 9.

<sup>156</sup> Peter Bouckaert testified that during his visit to Ljuboten, on 23 August 2001, he saw that the compound of Nazim Murtezani was burnt, including the home; Peter Bouckaert, T 2984; Exhibit P347. The house of Nazim Murtezani is located in close proximity to the house of Harun Rexhepi, which, as discussed earlier, was on 12 August 2001 set on fire by the police. The house of Nazim Murtezani is located by the road leading to Raštak (*see also* Exhibit P411). The Chamber finds that on 12 August 2001 the house of Nazim Murtezani was set on fire, similarly to the nearby house of Harun Rexhepi, by the police advancing in the direction of the houses of Adem Ametovski and the Jashari family.

<sup>157</sup> *See infra*, para 103.

<sup>158</sup> Ćemuran Redžepi, Exhibit P372, para 9; Farush Memedi, Exhibit P266, para 8; Aziz Redžepi, Exhibit P432, para 12.

<sup>159</sup> M012, T 885; M017, T 612-615; Ismail Ramadani, Exhibit P188, paras 10, 12; Vehbi Bajrami, Exhibit P247.1, p 2.

<sup>160</sup> Ismail Ramadani, Exhibit P188, para 11.

families, together with three more men, were in the basement of the adjacent house of Zija Ameti which was located in the same compound.<sup>161</sup>

51. Armed uniformed police approached the basement of Adem Ametovski's house and fired several shots at the basement window.<sup>162</sup> The men in the basement surrendered immediately; an elderly man waived a white cloth through the basement window as a sign of surrender.<sup>163</sup> The police then ordered the men to leave the basement. The men were made to leave the basement through the window.<sup>164</sup> None were armed. None of them wore NLA uniform or insignia. All houses in Adem Ametovski's compound were then searched by the police.<sup>165</sup> No arms, ammunition, explosives, uniforms, or other military equipment was located.

52. Outside the basement, in the yard of Adem Ametovski's house, the police took money, valuables and identification cards from the men.<sup>166</sup> The men were ordered to lie down in the yard of the house and to pull their t-shirts over their heads. The police then started to beat them severely.<sup>167</sup>

53. In the meantime, some police entered the basement of the adjacent house of Zija Ameti, where the women were sheltering. Money and jewellery was taken from the women as well.<sup>168</sup> Three men who were with the women were brought out and made to join the group of men from Adem Ametovski's basement.<sup>169</sup>

54. The men were then taken to the main gate of the house, at the entrance to the yard, and were ordered to lie face down on the ground again and to cover their heads with the t-shirts they were wearing.<sup>170</sup> They were questioned and called terrorists.<sup>171</sup> The police then started hitting the men with their weapons and fists as well as kicking them.<sup>172</sup> Considerable evidence shows that many of the men were quite seriously injured. Some police threatened the men with knives but, for the most

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<sup>161</sup> M017, T 615-616; Ismail Ramadani, Exhibit P188, para 11; M012, T 920-921.

<sup>162</sup> The witnesses' recollection of the time varied from 0800-0900 hours (M017, T 620), to 1000 hours (Ismail Ramadani, Exhibit P188, para 14), to after 1200 hours (Osman Ramadani, Exhibit P197, para 28). The balance of evidence indicates that these events occurred between 0900 hours and 1030 hours.

<sup>163</sup> M017, T 620; M012, T 939-940, 979; Vehbi Bajrami, Exhibit P247.1, p 2.

<sup>164</sup> M017, T 620-621; M012, T 887, 940, 971; Vehbi Bajrami, T 1837, 1861. *See also* Ismail Ramadani, T 1021, 1039.

<sup>165</sup> Ismail Ramadani, Exhibit P189, para 10.

<sup>166</sup> M012, T 888; M017, T 621; 616-617; Ismail Ramadani, Exhibit P188, para 16; Ismail Ramadani, Exhibit P189, para 11; Osman Ramadani, Exhibit P197, para 36; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1844.

<sup>167</sup> M012, T 888; M017, T 625; Ismail Ramadani, Exhibit P188, para 16; Osman Ramadani, Exhibit P197, para 31-32; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1870.

<sup>168</sup> M017, T 705; M012, T 892.

<sup>169</sup> M017, T 621-623; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>170</sup> M012, T 888; M017, T 625; Exhibit P17; Ismail Ramadani, Exhibit P188, para 17; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>171</sup> M017, T 621.

<sup>172</sup> M012, T 889-890; Ismail Ramadani, Exhibit P188, para 17.

part, were prevented from taking further action by other police.<sup>173</sup> However, one policeman carved a cross on the back of one of the men, Ismail Ramadanani, with a knife.<sup>174</sup> Evidence also indicates that the men were forced to sing a Macedonian song and to repeat “Long live Arkan.”<sup>175</sup>

55. The men then heard a gunshot. One of the men from the group, Aziz Bajrami, who at that moment appears to have been talking to his son, was wounded by a shot from a police automatic rifle.<sup>176</sup> His son Sulejman Bajrami<sup>177</sup> was hit or kicked badly in the head.<sup>178</sup> Shortly afterwards the men heard gunshots.<sup>179</sup> In the Chamber’s finding, Sulejman Bajrami, who had commenced to walk or run away, was lying dead on the right side of the road which passes Adem Ametovski’s house.<sup>180</sup> He had been shot many times and died from police gunfire.

56. The police then ordered the men to walk barefoot,<sup>181</sup> to the police checkpoint at Braca’s house, located between Ljuboten and the adjoining village of Ljubanci.<sup>182</sup> Many were violently mistreated on the way and after arriving at Braca’s house.<sup>183</sup> They were escorted by four to six armed men dressed in police camouflage uniforms, members of the police unit.<sup>184</sup> Aleksandar Janevski, an employee of the “Kometa” security agency, was one of the escorting police.<sup>185</sup>

57. Two elderly men who were among the men in this group, Muharem Ramadanani<sup>186</sup> and Aziz Bajrami,<sup>187</sup> were ordered to stay at Adem Ametovski’s house.<sup>188</sup> As discussed later in this Judgement, witnesses later learned that Muharem Ramadanani was killed that morning by police at the gate of the house.<sup>189</sup>

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<sup>173</sup> M017, T 621-623; M012, T 889; Ismail Ramadanani, Exhibit P188, para 18.

<sup>174</sup> M012, T 894; Ismail Ramadanani, Exhibit P188, paras 19, 20; Exhibit P194.

<sup>175</sup> M017, T 621-623; Osman Ramadanani, Exhibit P197, para 35. Arkan was a notorious Serb paramilitary leader who had fought in Croatia and in Bosnia.

<sup>176</sup> M012, T 893, 949; Ismail Ramadanani, Exhibit P188, para 22.

<sup>177</sup> Sulejman Bajrami was one of the three men who were brought from the basement where the women were located. (M017, T 615-616; Osman Ramadanani, Exhibit P197, para 26; Ismail Ramadanani, Exhibit P188, para 12; Ismail Ramadanani, T 1022)

<sup>178</sup> Osman Ramadanani, Exhibit P197, para 33; Ismail Ramadanani, T 1022.

<sup>179</sup> Osman Ramadanani, Exhibit P198, para 22; Ismail Ramadanani, Exhibit P188, para 24; Exhibit P189, para 189.

<sup>180</sup> M017, T 624, 626-628; M012, T 892, 974; Osman Ramadanani, Exhibit P197, para 33; Ismail Ramadanani, Exhibit P188, para 25; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>181</sup> Ismail Ramadanani, Exhibit P188, para 26; Osman Ramadanani, Exhibit P197, para 36. *See also* M017, T 616-617.

<sup>182</sup> M017, T 634; Exhibit P20.

<sup>183</sup> M012, T 897; Osman Ramadanani, Exhibit P197, para 36; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>184</sup> M053, T 1912-1914; M052, T 8282.

<sup>185</sup> M053, T 1910; M052, T 8283.

<sup>186</sup> Muharem Bajrami was among the men in Adem Ametovski’s basement. (M017, T 613-615; M012, T 885; Ismail Ramadanani, Exhibit P188, para 12; Osman Ramadanani, Exhibit P197, paras 26, 31)

<sup>187</sup> Aziz Bajrami was brought from the basement of Zija Ameti’s house where the women were sheltering. (M017, T 615, 621-623)

<sup>188</sup> Ismail Ramadanani, Exhibit P188, para 27.

<sup>189</sup> M012, T 894-895, 974; Ismail Ramadanani, Exhibit P188, paras 27, 57; Osman Ramadanani, Exhibit P197, para 57. *See infra*, para 321.

58. The Chamber heard extensive evidence regarding these armed men at Adem Ametovski's house on 12 August 2001. They were members of the armed police unit which had entered the village at about 0800 hours. The evidence indicates that the men who arrived at Adem Ametovski's house were wearing two types of uniforms: black or dark colour uniforms and camouflage uniforms.<sup>190</sup> One witness identified these forces as members of the special police units "Tigers" and "Lions," because, in his understanding, they were wearing the uniform of the "Lions" and the "Tigers" units. However, he identified this as the camouflage uniform with shoulder insignia depicted on Exhibit P15.<sup>191</sup> There were witnesses who said they saw shoulder insignia with the word "Lions" in Macedonian written on them,<sup>192</sup> while others were not able to see what the insignia were.<sup>193</sup> Some witnesses testified that the men had face-masks.<sup>194</sup> However, others were able to recognize some local people whom they knew among the police and whom they identified in their evidence.<sup>195</sup> The Chamber accepts that some of the police wore facemasks.

59. The evidence as to the number of these police varied widely, from one witness who put the number at about 50,<sup>196</sup> to another who considered he saw 200 or 300 men in the yard of Adem Ametovski's house.<sup>197</sup> They all carried automatic rifles.<sup>198</sup> A witness saw an armoured vehicle, green in colour, with an anti aircraft heavy weapon mounted on top in the yard of Adem Ametovski's house.<sup>199</sup> The Chamber accepts that a patrol from Mirkovci police station in a Hermelin APC was supporting the police in the village and had reached Ametovski's house at the time,<sup>200</sup> although there is much dispute whether any weapon was mounted on this APC and, if so, what type of weapon.

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<sup>190</sup> M012, T 888; Ismail Ramadani, Exhibit P188, para 14; Ismail Ramadani, T 1018; Osman Ramadani, Exhibit P197, para 30; Vehbi Bajrami, Exhibit P247.1, p 2.

<sup>191</sup> M017, T 618-620.

<sup>192</sup> Ismail Ramadani, Exhibit P188, para 14; Osman Ramadani, Exhibit P197, para 30; Vehbi Bajrami, Exhibit P247.1, p 2.

<sup>193</sup> M012, T 969.

<sup>194</sup> Osman Ramadani, Exhibit P197, para 30.

<sup>195</sup> M017 recognised in particular a man from Raštak who was not a regular policeman. (M017, T 621-623) Ismail Ramadani recognised Nikola Kostovski, Srećko Milevski, Mirče Stojanovski and Zoran Stojanovski. (Ismail Ramadani, Exhibit P188, para 15) He saw a person he thought was Andjele Lnu, a regular policeman from Mirkovci police station. (Ismail Ramadani, Exhibit P188, para 15) He also recognized Zoran Lnu, from Raštak who was counting the money collected from the men in front of Adem Ametovski's house. (Ismail Ramadani, Exhibit P189, para 11) He understood him to be an army reservist but there is nothing else in the evidence to confirm this identification or that Zoran Lnu was then an army reservist.

<sup>196</sup> Ismail Ramadani, Exhibit P188, para 14.

<sup>197</sup> Vehbi Bajrami, Exhibit P247.1, p 2; Vehbi Bajrami, T 1868-1869.

<sup>198</sup> M012, T 969; Ismail Ramadani, Exhibit P188, para 15; Osman Ramadani, Exhibit P197, para 30.

<sup>199</sup> Vehbi Bajrami, Exhibit P247.1, p 2.

<sup>200</sup> M037 testified that having reached the eastern part of the village, the Hermelin APC stopped by one of four houses standing in a row by the road to Raštak (M037, T 782-784; Exhibits P38; P39), where having got off the APC, he walked back to another house, indicating, the Chamber finds, the house of Adem Ametovski, although the distance is much greater than 50-60 metres, as indicated by M037. M037 saw Johan Tarčulovski and also a group of 10 people at the entrance to this house. M037 was told by Johan Tarčulovski that those people had been found inside the house. (M037, T 786) Driver's licences and personal ID cards were found on the people from the

60. In the Chamber's finding, the armed men that entered Adem Ametovski's compound on 12 August 2001 and mistreated the men there belonged to the police unit that had entered Ljuboten at about 0800 hours. This was the same police unit that had also attacked Elmaz Jusufi's house, shot Rami Jusufi and set the Jusufis' houses, and later, the Redžepis' and other houses on fire. Men of this unit had been near Murati's house as described earlier. In reaching this conclusion the Chamber takes into account in particular that witnesses at these locations provided generally consistent descriptions of these forces, that the locations were not far apart, and demonstrated a pattern of progress through the village, and the similarity of conduct at the locations.

61. The Chamber further accepts that this armed police unit comprised uniformed members of the police reserve forces, including, as will be discussed later, some who were employees of the private security agency "Kometa."<sup>201</sup> Some identification evidence from residents of Ljuboten indicates that among the reserve police were also some from the local area. The Chamber is unable to find that members of the special units "Lions" or "Tigers" were in the police unit. Some witnesses based their conclusions that these police belonged to the "Lions" or "Tigers" special units at least in part on the fact that they wore uniforms of those special units. However, it is the evidence that at the material time these same uniforms were at times worn by the regular police, the reserve police, and the special units.<sup>202</sup> There were witnesses who thought they had seen shoulder insignia with the word "Lions" in Macedonian. All police uniforms of this type have shoulder insignia and these are not readily differentiated. Further, as discussed elsewhere, while the "Lions" unit was formally established on 6 August 2001, there is much evidence that it was not operational until much later,<sup>203</sup> although on other evidence the formal establishment merely regulated what was already *de facto* an operational unit. Given this variety of evidence the Chamber cannot find that

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house. M037 said that he tried to establish the identity of these people on the basis of documents found on them and by questioning them. The captured people were specifically asked whether they were from Kosovo. (M037, T 786) The Chamber is unable to be satisfied of the truth of aspects of this evidence. M037 had a clear interest in disassociating himself from the actions of the police at the house of Adem Ametovski and in suggesting legitimate conduct on his own part. Significantly, in the evidence of M037 there is no mention of mistreatment, even though the evidence is clear that serious acts of mistreatment were being committed at the time. Further, it is the effect of the evidence of M037 that the Hermelin APC operated independently from the police unit of Johan Tarčulovski. It is not credible that in the circumstances of that morning he would park the Hermelin APC and walk alone back along the road. Further, a soldier stated that from his observation post on a hill above the village, he saw a police unit consisting of policemen who followed a Hermelin APC. (M2D-008, T 10553-10554; 10583) The Chamber accepts that the police unit including Johan Tarčulovski arrived at the house of Adem Ametovski following the Hermelin APC.

<sup>201</sup> See *supra*, para 73.

<sup>202</sup> Exhibit P15 depicts green/brown/yellow camouflage uniforms with the patch of the police. The Chamber heard evidence that at the material time the uniforms depicted in Exhibit P15 were worn by the uniformed police, the reserve force, the special officers, and the special police unit. (M037, T 762; M083, T 1457) The Chamber is persuaded that at the time material to the Indictment the camouflage uniforms depicted in Exhibit P15 were used by the regular and reserve police forces. While these uniforms may also have been used by the special police units, this fact alone is not sufficient to establish that members of a special police unit were in Ljuboten on 12 August 2001.

<sup>203</sup> See *infra*, para 491.

members of the “Lions” or “Tigers” were in the unit. The Chamber also notes the possibility, although it does not find this to be the case, that the police unit may have involved persons armed, uniformed, equipped and functioning as though they were members of the police reserve but who had not been formally appointed, were not entitled to be issued with arms under the applicable procedures.

62. After the events at Adem Ametovski’s house, as mentioned earlier, 10 male ethnic Albanian residents were escorted to Braca’s house by a group of four to six policemen.<sup>204</sup> The rest of the police joined the Hermelin APC and continued to Qani Jashari’s house.

63. There is evidence that in the morning of 12 August 2001 several ethnic Albanian men from Ljuboten including Xhelal Bajrami, Qani Jashari, Bajram Jashari, and Kadri Jashari were in Xhelal Bajrami’s house which was located in the eastern part of Ljuboten, some 200 metres away from Adem Ametovski’s house, also on the road leading to Raštak.<sup>205</sup> The house was located on the northern side of the road.<sup>206</sup> It is their evidence that they had spent the entire morning since 0930 hours there together.<sup>207</sup> It is further the evidence that they left the house as they heard screaming and shooting coming from Adem Ametovski’s house.<sup>208</sup> The evidence indicates that Bajram Jashari, Kadri Jashari and Xhelal Bajrami then ran uphill in the direction of Qani Jashari’s house which was located to the east of Xhelal Bajrami’s house.<sup>209</sup> At this moment the sound of a Hermelin APC approaching was heard.<sup>210</sup>

64. There is also evidence that in the meantime, another group of Ljuboten residents had gathered in Afet Zendeli’s house located to the south of the road to Raštak.<sup>211</sup> It is the evidence of two of them, M088 and M092, that at a time after 1000 hours they received a phone call informing them that the police were mistreating people at checkpoints and that other people were leaving the village.<sup>212</sup> It was their evidence that after this phone call they decided to leave the house. First they ran towards Zendel Zendeli’s house where they stopped for a brief period of time. From there they

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<sup>204</sup> See *supra*, para 56.

<sup>205</sup> M039, Exhibit P200.2, paras 4, 6, 16.

<sup>206</sup> M039, Exhibit P200.2, para 6.

<sup>207</sup> M039, Exhibit P200.2, paras 13, 14; M039, T 1141, 1157.

<sup>208</sup> M039, Exhibit P200.2, para 15.

<sup>209</sup> M039, Exhibit P200.2, paras 15, 16, 17, 6.

<sup>210</sup> M039, Exhibit P200.2, para 19.

<sup>211</sup> M088, Exhibit P206, para 18; M092, Exhibit P215, para 10. Regarding the location of the Zendelis’ family houses see Exhibit 2D20.

<sup>212</sup> M088, T 1217; M088, Exhibit P206, para 20.

ran uphill towards Qani Jashari's house which was about 200 to 300 metres away.<sup>213</sup> At Qani Jashari's house they found Kadri Jashari, Bajram Jashari and Xhelal Bajrami.<sup>214</sup>

65. There is also army evidence suggesting that firing was observed coming from Qani Jashari's house and/or neighbouring houses belonging to the Jashari family, earlier than in the evidence just outlined, when the five reached Qani Jashari's house.<sup>215</sup> For reasons expressed elsewhere the Chamber has significant reservations about the honesty of this evidence. These issues will be dealt with further later in this Judgement.<sup>216</sup>

66. The five men identified above were in Qani Jashari's house when the Hermelin APC approached along the road. It was followed, about a minute later, by a big group of policemen on foot.<sup>217</sup> They were wearing typical police uniforms of police reservists.<sup>218</sup> In the Chamber's finding, this was the same police unit which was responsible for the earlier events in the village that day which have been described. The five men in Qani Jashari's house heard shouting from outside the house; there was no shooting at the time.<sup>219</sup> It is the evidence of the two survivors of the five men, M088 and M092, that at this moment they decided to leave the house.<sup>220</sup> They left through the back window and went away from the road towards the tobacco drying stable. From there they decided to run through the open field to the woods.<sup>221</sup> The distance that they had to cover was about 500 metres.<sup>222</sup>

67. At about the same time a machine-gun was fired from the direction of the Hermelin APC which had stopped in the middle of the road before the gravel driveway leading to Qani Jashari's house.<sup>223</sup> The police on foot also started shooting. The police went in the direction of Qani Jashari's house and also into the new houses belonging to the Jashari family on the southern side of the road.<sup>224</sup> They were shooting at Qani Jashari's house. After a while a policeman was heard screaming that they could not destroy the house as the walls were made of stone.<sup>225</sup> The Hermelin APC then went up to Qani Jashari's house, followed by the police. They entered Qani Jashari's compound.<sup>226</sup> Then flames came out of Qani Jashari's house, a big store of grass went on fire, there

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<sup>213</sup> M088, Exhibit P206, para 21; M092, Exhibit P215, para 13.

<sup>214</sup> M088, Exhibit P206, para 22; M092, Exhibit P215, para 14; M092, T 1295.

<sup>215</sup> *See infra*, para 154.

<sup>216</sup> *See infra*, para 155.

<sup>217</sup> M039, Exhibit P200.2, paras 20, 22.

<sup>218</sup> M039, Exhibit P200.2, para 23.

<sup>219</sup> M088, Exhibit P206, paras 23, 24.

<sup>220</sup> M088, Exhibit P206, para 25; M088, T 1219; M092, T 1297.

<sup>221</sup> M088, Exhibit P206, para 25; M092, Exhibit P215, para 18.

<sup>222</sup> M092, Exhibit P215, para 18. *See also* M088, Exhibit P206, para 25.

<sup>223</sup> M039, Exhibit P200.2, para 22.

<sup>224</sup> M039, Exhibit P200.2, paras 24, 25, 26, 5.

<sup>225</sup> M039, Exhibit P200.2, para 25.

<sup>226</sup> M039, Exhibit P200.2, para 26.

was constant shooting.<sup>227</sup> There is evidence that Kadri Jashari and Bajram Jashari were heard screaming, asking for help. Their voices came from outside the house.<sup>228</sup>

68. While the police were shooting at Qani Jashari's house, it is the evidence that the five men had started running through the field towards the woods. They came under fire from Malistena where the army positions Smok and Bomba were located, and from where the police were by the Jashari houses.<sup>229</sup> Shortly after, fire was also opened at the men from the Hermelin APC.<sup>230</sup> It appears that Zolja missiles were also fired from the location of the Hermelin APC, as two days later spent Zolja casings were found on the road to Qani Jashari's house.<sup>231</sup> The men came under heavy shooting. The first man managed to escape unhurt. The second man, Kadri Jashari, was wounded but could not continue.<sup>232</sup> His dead body was found in the field.<sup>233</sup> The third man was wounded in his leg but he managed to reach the woods.<sup>234</sup> The bodies of the remaining two men, Xhelal Bajrami and Bajram Jashari, were later found in the field, the body of Bajram Jashari, close to the tobacco drying stable and the body of Xhelal Bajrami, further in the field.<sup>235</sup> Three or four gasoline bottles were then thrown from the Hermelin APC in the direction of Qani Jashari's house.<sup>236</sup> Qani Jashari's house was set on fire by police.<sup>237</sup> Two of the Jashari's houses located on the southern side of the road were also set on fire.<sup>238</sup> The events from the arrival of the Hermelin APC and the police until they left may only have lasted for as short a time as approximately 20 minutes.<sup>239</sup>

69. There is evidence that before the police unit left the area two or three police found a Thompson sub-machine gun and two automatic Chinese-made Kalashnikov rifles near these dead bodies,<sup>240</sup> as well as ammunition including 50 bullets for the Thompson.<sup>241</sup> Police showed the

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<sup>227</sup> M039, Exhibit P200.2, para 27.

<sup>228</sup> M039, Exhibit P200.2, para 27.

<sup>229</sup> M092, Exhibit P215, para 19; M092, T 1297. *See also* M088, Exhibit P206, para 25. The houses are in the Elezaj neighbourhood.

<sup>230</sup> M092, Exhibit P215, para 20.

<sup>231</sup> Henry Bolton, T 1627-1629; Exhibit P238, p 2.

<sup>232</sup> M092, Exhibit P215, para 20; M039, Exhibit P200.2, para 27.

<sup>233</sup> M039, Exhibit P200.2, para 41; M039, T 1167; Exhibit P203, p 3.

<sup>234</sup> M092, Exhibit P215, para 21. *See also* M088, Exhibit P206, paras 27, 29.

<sup>235</sup> M039, Exhibit P200.2, paras 37, 39, 40; M039, T 1167; Exhibit P203, pp 2; 4. They were buried a few days later still dressed in the same clothes, without being searched. (M039, T 1148)

<sup>236</sup> M039, Exhibit P200.1, p 5; M039, Exhibit P200.2, para 29. The Chamber records its specific finding, in this respect, that some or all of the inflammable materials used by the police in setting fire to the houses and property was carried into the village in the Hermelin APC.

<sup>237</sup> M039, Exhibit P200.1, p 5; M039, Exhibit P200.2, para 29; M092, T 1299. The Chamber notes M039's evidence that there was fire rising out of the house when the people who were inside left (M039, T 1166). Considering M039's earlier evidence (M039, Exhibit P200.2, para 27) and the contrary evidence it accepts that the house was set on fire after the five men had already left the house.

<sup>238</sup> M039, Exhibit P200.2, para 31.

<sup>239</sup> M039, Exhibit P200.2, para 34.

<sup>240</sup> M037, T 793; 835; same as those shown in Exhibits P23, P41, 2D6, 2D7.

<sup>241</sup> M037, T 793; 835. M039 testified that the Hermelin APC and police unit left the area after Qani Jashari's house and the other two houses were set on fire. (M039, Exhibit P200.2, paras 30, 34) The Chamber notes that he may not have been in a position to notice whether the police retrieved the three weapons from the field before they left.



weapons and ammunition to Johan Tarčulovski at the scene, who concluded on that basis that the dead men were terrorists.<sup>242</sup> It was suggested that an “inspection” should be conducted, but Johan Tarčulovski said there was no need for that as they were in a “state of war.”<sup>243</sup> There is evidence that Johan Tarčulovski then handed the three weapons to the patrol in the Hermelin APC, as his group had arrived on foot and could not carry the weapons.<sup>244</sup> SVR Skopje was informed, through the Mirkovci police station, about the death of the three perceived terrorists.<sup>245</sup> The driver of the Hermelin APC headed towards the Chinese Wall with the three weapons said to have been found near the dead bodies.<sup>246</sup> He also took a reserve policeman Vlado Janevski, a.k.a. Kunta, who had been wounded,<sup>247</sup> it appears, when he accidentally shot himself.<sup>248</sup> No other member of the police unit was injured that day.<sup>249</sup> The other members of the patrol in the Hermelin APC from Mirkovci police station went to the Chinese Wall on foot.<sup>250</sup>

70. While this was happening the detained residents from Adem Ametovski’s house were walking towards Braca’s house escorted by armed police. It is their evidence that at about 1230 or 1300 hours they arrived there.<sup>251</sup> It is the evidence of Osman Ramadani and Ismail Ramadani that there they saw one Hermelin APC which had stopped in the village.<sup>252</sup> Other witnesses testified that they saw two Hermelin APCs as they moved from Adem Ametovski’s house to Braca’s house,<sup>253</sup> coming from the same direction. Some did not see any vehicles.<sup>254</sup> In the Chamber’s finding, the men from Adem Ametovski’s house arrived at Braca’s house at about the same time as the Hermelin APC returning from Qani Jashari’s house.<sup>255</sup> The Chamber accepts the evidence of M037 that on 12 August 2001, no other Hermelin APC had entered Ljuboten.<sup>256</sup>

71. At Braca’s house the men from Adem Ametovski’s house saw Macedonian civilians from Ljuboten and also police.<sup>257</sup> There is evidence that a group of around 20 or 30 villagers from Ljubanci, revolted by the land mine incident in Ljubotenski Bačila,<sup>258</sup> tried to approach the people

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<sup>242</sup> M037, T 792.

<sup>243</sup> M037, T 793.

<sup>244</sup> M037, T 793.

<sup>245</sup> M037, T 794; 803.

<sup>246</sup> M037, T 793-794.

<sup>247</sup> M037, T 864-865.

<sup>248</sup> M052, T 8294-8295. The witness appears to have confused Kunta with his brother Aleksandar. However, the evidence of M037 makes it clear that the wounded man was Kunta.

<sup>249</sup> See M037, T 864, 865, 870; M052, T 8293-8295. Exhibit P442.

<sup>250</sup> M037, T 865.

<sup>251</sup> Ismail Ramadani, Exhibit P188, para 30; Ismail Ramadani, T 1042; Osman Ramadani, Exhibit P197, para 43.

<sup>252</sup> M017, T 634.

<sup>253</sup> Osman Ramadani, T 1101. See also Vehbi Bajrami, T 1869.

<sup>254</sup> Ismail Ramadani, T 1042.

<sup>255</sup> M052, T 8290-8291.

<sup>256</sup> M037, T 826.

<sup>257</sup> M017, T 630, 739-740; Ismail Ramadani, Exhibit P188, para 31.

<sup>258</sup> See *infra*, para 102.

captured in Ljuboten,<sup>259</sup> apparently intent on revenge. As detailed elsewhere a land mine attributed to the NLA had exploded under an army truck killing eight soldiers and wounding others on 10 August. Two of the dead were from Ljubanci.

72. After arriving at Braca's house the detained residents from Adem Ametovski's house were held by the road outside the yard of the house. They saw the Accused Ljube Boškoski there.<sup>260</sup> On the evidence of M017, Ljube Boškoski addressed the policemen commending them for having caught the "terrorists."<sup>261</sup> The men from Adem Ametovski's house had their vision impeded by their t-shirts covering their heads but while they were not able to observe Ljube Boškoski carefully, they were still able to make limited observations of him.<sup>262</sup> Ljube Boškoski was in the garden of Braca's house, only a few metres away from this detained group of men.<sup>263</sup> Indeed, as it will be discussed later, at some time after 1200 hours, Ljube Boškoski had arrived at Braca's house and stayed there until some time before 1345 hours.<sup>264</sup>

73. 20 to 100 people were present inside the fence in the courtyard of Braca's house at the time. Among them there were police reservists in camouflage uniforms, army reservists and civilians.<sup>265</sup> After the completion of the operation in the village of Ljuboten, the police involved in it, or at least some of them, returned to the checkpoint at Braca's house. Bučuk, the owner of the private security agency Kometa,<sup>266</sup> was seen among the people returning from Ljuboten.<sup>267</sup> Aleksandar Janevski and Vlado Janevski, a.k.a. Kunta, both employees of Kometa,<sup>268</sup> were also seen among the people returning after the action in Ljuboten.<sup>269</sup> As indicated, Vlado Janevski had been brought there by the Hermelin APC because he had wounded himself. Some of the police seen returning from Ljuboten after the police operation had been issued with AK-47 weapons at OVR Čair on the evening of 11 August.<sup>270</sup> This will be discussed in more detail later in this Judgement.<sup>271</sup>

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<sup>259</sup> M037, T 799-800.

<sup>260</sup> M017, T 632-635; Exhibit P21; Ismail Ramadani, Exhibit P188, para 31; Osman Ramadani, Exhibit P197, para 37; Osman Ramadani, Exhibit P198, para 25.

<sup>261</sup> M017, T 632-635; Exhibit P21.

<sup>262</sup> M017, T 633-634; 711; Osman Ramadani, Exhibit P197, para 40.

<sup>263</sup> Ismail Ramadani, Exhibit P188, para 32; Osman Ramadani, Exhibit P197, para 37; *See also* Osman Ramadani, T 1080.

<sup>264</sup> *See infra*, para 425.

<sup>265</sup> Blagoja Jakovski, T 3936-3939; 3994.

<sup>266</sup> M052, T 8258. *See also infra*, para 497.

<sup>267</sup> M052, T 8290-8291; 8355. One other witness claimed no knowledge of the presence of Bučuk at the Chinese Wall on that day, although before the trial he had stated to the Prosecution investigator that he had seen him there. (Blagoja Jakovski, T 3939-3941)

<sup>268</sup> M052, T 8262.

<sup>269</sup> M052, T 8293-8294.

<sup>270</sup> M052, T 8274.

<sup>271</sup> *See infra*, paras 117-118.

74. Shortly after arriving at Braca's house the men from Adem Ametovski's house were ordered to lie face down on the ground outside the fence.<sup>272</sup> Police beat them severely, hitting and jumping on them.<sup>273</sup> The beatings were so severe that some of the men lost consciousness.<sup>274</sup> When one of the men eventually regained consciousness he noticed that he no longer had his trousers or underwear on. His face and his body were covered in blood.<sup>275</sup> The men were in bad condition. Some of them could hardly move or stand.<sup>276</sup>

75. From Braca's house the detained men were loaded onto a truck guarded by two armed police. While there is evidence that these were believed to be reservists<sup>277</sup> the evidence provides no basis for a conclusion that they were members of the police unit that had entered the village. The truck had come from Mirkovci police station. They were then transported to Mirkovci police station.<sup>278</sup> Together with the detained men, the three weapons seized in the village of Ljuboten were loaded on the truck.<sup>279</sup> ID cards seized from the captured men were brought to the Chinese Wall,<sup>280</sup> although the evidence does not disclose what then became of them.

76. Reports prepared by Mirkovci police station and OVR Čair indicate that 10 persons were captured in Ljuboten on 12 August 2001 and brought to the checkpoint and that three automatic weapons were also found, two of Chinese production and one Thompson, as well as ammunition.<sup>281</sup> While there are differences in the precise description of the weapons and ammunition, in the Chamber's finding, it is clear that these were the weapons which, according to police evidence in this trial, were found near the bodies of the three men in the field by Qani Jashari's house. The three weapons and ammunition were the only weapons said to have been found in Ljuboten on that day.

77. At Mirkovci police station the Ljuboten residents from Adem Ametovski's house were taken to a basement or a garage.<sup>282</sup> They were further severely mistreated there by police.<sup>283</sup> They

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<sup>272</sup> M017, T 630; M012, T 976; Osman Ramadani, Exhibit P197, para 37.

<sup>273</sup> M017, T 630; M012, T 897; Ismail Ramadani, Exhibit P188, para 34; Exhibit P197, para 45; Vehbi Bajrami, T 1872.

<sup>274</sup> M017, T 634-6345; M012, T 898; Osman Ramadani, Exhibit P197, para 45; Osman Ramadani, Exhibit P198, para 28.

<sup>275</sup> M012, T 898-899.

<sup>276</sup> Ismail Ramadani, T 997.

<sup>277</sup> Ismail Ramadani, Exhibit P188, paras 35-36. *See also* M052, T 8329; M083, T 1398-1401; Exhibit P227.

<sup>278</sup> M012, T 899; Ismail Ramadani, Exhibit P188, para 36; Osman Ramadani, Exhibit P197, para 45; Osman Ramadani, T 1101. *See also* M052, T 8329; M083, T 1398-1401; Exhibit P227.

<sup>279</sup> M083, T 1431-1432; 1446; Exhibit P23.

<sup>280</sup> Eli Čakar, Exhibit P441, para 18; Exhibit P442.

<sup>281</sup> Exhibits P23; P108; M083, T 1381-1394; Exhibits P257; P54, pp 105-106 (42-43 of the English version); Blagoja Toškovski, T 4295.

<sup>282</sup> M012, T 899-900; Ismail Ramadani, Exhibit P188, para 37; Exhibit P191, Ismail Ramadani, T 998; Osman Ramadani, Exhibit P197, para 46; Vehbi Bajrami, Exhibit P247.1, p 3.

were beaten with rifle butts, baseball bats and batons.<sup>284</sup> At some point the detainees were taken to a room in the police station. They were interrogated there and some were threatened and forced to sign blank papers.<sup>285</sup> Those who did not want to sign the documents were sent back to the basement where they were subjected to further beatings.<sup>286</sup> At some point the police informed the detainees that they would be given a paraffin glove test but did not indicate what the purpose of this test was.<sup>287</sup> Some of them were later subjected to a paraffin glove test at Mirkovci police station.<sup>288</sup>

78. Ljuboten residents were subjected to brutal beatings in Mirkovci police station.<sup>289</sup> The evidence is specific with respect to Adem Ametovski, Hamdi Ametovski and Atulla Qaili. Adem Ametovski sustained severe injuries, his teeth were broken and he was unconscious.<sup>290</sup> Hamdi Ametovski was beaten particularly badly.<sup>291</sup> Atulla Qaili was also subjected to severe beatings.<sup>292</sup> He was unconscious most of the time at Mirkovci police station but nevertheless was subjected to further beatings.<sup>293</sup> In the words of a witness, there was not a part of Qaili's body that was not covered in blood; he was unable to speak.<sup>294</sup> The detainees asked for a doctor but initially nothing occurred.<sup>295</sup> After some time policemen and medical staff entered the basement and took Atulla Qaili away.<sup>296</sup> The evidence suggests that some medical assistance was provided to some other detainees at Mirkovci police station.<sup>297</sup>

79. In the evening of 13 August 2001 four or five of the Ljuboten residents who were detained in Mirkovci police station were taken to Skopje City Hospital.<sup>298</sup> There they were further ill-treated.<sup>299</sup> A witness believed that the persons carrying out these acts were policemen and a

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<sup>283</sup> Ismail Ramadanani, Exhibit P188, para 37. A witness testified that the police sprayed water on them, using a hose, M017, T 636. In this respect, *see* also Osman Ramadanani, Exhibit P197, para 46; Osman Ramadanani, Exhibit P198, para 31; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>284</sup> M017, T 638; Ismail Ramadanani, Exhibit P188, para 37. *See* also Osman Ramadanani, Exhibit P197, paras 46-47.

<sup>285</sup> M012, T 900-901; Ismail Ramadanani, Exhibit P188, paras 40, 41; Osman Ramadanani, Exhibit P197, para 48; Osman Ramadanani, Exhibit P198, para 32; Vehbi Bajrami, Exhibit P247.1, p 4; Vehbi Bajrami, T 1871, 1874.

<sup>286</sup> M012, T 901. Others were taken back to the basement, subjected to further beatings and threats and then asked to sign blank papers. (Ismail Ramadanani, Exhibit P188, paras 42, 45; Ismail Ramadanani, Exhibit P189, para 21) M012, T 902.

<sup>287</sup> Osman Ramadanani, Exhibit P197, para 52.

<sup>288</sup> M017, T 636-637.

<sup>289</sup> M012, T 901.

<sup>290</sup> M012, T 901.

<sup>291</sup> M012, T 901.

<sup>292</sup> M012, T 905.

<sup>293</sup> Ismail Ramadanani, Exhibit P188, para 43.

<sup>294</sup> M012, T 905.

<sup>295</sup> M012, T 905.

<sup>296</sup> M012, T 906; Ismail Ramadanani, Exhibit P188, para 44; Osman Ramadanani, Exhibit P197, paras 48, 51.

<sup>297</sup> *See* M012, T 954-955. Ismail Ramadanani, T 1026; Osman Ramadanani, T 1082; Vehbi Bajrami, Exhibit P247.1, p 4; Vehbi Bajrami, T 1873.

<sup>298</sup> M017, T 638-640; Ismail Ramadanani, Exhibit P188, paras 47-48; Ismail Ramadanani, T 1026; Osman Ramadanani, Exhibit P197, para 51.

<sup>299</sup> M017, T 638-640; Ismail Ramadanani, Exhibit P188, para 49; Ismail Ramadanani, T 1045-1046. The Chamber does not accept the evidence of M017 that some of the doctors hit and kicked the detainees (M017, T 638-64) as it is not corroborated and it contradicts other evidence. (*See*, for example, Ismail Ramadanani, Exhibit P188, para 49)

doctor,<sup>300</sup> while another witness identified these persons as reservists.<sup>301</sup> The basis for these identifications is unclear. The Chamber would observe here that, as found elsewhere, the hospital security was not part of the Ministry of Interior.<sup>302</sup> During their stay at the hospital medical assistance was provided to the detainees.<sup>303</sup> On the following day the detainees at the hospital were visited by an investigative judge and defence attorneys.<sup>304</sup> One of the detainees was shown a paper with his signature stating that he had been a member of the NLA and that he was found in possession of one of the automatic weapons which were seized on 12 August in Ljuboten.<sup>305</sup> The witness assumed that the statement had been written on the blank paper that he was forced to sign in Mirkoveci police station. He denied its content to the investigative judge and explained the circumstances in which he was forced to sign a blank paper.<sup>306</sup> Nevertheless, from Skopje City Hospital these men were taken to Šutka prison where they were held in prison for four months.<sup>307</sup> They were released in December 2001 following a decision of the President as discussed later.<sup>308</sup>

80. On 12 August many Ljuboten residents also attempted to flee the village in the direction of Skopje. Their attempts to leave the village continued until late afternoon on 12 August 2001<sup>309</sup> and on the following days. In the early afternoon of 12 August a group of residents were stopped, on the main road leading from Ljuboten to Skopje, approximately 300 metres before Buzalak police checkpoint,<sup>310</sup> by policemen in camouflage uniforms and searched.<sup>311</sup> Their identification cards were checked and the men were ordered to take their shirts off before being allowed to proceed to the actual checkpoint.<sup>312</sup> At the checkpoint the police separated men from women and children.<sup>313</sup> The men were made to lie down. The men were beaten there by the police.<sup>314</sup> They were hit with rifle butts and kicked.<sup>315</sup> From there some of the men were taken to Butel police station in Skopje in a police vehicle.<sup>316</sup> The other men were taken to Proleće police station in Skopje,<sup>317</sup> where they

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<sup>300</sup> M017, T 638-639.

<sup>301</sup> Ismail Ramadani, Exhibit P188, para 49.

<sup>302</sup> See *infra*, para 517.

<sup>303</sup> Ismail Ramadani, Exhibit P188, para 49; Ismail Ramadani, T 1026-1027.

<sup>304</sup> Ismail Ramadani, Exhibit P188, para 51; M017, T 734-735.

<sup>305</sup> Exhibit P54.008, p 3.

<sup>306</sup> Ismail Ramadani, Exhibit P188, paras 51, 52.

<sup>307</sup> Ismail Ramadani, Exhibit P188, paras 54-56; M017, T 643-644. At Šutka prison M017 was hit once by a prison staff or a policeman at the prison. (M017, T 643-644)

<sup>308</sup> M017, T 643-644. See also *infra*, para 95.

<sup>309</sup> Mamut Ismaili, Exhibit P219.1, para 6; Farush Memedi, Exhibit P266, para 10; Exhibit P376; Isni Ali, Exhibit P263, para 7; Isni Ali, T 2018-2020.

<sup>310</sup> Mamut Ismaili, Exhibit P219.1, para 7; Farush Memedi, Exhibit P266, para 13.

<sup>311</sup> Mamut Ismaili, Exhibit P219.1, para 7; Farush Memedi, Exhibit P266, para 13.

<sup>312</sup> Ćemuran Redžepi, Exhibit P372, para 15; Sherafedin Ajrullai, Exhibit P403, para 7; Sherafedin Ajrullai, T 4028.

<sup>313</sup> Mamut Ismaili, Exhibit P219.1, para 7; Farush Memedi, Exhibit P266, para 13. See also Ćemuran Redžepi, Exhibit P372, paras 17, 18, 19; Sherafedin Ajrullai, Exhibit P403, paras 7-8; Isni Ali, Exhibit P263, para 8.

<sup>314</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>315</sup> Mamut Ismaili, Exhibit P219.1, para 7; Farush Memedi, Exhibit P266, para 13. See also Ćemuran Redžepi, Exhibit P372, paras 17, 18, 19.

<sup>316</sup> Sherafedin Ajrullai, Exhibit P403, para 10; Mamut Ismaili, Exhibit P219.1, para 8; Farush Memedi, Exhibit P266, para 13; Ćemuran Redžepi, Exhibit P372, paras 21, 22.

found about 30 other Ljuboten residents who were already detained there.<sup>318</sup> The women and children were allowed to return to Ljuboten.<sup>319</sup>

81. Conduct of this nature was repeated on several occasions in the afternoon of 12 August 2001. Witnesses described such events occurring shortly after 1300 hours<sup>320</sup> and later in the day, after 1700 hours.<sup>321</sup> The evidence indicates that different groups of 7, 10, 20 or 50 men were ordered to lie down, that they were beaten and later transported to a police station in Skopje.<sup>322</sup>

82. The evidence reveals that as Ljuboten residents were leaving the village hundreds of ethnic Macedonian civilians<sup>323</sup> with shovels, axes and hunting guns, were gathering near Buzalak checkpoint, coming from the direction of Radišani, to attack the ethnic Albanian population from Ljuboten.<sup>324</sup> A witness testified that policemen accompanying the Ljuboten residents fired shots to scare the approaching crowd of Macedonian civilians and to prevent them from attacking the people from Ljuboten.<sup>325</sup> It was further suggested that an order was issued, possibly by the Ministry of Interior, to take the people to an elevation 100 metres away from the Buzalak checkpoint and to stop there,<sup>326</sup> until buses arrive to transport the people.<sup>327</sup> The witness did not specify where to these buses were to take the people from Ljuboten. Another witness testified that the order was for the people from Ljuboten to be transported by buses to Skopje.<sup>328</sup> However, as found earlier, many male ethnic Albanian residents of Ljuboten were in fact taken to police stations where they were detained for some days. At the checkpoint they were mistreated by police. Another incident in the afternoon was described in the evidence. As Ljuboten residents were approaching the checkpoint some young ethnic Macedonian civilians started to beat two young ethnic Albanian residents of Ljuboten. This occurred after a policeman<sup>329</sup> signalled them.<sup>330</sup> The two young men started

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<sup>317</sup> At approximately 1800 hours at Kodra e Zaimit police checkpoint policemen in uniform stopped the people who were trying to leave and separated men from women and children. Several male Ljuboten residents were already there laying face down on the ground. After a few minutes this group of several male Ljuboten residents was taken to Proleće police station. (Isni Ali, Exhibit P263, para 8; Isni Ali, T 2007) *See* also Farush Memedi, Exhibit P266, para 15.

<sup>318</sup> Isni Ali, Exhibit P263, para 10.

<sup>319</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>320</sup> Mamut Ismaili, Exhibit P219.1, para 6-7; Farush Memedi, Exhibit P266, paras 10-14.

<sup>321</sup> Isni Ali, Exhibit P263, paras 7-8; Isni Ali, T 2007.

<sup>322</sup> Mamut Ismaili, Exhibit P219.1, para 7; Farush Memedi, Exhibit P266, para 13. *See* also Ćemuran Redžepi, Exhibit P372, paras 22-24.

<sup>323</sup> M052, T 8405-8406; Petre Stojanovski, T 9161.

<sup>324</sup> M084, T 1498; Ćemuran Redžepi, Exhibit P372, para 14.

<sup>325</sup> M084, T 1498.

<sup>326</sup> M084, T 1500.

<sup>327</sup> M084, T 1500.

<sup>328</sup> M052, T 8405-8406.

<sup>329</sup> Ejup Hamiti, T 4428- 4429.

<sup>330</sup> Ejup Hamiti, Exhibit P 417, p 3; Ejup Hamiti, T 4436-4437.

running away towards Radišani. Two policemen shouted at them to stop and opened fire on them. One of the young ethnic Albanian men was hit in the forehead by a bullet and fell unconscious.<sup>331</sup>

83. The ethnic Albanian Ljuboten men taken from Buzalak checkpoint to Butel (also known as Čair) police station were taken to the basement of the police station,<sup>332</sup> or to a small room on the first floor.<sup>333</sup> At their arrival at Butel some were beaten by police in camouflage uniforms who were wearing masks.<sup>334</sup> In the afternoon and in the evening of 12 August some of the detained men from Ljuboten were loaded onto police vehicles and were moved from Butel police station to Karpoš police station in Skopje.<sup>335</sup> Others were taken from Butel police station to Proleće police station.<sup>336</sup> On their way from Butel police station some of these men were beaten by policemen in camouflage uniforms.<sup>337</sup>

84. Those who were taken to Karpoš police station were taken to a room in the basement where they were further badly mistreated for about one hour.<sup>338</sup> Then they were taken individually to a room where at least some of them underwent paraffin glove tests.<sup>339</sup> The men were interviewed.<sup>340</sup> Some were accused of having been fighting in the NLA.<sup>341</sup> Some were forced to sign papers.<sup>342</sup> This happened in the presence of two men in civilian clothes and a police woman. There were also policemen in camouflage uniforms and masks.<sup>343</sup> Despite the mistreatment inflicted at Karpoš police station and before that, no medical treatment was provided.<sup>344</sup>

85. Some of the men were taken from Karpoš police station eventually to Bit Pazar police station in Skopje. They received further beatings on their way to Bit Pazar police station, and as they entered the police station, but the beatings stopped after the intervention of a senior police officer.<sup>345</sup> The men were interviewed by the senior police officer and then released.<sup>346</sup> Other men

<sup>331</sup> Ejup Hamiti, Exhibit P 417, p 3; Ejup Hamiti, T 4436-4437; Exhibit P419.

<sup>332</sup> Mamut Ismaili, Exhibit P219.1, para 8; Ćemuran Redžepi, Exhibit P372, para 25; Sherafedin Ajrullai, Exhibit P403, para 12.

<sup>333</sup> Farush Memedi, Exhibit P266, para 14, Farush Memedi, T 2036-2037.

<sup>334</sup> Sherafedin Ajrullai, Exhibit P403, para 11.

<sup>335</sup> Mamut Ismaili, Exhibit P219.1, para 8; Ćemuran Redžepi, Exhibit P372, para 27; Sherafedin Ajrullai, Exhibit P403, para 15.

<sup>336</sup> Farush Memedi, Exhibit P266, para 15.

<sup>337</sup> Mamut Ismaili, Exhibit P219.1, para 8; Farush Memedi, Exhibit P266, para 14, Farush Memedi, T 2041. *See also* Sherafedin Ajrullai, Exhibit P403, para 11.

<sup>338</sup> Sherafedin Ajrullai, Exhibit P403, para 17; Mamut Ismaili, Exhibit P219.1, para 8.

<sup>339</sup> Mamut Ismaili, Exhibit P219.1, para 8; Mamut Ismaili, Exhibit P219.2, para 6; Ćemuran Redžepi, Exhibit P372, para 29; Sherafedin Ajrullai, Exhibit P403, para 17;

<sup>340</sup> Ćemuran Redžepi, Exhibit P372, para 30; Ćemuran Redžepi, T 3549.

<sup>341</sup> Ćemuran Redžepi, Exhibit P372, para 30.

<sup>342</sup> Ćemuran Redžepi, Exhibit P372, para 30.

<sup>343</sup> Ćemuran Redžepi, Exhibit P372, para 30; Sherafedin Ajrullai, Exhibit P403, para 17.

<sup>344</sup> Mamut Ismaili, Exhibit P219.1, para 12.

<sup>345</sup> Sherafedin Ajrullai, Exhibit P403, para 20.

<sup>346</sup> Sherafedin Ajrullai, Exhibit P403, para 20.

from Ljuboten who had remained in Karpoš police station were taken to Skopje court in the evening of 14 August 2001.<sup>347</sup>

86. The ethnic Albanian Ljuboten residents taken to Proleće police station were beaten severely by policemen there.<sup>348</sup> They were not interviewed about the events at Ljuboten.<sup>349</sup> Some were forced to sign blank papers<sup>350</sup> and many were forced to undergo paraffin glove tests.<sup>351</sup> Those who tested positive were held in the police station.<sup>352</sup> In the evening of 13 August several of the men were taken to a state hospital in Skopje where they spent the night. They were guarded by an armed policeman in camouflage uniform.<sup>353</sup> In the morning a man in civilian clothes further mistreated two of the men in front of what a witness understood to be a high ranking police officer in camouflage uniform,<sup>354</sup> although the basis for his understanding is not clear. Around midnight on 14 August these Ljuboten residents were taken from the hospital to Skopje court.<sup>355</sup> In the meantime the beatings in Proleće police station had continued.<sup>356</sup> On 14 August 2001 some of the men were transferred from Proleće police station to Bit Pazar police station.<sup>357</sup> They were mistreated in the yard of the police station.<sup>358</sup> Late in the evening on 14 August 2001, perhaps as late as 0200 hours on 15 August 2001 they were taken to Skopje court.<sup>359</sup>

87. Many ethnic Albanian Ljuboten residents who had been detained at various police stations in Skopje on 12, 13 and 14 August were taken to Skopje court on 14 August 2001. Some of them gave evidence about their experience in Skopje court. Their accounts will be reviewed briefly below.

88. On 14 August 2001, M012 was transported from Mirkovci police station to Skopje court together with other Ljuboten residents. At the moment of their arrival they were beaten with rubber batons and were kicked by police, some of whom were in uniforms and some in civilian clothes. He and another five men were taken to a court where a judge, a prosecutor and a lawyer were present. At the time M012 was in a very bad condition, he had injuries on his face, and he could barely stand on his feet. He did not have any trousers. He heard discussions amongst the judge, the prosecutor and the defence lawyer about his physical state and that he should have been taken to a

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<sup>347</sup> Mamut Ismaili, Exhibit P219.1, para 9; Ćemuran Redžepi, Exhibit P372, para 31, Ćemuran Redžepi, T 3510.

<sup>348</sup> Isni Ali, Exhibit P263, para 9, Isni Ali, T 2008-2010, 3463-3464; Farush Memedi, Exhibit P266, para 16.

<sup>349</sup> Isni Ali, T 2010-2011; Farush Memedi, T 2038-2040, 2047-2048.

<sup>350</sup> Farush Memedi, Exhibit P266, para 18.

<sup>351</sup> Isni Ali, Exhibit P263, para 9, Isni Ali, T 2008-2010, 3464; Farush Memedi, Exhibit P266, para 18.

<sup>352</sup> Isni Ali, T 3468.

<sup>353</sup> Farush Memedi, Exhibit P266, para 20.

<sup>354</sup> Farush Memedi, Exhibit P266, para 21.

<sup>355</sup> Farush Memedi, Exhibit P266, para 22.

<sup>356</sup> Isni Ali, Exhibit P263, para 10.

<sup>357</sup> Isni Ali, Exhibit P263, paras 11, 12; Isni Ali, T 2011-2012.

<sup>358</sup> Isni Ali, Exhibit P263, para 12, Isni Ali, T 2011-2012.



hospital. M012 and the other men were asked how they had received their injuries. They were informed that they would be imprisoned for 30 days in Šutka prison.<sup>360</sup> However, M012 spent four months in detention there.<sup>361</sup> M012 knew that he was accused of committing terrorism.<sup>362</sup>

89. Vehbi Bajrami was also taken to Skopje court from Mirkovci police station. There a judge showed him a piece of paper bearing his signature. After Vehbi Bajrami informed the judge that he did not know what he had signed, the judge explained that Vehbi Bajrami had signed a statement indicating that he had been found in possession of an automatic rifle and a hand grenade. Vehbi Bajrami denied this and told the judge that he was forced to sign the document by the police. He testified that he gave a statement in the court and that the statement included in his court file was altered. On their way out of the court building he and the other detainees from Ljuboten were beaten by persons in civilian clothes.<sup>363</sup> He was then taken to Šutka prison where he was held for four months.<sup>364</sup>

90. Mamut Ismaili was brought from Karpoš police station to Skopje court in the evening of 14 August 2001. He saw 10 or 15 other Ljuboten residents in the court building. Mamut Ismaili and the others were badly beaten with rifle butts and other implements by policemen in camouflage uniforms among whom there were some women. Mamut Ismaili was then taken to what he thought was an office where he saw two men and a woman in civilian clothes. One of the men, whom Mamut Ismaili believed was a judge, asked him to identify himself. Mamut Ismaili was interviewed about the events in Ljuboten and about whether he was a member of the NLA. He said he had been beaten by the police. Mamut Ismaili was then required to sign a document which he understood recorded what he had said. He was then told that he would be in custody for 30 days. He did not know whether a defence lawyer was present. He did not have an attorney when he was questioned.<sup>365</sup> Mamut Ismail was taken to Šutka prison where he was held for four months.<sup>366</sup>

91. Isni Ali was taken to Skopje court from Bit Pazar police station very late during the night of 14 August 2001, probably after midnight. In the hallway of the court building he was mistreated by police officers and reservists. A woman whom Isni Ali thought was a judge, although he offered no reason for this understanding, walked on his feet with her high heels. After some time he was taken to what he believed was an office. There were three persons there, one of them introduced himself

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<sup>359</sup> Isni Ali, Exhibit P263, para 13, Isni Ali, T 2012-2014.

<sup>360</sup> M012, T 912.

<sup>361</sup> M012, T 919.

<sup>362</sup> M012, T 916.

<sup>363</sup> Vehbi Bajrami, Exhibit P247.1, p 4; Vehbi Bajrami, T 1822.

<sup>364</sup> Vehbi Bajrami, Exhibit P247.1, p 4.

<sup>365</sup> Mamut Ismaili, Exhibit P219.1, paras 9, 10; Mamut Ismaili, Exhibit P219.2, para 7; Mamut Ismail, T 1353-1354.

<sup>366</sup> Mamut Ismaili, Exhibit P219.1, para 11.

as a judge, and the second as Isni Ali's defence lawyer. The judge read a document stating that Isni Ali was a terrorist. This he denied. He said he was then required to sign the document after which he was taken to the basement of the court and later was transferred to Šutka prison.<sup>367</sup>

92. Aziz Redžepi was also taken to Skopje court from Bit Pazar police station. This was in the early evening on Tuesday, 14 August 2001. When he arrived there he saw other residents of Ljuboten there. Aziz Redžepi was taken to what he thought was an investigative judge. He said he wanted to have his private lawyer present. The judge responded that the lawyer was not available as he was elsewhere and that they did not have time to wait for him. The judge then assisted Aziz Radžepi to contact another lawyer. After reviewing briefly the indictment the lawyer spoke with the investigative judge and then informed Aziz Redžepi that there was nothing that he could do. Aziz Redžepi was accused of using weapons. It was said he tested positive on a paraffin glove test. Aziz Redžepi was questioned by the judge. He informed the judge that he had been beaten at Proleće and Bit Pazar police stations and on the premises of the court. After an intervention by the lawyer the judge told the policemen not to touch Aziz Redžepi any more.<sup>368</sup> He was then taken to Šutka prison where he was detained until December 2001.<sup>369</sup>

93. Farush Memedi was taken from a hospital in Skopje to Skopje court around midnight on 14 August 2001. There he saw approximately 20 men from Ljuboten.<sup>370</sup> They were guarded by a policeman in camouflage uniform. Another policeman beat any of them who tried to move.<sup>371</sup> One by one they were taken into what the witness described as an office. There Farush Memedi was told that he had tested positive to a paraffin glove test and that this was proof that he had been holding weapons.<sup>372</sup> Farush Memedi did not respond anything to that. An Albanian lawyer who Farush Memedi did not personally know represented him.<sup>373</sup> Farush Memedi received only one document from the court, which was an indictment charging him with terrorism.<sup>374</sup> He was then taken to Šutka prison where he remained in detention for four months.<sup>375</sup>

94. On 14 August, in the evening, Ćemuran Redžepi was taken from Karpoš police station to Skopje court. He was not mistreated there, in fact police officers asked him whether he would like to eat or drink something. He saw, however, that there were other police officers wearing masks

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<sup>367</sup> Isni Ali, Exhibit P263, paras 14-15; Isni Ali, T 2012-2014; 3476; 3479; 3496-3497.

<sup>368</sup> Aziz Redžepi, Exhibit P432, paras 33-38; Aziz Redžepi, T 4677-4679; 4680-4682.

<sup>369</sup> Aziz Redžepi, Exhibit P432, paras 39, 41.

<sup>370</sup> Farush Memedi, Exhibit P266, para 22.

<sup>371</sup> Farush Memedi, Exhibit P266, para 22.

<sup>372</sup> Farush Memedi, Exhibit P266, para 23.

<sup>373</sup> Farush Memedi, Exhibit P266, para 23; Farush Memedi, T 2469.

<sup>374</sup> Farush Memedi, Exhibit P266, para 26; Farush Memedi, T 2082-2084; 2447.

<sup>375</sup> Farush Memedi, Exhibit P266, paras 23, 24.

who mistreated those they brought to the court.<sup>376</sup> He was taken to what he described was an office where a judge and a prosecutor were present. There was also a court appointed lawyer, despite Redžepi's resistance to having a lawyer appointed to represent him. Ćemuran Redžepi signed a statement that was given to him. He was not allowed to say anything during the hearing. The whole hearing lasted about 15 minutes.<sup>377</sup> Ćemuran Redžepi was then taken to Šutka prison where he was detained for 125 days.<sup>378</sup>

95. The accounts noted briefly above are unsupported by other evidence. It is not clear whether references to "police" in the testimonies are references to members of the Ministry of Interior or to the court police which fall under the Ministry of Justice.<sup>379</sup> The evidence also calls into question whether statements were obtained from these Ljuboten residents by use of force. These disputed issues have not been fully explored before the Chamber. The Chamber cannot reach a conclusion about them. The Chamber notes, from court records, that on 14 August 2001 these Ljuboten residents were detained initially on suspicion of having committed the criminal act of terrorism. The charges against them were later changed to "service in enemy forces." Eventually, criminal proceedings against them were discontinued in December 2001 as a result of pardon issued by the President pursuant to an amnesty law.<sup>380</sup> The Chamber notes that on the evidence before it, it has not been established that these Ljuboten residents were members of the NLA.

96. In the days following 12 August 2001 many ethnic Albanian Ljuboten residents left the village. On Sedat Murati's evidence many did not return until two weeks later.<sup>381</sup> During this period the village was nearly empty.<sup>382</sup> There was some isolated shooting during this period.<sup>383</sup> At least two houses belonging to ethnic Macedonians (a house belonging to a person named Mirce and the house of Kostovski) were set on fire on 13 or 14 August.<sup>384</sup> At least one ethnic Albanian house was also set on fire during this period.<sup>385</sup>

97. On 14 August 2001 an OSCE representative, Henry Bolton, entered Ljuboten. He saw the dead bodies of a man in his twenties and of an older man laying along the road. There were several gunshot wounds on these bodies.<sup>386</sup> In the Chamber's finding these were the bodies of Sulejman

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<sup>376</sup> Ćemuran Redžepi, Exhibit P372, para 32.

<sup>377</sup> Ćemuran Redžepi, Exhibit P372, para 33; Ćemuran Redžepi, T 3535-3539; Exhibit 1D102.

<sup>378</sup> Ćemuran Redžepi, Exhibit P372, paras 33-36.

<sup>379</sup> See *infra*, para 389.

<sup>380</sup> Exhibits P46.05; P47, pp 2, 5, 7; P48.1.

<sup>381</sup> Sedat Murati, Exhibit P405, para 34.

<sup>382</sup> Sedat Murati, Exhibit P405, para 35.

<sup>383</sup> Sedat Murati, Exhibit P405, para 35.

<sup>384</sup> Sedat Murati, Exhibit P405, para 35; Fatmir Kamberi, Exhibit P426, para 21.

<sup>385</sup> Fatmir Kamberi, Exhibit P426, para 22.

<sup>386</sup> Henry Bolton, Exhibit P236.1, paras 11, 14.

Bajrami and Muharem Ramadani.<sup>387</sup> Mr Bolton was shown a basement in a house where, it was said, by some residents, these men had been sheltering on 12 August. In the Chamber's finding, this was Adem Ametovski's house. Further along the road the OSCE representative saw four houses which were severely damaged. It seemed to him that these houses were the centre of the assault. These houses, in the finding of the Chamber, belonged to the Jashari family. In the field to the north of these houses there were three more bodies, each of which had numerous gunshot wounds.<sup>388</sup> In the Chamber's finding, these were the bodies of Xhelal Bajrami, Bajram Jashari and Kadri Jashari.<sup>389</sup>

98. During his visit to Ljuboten on 14 August 2001 Mr Bolton noticed two men dressed in black. He inferred they were members of the NLA. Mr Bolton contacted the police in Skopje and asked for an investigative judge to be sent to Ljuboten. He was informed that it was not safe for the judge to go to Ljuboten. Mr Bolton then advised the Ljuboten residents to deal with the bodies as they felt appropriate.<sup>390</sup>

#### **B. Macedonian army units involved in the events in Ljuboten**

99. As indicated earlier, there is evidence that on 12 August 2001, units of the Macedonian army positioned near Ljuboten fired in the direction of the village. The units belonged to the 3rd Battalion of the 1<sup>st</sup> Guardist Brigade. The 1<sup>st</sup> Guardist Brigade was stationed to the north of Skopje.<sup>391</sup> With three other brigades it came under the area command of General Sokol Mitrovski.<sup>392</sup> The commander of the 1<sup>st</sup> Guardist Brigade was Colonel Blažo Kopačev.<sup>393</sup> In August 2001, Major Mitre Despodov was the commander of the 3<sup>rd</sup> battalion.<sup>394</sup> His deputy was Sasha Isovski.<sup>395</sup> The 3<sup>rd</sup> Battalion command was stationed in the dormitory building of the primary school in the village of Ljubanci.<sup>396</sup> The logistic and operational headquarters of the battalion were also located there.<sup>397</sup> The 3<sup>rd</sup> Guardist Battalion was composed of three infantry companies and one mortar battery.<sup>398</sup> The 1<sup>st</sup> Infantry Company, under the command of Lieutenant Zoran Saltamarski, was stationed at Brodec.<sup>399</sup> Lieutenant Marijo Jurišić was the commander of the

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<sup>387</sup> See *supra*, paras 55; 57.

<sup>388</sup> Henry Bolton, Exhibit P236.1, para 18.

<sup>389</sup> See *supra*, para 68.

<sup>390</sup> Henry Bolton, Exhibit P236.1, para 22.

<sup>391</sup> M051, T 4196; Exhibits 1D99; 1D81, p 3.

<sup>392</sup> M051, T 4196; Nikolče Grozdanovski, T 10413.

<sup>393</sup> M051, T 4196; Nikolče Grozdanovski, T 10447.

<sup>394</sup> Marijo Jurišić, T 3295-3296; M051, T 4118; 4196; Mitre Despodov, T 2603; 2665; Nikolče Grozdanovski, T 10399; 10450; Exhibit P303.

<sup>395</sup> Marijo Jurišić, T 3368; Mitre Despodov, T 2665.

<sup>396</sup> Mitre Despodov, T 2545; Marijo Jurišić, T 3368; Nikolče Grozdanovski, T 10400; 10458.

<sup>397</sup> Marijo Jurišić, T 3296; Exhibit P233.

<sup>398</sup> Marijo Jurišić, T 3292; 3368; Mitre Despodov, T 2665.

<sup>399</sup> Marijo Jurišić, T 3368; Mitre Despodov, T 2665.

2<sup>nd</sup> Infantry Company.<sup>400</sup> His deputy was Lieutenant Darko Brašnarski.<sup>401</sup> The command post of the 2nd Infantry Company was in the children's holiday resort above Ljubanci next to the St Nikola Monastery.<sup>402</sup> The resort also housed other soldiers of the 3<sup>rd</sup> Battalion.<sup>403</sup> There were 100 to 120 soldiers in Lieutenant Jurišić's company.<sup>404</sup> The 3rd Infantry Company, under the command of Ferdo Pavlov, was stationed at Raštak.<sup>405</sup> The mortar battery of the 3<sup>rd</sup> Guardist Battalion was under the command of Captain Nikolče Grozdanovski.<sup>406</sup> It was also billeted at the children's holiday resort.<sup>407</sup>

100. The 3<sup>rd</sup> Guardist Battalion consisted almost exclusively of reservists. The superiors were from the regular composition of the army.<sup>408</sup> A large number of reservists from the 3<sup>rd</sup> Guardist Battalion came from the surrounding villages, especially from Ljubanci.<sup>409</sup> Because of the large number of reservists under his command, Major Despodov had to deal with various problems, including a lack of discipline and alcohol abuse. Soldiers were not sufficiently trained and some of them did not even know how to hold their weapons.<sup>410</sup>

### **C. Events of 10 August 2001**

101. The present Indictment is limited to events that occurred in Ljuboten and its surroundings on 12 August and the following days. However, the events that took place on 10 and 11 August 2001 are of material relevance to allegations in the Indictment and will be discussed below.

102. On 10 August 2001, a vehicle of the Macedonian army ran over a land mine near Ljubotenski Bačila, some 10 kilometres from Ljuboten,<sup>411</sup> resulting in the death of eight soldiers from the 2nd Infantry Company and injuries to six.<sup>412</sup> Two of the soldiers killed were reservists from the village of Ljubanci.<sup>413</sup> Immediately after the incident, Major Despodov ordered that assistance be provided to the soldiers injured in the incident.<sup>414</sup> Lieutenant Jurišić went to the place where the incident had occurred.<sup>415</sup> The soldiers who went there came under fire from what were

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<sup>400</sup> Marijo Jurišić, T 3290; 3367-3368; Mitre Despodov, T 2666.

<sup>401</sup> Marijo Jurišić, T 3368.

<sup>402</sup> Mitre Despodov, T 2545; erroneously referring to the monastery as "St Ilija Church".

<sup>403</sup> Marijo Jurišić, T 3298; Exhibit P367; Nikolče Grozdanovski, T 10458; 10483.

<sup>404</sup> Marijo Jurišić, T 3353

<sup>405</sup> Marijo Jurišić, T 3368; Mitre Despodov, T 2545-2546; 2666.

<sup>406</sup> Marijo Jurišić, T 3368; Mitre Despodov, T 2666; Nikolče Grozdanovski, T 10399; 10403; 10457.

<sup>407</sup> Mitre Despodov, T 2666; Nikolče Grozdanovski, T 10399; 10458.

<sup>408</sup> Mitre Despodov, T 2614; Nikolče Grozdanovski, T 10454.

<sup>409</sup> Nikolče Grozdanovski, T 10454; Mitre Despodov, T 2661.

<sup>410</sup> Mitre Despodov, T 2632.

<sup>411</sup> M012, T 936.

<sup>412</sup> Exhibits P45, p 135; P 466, Section 5, p 43; Marijo Jurišić, T 3355; Henry Bolton, T 1644-1647; Exhibit 1D13; Mitre Despodov, T 2638-2639.

<sup>413</sup> Marijo Jurišić, T 3355.

<sup>414</sup> Mitre Despodov, T 2639; Exhibit P301.

<sup>415</sup> Mitre Despodov, T 2639; 2637.

believed to be terrorists.<sup>416</sup> Troops of the 3<sup>rd</sup> Guardist Battalion opened fire from 120 millimetre mortars and two 76 millimetre cannons.<sup>417</sup> The army also used a helicopter for aerial spotting.<sup>418</sup> A quantity of ammunition and arms were found at the site.<sup>419</sup>

103. Major Despodov suggested that throughout this operation on 10 August 2001 he issued specific orders for his soldiers to fire at the “terrorists” and not towards the village of Ljuboten.<sup>420</sup> However, contrary to his suggestion, it is the evidence, including a report prepared contemporaneously by Major Despodov and submitted to his command,<sup>421</sup> and the Chamber accepts that, Ljuboten did come under fire from his troops on 10 August 2001. The report of Major Despodov noted that a few members of the group thought to be responsible for the land mine incident subsequently started moving towards Ljuboten. According to the report, on their way towards Ljuboten the men took shelter at a sheepfold. The Macedonian army directed cannon fire at them.<sup>422</sup> Later on, the army fired in the direction of the village with mortars and a cannon.<sup>423</sup> As a result of this operation by the Macedonian army on 10 August 2001, four perceived “terrorists” were killed. The report specifies that they were killed at various locations outside the village: at the entry to the village, above a drinking fountain above the village and above a road leading to the village.<sup>424</sup>

104. The shelling and shooting on 10 August 2001 was observed by residents of Ljuboten. It was coming from the mountains above the village.<sup>425</sup> The shooting continued during that night and until the morning of 11 August.<sup>426</sup> In the afternoon of 10 August 2001, a five-year old boy who was playing in the village on the road leading to Raštak was hit by a mortar shell. He died immediately.<sup>427</sup> Some evidence indicates that Memet Memeti was also killed in Ljuboten on 10 August.<sup>428</sup>

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<sup>416</sup> Mitre Despodov, T 2639; Marijo Jurišić, T 3355-3356.

<sup>417</sup> Exhibit P301.

<sup>418</sup> Nikolče Grozdanovski, T 10413; 10477; Mitre Despodov, T 2639.

<sup>419</sup> M051, T 4180; Exhibit 1D86.

<sup>420</sup> Mitre Despodov, T 2639.

<sup>421</sup> Mitre Despodov, T 2553.

<sup>422</sup> Exhibit P301; *see also* M2D-008, T 10535; Exhibit 2D95.

<sup>423</sup> M2D-008, T 10541; 10592.

<sup>424</sup> Exhibit P301.

<sup>425</sup> Ismail Ramadani, Exhibit P188, paras 6, 7; Ismail Ramadani, Exhibit P189, para 4; Osman Ramadani, Exhibit P197, para 4; M039, Exhibit P200.1, pp 2-3; Mamut Ismaili, Exhibit P219.1, para 3; Isni Ali, Exhibit P263, para 3; Sherafedin Ajrullai, Exhibit P403, para 5; Ćemuran Redžepi, Exhibit P372, para 3; Aziz Redžepi, Exhibit P432, para 3; Fatmir Kamberi, Exhibit P426, paras 6-9;

<sup>426</sup> Osman Ramadani, Exhibit P197, para 21.

<sup>427</sup> Osman Ramadani, Exhibit P197, paras 5, 6, 14-18; Isni Ali, Exhibit P263, para 4; *see also* Ćemuran Redžepi, Exhibit P372, para 4; Aziz Redžepi, Exhibit P432, para 5.

<sup>428</sup> Howard Tucker, P443, p 14, Body 1D/10; *see also* Exhibit 1D8.

105. The land mine incident at Ljubotenski Bačila caused much unrest among the population of Macedonian ethnicity in the area, especially in the village of Ljubanci.<sup>429</sup> The village and area of Ljuboten were monitored by the army in co-operation with members of the Ministry of Interior (*i.e.* the police).<sup>430</sup> Major Despodov testified that the unit which co-operated with the army in the monitoring process came from the Mirkovci police station.<sup>431</sup>

106. In the afternoon of 10 August 2001,<sup>432</sup> the Accused Johan Tarčulovski arrived at the Čair police station.<sup>433</sup> Also many persons wearing police reserve uniforms arrived and gathered in the yard of the police station.<sup>434</sup> Zoran Krstevski and Goče Ralevski were also there. Zoran Krstevski was believed to be an advisor to the Minister of Interior, Ljube Boškovski,<sup>435</sup> although there is evidence that he took the position only at the end of September 2001.<sup>436</sup> Goče Ralevski was a member of the private security agency “Kometa”.<sup>437</sup> Johan Tarčulovski and Zoran Krstevski enquired whether the Head of OVR Čair, Ljube Krstevski (not a relative of Zoran Krstevski), had been contacted by higher officials from the Ministry of Interior.<sup>438</sup> OVR (*Oddelenie za Vnatrešni Raboti*) Čair, or Department for Internal Affairs, was an organisational unit of the Ministry of Interior, in charge of one of the municipalities of the City of Skopje.<sup>439</sup> SVR (*Sektor za Vnatrešni Raboti*) Skopje, Sector for Internal Affairs, was responsible for the entire City of Skopje.<sup>440</sup>

107. The Head of OVR Čair provided vehicles so that the police reservists who gathered in the yard of the Čair police station could go to Ljubanci village and then to the children’s holiday resort outside Ljubanci, where they were to be accommodated.<sup>441</sup> In addition, bullet-proof vests and six radio units for use by the police reservists were issued to Johan Tarčulovski.<sup>442</sup> Among the persons in police reserve uniforms who arrived at OVR Čair that day were a number of persons associated

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<sup>429</sup> Mitre Despodov, T 2647; Marijo Jurišić, T 3356-3357.

<sup>430</sup> Mitre Despodov, T 2554; Exhibit P301.

<sup>431</sup> Mitre Despodov, T 2554; 2661.

<sup>432</sup> In an official note composed by M052 for a commission of inquiry, he placed the event on 11 August 2001. However, the witness stated in court that this was an error and that the event could not have occurred on 11 August. M052, T 8344-8345.

<sup>433</sup> M052, T 8256; 8259.

<sup>434</sup> M052, T 8259-8262.

<sup>435</sup> M052, T 8259; Exhibit P574.

<sup>436</sup> Vesna Dorevska, T 9605; 9610; 9642; 9652; Exhibits 1D285; 1D307.

<sup>437</sup> M052, T 8261; Exhibit P534.

<sup>438</sup> M052, T 8259.

<sup>439</sup> *See infra*, para 482.

<sup>440</sup> *See infra*, para 479.

<sup>441</sup> M052, T 8259-8262.

<sup>442</sup> M084, T 1470; Exhibit P231. The witness stated that the vests and radio units were distributed a day later, on 11 August 2001; M084, T 1468. However, the entry in a diary recording this event is placed before where entries for 11 August 2001 begin, which suggests that the event took place on 10 August; Exhibit P231. Further, a person whose presence was apparently noted on that occasion (M084, T 1466) denied having met Johan Tarčulovski on 11 August 2001; M052, T 8327.

with the “Kometa” agency, including its owner Zoran Jovanovski, a.k.a. Bučuk.<sup>443</sup> On 25 and 26 July 2001, employees of this agency had received from the police weapons, including automatic rifles, and camouflage uniforms with police insignia on the sleeves.<sup>444</sup>

108. The evidence establishes that on the evening of 10 August 2001,<sup>445</sup> at some time after 1700 hours, a meeting was held at the command post of the 3rd Guardist Battalion in the building of the school in Ljubanci.<sup>446</sup> The meeting was attended by key representatives in the area of the army and the police (Ministry of Interior). Johan Tarčulovski, Major Despodov, the Head of OVR Čair Ljube Krstevski, Slavko Ivanovski the commander of police station Mirkovci, and Borce Pesevski the head of the sector of analysis at OVR Čair were, among others, present at the meeting.<sup>447</sup> The Head of OVR Čair had discussed with Petre Stojanovski, of SVR Skopje, whether he should attend the meeting and Stojanovski ordered or approved Krstevski’s attendance.<sup>448</sup>

109. Notes were made of what occurred at this meeting by a witness, on the basis of information he gathered from officers at the command post of the 3rd Guardist Battalion.<sup>449</sup> Two days after the meeting a report was prepared on the basis of these notes. The report was submitted to the General Staff of the Macedonian Army.<sup>450</sup> Both the notes and the report are in evidence. They are only minor differences. They record that a group of 60 to 70 people in police uniforms had arrived in Ljubanci on the evening of 10 August 2001. It is recorded in the notes that the group of people in police uniforms initially came to the house of Johan Tarčulovski in Ljubanci.<sup>451</sup> The report does not mention the house of Johan Tarčulovski, but records that the group was led by Johan

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<sup>443</sup> A witness saw Zoran Jovanovski, a.k.a. Bučuk, in the yard of the Čair police station. The witness knew him as Bučuk at the time but not his real name. A colleague told the witness that Bučuk was a criminal. The witness was also told that Bučuk was the owner of the security agency “Kometa”; M052, T 8258. The witness accepted in cross-examination that he might have been misinformed about the identity of the person he believed was Bučuk and thus that he could not vouch for the accuracy of this identification; M052, T 8563-8564. Yet, in view of other evidence of Bučuk’s involvement in the events in Ljuboten, which will be discussed, it is unlikely that the witness saw another Bučuk or that the person he saw was identified as Bučuk by mistake. Irrespectively of the name of the person who the witness saw, the Chamber is persuaded that the witness saw the owner of the security agency “Kometa”. As will be discussed, Zoran Jovanovski, a.k.a. Bučuk, was the owner of “Kometa”; *see infra*, para 497. Among the persons who arrived at OVR Čair on that day was also the elder of the Janevski brothers, Vladimir, a.k.a. Kunta, who also worked for “Kometa”; T 3632; M052, T 8261-8262; M053, T 1910. As indicated earlier, another member of “Kometa”, Goče Ralevski arrived at Čair on that day.

<sup>444</sup> On 25 July 2001, they were issued with weapons and equipment at PSOLO, *i.e.* the police station for external physical security of buildings; Miodrag Stojanovski, T 6778-6779; 6791-6792; 6814; Exhibit P436. Zoran Jovanovski, Vlado Janev, Aleksandar Janevski and Trajce Kuzmanovski, among others, were issued with weapons and camouflage uniforms on that day; Miodrag Stojanovski, T 6794-6795; Exhibit P436.

<sup>445</sup> A witness placed this meeting on 11 August 2001; M084, T 1477. However, the consistent evidence of other witnesses, as well as documents, which the Chamber accepts, indicate that the meeting took place on 10 August 2001; M052, T 8264; Mitre Despodov, T 2555; Petre Stojanovski, T 9151-9152; Exhibits P302, p 14; P303.

<sup>446</sup> M052, T 8264; M084, T 1477; Mitre Despodov, T 2555; Exhibit P303.

<sup>447</sup> Mitre Despodov, T 2555; 2649; M052, T 8264-8265; M084, T 1478; Exhibit P302, p 14.

<sup>448</sup> M052, T 8262-8264; 8459; Petre Stojanovski, T 9152; 9337.

<sup>449</sup> M051, T 4119-4121.

<sup>450</sup> M051, T 4126-4127; 4193.

<sup>451</sup> Exhibit P302.



Tarčulovski.<sup>452</sup> According to both documents, a truck of the Ministry of Interior (the police) also arrived with “bombs”, weapons and ammunition which were distributed to the group. They further record that Major Despodov was told by members of the group that they had been ordered to stay overnight at the rest house in Ljubanci and to “clean up Ljuboten from terrorists”, and that the major approved the accommodation.<sup>453</sup> The notes and the report also record that Major Despodov was informed by the officers of the Ministry of Interior that the President knew about their stay in Ljubanci but that no one else should know about it.<sup>454</sup> A similar account of events of that evening is recorded in a report prepared by Colonel Kopačev,<sup>455</sup> in which it is also recorded that upon an order from the President, the action in Ljuboten was to commence at 0430 hours on the following day.<sup>456</sup>

110. However, in his evidence, Major Despodov disputed the account of events recorded in the notes and the report.<sup>457</sup> He stated that he never saw or heard about the arrival of 60 or 70 people, denied having been requested to provide accommodation to any policemen,<sup>458</sup> and that he did not see a truck of the Ministry of Interior in Ljubanci.<sup>459</sup> As Major Despodov was the commander of all military units stationed in the area of Ljubanci it is improbable in the extreme that he was ignorant of the arrival of a large group of such persons in his zone of responsibility, indeed at the command post, and of the armaments and the proposed action. Having weighed carefully his evidence in these respects, the manner in which he gave this and other evidence, the nature and content of the contemporaneous notes and reports, the matters discussed in following paragraphs, and the very clear and strong interest of Major Despodov to disassociate himself from the actions of the Accused Johan Tarčulovski and this group of persons in police uniforms with regard to the events in Ljuboten that followed on 12 August 2001, the Chamber is entirely persuaded that the notes and the contemporaneous army reports are to be accepted in preference to the evidence of Major Despodov in respect of these matters. It finds accordingly. Aspects of the account provided in the notes and military reports are also confirmed by the evidence of Captain Grozdanovski and M084, who saw police reservists in the yard of the school in Ljubanci on 10 August and later that evening in the children’s holiday resort.<sup>460</sup>

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<sup>452</sup> Exhibit P303.

<sup>453</sup> Exhibits P302; P303.

<sup>454</sup> Exhibits P302; P303.

<sup>455</sup> Exhibit P304.

<sup>456</sup> Exhibit P304.

<sup>457</sup> Mitre Despodov, T 2573.

<sup>458</sup> Mitre Despodov, T 2578.

<sup>459</sup> Mitre Despodov, T 2654.

<sup>460</sup> Nikolče Grozdanovski, T 10479-10480; M084, T 1478-1479. M084 testified that he visited the children’s holiday resort on the day when the meeting at the school in Ljubanci took place. As noted earlier, M084 mistook 10 August 2001 for 11 August; *see supra*, footnote 445. Therefore, the Chamber accepts that his account of events on that evening on 11 August, in truth related to 10 August.

111. Major Despodov did accept in his evidence, however, that there had been a meeting that night at Ljubanci at which the participants in the meeting talked about the presence of “terrorists” in Ljuboten and how to capture them.<sup>461</sup> Other evidence indicates that Ljube Krstevski was expected to strengthen the police checkpoints in the area of Ljuboten.<sup>462</sup> Major Despodov also testified that a man from the Ministry of Interior (police), whose name he claimed not to remember, stated at the meeting that the police were undertaking an operation to enter the village.<sup>463</sup> Major Despodov testified that the man from the Ministry enquired whether Despodov had received orders from his superiors relating to the planned operation.<sup>464</sup> It was the evidence of Major Despodov that he responded he had not received any such order and that he could only participate in the operation if he received one.<sup>465</sup> Another account of the meeting indicates that Johan Tarčulovski requested artillery support from Major Despodov,<sup>466</sup> who said that he would not fire without a written order. Johan Tarčulovski replied: “Right, you will receive an order”.<sup>467</sup>

112. The report submitted to the General Staff of the Army of that meeting also records it having been explained that the Ministry of Interior would provide weapons and necessary equipment for the purposes of the operation in Ljuboten. It appears from the report that the weapons were to be provided to the group of 60-70 persons in police uniforms which had arrived at the school that evening with Johan Tarčulovski.<sup>468</sup> The representatives of the Ministry of Interior also told Major Despodov that he would receive, by telephone, orders from the President of FYROM.<sup>469</sup> This, too, is rejected by Major Despodov who said in his evidence that “something like this was not discussed.”<sup>470</sup> The report also indicates that the group of 60-70 persons had been issued with weapons before the meeting.<sup>471</sup> Although the report may not be immediately clear with regard to weapons, when taken with other evidence on this issue, in the Chamber’s finding the group of 60-70 led by Johan Tarčulovski were to be provided with necessary weapons and armament by the police and this had already occurred by the time of the meeting.

113. In the Chamber’s finding from the evidence, and other evidence mentioned more particularly in other contexts in the Judgement, with the knowledge of at least some quite senior police officers (Ministry of Interior), the Accused Johan Tarčulovski was to lead a group of 60-70

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<sup>461</sup> Mitre Despodov, T 2562; M052, T 8266; 8553-8554.

<sup>462</sup> M052, T 8266.

<sup>463</sup> Mitre Despodov, T 2562.

<sup>464</sup> Mitre Despodov, T 2556.

<sup>465</sup> Mitre Despodov, T 2574.

<sup>466</sup> M052, T 8267.

<sup>467</sup> M052, T 8267.

<sup>468</sup> “... armament and equipment for the above listed persons ...”. Earlier in the report, the group of 60-70 persons in uniforms of the Ministry of Interior. Exhibit P303.

<sup>469</sup> Exhibit P303.

<sup>470</sup> Mitre Despodov, T 2578.

<sup>471</sup> Exhibit P303.

men,<sup>472</sup> which had been assembled in the afternoon of 10 August 2001 and which were uniformed as members of the police. It comprised, at least in part, persons also in the employ of the “Kometa” security agency. This group was to undertake a confidential operation, the object of which was described as being to clean up the village of Ljuboten from terrorists. The group was armed with weapons, including explosives, by the police, which also provided bullet proof vests, radios and transport for the weapons and the men from OVR Čair to Ljubanci and to a children’s holiday resort used by the army outside Ljubanci late on 10 August 2001. The police were also to reinforce their positions at checkpoints in the vicinity of Ljuboten. At least part of the group of 60-70 men were accommodated by the army outside of Ljubanci in the children’s holiday resort. The army was also asked to provide supporting fire for the operation from its positions on the hills in the vicinity of Ljuboten. A joint planning meeting was held on the evening of 10 August 2001 in a school in Ljubanci then used by the army. Those present included Johan Tarčulovski, Ljube Krstevski the Head of OVR Čair of the police and Major Despodov of the army. The operation was originally intended to be undertaken on the morning of 11 August 2001, but, as will be discussed, it was postponed until 12 August 2001.

114. As discussed in more detail later, there is evidence that at the time it was said by Johan Tarčulovski and others that this operation was undertaken with the knowledge and support, or on the order, of the then President of FYROM, Boris Trajkovski. He has since died. This is consistent with what occurred and with the involvement of Johan Tarčulovski who was then serving with the security team of the President, but whose seniority and usual duties in the Ministry of Interior would not normally be such that he would be chosen to lead an operation of this nature. On the other hand, there is no direct and reliable independent confirmation of the President’s role. The evidence of it is from witnesses who are not credible in other matters, and by virtue of the subsequent death of the President, it could be very convenient, for a number of persons in the police and army, for it to appear that the President ordered the operation. The Chamber, therefore, refrains from making a positive finding that the President ordered the operation in Ljuboten. It is recognised, however, that this evidence indicates that this may well have occurred. Had the operation by the police in Ljuboten on 12 August 2001 been ordered by the President, that would not necessarily preclude the Accused Ljube Boškoski having a direct role in directing the operation, or having knowledge of it before 12 August. It does leave open, however, that the planning and organisation of the operation may have occurred without Ljube Boškoski being involved or knowing of it. He may have been by-passed.

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<sup>472</sup> There is evidence that additional men may have arrived the following day; *see infra*, para 117.

115. There is evidence which satisfies the Chamber that persons in some positions of authority in the police force (the Ministry of Interior) had knowledge of the proposed operation and were actively involved in supporting it, the evidence is not sufficient to enable findings to be made whether this knowledge and involvement reached to the most senior levels of the police hierarchy or to the ministerial head of the police force, the Minister of Interior at the time who is the Accused Ljube Boškosi. There is evidence which could suggest this, but it is not sufficiently clear or conclusive as to enable a finding of knowledge by Ljube Boškosi to be made.

#### **D. Events of 11 August 2001**

116. Sporadic small arms fire could be heard on 11 August 2001 in the village of Ljuboten.<sup>473</sup> Some evidence suggests that there were two mortar impacts in the village on that day.<sup>474</sup> At around 0900 hours on 11 August 2001, firing by the Macedonian army from infantry weapons towards the village of Ljuboten was observed by the police. The fire was coming from the direction of the children's holiday resort near Ljubanci.<sup>475</sup>

117. On 11 August 2001, weapons were distributed at the Čair police station to two other groups of men. In the morning hours of that day, a group of 20 to 30 volunteers from Ljubanci received weapons.<sup>476</sup> The men from this group had visited the police station on the preceding day,<sup>477</sup> but weapons had not been given to most of them on that occasion.<sup>478</sup> Another group received weapons in the evening of 11 August. It was a group of nine,<sup>479</sup> or possibly 12 to 13,<sup>480</sup> armed persons in camouflage uniforms. They too were issued with AK-47 automatic rifles, "Kalashnikovs".<sup>481</sup> It is the evidence that some men from the two groups issued with weapons on 11 August 2001 had been convicted of criminal offences.<sup>482</sup> Evidence has been given suggesting that the weapons were distributed to men from the second group, arriving in the evening, pursuant to an oral order which Ljube Krstevski received from Goran Mitevski, Director for the Public Security Bureau, or Petre

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<sup>473</sup> Osman Ramadani, Exhibit P197, para 26; M039, Exhibit P200.1, p 4; M088, Exhibit P206, para 13; Mamut Ismaili, Exhibit P219.1 para 5; Ćemuran Redžepi, Exhibit P372, para 6; Fatmir Kamberi, Exhibit P426, para 10.

<sup>474</sup> Osman Ramadani, Exhibit P197, para 26; *see also* M092, Exhibit P215, para 10.

<sup>475</sup> Exhibits P42; P159; M037, T 770-771.

<sup>476</sup> M053, T 1889; 1892-1894; 1975; Exhibits P231; P251.

<sup>477</sup> M053, T 1890-1891; M084, T 1461; M052, T 8564-8565.

<sup>478</sup> While M053 testified that no weapons were issued to these people on that day, (M053, T 1890-1891) other evidence indicates and the Chamber accepts that some of them did receive weapons; M052, T 8560. Enquiries were made to determine whether the volunteers requesting weapons had criminal records and those who were cleared and had proper appearance were issued with weapons; M084, T 1461-1462; 1465; Exhibit P231; M052, T 8273; 8480-8481; 8484.

<sup>479</sup> Exhibit P232.

<sup>480</sup> M084, T 1472; 1475.

<sup>481</sup> M084, T 1472-1475; Exhibit P232; M053, T 1892; 1983; 1900-1905; Exhibit P251; M052, T 8481; 8484.

<sup>482</sup> M084, T 1475-1476; Exhibit P592. The Chamber also heard evidence that the criminal records of some of these people might have been expunged; Exhibit 1D329.

Stojanovski.<sup>483</sup> However, the Chamber received contradictory evidence on this matter.<sup>484</sup> The Chamber is unable to make a finding, as the evidence regarding it appears to be affected by the witnesses' desire to distance themselves from the event and to avoid responsibility for the issuing of weapons in defiance of the applicable procedures.

118. On 12 August 2001, after the police operation men from the first group issued with weapons during the morning of 11 August were seen at Braca's house.<sup>485</sup> As indicated earlier, on 12 August 2001, men identified as being in the second group issued with weapons on the evening of 11 August were seen on 12 August returning from the village of Ljuboten after the police operation.<sup>486</sup>

119. Yet another group of people arrived at the Čair police station on 11 August. After 1900 hours, Zoran Jovanovski a.k.a. Bučuk, and between 20 and 30 men from the "Kometa" security agency, came to the police station. They wore camouflage uniforms and had automatic weapons.<sup>487</sup> There were police insignia on their uniforms.<sup>488</sup> The evidence does not reveal the purpose of their visit to the Čair police station.

120. It is convenient at this point to record that it is on the basis of the varied evidence about groups of men numbering perhaps 60-70, 20-30 and 9-13 assembling at Čair police station at various times and circumstances on 10 and 11 August, as well as this further group of 20-30 men on 11 August who may have also been in the earlier groups, and in the absence of more specific evidence, that the Chamber has found that the police unit which entered Ljuboten on the morning of 12 August 2001 numbered at least 60-70 men and may have numbered in excess of 100 men.

121. The Chamber also heard what could be very material evidence of M052 that in the morning hours of 11 August 2001, the Head of OVR Čair, Ljube Krstevski, was called to the office of General Sokol Mitrovski, Commander of the Skopje Defence Command, in the military barracks at the settlement Aerodrom.<sup>489</sup> According to this evidence, General Mitrovski was upset by the loss of soldiers in the land mine incident at Ljubotenski Bačila.<sup>490</sup> He said that the army was going to undertake combat activities against the NLA.<sup>491</sup> Major Despodov would be in charge of combat

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<sup>483</sup> M052, T 8272-8274; 8251; 8323; 8479-8482; M053, T 1895; Exhibit P536. The evidence suggests that Petre Stojanovski told the Head of OVR Čair to comply with the alleged order to issue weapons to the arriving men, even though it was apparently known that some of those men had criminal records. M052, T 8272-8274.

<sup>484</sup> Petre Stojanovski, T 9297.

<sup>485</sup> M053, T 1911-1912; 1986.

<sup>486</sup> M052, T 8274.

<sup>487</sup> M053, T 1903-1904; Exhibit P251.

<sup>488</sup> M053, T 1993.

<sup>489</sup> M052, T 8270-8271.

<sup>490</sup> M052, T 8312-8313.

<sup>491</sup> M052, T 8271.

activities in the area of Ljubanci.<sup>492</sup> General Mitrovski said that the person who was going to lead the combat activities of the Macedonian security forces was Johan Tarčulovski. “He was their boss”.<sup>493</sup> General Mitrovski said that Ljube Krstevski would receive tasks from Ljupčo Bliznakovski, the Deputy to the Head of SVR Skopje,<sup>494</sup> who was present at the meeting.<sup>495</sup> Bliznakovski told Ljube Krstevski to strengthen the checkpoints in the area of Ljuboten.<sup>496</sup>

122. The Chamber is unable to accept the truth of this evidence and it is not able to make a finding on the basis of it. The witness left the Chamber with the clear and strong impression that he sought to amplify the responsibility of the army for the operation in Ljuboten. There is also internal conflict in it as Major Despodov is said to have been in charge of combat activities whereas Johan Tarčulovski was to lead the combat activities. In addition, aspects of this evidence stand in contradiction with a report prepared by Colonel Kopačev, which indicates that on 12 August 2001, General Sokol Mitrovski appeared to Colonel Kopačev to be unaware of the on-going operation in Ljuboten.<sup>497</sup>

123. On 11 August 2001, the funeral of the soldiers killed on the preceding day in the mine incident at Ljubotenski Bačila took place. The funeral was attended by several thousand people not only from Ljubanci but also from the broader area surrounding Skopje. The people attending the funeral were highly agitated.<sup>498</sup>

124. There is a military report that in the afternoon of 11 August 2001, a group led by Johan Tarčulovski conducted a reconnaissance of the village of Ljuboten.<sup>499</sup> Another account of events of the day provides that at about 1700-1730 hours, the Macedonian army opened fire,<sup>500</sup> which is contrary to an army report that it was in fact the group led by Johan Tarčulovski that from 1730 to 1800 hours fired with hand-held “Zolja” rocket launchers.<sup>501</sup> Military reports record that also on this occasion Johan Tarčulovski requested Major Despodov to provide mortar fire support to combat activities of Tarčulovski’s group.<sup>502</sup> However, once again, Major Despodov specifically

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<sup>492</sup> M052, T 8312-8313.

<sup>493</sup> M052, T 8271.

<sup>494</sup> *See infra*, para 483.

<sup>495</sup> M052, T 8271.

<sup>496</sup> M052, T 8271. A number of orders were given regarding the deployment of policemen at the checkpoints in the area of Ljuboten at the time. An increase in the number of policemen manning the Buzalak checkpoint can be observed in the weekend of 10-12 August 2001. On 10 and 11 August, 9 policemen were deployed; Exhibits P544; P491. On 12 August, the number of policemen was raised to 11; Exhibit P492. The number at the Chinese wall checkpoint was significantly larger on 12 August. (15 policemen, M052, T 8280) However, there appears to have been no increase at other checkpoints; Exhibits P546; P538; P545; P547; 1D283; 1D284.

<sup>497</sup> Exhibit P304, p 2.

<sup>498</sup> Mitre Despodov, T 2648.

<sup>499</sup> Exhibit P303.

<sup>500</sup> Exhibit P302.

<sup>501</sup> Exhibit P304, p 1.

<sup>502</sup> Exhibits P303; P304.

denied receiving such a request from Johan Tarčulovski on that day.<sup>503</sup> The Chamber notes in respect of these conflicting reports, that residents of Ljuboten did not observe heavy firing in the afternoon of that day.<sup>504</sup> The Chamber accepts that in the afternoon hours of 11 August 2001, Johan Tarčulovski with police from the group conducted a reconnaissance of the village of Ljuboten but that there was no fire support from the army at the time.

125. On 11 August 2001, at around 1700 or 1800 hours, Johan Tarčulovski returned to the command post of the 3rd Guardist Battalion in Ljubanci.<sup>505</sup> It is the evidence of Major Despodov that he informed Johan Tarčulovski that he had not received any order in respect of the planned operation and that he was adamant that without an order he would not take any action unless in defence of a direct attack.<sup>506</sup> It was the evidence of Major Despodov that Johan Tarčulovski became angry and said to Despodov that the action would take place, with or without the assistance of Despodov's troops.<sup>507</sup>

126. Major Despodov went on to say that at some point Johan Tarčulovski spoke on the phone and then passed the phone to Despodov, telling him that the President would like to speak to him.<sup>508</sup> Major Despodov placed this event on 10 August 2001.<sup>509</sup> However, all the other evidence relating to this event indicates that it occurred on 11 August 2001, and the Chamber so finds.<sup>510</sup> Zlatko Keskovski testified that on 11 August 2001, at around 1700 or 1800 hours, he received a phone call from Johan Tarčulovski. At the time President Trajkovski was at Zlatko Keskovski's house. Johan Tarčulovski told Keskovski that preparations were being made for an action and an army major refused to co-operate with other members of the security forces.<sup>511</sup> Johan Tarčulovski requested to speak to the President. During their conversation, the President asked Tarčulovski to establish contact with the major. Subsequently, the President talked to Major Despodov.<sup>512</sup> Similar accounts of the event are recorded in military reports.<sup>513</sup>

127. Major Despodov testified that the President asked him whether he was under the command of General Sokol Mitrovski and, upon confirmation, told Despodov that he would speak to the

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<sup>503</sup> Mitre Despodov, T 2588.

<sup>504</sup> Osman Ramadani, Exhibit P197, para 26; M039, Exhibit P200.1, p 4; M088, Exhibit P206, para 13; Mamut Ismaili, Exhibit P219.1 para 5; Ćemuran Redžepi, Exhibit P372, para 6; Fatmir Kamberi, Exhibit P426, para 10.

<sup>505</sup> Mitre Despodov, T 2559-2560.

<sup>506</sup> Mitre Despodov, T 2566-2568.

<sup>507</sup> Mitre Despodov, T 2566-2568.

<sup>508</sup> Mitre Despodov, T 2650-2651.

<sup>509</sup> Mitre Despodov, T 2580-2581; 2650.

<sup>510</sup> Exhibits P302; P303; P304; Zlatko Keskovski, T 10014.

<sup>511</sup> Zlatko Keskovski, T 10004-10005.

<sup>512</sup> Zlatko Keskovski, T 10005-10007; 10139.

<sup>513</sup> Exhibits P303; P304.

general and would call Major Despodov again.<sup>514</sup> The President also said that the police representatives who had been previously sent to the command post of the major “knew what to do”.<sup>515</sup> Major Despodov stated that he received from the President “certain instructions” to “undertake measures and activities under [his] competence”.<sup>516</sup> Major Despodov testified that this was his only conversation with the President at the time.<sup>517</sup> The military reports record the event in a similar way. They indicate that the conversation of the President and Major Despodov took place at some time between 1800 and 1900 hours.<sup>518</sup>

128. The evidence of Zlatko Keskovski, then Head of Section for Security of the President and Johan Tarčulovski’s superior,<sup>519</sup> however, goes much further. It was the evidence of Zlatko Keskovski that during the telephone conversation, the President ordered Major Despodov to support the actions that the security forces needed to carry out under his authority.<sup>520</sup> In cross-examination Zlatko Keskovski referred to an “order to attack Ljuboten”.<sup>521</sup> The evidence of Zlatko Keskovski also differs from the other evidence on another issue, viz. the reason given by the President for his need to contact General Sokol Mitrovski. Zlatko Keskovski testified that the President told the major that he would phone General Mitrovski to inform him about the order issued by the President.<sup>522</sup> It is Major Despodov’s evidence, in effect, that after the President had spoken to the General, the President would then inform him about the outcome of the conversation and the exact scope of Despodov’s responsibility for the operation. The Chamber also notes the evidence indicating that on the following day, Major Despodov inquired from Colonel Kopačev whether General Mitrovski had issued any orders.<sup>523</sup>

129. In a report submitted to General Sokol Mitrovski, another view on the arrangements for the operation in Ljuboten is presented. The report indicates that Major Despodov knew about the operation as of 10 August 2001 and in fact planned it together with Johan Tarčulovski. According to the report, Major Despodov did not inform anyone about the planned operation, in return for which he received guarantees from Johan Tarčulovski that he would be exonerated from responsibility with the assistance of the President.<sup>524</sup> The evidence does not reveal the source of this piece of information. The report appears to be based on information provided by Colonel

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<sup>514</sup> Mitre Despodov, T 2581.

<sup>515</sup> Mitre Despodov, T 2579.

<sup>516</sup> Mitre Despodov, T 2580.

<sup>517</sup> Mitre Despodov, T 2582.

<sup>518</sup> Exhibits P303; P304.

<sup>519</sup> *See infra*, para 537.

<sup>520</sup> Zlatko Keskovski, T 10006-10007, 10139.

<sup>521</sup> Zlatko Keskovski, T 10170.

<sup>522</sup> Zlatko Keskovski, T 10006-10007, 10139.

<sup>523</sup> Exhibits P303; 304.

<sup>524</sup> Exhibit P304, p 3.



Kopačev's subordinates. Another report prepared at the time at the 1st Guardist Brigade does not refer to any guarantees of exemption from responsibility. The report by Colonel Kopačev may have been influenced by a wish to conceal the extent of the army's involvement at various levels. The Chamber is not able to accept that guarantees of exemption from responsibility were offered to Major Despodov.

130. The Chamber notes that there would be no apparent interest for Major Despodov to conceal an order issued by the President. Had there been one, it is to be expected that Despodov would testify about it, as it could minimise his responsibility for the events in Ljuboten. Once again the Chamber is faced with materially conflicting evidence of FYROM officials. For reasons already given, it has not been able to accept as true some aspects of Major Despodov's evidence which appear to be influenced by a concern to protect his own position. In the case of Zlatko Keskovski the Chamber was concerned, from its content and the demeanour of the witness, that the evidence was influenced by a desire to assist the Accused Tarčulovski by suggesting that he acted under a direct order of the President, the then Commander in Chief of the Security Forces. The President has since died. There is no independent reliable evidence which assists the Chamber. Having fully weighed the evidence, the Chamber does accept that on the evening of 11 August 2001, Johan Tarčulovski had Major Despodov speak on the telephone to the President of FYROM. The Chamber does not accept from the evidence of Zlatko Keskovski that the President gave Major Despodov a direct and absolute order. The Chamber does accept that Major Despodov was concerned the following morning whether any specific order had come from General Sokol Mitrovski, which helps confirm that Major Despodov did not receive a direct and absolute order from the President on the previous evening, and that Despodov apparently understood that he should support the police operation led by Johan Tarčulovski, but only within the scope of his normal authority, unless General Sokol Mitrovski were to give some more specific order, which did not happen. This was instruction or encouragement enough from the President, however, for Major Despodov to provide opening artillery support at the beginning of the operation, albeit on the pretence as the Chamber finds it to be in the detailed discussion later, of returning fire at observed hostile targets in the village, and to have his units watch activities in and around the village to prevent any NLA entering the village or escaping from the village during the police operation.

131. It is also to be noted that military reports record another visit by representatives of the Ministry of Interior and Johan Tarčulovski at the command post of the 3rd Guardist Brigade. It is recorded that after 2200 hours on 11 August 2001, they visited Major Despodov to make final arrangements for the operation. Johan Tarčulovski announced that it would commence at 0430 hours on the following day. The reports provide that Major Despodov reiterated that he would need

orders to support the action, to which Johan Tarčulovski replied that there would be orders from the President or “the persons around him”.<sup>525</sup>

**E. Were the events in Ljuboten justified by military necessity?**

132. It is the position of the Defence that individuals from Ljuboten participated in placing the land mine that killed eight Macedonian soldiers on 10 August, that there was an NLA presence in Ljuboten on the weekend of 10-12 August,<sup>526</sup> and that Ljuboten was used as a logistics base by the NLA as early as February of 2001.<sup>527</sup> It is argued that there was a legitimate reason for the security forces to enter the village,<sup>528</sup> and that the purpose of the operation was to search for NLA members in the village to prevent further attacks.<sup>529</sup> It is further submitted that on 12 August, there were a number of NLA positions within Ljuboten from which the army and in some cases the police, received fire on 12 August 2001.<sup>530</sup> It is the position of the Defence that Ljuboten was a legitimate military target,<sup>531</sup> that the operation was limited to those areas and houses where members of the NLA were believed to be located,<sup>532</sup> and that fire upon these locations was justified by military necessity.<sup>533</sup>

133. The Prosecution argues that Ljuboten was not an NLA stronghold, and it was not used as an NLA logistics base.<sup>534</sup> It is argued that while the NLA may have enjoyed support in the village, it was not “full of NLA fighters” on 12 August.<sup>535</sup> The Chamber also notes in this context the assertion or admission in the Indictment that there were, on 12 August, about 10-15 “armed Albanian combatants” present in Ljuboten, armed with automatic weapons and at least one machine-gun.<sup>536</sup> Finally, the Prosecution submits that the destruction that occurred in Ljuboten was not justified by military necessity.<sup>537</sup>

134. The Chamber observes that the Defence has, in support of a number of its assertions on the issue of NLA membership of specific persons and NLA and logistical support, relied heavily and sometimes exclusively on Security and Counter-Intelligence Division (UBK) operative interviews and reports of which the sources are anonymous, and the content is unverified. A number of such

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<sup>525</sup> Exhibits P302, P303, P304.

<sup>526</sup> Boškoski Defence Final Brief, para 271.

<sup>527</sup> Boškoski Defence Final Brief, paras 271, 283; Tarčulovski Defence Final Brief, para 165.

<sup>528</sup> Tarčulovski Defence Final Brief, para 174.

<sup>529</sup> Boškoski Defence Final Brief, paras 280, 283.

<sup>530</sup> Boškoski Defence Final Brief, para 323; Tarčulovski Defence Final Brief, paras 200-204.

<sup>531</sup> Tarčulovski Defence Final Brief, para 191.

<sup>532</sup> Boškoski Defence Final Brief, paras 284-285.

<sup>533</sup> Boškoski Defence Final Brief, para 323.

<sup>534</sup> Prosecution Final Brief, para 158-159.

<sup>535</sup> Prosecution Final Brief, para 159.

<sup>536</sup> Indictment, para 68.

<sup>537</sup> Prosecution Final Brief, paras 80, 155, 157.

interviews and reports came into existence months after the events in Ljuboten.<sup>538</sup> In the absence of independent confirmation, the Chamber is unable to rely on these documents for the truth of their content. Equally, in light of evidence to the contrary, the Chamber is not persuaded that it can attach significant weight to the suspiciously almost uniform evidence of Ljuboten residents that no individuals from Ljuboten participated in the land mine incident,<sup>539</sup> that none of the villagers were NLA members,<sup>540</sup> that there was no NLA presence in Ljuboten on the weekend of 10-12 August,<sup>541</sup> and denying that there was any form of logistical support to the NLA from within Ljuboten.<sup>542</sup> In these circumstances, while recognizing that a credible source is not *ipso facto* reliable, the Chamber has been assisted in many matters by the evidence provided by more neutral sources. However, in this respect the Chamber must observe that it approaches with care the evidence provided by Peter Bouckaert, a senior researcher for Human Rights Watch (“HRW”). His observations of the village were made 11 days after the events. Further, the HRW report on the relevant events in Ljuboten,<sup>543</sup> to which he was the main contributor, and which is a cornerstone of his evidence, is sourced primarily by unchallenged accounts of ethnic Albanian residents from Ljuboten which have not been tested against the other differing accounts which the Chamber has heard.<sup>544</sup>

135. It is also noted that the evidence regarding NLA presence in Ljuboten and the question of whether Ljuboten was a logistics base often refers to “terrorists”, armed groups, or persons wearing black clothes, without using the term “NLA” as such.<sup>545</sup> In many cases this is merely a matter of terminology and no distinction is intended. However, this distinction in terminology touches upon an issue mentioned later in the Judgement, whether, during the situation in FYROM in 2001, there were a number of ethnic Albanian armed groups involved in fighting the police and army.<sup>546</sup>

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<sup>538</sup> *Inter alia*, and especially, Exhibits 1D87; 1D165; 1D166; 1D167; 1D168; 1D223.1; 1D273.

<sup>539</sup> M012, T 936; Ćemuran Redžepi, T 3519-3520; Ismail Ramadani, T 1011; Vehbi Bajrami, T 1835; 1864.

<sup>540</sup> M012, T 942; 961-962; Aziz Rexhepi, T 4660-4665; Elmas Jusufi, T 548-550; Fatmir Kamberi, T 4570-4574; 4577; 4620; Fatmir Kamberi, Exhibit P426, para 5; Vehbi Bajrami, T 1847-1848; 1864; Sedat Murati, T 4080-4083; 4109; M017, T 706-708; Ismail Ramadani, T 1009-1010; Osman Ramadani, T 1092-1095; Osman Ramadani, Exhibit P197, para 20.

<sup>541</sup> Nazim Bushi, T 5669-5670; 5678-5683; M088, Exhibit P206, paras 12, 29; M092, Exhibit P215, paras 28-30, 40; Isni Ali, T 3457-3458; Aziz Rexhepi, T 4665-4667; Ćemuran Redžepi, T 3512; 3544; Elmas Jusufi, T 550; Farush Memedi, T 2052; Vehbi Bajrami, T 1864-1865; Sedat Murati, T 4076.

<sup>542</sup> Aziz Rexhepi, T 4658; Ćemuran Redžepi, T 3518; Ismail Ramadani, T 1009; Elmas Jusufi, T 493-494; Fatmir Kamberi, T 4576-4577; Ismail Ramadani, T 1008-1009; 1029-1030; 1049; *see also* Nazim Bushi, T 5607; 5647; 5883.

<sup>543</sup> Exhibit P352.

<sup>544</sup> Exhibit P352. The Chamber also notes that aspects of his observations may have been influenced by media reports. (Peter Bouckaert, T 3074-3075)

<sup>545</sup> Igno Stojkov, T 8922-8923; Blagoja Markovski, T 10648. The Chamber notes that the witness’ conclusion of a structure of an Albanian armed group in Ljuboten does not refer to NLA as such; Exhibit 2D101, paras 333-334 and 343.

<sup>546</sup> *See infra*, para 211.

## 1. NLA presence and logistics base in Ljuboten

136. From a number of reports in evidence, it appears that from the early months of 2001 and onward, Macedonian authorities were receiving information which provided some basis for the view that the area around Ljuboten was being used for purposes of logistics by the NLA,<sup>547</sup> more particularly from around June 2001. Witnesses have testified that the Skopska Crna Gora ridge running above Ljuboten was being used as a channel for the entry of NLA and the transport of weapons from Kosovo to FYROM, starting in early 2001.<sup>548</sup> These reports do not reflect that there was an increase of weapons transport in the month of August, or leading up to the events on 10-12 August specifically.<sup>549</sup> In addition, there is evidence suggesting that from around March 2001, individual Ljuboten villagers started to provide logistical support to the NLA.<sup>550</sup> This evidence does not, however, indicate that there was a particular increase of support in the time period just prior to the events on 10-12 August.

137. Despite the potential risk posed by the movement of weapons in the Bašinec area above Ljuboten, the evidence of Captain Grozdanovski, stationed at the army's position at Smok from June 2001 onwards, suggests the general security situation in the area of Ljubanci-Ljuboten leading up to the events in Ljuboten was "good".<sup>551</sup> There were no combat activities.<sup>552</sup> A number of Ljuboten residents expressed similar views.<sup>553</sup> While his army positions provided a good view of Ljuboten,<sup>554</sup> Captain Grozdanovski did not observe combat preparations in the village in the time leading up to the events on 10-12 August.<sup>555</sup> Although, according to a witness, soldiers were able to observe movement of people, horses and vehicles in the slopes above Ljuboten near Ljubotenski

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<sup>547</sup> Zoran Jovanovski, T 4941-4950; Exhibits 1D157; 1D160; 1D163, p 3; *see also* T 5107-5108; Exhibit P438, dated 14 August 2001; 1D160, p 2, "Ljuboten village is appointed as a main logistics base of this group", *i.e.*, the NLA. *See also* Mitre Despodov, T 2620-2621; M037, T 819-823; M051, T 4162; 4201-4202; Exhibit 2D36; Marijo Jurišić, T 3348-3349; M053, T 1986; 1992; Blagoja Markovski's expert report states that Ljuboten became a logistics base for the area of Skopje for the armed extremists groups (para 329, "who called themselves the NLA") in the Kumanovo-Lipkovo region, as of June 2001, T 10864-10865; Exhibit 2D101, paras 342-343; *see also* 1D162 pp 6-7; *see also* Exhibits 1D157; 1D163. These exhibits state that there is movement of people, and installations in Bašinec, above Ljuboten, for example, but do not state as such that Ljuboten was a base.

<sup>548</sup> Zoran Jovanovski, T 4944; 4950; Mitre Despodov, T 2620-2621; M037, T 820; *see also* M051, T 4144-4147.

<sup>549</sup> Exhibits 1D157; 1D160; 1D163, p 3; P438.

<sup>550</sup> M051, T 4154-4157; 4158-4159; 4161-4162; 4166-4168; Exhibits 1D141; 1D142; 1D143; 1D144; 1D169; *see also* Exhibit 1D157.

<sup>551</sup> Nikolče Grozdanovski, T 10405; 10468; 10514.

<sup>552</sup> Nikolče Grozdanovski, T 10411.

<sup>553</sup> Elmas Jusufi, T 506; 546; M088, Exhibit P206, para 5; M092, Exhibit P215, para 3; Farush Memedi, Exhibit P266, para 3.

<sup>554</sup> Nikolče Grozdanovski, T 10410; 10461-10462; 10471.

<sup>555</sup> Nikolče Grozdanovski, T 10411.

Bačila towards Matejčec,<sup>556</sup> the witness testified that no action was taken; these activities were “not endangering us.”<sup>557</sup>

138. Turning next to the question of NLA presence in Ljuboten, the evidence suggests that a number of Ljuboten residents were NLA members,<sup>558</sup> and that there were individual NLA members present in Ljuboten prior to and during the events on 10-12 August.<sup>559</sup> Further, there is some evidence which could suggest that a number of Ljuboten residents were involved in the planting of the land mine at Ljubotenski Bačila on 10 August, resulting in the deaths of eight FYROM soldiers.<sup>560</sup> This evidence is based, however, on UBK documents prepared by unknown persons recording assertions of unnamed persons. Moreover, these documents post-date the events in Ljuboten by a number of months and were not available to the police or the army in August 2001. The Chamber has already expressed its inability to accept their reliability. There is also some evidence that the individuals who participated in the planting of the mine subsequently retreated towards or into Ljuboten.<sup>561</sup> Contemporaneous reports record that on 10 August, as observed by a Mirkovci police patrol stationed near Ljuboten, there were three armed persons in black uniform seen between the school and the cemetery, on the left side of the road in the houses of the “Zendelovski” family.<sup>562</sup> Lieutenant Jurišić confirmed that he received a report on 10 August to the effect that three armed persons had entered the village from the direction of the explosion, in the area of the Zendeli home.<sup>563</sup> As established elsewhere in the Judgement, a contemporaneous army report of the event recorded that four terrorists were killed by the army while fleeing in the direction

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<sup>556</sup> Nikolče Grozdanovski T 10405-10406; T 10469.

<sup>557</sup> Nikolče Grozdanovski, T 10472.

<sup>558</sup> M088, Exhibit P206, para 12; M092, Exhibit P215, paras 28-30; M039, P200.2, para 32; Zoran Jovanovski, T 4951; Exhibit 1D164; Nazim Bushi, T 5607-5608.

<sup>559</sup> Zoran Jovanovski, T 4951-4952; Exhibit 1D165; M052, T 8461; 8534-8535; M051, T 4150; 4218-4219; Exhibit 1D162, p 6; Exhibit 1D24, OSCE special report on events in Ljuboten dated 14 August, refers to presence of “EAAG” in Ljuboten during hostilities. Henry Bolton, OSCE representative, used the term ethnic Albanian armed groups (“EAAG”) to refer to the NLA because the term NLA as in Macedonian has the same acronym as KLA, T 1607; Marijo Jurišić received reports from his soldiers of movement of armed people in black uniform, and testified that he was aware that black uniforms were worn by the NLA, T 3347-3348; *see also* Exhibits 1D34; 1D166; *see also* Blagoja Markovski, Exhibit 2D101, para 342, relying on Rule 65ter 2D433, MoI document recording information received from an unsourced operative on 29 November 2001 stating that on 26 June 2001, a number of armed extremists who had taken part in the attack in Aračinovo, returned to Ljuboten on foot through Raštak. The Chamber finds that the source of Blagoja Markovski assertion in the report not reliable, and will not rely on this evidence in the absence of independent confirmation for reasons set out in earlier in the Judgement.

<sup>560</sup> Zoran Jovanovski, T 4948; 4953-4954; Exhibit 1D161; *see also* M052, T 8535; *see also* Exhibit P438.

<sup>561</sup> Mitre Despodov, T 2642-2644; Marijo Jurišić, T 3357-3358; M053, T 1974; 1985-1986; Petre Stojanovski, T 9307; M2D-008, T 10535-10540, Exhibits 2D94; 2D95. The Chamber notes that contemporaneous military reports record that the army had killed four “terrorists” that had allegedly participated in the attack and does not refer to individuals retreating into the village afterwards, Exhibits 1D238; P301, stating that “a smaller group” of 3-4 terrorists withdrew into the direction of Ljuboten village.

<sup>562</sup> Blagoja Toskovski, T 4347-4348; Petre Stojanovski, T 9150-9151; *see* Exhibits 1D20, p 12; P114; P151; 1D84; 2D44; 1D145; 2D42 p 4; Exhibit 1D361 p 1; *see also* Exhibit 1D137, p 4, a report by the Ministry of Defence dated 21 September 2001, stating that on 10 August at about 1530 hours, the police patrol located in Ljuboten observed three armed and uniformed individuals moving from the school towards the cemetery in the village.

<sup>563</sup> Marijo Jurišić, T 3357-3358.

of Ljuboten.<sup>564</sup> A report by Colonel Blazo Kopačev of the 1<sup>st</sup> Guardist Brigade dated 10 August 2001 records that immediately following the landmine explosion at Ljubotenski Bačila, there was fire directed at the injured FYROM soldiers and the FYROM soldiers who came to their aid from, *inter alia*, the Mosque in Ljuboten.<sup>565</sup>

139. It is also recorded on 10 August in a contemporaneous military army log that FYROM security forces believed that there was a group of 100 persons moving in the hills from Matejče towards, *inter alia*, Ljuboten and Ljubanci with the intent to attack checkpoints of the security forces.<sup>566</sup> The evidence of M051 makes clear, however, that the army shelled this group of individuals and prevented them from entering the villages.<sup>567</sup> M051, confronted with the OTP statement of NLA commander Xhezair Shaqiri, aka Hoxha, confirmed that there were NLA re-enforcements who set out to enter Ljuboten village and join the others already inside; he added that they would have entered Ljuboten had the Macedonian army not shelled them.<sup>568</sup> Witnesses have also testified to a perceived risk that the NLA would transfer its actions to the city of Skopje.<sup>569</sup> M051 confirmed a number of documents pre-dating 12 August, to the effect that the NLA was planning to attack Skopje.<sup>570</sup> A military diary entry of the 1<sup>st</sup> Guardist Brigade dated 11 August also records that information was received at 1520 hours to the effect that Gzim Ostreni had ordered Xhavit Hasani<sup>571</sup> to attack Raštak and Ljubanci.<sup>572</sup> None of these documents, however, suggest that such attacks would be conducted from within Ljuboten itself.

140. Having regard to the body of evidence briefly canvassed in the preceding paragraphs, and the acceptance by the Prosecution in the Indictment that there were 10-15 “armed Albanian combatants” in Ljuboten on 12 August,<sup>573</sup> the Chamber records here its findings that at the relevant time individual NLA members were from Ljuboten village, and that a number of NLA were present in Ljuboten prior to and during the events on 10-12 August. While the Chamber accepts that the Macedonian police and army had information indicating logistical support by individual Ljuboten

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<sup>564</sup> Exhibit 1D238.

<sup>565</sup> Exhibit 2D103.

<sup>566</sup> M051, T 4212-4213; Exhibit 2D42, pp 7-8.

<sup>567</sup> M051, T 4212-4215; *see* also M092, T 1323-1325.

<sup>568</sup> M051, T 4214-4215.

<sup>569</sup> Blagoja Markovski, T 10693; M051, T 4144-4147.

<sup>570</sup> M051, T 4204-4206; 4208-4209; Exhibits 2D38; 2D39 p 3; 2D40, p 7; 2D41.

<sup>571</sup> Nazim Bushi testified that Xhavit Hasani was in charge of NLA morale and information, T 5941; Mitre Despodov testified that there were serious threats that his units and positions would be attacked by a terrorist unit led by Xhavit Hasani (apparently just prior to 10-12 August), T 2591; *see* also Exhibit 1D161, MoI operative interview, 15 August 2001, suggested that Dzavid Asani organized the land mine attack; *see* also Exhibit 1D223.1, UBK operative interview dated 22 August, claiming that “Dzavid Asan” was behind the placement of the mine. The Chamber notes that this interview was conducted with an operative following his arrest and the Chamber attaches little weight to it for this reason – the “operative” is the brother of witnesses Ismail and Osman Ramadani (*see* Ismail Ramadani, Exhibit P188, para 6; Osman Ramadani, Exhibit P197, para 2).

<sup>572</sup> Exhibit 1D85.

<sup>573</sup> Indictment, para 68.

villagers to the NLA in the months leading up to the events, and also that Ljuboten served a logistical function to the NLA primarily because of its position along the Skopska Crna Gora transport route, the Chamber is not able to accept that Ljuboten was a logistics base for the NLA. There is no evidence whatsoever, for example, of an NLA storage or distribution centre of any kind in the village. Further, the evidence does not support the view that there was an increase of either logistical support or NLA presence in the village in July or August. The Chamber does accept, however, that there was information available to the police and army that a number of terrorists who participated in the land mine attack on 10 August fled in the direction of Ljuboten, of whom some were killed but others were suspected to be hiding out in the village. For this reason, the Chamber accepts that on the basis of the information available to the police, there were legitimate reasons for the police to enter the village of Ljuboten on 12 August because of a suspected terrorist or NLA presence.

## 2. Macedonian army stationed near Ljuboten

141. In August 2001 the Macedonian army occupied several positions around Ljuboten. The position that was the closest to the village was “Smok”, located on the mountain above Ljuboten,<sup>574</sup> The distances from Smok to the Orthodox Church and to the Mosque in Ljuboten are between one and two kilometres.<sup>575</sup> The position Smok was a vantage point offering a good view of most parts of the village, especially the part around the Mosque.<sup>576</sup> The post was manned by five soldiers from the 2<sup>nd</sup> Infantry Company of the 1<sup>st</sup> Guardist Brigade, including a sniper using a 7.9 millimetre sniper rifle. The unit deployed at Smok also had also four automatic rifles and a machine-gun.<sup>577</sup>

142. The next position, slightly further from Ljuboten, was called “Bomba”.<sup>578</sup> There were 82 millimetre mortars and cannons positioned at Bomba.<sup>579</sup> They probably belonged to the 2<sup>nd</sup> Infantry Company, which had a platoon of 82 millimetre mortars and a cannon platoon with 76 millimetre cannons.<sup>580</sup>

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<sup>574</sup> Mitre Despodov, T 2660; Marijo Jurišić, T 3292; 3295-3296; 3319; Exhibits P298; P366; Nikolče Grozdanovski, T 10409-10410; 10464-10465; Exhibits 2D86; P596; M2D-008, T 10533.

<sup>575</sup> Nikolče Grozdanovski, T 10462; Exhibit P595.

<sup>576</sup> Mitre Despodov, T 2660; Nikolče Grozdanovski, T 10410; 10462; 10471.

<sup>577</sup> M2D-008, T 10534; 10563; Nikolče Grozdanovski, T 10467.

<sup>578</sup> Mitre Despodov, T 2666-2667; Marijo Jurišić, T 3292; 3295-3296; 3319; Exhibits P298; P366; Nikolče Grozdanovski, T 10409-10410; 10464-10465; Exhibits 2D86; P596.

<sup>579</sup> Nikolče Grozdanovski, T 10419-10420.

<sup>580</sup> Nikolče Grozdanovski, T 10401; 10436; 10458-10459; the witness referred to the “the 1st infantry squad where Jurisic Mario was the commander”, which the Chamber accepts was a reference to the 2<sup>nd</sup> infantry company commanded by Lieutenant Jurišić; Marijo Jurišić, T 3325.

143. Another mortar battery was positioned just above the children's holiday resort in Ljubanci, near the St Nikola monastery.<sup>581</sup> The mortars of the battery were positioned at a place called "Zvero", in a valley on the north-western side of the slope descending towards Ljuboten. The village was not visible from the position.<sup>582</sup> The battery had 120 millimetre mortars. Ljuboten was within easy range of these mortars.<sup>583</sup> They were positioned in three directions: two mortars were directed at Crn Kamen, near the village of Brodec, two towards Bel Kamen, and two towards Ljuboten.<sup>584</sup> Benchmarks were set for each mortar. The benchmarks positioned in the direction of the village of Ljuboten were trained on the Church, the Mosque, the graveyard and the workshop.<sup>585</sup> At a location called Zdravec, which was further up the slope on which the posts Smok and Bomba were located, this mortar battery had an observation post manned by two soldiers.<sup>586</sup>

144. It is the evidence of army personnel from the military units positioned in the area of Ljuboten and it is recorded in contemporaneous military reports that on 12 August 2001, at about 0800 hours, their positions were fired at from the direction of the village. Captain Grozdanovski testified, and his report prepared at the time indicates, that his mortar battery opened fire at around 0900 hours<sup>587</sup> and continued until 1000 hours, firing a total of 16 shells from their 120 millimetre mortars.<sup>588</sup> A military report indicates that another unit active in the area, the 2nd Infantry Company, started heavy firing shortly after 0920 hours.<sup>589</sup> Lieutenant Jurišić, the commander of that company, testified that it fired 82 millimetre mortars and two 76 millimetre cannons.<sup>590</sup> According to contemporaneous reports, there was no firing from the positions of the army towards the village of Ljuboten after 1000 hours, apart from firing towards the area of the graveyard, which continued until some time after 1100 hours.<sup>591</sup> While noting these reports and the evidence of witnesses Grozdanovski and Jurišić and other army personnel, for reasons which are considered more fully in what follows and elsewhere in this Judgement, the Chamber indicates its view that in many respects the contemporary army reports and the evidence of these witnesses are not accurate or reliable and are in fact contrived to justify firing by the army and to present an erroneous account of targets and timing of army fire. In the Chamber's finding, firing by 120 millimetre and 82

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<sup>581</sup> Nikolče Grozdanovski, T 10399.

<sup>582</sup> Nikolče Grozdanovski, T 10404; 10460; Exhibits P595; P596; Marijo Jurišić, T 3292.

<sup>583</sup> Nikolče Grozdanovski, T 10401; 10458; 10465; Marijo Jurišić, T 3325.

<sup>584</sup> Nikolče Grozdanovski, T 10403.

<sup>585</sup> Nikolče Grozdanovski, T 10403-10404.

<sup>586</sup> Nikolče Grozdanovski, T 10401; Exhibit P595.

<sup>587</sup> Exhibit 1D26; Nikolče Grozdanovski, T 10416.

<sup>588</sup> Exhibit 1D25.

<sup>589</sup> Exhibit 1D26.

<sup>590</sup> Marijo Jurišić, T 3325.

<sup>591</sup> Exhibits P306; 1D25; 1D26. Another military report indicates that Colonel Kopačev, who was present at the positions of the 3rd Guardist Battalion in the area of Ljuboten between 1130 and 1300 (Mitre Despodov, T 2584; Exhibits P303; P304), ordered his troops to stop firing; Exhibit P304. However, Major Despodov testified that by the time the colonel arrived, the combat activities of his units had stopped; Mitre Despodov, T 2584.



millimetre army mortars commenced the Ljuboten operation on 12 August. Firing commenced at around 0800 hours.

### 3. Possible NLA target positions in Ljuboten on 12 August

145. The Defence submits that one of the locations from which there was outgoing fire on 12 August was an NLA position close to the Orthodox Church consisting of several houses.<sup>592</sup> As established by the evidence, there were a number of Jusufi family members living in a row of houses in that area which was slightly to the northeast of the Church.<sup>593</sup> Two witnesses marked the row of Jusufi family member houses as a location from which there was fire on 12 August, Captain Grozdanovski and another army witness M2D-008.<sup>594</sup> Captain Grozdanovski's contemporaneous military report is not as specific as his evidence but does refer to firing coming from "the sector around the Church".<sup>595</sup> While Lieutenant Jurišić's evidence seeks to confirm that this report corresponded to information he possessed on 12 August,<sup>596</sup> his own contemporaneous report does not refer to an area near the Church.<sup>597</sup> It does refer to "DTG" (Divergent Terrorist Groups) in the "front part" of the village but this is far too vague and widespread to suggest a reference to the area near the Church. In his evidence, Captain Grozdanovski suggested that what he had seen was a group of about four to five terrorists that were firing from the houses, "in front of the church on the left side". He added that there was a courtyard with a wall, and that they were firing from the balcony and from the windows.<sup>598</sup> Firing from these houses was first suggested by Captain Grozdanovski when he was interviewed as a suspect by the OTP. This sighting was offered as justification for mortar and other firing from the army in the early moments of the operation in the village on 12 August 2001. According to a report prepared at the time of the events by Captain Grozdanovski, his mortar battery fired eight mortar shells at the houses in the area of the Church, including a group of houses which evidence shows belong to the Jusufi family.<sup>599</sup>

146. However, the Chamber notes that none of the witnesses present during the relevant time period at the house of Elmaz Jusufi, which is in the group of houses allegedly shelled by the army, gave evidence of shelling. The only explosions heard by Elmaz Jusufi were caused by the police's

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<sup>592</sup> Tarčulovski Defence Final Brief, para 200.

<sup>593</sup> See *supra*, para 43.

<sup>594</sup> Nikolčević Grozdanovski, T 10416-10418; Exhibit 2D87; see also Exhibit 1D281.3, "C-1" marking location of 3-4 terrorists from where fire came from; M2D-008, T 10543; 10544-10546; Exhibit 2D96; see Exhibit P427, marked by Fatmir Kamberi, for the location of the Jusufi/Rashiti family houses.

<sup>595</sup> Exhibit 2D31 (same as Exhibit 1D25, which refers to "the area of the Church").

<sup>596</sup> Marijo Jurišić, T 3378-3379.

<sup>597</sup> Exhibit P306; see also Exhibit 1D26, reference to "terrorists" in the "beginning" of the village.

<sup>598</sup> Nikolčević Grozdanovski, T 10417.

<sup>599</sup> Exhibit 1D25; Nikolčević Grozdanovski, T 10416-10419; Exhibit 2D87. The Chamber notes that in a photograph marked during his OTP suspect interview in 2004, Nikolčević Grozdanovski indicated a more specific location of

attempts to blow open gates to houses in the area.<sup>600</sup> His wife Zenep Jusufi and his relative Muzafer Jusufi, both present in the same house throughout 12 August 2001 did not witness incoming shell fire during that day. It is of significance that the houses of members of the Jusufi family stand very close to one another so that it cannot be accepted that sounds of a mortar shell exploding on one, would not have been heard by persons present in another of these houses. Further, Peter Bouckaert made observations of houses on the street which passes through this neighbourhood<sup>601</sup> and observed that all the chimneys, which he saw in damaged houses along this street, were still standing, indicating to him that the damage was not from the explosion of shells but caused by burning.<sup>602</sup> The Chamber concludes that fire, rather than mortar shelling, was the cause of the damage. It thus appears that none of the mortar shells fired by the army hit the houses of the Jusufis. The Chamber is not able to accept that, if there had in truth been such clear and specific sightings of aggressive military activity from the Jusufi houses on 12 August, these houses would not have been specifically targeted by the army. For this reason and having weighed the general body of evidence affecting this issue, it is therefore accepted that there was no outgoing fire from these houses of the Jusufi family, which includes the house of Rami Jusufi, on 12 August.<sup>603</sup>

147. The evidence does establish that the house of Dalip Murati, to the west of the Church, was possibly shelled on 10 August,<sup>604</sup> and that the barn of his house, and possibly the house itself, was also shelled on 12 August, as was the house of Jakup Miftari (Myftari), another ethnic Albanian living in this area.<sup>605</sup> From the position at Straište police checkpoint on the morning of 12 August, it was observed that to the south-west of the Church<sup>606</sup> three persons wearing black clothes, one of

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outgoing fire in relation to the row of Jusufi houses, and confirmed his marking on this photograph that they shelled four to six mortars in this direction, T 10499-10500; Exhibit 1D281.3.

<sup>600</sup> Elmaz Jusufi, Exhibit P8.1, para 22.

<sup>601</sup> Peter Bouckaert, Exhibit P322, para 57-59; Peter Bouckaert, T 2964-2973; Exhibit P335.

<sup>602</sup> Peter Bouckaert, T 2968.

<sup>603</sup> *See supra*, para 45.

<sup>604</sup> M012 marked with "7" the house of "Haxhi Dalipi" as one of the locations where he saw shells falling on 10 August T 965; 967-968; Exhibit 2D13. The Chamber notes that the person referred to as "Haxhi Dalipi" is the same person as "Dalip Murati" (Peter Bouckaert, Exhibit P322, para 51; Fatmir Kamberi, T 4607; 4608); Other evidence which suggests the possibility that his house was shelled on 10 August is provided by M092, who learned on 10 August that Dalip Murati had been injured due to shelling, but does not refer specifically to Dalip Murati's house being shelled, Exhibit P215, para 7; *see also* Farush Memedi, who stated that he saw impacts (of shells) in an area below the Church on 10 August, and that he later learned that Dalip Murati was killed as a result of shelling, but does not specifically say that his house was shelled on this day or that it was on this day that Dalip Murati was killed, Exhibit P266, para 3. The Chamber has evidence from a family member, however, corroborated by others, that Dalip Murati was in fact killed on 12 August.

<sup>605</sup> Sedat Murati, T 4059-4063; Sedat Murati, Exhibit P405, paras 15-19, 24-26; Exhibit P407; Fatmir Kamberi, Exhibit P426, paras 13, 14. The witness, during his testimony, appears to suggest that the barn of "Haxhi Dalipi" was burned on 10 August as a result of shelling, T 4606-4607. In his Rule 92*bis* statement he states that the barn and possibly the house of Dalip Murati were shelled on 12 August. The Chamber accepts that his house was shelled on 12 August and that it may also have been shelled on 10 August.

<sup>606</sup> M037 testified to seeing movement of people on the right hand side of the Church as seen from Straište checkpoint, which is the southwest, T 828.

them carrying an automatic rifle, were running between the houses and the yards.<sup>607</sup> This observation, however, cannot be accepted as a sighting at the house of Dalip Murati. As mentioned above, on a photograph accompanying his 2004 OTP suspect interview, Captain Grozdanovski marked a location to the west of the Church from which he said his army position received rifle fire on the morning of 12 August.<sup>608</sup> A cross reference of maps, however, indicates that this marked location is further to the west of Dalip Murati's house.<sup>609</sup> The Chamber is unable to accept from the evidence, therefore, that there was firing from the house of Dalip Murati on 12 August. Further, while it is open on the evidence that certain members of the Murati family may have been NLA members,<sup>610</sup> there is no evidence that Dalip Murati was an NLA member or that his house was used as an NLA position on 12 August.

148. There is evidence which could indicate that the first mortar shells that fell on Ljuboten on 12 August were fired by the NLA. Henry Bolton, a person of military experience, from the OSCE field office in Radišani at a distance of two kilometres from Ljuboten,<sup>611</sup> heard a loud detonation at 0805 hours of what he believed to be 120 millimetre mortar shells; he saw smoke rising in the area close to a white building near the Orthodox Church in Ljuboten, but was unable to pinpoint the exact location of impact on a photograph.<sup>612</sup> Henry Bolton noted that there were potential targets for the NLA, one of which was a police post or checkpoint near the Church.<sup>613</sup> Henry Bolton understood that the Macedonian forces in the area did not have 120 millimetre mortars, and it was his belief, therefore, that it must have been the NLA attacking this police post.<sup>614</sup> An OSCE Special Report on events in Ljuboten dated 16 August 2001 relays Mr Bolton's observations that the first mortar, believed to be 120 millimetre calibre, fell near the Orthodox Church, in what was described as the Macedonian section of the village.<sup>615</sup> Yet another document, from the Embassy of Germany dated 16 August 2001, records that there is "no doubt" that the first three mortars fired on 12 August were aimed at the security forces.<sup>616</sup> However, this document appears to be based on information received from an OSCE press briefing.

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<sup>607</sup> M037, T 828.

<sup>608</sup> Exhibit 1D281.3, marking "C-4".

<sup>609</sup> Exhibits P407; 2D13 marking "7"; 2D48 marking "1".

<sup>610</sup> M088, Exhibit P206, para 12; M088, T 1213-1214; M092, Exhibit P215, para 28.

<sup>611</sup> M084, T 1495.

<sup>612</sup> Henry Bolton, Exhibit P236.1, para 6; Henry Bolton, the witness found it difficult to be precise in his markings of the location he saw smoke rising near the church, and marks an approximate area, T 1672-1673; Exhibits 1D21, 1D22.

<sup>613</sup> Henry Bolton, T 1674; Henry Bolton, Exhibit P236.1, para 6; Elmaz Jusufi, Exhibit P8.1, para 12; Elmaz Jusufi, Exhibit P8.2, para 6; *see also* Fatmir Kamberi, Exhibit P426, paras 10-11.

<sup>614</sup> Henry Bolton, Exhibit 236.1, para 6.

<sup>615</sup> Exhibit 1D24, p 3.

<sup>616</sup> Exhibit 1D224.

149. Contrary to the understanding of Henry Bolton, however, the Macedonian army *did* in fact have 120 millimetre mortars in the area, which were fired that morning. Benchmarks for these mortars had been set. One of them was the Church.<sup>617</sup> Of course, Henry Bolton heard and observed the events from some two kilometres distance. He was unsure of the position from which he saw smoke rising. In the Chamber's finding, he was mistaken in attributing this mortar fire to the NLA, and in the conclusion that this mortar fire fell in the Macedonian section of the village. In the Chamber's finding the first mortar shells exploded in an ethnic Albanian residential area, which is to the west of, but in the general vicinity of, the Orthodox Church. These were fired by Macedonian army mortars at, or shortly after 0800 hours on 12 August. They were not fired in response to NLA fire, whether from the village or from elsewhere, despite evidence of army witnesses to the contrary.<sup>618</sup>

150. Captain Grozdanovski and his subordinate M2D-008 also suggested in their evidence that they actually saw these mortar shells falling on houses in the Macedonian area of Ljuboten, the position indicated being to the west of the Church. There is no evidence of any house in the Macedonian area being damaged that morning. The only two houses shelled were the houses of two ethnic Albanians Jakup Miftari (Myftari) and Dalip Murati (his barn and perhaps his house). These are, at least in a broad sense, in the vicinity of the Church and close to the Macedonian residential area. Both of these houses are adjacent to the location which Captain Grozdanovski identified in 2004 during his suspect interview<sup>619</sup> as a location from which, according to the witness, the army was receiving rifle fire.<sup>620</sup>

151. Further, none of the contemporaneous reports of army members concerning the events on 12 August record any reference to the NLA shelling Macedonian houses. Rather, the reports suggest that the army responded to fire from the village directed *at the army positions* at around 0800.<sup>621</sup> Significantly, Captain Grozdanovski did not refer to these three alleged NLA mortar shells falling on Macedonian houses during either of his suspect interviews in 2004, nor did he refer to them in his contemporary report on the events in Ljuboten on 12 August.<sup>622</sup> The Chamber finds,

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<sup>617</sup> Nikolče Grozdanovski, T 10404; 10526-10527.

<sup>618</sup> See, for example, Nikolče Grozdanovski, T 10416-10417; 10499; Exhibit 1D281.3, a photograph marked by Nikolče Grozdanovski during his 2004 interview with the OTP, indicating outgoing rifle fire with marking "C-4"; Exhibit 1D25; 1D26; P306.

<sup>619</sup> Sedat Murati, T 4059-4063; Exhibits P406; P407, house of Jakup Miftari (Myftari) marked with "1", also marking house of Dalip Murati; Sedat Murati, Exhibit P405, paras 16-19, 24-26; see also M012, T 967-968, Exhibit 2D13, marking "7" as the house of Dalip Murati.

<sup>620</sup> Nikolče Grozdanovski, Exhibit 1D281.3, marking "C-4 Puški", translating to "rifle fire".

<sup>621</sup> See for example, Exhibits 1D25 (same as 2D31); 1D26; P306.

<sup>622</sup> Nikolče Grozdanovski, T 10500-10501; Exhibit 2D31; his explanation for this omission was that on the maps accompanying his first suspect interview, he had only marked the shells fired from his own mortars, and he had not referred to them in his contemporary report because Major Despodov wanted him to include only the location of the targets that the army fired at. The Chamber did not accept the logic of this explanation or the honesty of his

therefore, that Captain Grozdanovski and M2D-008 have fabricated their evidence before this Chamber that NLA mortar shells fell on this part of the village at around 0800 hours on 12 August 2001. In the Chamber's finding the only mortar shells to land in that part of the village at around that time were fired by the army at around 0800 hours. These shells hit the house of Jakup Miftari, the barn of Dalip Murati and perhaps his house.<sup>623</sup> Also for these reasons, and in the absence of satisfactory evidence to the contrary, the Chamber does not accept the evidence of Captain Grozdanovski or of M2D-008 that the army fired these mortar shells in response to fire from this area of the village on the army positions.

152. Other perceived NLA positions, according to the Defence, were located in a densely populated area, which a witness referred to as "Dolno Maalo", or old village,<sup>624</sup> as well as in the vicinity of the Mosque.<sup>625</sup> This latter area merges with the Dolno Maalo area which is slightly to the west. This is a densely populated area, included within it are the houses of, *inter alia*, Abdulla Lutfiu, Nazim Murtezani, Harun Redžepi and Ismet Rexhepovski (Redžepi). As detailed elsewhere, these houses were destroyed or damaged by the police led by Johan Tarčulovski on 12 August.<sup>626</sup> The Chamber does not have credible evidence to support the defence contention of NLA membership of these individuals.<sup>627</sup>

153. There is evidence that the police encountered resistance from a machine-gun at a house near a bridge.<sup>628</sup> M037 marked a bridge approximately in the centre of the village on a photograph and testified that Johan Tarčulovski had told him, during the morning of 12 August, that there were some men in black uniforms at this location.<sup>629</sup> It was not suggested by this evidence that police

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evidence. Had NLA shells in truth fallen on the village at the beginning of the operation that morning this would have been a matter of great significance and a feature of any army report. No report refers to this.

<sup>623</sup> Sedat Murati, Exhibit P405, para 17; Fatmir Kamberi, Exhibit P426, paras 13, 14; *see also* Nikolče Grozdanovski, T 10501-10505; 10526-10527. Shells appear to have been fired into an area in the general vicinity of the Church where Albanians were living.

<sup>624</sup> M2D-008, T 10547-10548; 10575.

<sup>625</sup> Tarčulovski Defence Final Brief, paras 201-202.

<sup>626</sup> *See supra*, para 49.

<sup>627</sup> The Chamber notes that while there is evidence that Besim Murtezani, a possible relative, was an NLA member (M088, Exhibit P206, para 12; M092, Exhibit P215, para 28), the evidence does not establish that Nazim Murtezani was an NLA member; *see also* Exhibit 1D146, a number of Murtezani family members tested positive to the paraffin glove test.

<sup>628</sup> M051 confirms the evidence in his notebook, containing information received from a meeting with army officers and from several conversations the witness had with army officers on 12 August, that at this bridge, the police encountered resistance at the house belonging to "Qenan". The notebook, and the contemporaneous report of the witness, records that assistance was requested from the army to launch a mortar shell on the house and the bridge. It is further recorded that the army launched a mortar at Qenan's house and the bridge, as well as a cannon, T4119-4120; 4124-4126; 4171; Exhibit P302, pp 14-15 (N001-4712-N001-4713); *see also* Exhibits P303 p 2; 1D30.

<sup>629</sup> M037, T 781; 831; Exhibit P38, indicating the bridge with a cross. The Chamber notes that the marked bridge by M037 is very likely the bridge referred to by M051 concerning the location where the police encountered resistance very early on in the morning, *i.e.*, the bridge and the house of "Qenan", who the Chamber believes is the village leader Kenan Salievski (*see*, for example, Exhibit 1D30). The IMG map, however, does not mark the house of Kenan Salievski. In addition, the Chamber cannot be sure whether there were one or several bridges in the village.

had been fired on from this area. M2D-008 and Captain Grozdanovski each marked on photographs a position in that approximate location from which they suggest the army was receiving fire on 12 August.<sup>630</sup> Captain Grozdanovski described an old house<sup>631</sup> from which he says there was outgoing sniper fire towards the army as well as towards the police.<sup>632</sup> M2D-008, however, marked a different house to the east of that marked by Captain Grozdanovski.<sup>633</sup> Further, it was his evidence that there was machine-gun fire as well as sniper fire directed at the army positions from the location he marked.<sup>634</sup> Each of the witnesses who gave the evidence just mentioned has demonstrated to the Chamber that their evidence of material events that morning is not honest. While the Chamber accepts that M037 had discussions with the Accused Johan Tarčulovski about areas in the village of interest or concern to the police unit as it moved through the village, and that it could be the case that a sighting of men in black uniforms or clothing near to the bridge was mentioned, it notes that firing at the police from this position was not mentioned. Despite the inability to accept the truth of all that these witnesses say in their evidence, the Chamber is conscious of the extent of the evidence of a sniper firing on an army position from this general area, and of reports of a machine-gun, and accepts it may have been believed that a sniper and a machine-gun was operating against the army or the police from this position.

154. There is also evidence that during the morning of 12 August there was outgoing fire from the area in which the Mosque is located.<sup>635</sup> The Mosque and the Mosque area had already been a

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<sup>630</sup> The Chamber observes that M2D-008 and Captain Grozdanovski marked two separate houses close to each other in the area referred to by M2D-008 as Dolno Maalo, on the road leading from the bridge towards the Mosque, just over the crossing of the bridge; M2D-008, T 10543; 10547; Exhibit 2D97, marking "1"; Nikolče Grozdanovski, T 10422-10423; Exhibit 2D89; see also Exhibit 1D25 (same as 2D31); see also Exhibit 1D281.2, marking "C-2" as location of Snipers, marked by Captain Grozdanovski during his 2004 OTP suspect interview; see also M037, T 781; 830-831; Exhibit P38, indicating the bridge with a cross.

<sup>631</sup> Nikolče Grozdanovski, T 10421-10423; Exhibit 2D89, house marked "1".

<sup>632</sup> Nikolče Grozdanovski, T 10421-10423; Exhibit 2D89, marking "1"; Exhibit 1D281, a photograph marked by Nikolče Grozdanovski during his suspect interview with the OTP in 2004, marking "C-2" indicating sniper fire, on which according to the witness, the army fired 6-8 mortars in response; see also Exhibit 2D31 (same as 1D25). M2D-008, T 10543; 10546-10547; Exhibit 2D97, marking "1".

<sup>633</sup> M2D-008, T 10543; 10546-10547; Exhibit 2D97, marking "1".

<sup>634</sup> M2D-008 testified that he determined the exact position from where the sniper was shooting by placing a helmet on a rock; the helmet was hit at that position and judging from the side the helmet was hit, they determined the sniper came "directly from the area of Dolno Maalo", T 10546; see also Exhibit 1D26, a report by Darko Brašnjarski stating that a sniper fired at the army position at "B-1" and that during this, a helmet that was on send (*sic*) bags was hit and damaged. The Chamber notes that there is evidence from M2D-008 that sniper fire had also come from the Dolno Maalo area in the afternoon of Friday 10 August, T 10540-10542; 10589-10591.

<sup>635</sup> M2D-008, T 10546-10549; Exhibit 2D97 marking "2"; Marijo Jurišić marked the general region by the Mosque from which there was either sniper or machine-gun fire, but testified that he is unable to mark the exact house, T 3373-3376; Exhibit 2D29; see also Exhibit P306, Marijo Jurišić's contemporaneous report describing it as "an old house under the Mosque". Nikolče Grozdanovski refers to an "old house 100 metres under the mosque from which there was probably a sniper, in his contemporary report, Exhibit 1D25; however, in his testimony, he does not talk about the direct vicinity of the mosque as a location of outgoing fire. Rather, he marks a location which is more towards the center of the village, on the road leading to the bridge, T 10422-10423; Exhibit 2D89, marking "1". This is a location the Chamber has found to be in the area described as the Dolno Maalo. Severak witnesses have testified about outgoing fire from the mosque but did not mark a photograph; M037, T 828; 832; Mitre Despodov, T 2597; 2676; M051, T 4223; see also Exhibit 1D26.

target of army shelling on 10 August.<sup>636</sup> The report of Captain Grozdanovski records that on 12 August his mortar battery fired five mortar shells at an old house some 100 metres under the Mosque.<sup>637</sup> It is the evidence that the 2nd Infantry Company fired their cannons at an old house under the Mosque.<sup>638</sup> However, the Chamber heard evidence of residents of the area, Aziz Rexhepi (Redžepi) and Ćemuran Rexhepi (Redžepi) (who was residing in the house of Ismet Rexhepi (Redžepovski) at the time). Neither of them spoke of their houses or of houses in their proximity being shelled.<sup>639</sup> Given the close proximity of the houses of Nazim Murtezani, Abdulla Lutfiu and Harun Rexhepi (Redžepi),<sup>640</sup> it is difficult to accept that Aziz and Ćemuran Rexhepi (Redžepi) would not have heard the sound of impact of mortar or cannon shells. Peter Bouckaert, during his visit to Ljuboten on 23 August 2001, however, noticed traces of gunshot fire on the exterior walls of the compound of Nazim Murtezani, although he could not say, of course, when this may have occurred.<sup>641</sup> However, he did not observe any other damage caused by gunshot fire. It is the evidence that on 10 August an army mortar shell exploded on a gravel track between the house of Nazim Murtezani and Nevzat Murtezani. This would account for the traces on the exterior walls. The effect of this body of evidence is to satisfy the Chamber, and it finds, that these houses and houses in their vicinity were not hit by mortar or cannon fire on 12 August 2001. Had there been outgoing firing from a house in this vicinity, the army can have been expected to respond against the house in question. Nonetheless, the area from which the military witnesses said they observed outgoing firing and which they marked – although differently and vaguely – on photographs, is large and includes a number of other houses, some being located at some distance from the houses of Aziz and Ćemuran Rexhepi (Redžepi). While the Chamber has indicated its inability to accept the truth of all that some of these army witnesses say in their evidence about the events on 12 August, the Chamber is conscious that on the available evidence it cannot be certain that no army shells fell somewhere in the areas marked. It accepts that it may have been believed by army personnel that there was outgoing fire from a house within the areas marked on photographs.

155. The Chamber has been presented with much evidence of firing from, and at, a group of houses in the north-eastern part of Ljuboten in the area of the road to Raštak. The Defence alleged

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<sup>636</sup> M012, T 966-967; Exhibit 2D11; M017, T 722; Exhibit 2D4; Fatmir Kamberi, Exhibit P426, para 7; Elmaz Jusufi, T 557-558; 564; Exhibit 2D1; *see also* Mamut Ismaili, Exhibit P219.1, paras 2, 3; Mamut Ismaili, Exhibit 219.2, para 2; M037 testified that there was sniper fire from the direction of the mosque, which hit a house (at or near) Straista checkpoint, where the witness was at the time, T 832.

<sup>637</sup> Exhibits 1D25 (same as Exhibit 2D31); 2D89.

<sup>638</sup> Exhibit P306; Marijo Jurišić, T 3375; Exhibit 2D29.

<sup>639</sup> Ćemuran Redžepi, Exhibit P372; Ćemuran Redžepi, T 3555; Aziz Redžepi, Exhibit P432.

<sup>640</sup> Exhibits P433; P411.

<sup>641</sup> Peter Bouckaert, T 2984; Exhibit P347. The house of Nazim Murtezani is in the proximity of the area allegedly targeted by cannons, *see* Exhibits P410; P411; 2D29, marking “3”. Similarly, the only damage reported by Peter Bouckaert in respect of the house of Xhefki Huscini, located across the street from the houses of Ismet Rexhepovski and Abdulla Lutfiu (Exhibit P334), was caused by a Zolja missile; Peter Bouckaert, T 2980-2982; P345; Peter Boeckert, Exhibit P322, paras 64 and 65.

that there was an NLA position on this road, consisting of four identical houses and one separate house to the north of the road.<sup>642</sup> These houses belonged to Jashari family members, *inter alia* Qani Jashari. The Chamber notes here that there were witnesses who marked on photographs the house of Qani Jashari on the north side of the road, and the houses of Jashari family members just to the south of the road to Raštak.<sup>643</sup> Captain Grozdanovski testified that machine-gun fire was reported to be fired from these houses towards army positions.<sup>644</sup> It is suggested by Captain Grozdanovski that from this location there was also outgoing fire at the security forces near the Church.<sup>645</sup> It was his evidence that the firing started early in the morning from at least one of the houses on the southern side of the road.<sup>646</sup> Another witness described firing from inside the houses, the barn next to the houses and the side of the houses.<sup>647</sup> It is also the evidence of Captain Grozdanovski that the machine-gun was then moved across the road to the house identified by other evidence as belonging to Qani Jashari.<sup>648</sup> Captain Grozdanovski testified, as was recorded in his contemporaneous report, that his mortar battery fired three mortar shells at the house of Qani Jashari.<sup>649</sup> In addition to mortar shells, a sniper and machine-guns were used by the army to fire at the target.<sup>650</sup> Soldiers of the mortar battery also fired a machine-gun and a sniper rifle at the first two of the four houses on the south side of the road belonging to the Jashari family.<sup>651</sup> It is the evidence that the 2nd Infantry Company fired their cannons at the second of these four houses.<sup>652</sup> Despite this suggested targeted firing, however, there is no evidence of mortar shells or cannon shells falling on either of these

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<sup>642</sup> Tarčulovski Defence Final Brief, para 204.

<sup>643</sup> Nikolče Grozdanovski, T 10421; 10424-10428; 10521-10523; Exhibits 2D90; 2D92. Although the witness had marked another house as a location of outgoing fire from a machine gun in his OTP suspect interview 2004, his testimony in court satisfies the Chamber that he was mistaken and he marked on photographs during his testimony the houses where he believed there was outgoing fire. M2D-008, T 10540-10541; 10546; 10549-10552; T 10555-10556; 10589-10590; Exhibits 2D98; 2D99; *see also* Marijo Jurišić, T 3372-3376; Exhibit 2D29; *see also* Exhibit P306. The Chamber notes that although a number of witnesses testified about firing from this location, they did not specifically mark the houses of Jashari family members or marked only a much more extensive area that included the Jashari houses. On the basis of other details of these witnesses' testimony concerning, *inter alia*, the type of outgoing fire from this location, the physical description of the houses in a line, and the later sighting of individuals running from this location towards the forest, the Chamber finds that this testimony concerns the houses of the Jashari family members. The Chamber also observes that a number of witnesses were unable to be precise or were mistaken as to the specific location from which there was outgoing fire in this area. The poor quality of the photograph presented to them and its perspective (Nikolče Grozdanovski, T 10442; 10507-10508; M2D-008, T 10550-10551; Exhibit 2D98), or that the photograph was taken more recently than 2001 and therefore depicts some different buildings, or because their view was from a considerable distance (for example, M052, T 8546-8551), appeared to explain this and left the Chamber satisfied they were referring to the Jashari family houses.

<sup>644</sup> Nikolče Grozdanovski, T 10421; 10424.

<sup>645</sup> Nikolče Grozdanovski, T 10427; Exhibit 2D90.

<sup>646</sup> Nikolče Grozdanovski, T 10426-10427; Exhibit 2D90; M2D-008, T 10550.

<sup>647</sup> M053, T 1995-1996.

<sup>648</sup> Nikolče Grozdanovski, T 10425-10426; 10428; 10523-10524; Exhibits 2D90, house marked "2"; Exhibit 2D31.

<sup>649</sup> The report of Captain Grozdanovski refers to the second of the four new houses. Exhibit 1D25. However, it was the evidence of Captain Grozdanovski that the targeted house was in fact located across the road from the four houses, on the Raštak road; Nikolče Grozdanovski, T 10425; Exhibit 2D90. As established elsewhere, the house across the road belonged to Qani Jashari, while the houses in the row of four belonged to other members of the Jashari family.

<sup>650</sup> Nikolče Grozdanovski, T 10428-10429.

<sup>651</sup> Nikolče Grozdanovski, T 10429; Exhibit 2D90.



houses on 12 August 2001. None of the witnesses present near the houses at the time gave evidence of mortar or cannon fire directed at the houses on that day.

156. Further, the OSCE observer Henry Bolton described his observations of the four houses at the “end of the road” (the Chamber accepts these are the Jashari family houses) on 14 August; the witness believed that two of these houses seem to have been the focus of the assault,<sup>653</sup> and stated that one of these houses in particular appeared to have been hit numerous times by bullets fired from the west.<sup>654</sup> Henry Bolton described these strike marks on this house,<sup>655</sup> but he did not see evidence of the explosion of mortar or cannon shells on, or in the vicinity of, these four houses. What Henry Bolton saw indicates bullet damage, not mortar or cannon shell explosions. Elsewhere in this Judgement the Chamber deals with the damage to the house of Qani Jashari, which is across the road from the row of four Jashari family houses dealt with above. As detailed in that discussion, the house was extensively damaged by fire and bullets, but it is not apparent that mortar or cannon shells damaged the house.

157. From a search of the interior of one of the houses in the row of four white houses belonging to the Jashari family that appeared to have been hit numerous times, OSCE representative Henry Bolton could not find any signs that it had in any way been defended.<sup>656</sup> Peter Bouckaert, who visited the scene much later, on 23 August, observed no evidence that there had been outgoing fire from the house of Qani Jashari.<sup>657</sup> However, because this house was left burning on 12 August and was assessed to be 60% damaged, the Chamber is not able to accept that Mr Bouckaert’s observations could be a sound basis for determining whether there had been outgoing fire.

158. The Chamber also observes that there is evidence that there was no firing as the Hermelin APC and the police approached the Jashari family homes along the road, but that the police commenced to fire when persons were seen running from Qani Jashari’s house across the field.<sup>658</sup> Army personnel also fired at the persons from Qani Jashari’s house as they ran across the field trying to reach the shelter of trees. This evidence that there was no firing as the police approached is difficult to reconcile with the army evidence that it was firing mortars, cannons, machine-guns,

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<sup>652</sup> Exhibit P306; Marijo Jurišić, T 3375; Exhibit 2D29.

<sup>653</sup> Henry Bolton, Exhibit P236.1, para 18.

<sup>654</sup> Henry Bolton, Exhibit P236.1, para 13.

<sup>655</sup> Henry Bolton, Exhibit P236.1, para 13; *see also* Peter Bouckaert, who testified that when he visited Ljuboten, on 23 August 2001, the chimney of the main house of the Jashari family was still standing, T 2987; *see also* Exhibit P348.

<sup>656</sup> Henry Bolton, Exhibit P236.1, para 13.

<sup>657</sup> Peter Bouckaert, Exhibit P322, para 74.

<sup>658</sup> *See supra*, para 68.

and rifles at the Jashari family houses including the house of Qani Jashari.<sup>659</sup> The police went on from the house of Qani Jashari to shoot at other houses in the row of Jashari houses.<sup>660</sup>

159. As discussed elsewhere in the Judgement, two Kalashnikov assault rifles, a Thompson sub-machine gun and live ammunition for these weapons is said by police witnesses to have been retrieved from near the dead bodies of Xhelal Bajrami, Kadri Jashari and Bajrami Jashari in the field behind Qani Jashari's house by the police on 12 August.<sup>661</sup> It is also the case that when the bodies of these three men were exhumed in April 2002, having been buried within a day or two of 12 August and later reburied, live ammunition of the type used by a Kalashnikov rifle, was found in the pocket of the trousers in which the body of Xhelal Bajrami had been buried.<sup>662</sup> The totality of the evidence would suggest that these bullets were in the trousers' pocket at the time Xhelal Bajrami was killed in the field by Qani Jashari's house. This is the most satisfactory evidence to suggest that these dead men were armed. None of the bodies were dressed in NLA uniforms although the outer clothing of one of them was black.

160. Despite the evidence of these three weapons and ammunition being found near the bodies of the three dead men, the same three weapons and the ammunition found were recorded, along with their serial numbers and calibre, in an official UBK note which included a list of ten individuals from Ljuboten handed over to Mirkovci police station.<sup>663</sup> A document titled "Criminal Charges against Nevaip Bajrami" dated 13 August 2001 includes the same ten individuals from Ljuboten, as well as a description of circumstances revealing the allegation that these individuals used "firearm" in combat activities against FYROM forces, that the "firearm and ammunition for this operation" was provided by "the same persons" and that the listed individuals deserted the operations at 1200 hours, leaving "fire-arm and equipment" to "avoid liability" for their terrorist activities.<sup>664</sup> Subsequent seizure reports of these exact weapons and amounts of ammunition reflect that they were indeed officially attributed to individuals who were hiding in the basement of Adem Ametovski, such as, *inter alia*, Nevaip Bajrami,<sup>665</sup> M017,<sup>666</sup> Vehbi Bajrami,<sup>667</sup> and Atulla Qaili,<sup>668</sup> The Chamber notes the testimony of Blagoja Toskovski concerning a number of these seizure reports allegedly signed in his presence; the witness suggested that while these individuals denied that the weapons and ammunition belonged to them, after the witness presented them with

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<sup>659</sup> See, for example, Exhibit 1D25 (same as 2D31); *see supra*, para 155.

<sup>660</sup> *See infra*, para 379.

<sup>661</sup> *See supra*, para 69.

<sup>662</sup> *See infra*, para 336.

<sup>663</sup> Exhibit P108.

<sup>664</sup> Exhibit P31, pp 2, 4.

<sup>665</sup> Blagoja Toskovski, T 4309; Exhibit P46, ERN 0463-8819.

<sup>666</sup> Blagoja Toskovski, T 4311; Exhibit P30; *see also* Exhibit P46, ERN 0463-8827; M017, T 652; 666-670; 730.

<sup>667</sup> Exhibit P46.20; *see also* Vehbi Bajrami, Exhibit P247.1, p 4.

<sup>668</sup> M083, T 1391-1392; Exhibit P46, ERN 0463-8879; *see also* Exhibit P23.

“arguments”, *i.e.*, that their paraffin glove tests were positive, none of them refused to sign the seizure certificates.<sup>669</sup> The Chamber also notes the evidence of Eli Čakar, that she was told by Boškoski personally, at the Braca’s house, that the weapons she filmed were taken from the “arrested terrorists.”<sup>670</sup> In the Chamber’s view there is a cloud of uncertainty over the evidence that these three weapons and ammunition were found in the field near the bodies of the three men identified above. Even if this were so, the same three weapons and ammunition were used as evidence against other men who were arrested at other times and in other parts of the village.

161. While conscious of the many variations and inconsistencies in the evidence (some of which will be further discussed), the demonstrated unreliability of some of the witnesses, the absence of a detailed inspection of the area on the day, the Chamber is unable to conclude that there was firing against the police or army from one or more of the houses of the Jashari family on the morning of 12 August. On the balance of all the relevant evidence, however, it must be left open that there may have been outgoing fire, whether directed at the police in the village or the army positions at Smok and Bomba, or both. The Chamber notes that it has very strong reservations about the evidence that the outgoing firing from this location included firing from a machine-gun, and is not persuaded that this occurred. The army evidence indicates these houses were under close observation yet no machine- gun capable of firing on Smok and Bomba army positions, over 800 metres away, was found at the houses by the police that morning, and there was no evidence of spent cartridge casings from such a weapon when Henry Bolton saw the Jashari homes on 14 August.<sup>671</sup>

162. The Chamber notes, in relation to the evidence alleging outgoing fire from the north-eastern part of the village, there were witnesses who, when asked to mark areas of outgoing fire on photographs circled general areas that include the identified houses of the Jashari family members, and extended to other houses including that of Adem Ametovski,<sup>672</sup> located at the beginning of the road to Raštak. As discussed in more detail elsewhere, on 12 August a number of individuals took shelter in the basement of Adem Ametovski’s house.<sup>673</sup> The Defence does not allege that this house was an NLA position. There is no evidence of firing from the house of Adem Ametovski on 12 August. The house and these in the same compound, were searched by the police that morning

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<sup>669</sup> Blagoja Toskovski, T 4312-4313.

<sup>670</sup> Eli Čakar, Exhibit P441, para 25.

<sup>671</sup> The Chamber recognizes the theoretical possibility that all the evidence of a machine-gun having been fired could have been removed by 14 August, and takes into account the fact that no exhaustive search was undertaken. The Chamber notes that the WWII or earlier style close infantry combat Thompson sub-machine gun, said to have been found in the field near Qani Jashari’s house, could not have been used to successfully fire on Smok or Bomba which were well beyond its range of fire from the Jashari family houses. The Chamber takes into account that in the Indictment the Prosecution accepts the presence of at least one machine-gun in the village.

<sup>672</sup> M052, T 8546-8551; Exhibit 2D83; M053, T 1986-1988; Exhibit 2D26; M084, T 1494-1495; 1504-1506; 1516; Exhibits 2D22, 2D23; *see also* M039, explaining the location of Adem Ametovski’s house in relation to Qani Jashari’s house, T 1121-1122 and Exhibit P201.

<sup>673</sup> *See supra*, para 50.

but no weapons, ammunition, other military equipment or uniforms were found. Henry Bolton testified that on 14 August he retrieved a “bird-hunting” shotgun from under the bench in the Ametovski basement, but that it did not appear to him that it had been used. This was not a military weapon. In the Chamber’s finding it was not used on 12 August.

163. A further NLA position, according to the Defence, was a location at or by the graveyard, from which the NLA allegedly fired at the Macedonian forces.<sup>674</sup> The Chamber has heard evidence of both sniper and possibly mortar fire directed at the army from the graveyard<sup>675</sup> on the outskirts of the village, or more precisely, a small forest next to the graveyard. It is the evidence that after 1100 hours,<sup>676</sup> the main target of the 2nd Infantry Company was an 82 millimetre mortar which, the soldiers believed, was firing at the positions of the company from the small forest next to the graveyard.<sup>677</sup> The Chamber does accept that there was mortar fire by the army into this forest, which may have been a response to suspected outgoing firing. It is not clear, however, that there was outgoing fire from a mortar. In this regard, the Chamber notes that it was the evidence of Marijo Jurišić that although the “sound and the time” the projectile was flying “approximately fit” the indication that the shells were being fired from the direction of the graveyard, to this date, the witness is not sure that the mortar was in fact located there or not.<sup>678</sup> No such weapon was located or positively identified. Late in the morning, mortar fire on army positions may have come from other localities in the mountains where there were NLA forces armed with mortars. There is other evidence to suggest that in the morning of 12 August, army positions in the hills above Ljuboten were fired upon from locations *outside* of Ljuboten, namely from Jecmeniste, Kuljm, Matejče, Raštanski Bačila, Bel Kamen,<sup>679</sup> and in the Chamber’s finding, most probably from a hill above Ljuboten called Pop Cesme.<sup>680</sup> Much army fire, including from army mortars and cannon, was directed against the NLA in the hills that day. Muzafer Agushi, NLA member, was killed on 12

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<sup>674</sup> Tarčulovski Defence Final Brief, para 203.

<sup>675</sup> M2D-008, T 10548-10549; Exhibit 2D97; Marijo Jurišić testified that the army fired several projectiles into the direction of the small forest next to the graveyard, however, to this date, he is not sure whether the mortar was, in fact, located there or not, T 3326; *see also* Exhibits P306; 1D26; P160.

<sup>676</sup> Exhibit 1D26.

<sup>677</sup> Marijo Jurišić, T 3325-3326; M2D-008, T 10548.

<sup>678</sup> Marijo Jurišić, T 3326.

<sup>679</sup> Nikolče Grozdanovski, T 10459-10463; 10429; 10436; 10524; Exhibit P595; *see also* Exhibit 2D45; Marijo Jurišić, T 3324; Exhibit P305, p 4; Exhibit P306; Mitre Despodov, T 2584; 2675-2676; 2547-2548; Exhibit P298.

<sup>680</sup> M092 confirms having given evidence, in para 22 of his *92bis* statement, that he believed that “probably” the NLA was firing with trench mortars from Pop Cesme at the Hermelin APC near Qani Jashari’s house, T 1316; Exhibit P215, paras 22, 31, 33. A little later on in his testimony, however, the witness’ evidence suggests that there were no NLA at the Pop Cesme position, T 1325.

August while positioned above Ljuboten, near Bašinec, with the NLA.<sup>681</sup> Bašinec is in the direction of Pop Cesme.<sup>682</sup>

164. There were no fortifications in the village on 12 August.<sup>683</sup> This is not necessarily conclusive of the absence of NLA fighters because conventional sandbag fortifications can be readily seen even from a distance of a kilometre and, therefore, may have been avoided for this reason,<sup>684</sup> and the houses and walls were by their construction able to be used as fortifications.<sup>685</sup> Numerous witnesses said that the high walls around Albanian houses provided a natural fortification.<sup>686</sup> Henry Bolton testified, however, that he did not see any of the typical fortifications in the village that he had seen elsewhere in FYROM.<sup>687</sup>

165. It is the evidence of Henry Bolton that on the length of the road leading up to the Jashari houses on the road to Raštak,<sup>688</sup> he observed hundreds of spent 7.62 ammunition cartridges in the village on 14 August,<sup>689</sup> as well as three M-80 64 millimetre RBR launcher tubes.<sup>690</sup> The 7.62 millimetre cartridges are used in the Kalashnikov rifle, with which the police, the army and the NLA were armed. Mr Bolton observed that these were scattered over a wide area, predominantly at points that would provide the person firing with cover from potential fire from the east. This indicated to the witness that those firing had progressed up the road from the west, *i.e.*, as, other evidence discloses, was the progress of the police and the Hermelin APC. There were no empty cartridge cases on the eastern side, which the witness would expect if there had been an exchange of fire.<sup>691</sup> He also observed that strike markings of bullets hitting solid objects on the side of the road were on the western side of the objects, which indicated to him that the rounds had been fired from the west.<sup>692</sup> This evidence, while of significance, is not conclusive. Mr Bolton was not in the village until 14 August. No detailed inspection was made on 12 August by any witness. Mr Bolton's observations were the result of general observation rather than exhaustive and meticulous inspection.

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<sup>681</sup> M092, T 1318; 1329; Exhibit P215, para 34; Ismail Ramadani, T 1013; 1015; *see also* Exhibit 1D7, p 6, listing Muzafer Agushi as a martyr who was killed in Ljuboten.

<sup>682</sup> M092, T 1324.

<sup>683</sup> Nikolče Grozdanovski, T 10411; 10452; 10469; Peter Bouckaert, Exhibit P322, para 41; *see also* Exhibit 1D30.

<sup>684</sup> M051, T 4250.

<sup>685</sup> M051 referred to fortifications he observed from the army positions above the village. However, it appears that he in fact was referring to the houses and walls from which there was alleged shooting, T 4171-4172.

<sup>686</sup> Nikolče Grozdanovski, T 10452; M051, T 4169-4170; 4172; Mitre Despodov, T 2636; 2686-2687; Marijo Jurišić, T 3351-3352.

<sup>687</sup> Henry Bolton, T 1629.

<sup>688</sup> Henry Bolton, T 1627; Exhibit P238, OSCE Spot Report 15 August 2001, p 2.

<sup>689</sup> Henry Bolton, T 1629-1630.

<sup>690</sup> Henry Bolton explained that an RBR is a Russian manufactured shoulder-launched light anti-tank rocket that cannot be reloaded, T 1627; *see also* Exhibit P238, p 2; *see also* Exhibit P304, referring to the distribution of hand-held rocket launchers to a group of persons who had assembled at the house of Johan Tarčulovski on 10 August.

<sup>691</sup> Henry Bolton, T 1629-1630.

<sup>692</sup> Henry Bolton, Exhibit P236.1, para 13.

166. Paraffin glove tests were carried out by the police on 12-13 August on a group of Ljuboten residents, including a number of witnesses and victims in this case, to establish whether they had been handling fire arms.<sup>693</sup> The Chamber has heard evidence from two expert witnesses concerning the weaknesses of the paraffin glove test. Dr Zlatko Jačovski testified that such a test is only able to prove the presence of nitrates and nitrites on a hand. Besides being in gunpowder these can also be found, *inter alia*, in fertilisers and on people who smoke cigarettes. It is the evidence that in order to determine whether a person has shot a firearm it is necessary to perform a trial shot with the same weapon and to examine the resultant pattern of deposits.<sup>694</sup> As a result of the challenges concerning the reliability of the paraffin glove test, the Chamber is unable to make a firm determination whether any of the Ljuboten residents who were subjected to a paraffin glove test by police following the Ljuboten operation had fired weapons on 12 August, on the basis of these tests alone. The Chamber further notes, in this regard, that it was the effect of police evidence that it was not possible to successfully obtain paraffin glove test results on the 10 persons detained from the basement of Adem Ametovski's house because of what was said to have been an "immense contamination" of their "foils" used for the test.<sup>695</sup> In other words these individuals were tested, but it is said no reliable results were obtained because the test foils were contaminated, a most surprising coincidence given the emphasis of the police position that these individuals were terrorists and the apparently false attribution of the three seized weapons and ammunition to the men from Adem Ametovski's basement.

167. It is significant that no member of the police or the army was killed or wounded. The only police casualty was a police reservist who accidentally shot himself. This is a surprising situation and provides further reason for caution about accepting the evidence about fire from locations in the village against police and army positions, especially machine-gun fire. In addition, the only NLA weapons allegedly recovered by the police from the village on 12 August 2001 were two Kalashnikov rifles and an old Thompson sub-machine gun, together with ammunition for these weapons.

#### 4. Conclusion

168. Earlier in this Judgement the Chamber has indicated, for the reasons given, that it has not been able to accept the truth of significant aspects of the evidence of Major Despodov who, in particular, sought to deny that his units had fired on Ljuboten on 10 August and to distance himself

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<sup>693</sup> See *supra*, para 77; see Exhibit 1D146, on which the names of Ljuboten residents that allegedly tested positive are underlined.

<sup>694</sup> Zlatko Jačovski, T 2293-2294; Simon Eichner, T 4456; 4490.

and his units from the activities of the police in Ljuboten on 12 August. Major Despodov commanded the military witnesses, who gave evidence of army action and observed activities in Ljuboten especially on 12 August. The general tenor of this evidence was that army positions only fired at specifically identified targets in Ljuboten in response to observed outgoing fire from these positions, and that in doing so the army acted only in accordance with its standing operational orders (*e.g.* firing only if fired on) and entirely independently of the police.

169. Contrary to this evidence, however, the Chamber does accept and finds that Major Despodov, and through him his units, were well aware of the police operation in Ljuboten on 12 August, provided support from 10 August to the police unit which was to conduct the operation, and directly supported the police operation on 12 August specifically by providing opening artillery fire from mortars into the village. It is in this context that after close observation of the army witnesses and careful weighing of their evidence and other contrary evidence, the Chamber has not been able to accept significant aspects of the evidence of officers and men from Major Despodov's command, especially Captain Grozdanovski, Lieutenant Jurišić and M2D-008.

170. The Chamber finds that the evidence of army personnel positioned in the area of Ljuboten and reports prepared by them at the time of the events are not consistent, on a number of issues, with other evidence, in particular the evidence of residents of the village and international observers. As indicated, no mortar or cannon fire, or damage caused by such fire, was observed in some of the areas, which, according to the military, were targeted. It is the view of the Chamber that the military reports were contrived for the purpose of demonstrating that in a number of cases there was fire from the village directed at army positions, to which the army responded. In truth, in the Chamber's finding, the army was not responding to outgoing fire from the village when it fired for a time with mortars at an Albanian part of the village, following which, as the police moved through the village, any army mortar and cannon fire was directed primarily at targets outside the village, including at a location near the cemetery.

171. For the reasons discussed earlier, the Chamber does not accept that there was outgoing fire from the village in the vicinity of the Orthodox Church or that the mortar fire directed by the army to this locality was in response to any NLA firing or perceived firing. The Chamber accepts that it may have been believed by army personnel that there was outgoing fire from a house in the general locality of the bridge in the village and from a house in the area in which the Mosque is located which area merges with the area described as Dolno Maalo, although the Chamber is not able to

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<sup>695</sup> See Exhibit P46.17. Blagoja Toskovski, when confronted with the contaminated foils of these individuals, the witness testified that there was an additional investigation and there was a positive paraffin glove test; asked where these results were, the witness answered that they were submitted to the Public Prosecutor, T 4418-4419.

make a finding that there was actual outgoing fire from these areas during the morning of 12 August. In the Chamber's finding it must be left open that there may have been outgoing firing directed at the police, or the army positions Smok and Bomba, or both, from the location of the Jashari family houses near the edge of the village on the road to Raštak although it is not able to accept that this included fire from a machine-gun. The Chamber accepts that the army directed mortar fire into a small forest by the graveyard on the outskirts of the village and that this may have been in response to suspected outgoing fire.

172. Otherwise, the evidence does not support the view that any other resistance was encountered by the police in Ljuboten on 12 August 2001. A limited number of NLA members were in the village although the evidence indicates the police did not enter all parts of the village and it cannot be concluded where they were located. The NLA in the village were very substantially outnumbered by a well armed police unit. NLA members may well have chosen to offer little armed resistance because the position appeared hopeless. NLA members may have been among those many villagers who sought to leave the village during the day. Apart from the events in the area of the Jashari family houses, there is no evidence that the actions of the police relating to the charges were in self defence or in the course of action against armed opponents nor is there a foundation for a reasonable doubt that this may have been the case.



## V. GENERAL REQUIREMENTS OF ARTICLE 3 OF THE STATUTE

173. The Accused are each charged with three counts of violations of the laws or customs of war pursuant to Article 3 of the Statute, namely one count of murder, one count of wanton destruction of cities, towns or villages not justified by military necessity, and one count of cruel treatment.<sup>696</sup> There are several preliminary requirements which must be satisfied for the applicability of Article 3 of the Statute. In addition to being satisfied that the crimes charged fall under this provision, it must be established that there was an armed conflict, whether international or internal, at the time material to the Indictment and that the acts of the Accused are closely related to this armed conflict.<sup>697</sup>

174. As discussed elsewhere in this Judgement,<sup>698</sup> motions of both Accused to challenge the jurisdiction of the Tribunal based on the submission that there was no armed conflict in FYROM in 2001 were dismissed by a decision of the Pre-Trial Chamber,<sup>699</sup> which was subsequently upheld by the Appeals Chamber.<sup>700</sup> As affirmed in those decisions, the question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial.<sup>701</sup>

### A. Armed Conflict

#### 1. Law

175. The test for armed conflict was set out by the Appeals Chamber in the *Tadić* Jurisdiction Decision: “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>702</sup> This test has been consistently applied in subsequent jurisprudence.<sup>703</sup> Given the circumstances of that case, the Trial Chamber in *Tadić* interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the

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<sup>696</sup> Indictment, paras 23, 25 and 42.

<sup>697</sup> *Tadić* Jurisdiction Decision, para 70.

<sup>698</sup> *See infra*, para 611.

<sup>699</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, “Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction”, 1 June 2005.

<sup>700</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case IT-04-82-AR 72.1, “Decision on Interlocutory Appeal on Jurisdiction”, 22 July 2005.

<sup>701</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, “Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction”, 1 June 2005, para 11; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case IT-04-82-AR 72.1, “Decision on Interlocutory Appeal on Jurisdiction”, 22 July 2005, para 13.

<sup>702</sup> *Tadić* Jurisdiction Decision, para 70.

<sup>703</sup> *Tadić* Trial Judgement, paras 561-562; *Čelebići* Trial Judgement, paras 183-185; *Krnjelac* Trial Judgement, para 51; *Kunarac* Appeals Judgement, para 56; *Kordić* Appeals Judgement, para 336; *Limaj* Trial Judgement, paras 83-84; *Naletilić* Trial Judgement, para 225; *Haradinaj* Trial Judgement, paras 37-38.

conflict and (ii) the organisation of the parties to the conflict,<sup>704</sup> as a way to distinguish an armed conflict “from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.<sup>705</sup> This approach has been followed in subsequent judgements, although care is needed not to lose sight of the requirement for protracted armed violence in the case of internal armed conflict, when assessing the intensity of the conflict.<sup>706</sup> The criteria are closely related.<sup>707</sup> They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.<sup>708</sup>

176. The Trial Chamber in *Tadić* noted that factors relevant to this determination are addressed in the Commentary to Common Article 3 of the Geneva Conventions.<sup>709</sup> These “convenient criteria” were identified by the drafters of Common Article 3 during negotiations of the Geneva Conventions in order to distinguish an armed conflict from lesser forms of violence, although these were rejected from the final text.<sup>710</sup> While these criteria give some useful indications of armed conflict, they remain examples only.<sup>711</sup> The drafters of the Commentary were of the view that Common Article 3 should be applied as widely as possible and could still be applicable in cases where “armed strife breaks out in a country, but does not fulfil any of the above conditions”.<sup>712</sup> The Trial Chamber in *Limaj*, after having reviewed the drafting history of Common Article 3, concluded that “no such explicit requirements for the application of Common Article 3 were intended by the drafters of the

<sup>704</sup> See *Tadić* Trial Judgement, para 562; *Čelebići* Trial Judgement, para 184; *Limaj* Trial Judgement, para 84; *Mrkšić* Trial Judgement, para 407.

<sup>705</sup> *Tadić* Trial Judgement, para 562.

<sup>706</sup> *Čelebići* Trial Judgement, para 184; *Kordić* Appeals Judgement, para 341; *Limaj* Trial Judgement, para 84; *Haradinaj* Trial Judgement, para 38.

<sup>707</sup> *Tadić* Trial Judgement, para 562.

<sup>708</sup> *Rutaganda* Trial Judgement, para 93; *Limaj* Trial Judgement, para 90; *Mrkšić* Trial Judgement, para 407.

<sup>709</sup> *Tadić* Trial Judgement, para 562. ICRC Commentary to Geneva Convention I, pp 49-50. These “convenient criteria” (which are in no way obligatory) are:

1. that the rebel party has an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. the legal Government is obliged to use the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3.
  - a. the de jure Government has recognized the insurgents as belligerents; or
  - b. that it has claimed for itself the rights of a belligerent; or
  - c. that it has accorded the insurgents recognition as belligerents for the purpose only of the convention; or
  - d. that the dispute has been admitted to the agenda of the UN Security Council or the General Assembly as being a threat to the peace, breach of the peace or an act of aggression.
4.
  - a. The insurgents have an organisation that purports to have the characteristics of a State
  - b. The insurgent civil authority exercises de facto authority over the persons within determinate territory.
  - c. The armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
  - d. The insurgent civil authority agrees to be bound by the provisions of the Convention.

<sup>710</sup> ICRC Commentary to Geneva Convention I, pp 49-50. The ICTR Trial Chamber in *Akayesu* referred to these criteria in its examination of whether an internal armed conflict existed in Rwanda in 1994. *Akayesu* Trial Judgement, para 619.

<sup>711</sup> In *Milošević* Rule 98bis Decision, the Trial Chamber observed at para 19 that “the ICRC Commentary is nothing more than what it purports to be, i.e., a commentary, and only has persuasive value.”

<sup>712</sup> ICRC Commentary to Geneva Convention I, p 50.

Geneva Conventions”.<sup>713</sup> Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case. The Chamber will examine how each of these criteria has been assessed in practice.

(a) Intensity

177. Various indicative factors have been taken into account by Trial Chambers to assess the “intensity” of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes,<sup>714</sup> the spread of clashes over territory and over a period of time,<sup>715</sup> any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict,<sup>716</sup> as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.<sup>717</sup> Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones;<sup>718</sup> the type of weapons used,<sup>719</sup> in particular the use of heavy weapons,<sup>720</sup> and other military equipment, such as tanks and other heavy vehicles;<sup>721</sup> the blocking or besieging of towns and the heavy shelling of these towns;<sup>722</sup> the extent of destruction<sup>723</sup> and the number of casualties caused by shelling or fighting;<sup>724</sup> the quantity of troops and units deployed;<sup>725</sup> existence and change of front lines between the parties;<sup>726</sup> the occupation of territory,<sup>727</sup> and towns and villages;<sup>728</sup> the deployment of government forces to the crisis area;<sup>729</sup> the closure of roads;<sup>730</sup>

<sup>713</sup> *Limaj* Trial Judgement, para 86.

<sup>714</sup> *Tadić* Trial Judgement, para 565; *Čelebići* Trial Judgement, para 189; *Milošević* Rule 98bis Decision, para 28; *Kordić* Appeals Judgement, paras 340; *Haradinaj* Trial Judgement, paras 91 and 99.

<sup>715</sup> *Tadić* Trial Judgement, para 566; *Čelebići* Trial Judgement, para 186; *Milošević* Rule 98bis Decision, para 29; *Kordić* Appeals Judgement, paras 340-341; *Halilović* Trial Judgement, paras 163-166, 169; *Limaj* Trial Judgement, paras 168, 169. See also paras 136-163; *Hadžihasanović* Trial Judgement, paras 20, 22; *Martić* Trial Judgement, para 344.

<sup>716</sup> *Milošević* Rule 98bis Decision, paras 30-31. See also *Čelebići* Trial Judgement, para 188.

<sup>717</sup> *Tadić* Trial Judgement, para 567; *Čelebići* Trial Judgement, para 190; *Martić* Trial Judgement, para 345; *Haradinaj* Trial Judgement, para 49.

<sup>718</sup> Because they have been evacuated (*Kordić* Appeals Judgement, para 340), expelled (*Tadić* Trial Judgement, para 565), threatened (*Limaj* Trial Judgement, para 139), or displaced (*Limaj* Trial Judgement, para 167, see also para 142); *Haradinaj* Trial Judgement, paras 49 and 97.

<sup>719</sup> *Milošević* Rule 98bis Decision, para 31; *Limaj* Trial Judgement, para 166; *Haradinaj* Trial Judgement, para 49.

<sup>720</sup> *Tadić* Trial Judgement, para 565 (“artillery bombardment”), *Limaj* Trial Judgement, para 166; see also paras 136, 138, 156, 158, 163.

<sup>721</sup> *Tadić* Trial Judgement, para 143 (“heavy shelling, followed by the advance of tanks and infantry”); *Halilović* Trial Judgement, para 166 (“tank, artillery and infantry attack”); *Limaj* Trial Judgement, paras 136, 166.

<sup>722</sup> *Tadić* Trial Judgement, para 143 (blockade of Kozarac); *Halilović* Trial Judgement, paras 165-167 (blockade of Mostar), 168 (siege of Sarajevo); see also *Limaj* Trial Judgement, para 153; *Haradinaj* Trial Judgement, para 96.

<sup>723</sup> *Tadić* Trial Judgement, para 565; *Kordić* Appeals Judgement, paras 337-338; *Limaj* Trial Judgement, para 142; *Haradinaj* Trial Judgement, para 49.

<sup>724</sup> *Tadić* Trial Judgement, para 565; *Kordić* Appeals Judgement, paras 339; *Halilović* Trial Judgement, paras 164; *Limaj* Trial Judgement, para 142; *Haradinaj* Trial Judgement, para 49.

<sup>725</sup> *Halilović* Trial Judgement, para 168; *Haradinaj* Trial Judgement, para 49.

<sup>726</sup> *Halilović* Trial Judgement, paras 161, 169, 172.

<sup>727</sup> *Halilović* Trial Judgement, para 163; *Limaj* Trial Judgement, paras 146, 158.

<sup>728</sup> *Halilović* Trial Judgement, paras 162, 164; *Limaj* Trial Judgement, paras 143, 163.

cease fire orders and agreements,<sup>731</sup> and the attempt of representatives from international organisations to broker and enforce cease fire agreements.<sup>732</sup>

178. At a more systemic level, an indicative factor of internal armed conflict is the way that organs of the State, such as the police and military, use force against armed groups.<sup>733</sup> In such cases, it may be instructive to analyse the use of force by governmental authorities, in particular, how certain human rights are interpreted, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict.<sup>734</sup> As is known, in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives.<sup>735</sup> The European Court of Human Rights has held in a number of cases that to use lethal force against a person whom it is possible to arrest would be “more than absolutely necessary”.<sup>736</sup> However, when a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law,<sup>737</sup> where a different proportionality test applies.<sup>738</sup>

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<sup>729</sup> *Limaj* Trial Judgement, paras 142, 150, 164, 169.

<sup>730</sup> *Limaj* Trial Judgement, para 144.

<sup>731</sup> *Hadžihasanović* Trial Judgement, para 23; *Martić* Trial Judgement, para 345.

<sup>732</sup> *Hadžihasanović* Trial Judgement, para 23.

<sup>733</sup> The second of the ICRC Commentary’s “convenient criteria” is that the legal government is “obliged to have recourse to the regular military forces against insurgents organized as military and possession of a part of the national territory”. ICRC Commentary to Geneva Convention I, p 50.

<sup>734</sup> See e.g. Arne Willy Dahl and Magnus Sandbu, “The Threshold of Armed Conflict”, *Société Internationale de Droit Militaire et de Droit de la Guerre*, 45, 3-4 (2006) p 369. Marco Sassòli identifies “direct involvement of governmental armed forces (vs. law enforcement agencies)” as one of a number of relevant factors in identifying armed conflict. Marco Sassòli, “Terrorism and War,” *Journal of International Criminal Justice* 4 (2006) at p 965.

<sup>735</sup> Under the European Convention on Human Rights, for example, such objectives are (a) self-defence (including defence of others), (b) in order to make a lawful arrest or to prevent the escape of a person lawfully detained, or (c) action lawfully taken for the purpose of quelling a riot or insurrection. Article 2, ECHR (1950). See, e.g. *McCann and Others v. United Kingdom*, ECtHR, App. No. 18984/91 (27 September 1995), paras 148-149: “The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted to kill an individual, but describes the situation where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than ‘absolutely necessary’ for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) [...] In particular, the force used must be strictly proportionate achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).”

<sup>736</sup> E.g., *McCann and Others v. United Kingdom*, ECtHR, App. No. 18984/91 (27 September 1995), paras 148-150; *Ergi v. Turkey*, ECtHR, App. No. 23818/94, (28 July 1998), para 79; and *McKerr v. United Kingdom*, ECtHR, App. No. 28883/95 (4 May 2001), para 110.

<sup>737</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para 25; *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para 106. But see Louise Doswald-Beck, “The right to life in armed conflict: does international humanitarian law provide all the answers?”, *International Review of the Red Cross* 88, 864 (December 2006), pp 881-904 (arguing that human rights law may supplement the rules of international humanitarian law relating to the use of force in non-international armed conflicts).

<sup>738</sup> It is noted that even in cases involving armed conflict some courts have assessed the use of force with reference to the proportionality principle under human rights standards. For example, the Israeli Supreme Court has held that a civilian who is directly participating in hostilities cannot be killed if less harmful means can be employed, such as arrest, interrogation, and trial, “[t]hus, if a terrorist taking a direct part in hostilities can be arrested, interrogated

179. The Boškoski Defence has argued that the situation in FYROM did not reach the required level of intensity, in part by comparing the situation in 2001 to that of the “troubles” in Northern Ireland, which it is argued, was never recognised as an armed conflict in State practice, and the confrontation between the Turkish army and the Kurdistan’s Workers Party (PKK), “a conflict of much greater scale and intensity”, which a Dutch court found not to have amounted to armed conflict.<sup>739</sup> However, in terms of the situation pertaining to the Turkish army and the PKK, the Supreme Court of the Netherlands did not, as claimed by the Boškoski Defence, find that this situation did not amount to an internal armed conflict, but rather held, in the context of its consideration of the requirement of double criminality under extradition law, that it was unnecessary for it to pronounce itself on the question.<sup>740</sup>

180. By contrast, some national courts have qualified other situations as conflicts not of an international character to which Common Article 3 of the Geneva Conventions applies. In this respect, the Chamber notes the factors that led these courts to make such a qualification. The Constitutional Court of the Russian Federation recognised in a 1995 judgement that Additional Protocol II applied to the armed conflict in the Chechen Republic.<sup>741</sup> The Court observed that the use of the armed forces under the Constitution did not require a link with a declaration of a state of emergency or a state of war and that when the State Duma adopted a resolution in 1994 on the use

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and tried, those are the means which should be employed”. *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Israel, Supreme Court, Judgment of 14 December 2006, HCJ 769/02, at para 40. The European Court of Human Rights did not pronounce itself on the existence or qualification of an armed conflict in Chechnya, however, it observed in regards to the situation that, “[t]he presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law enforcement bodies [...] may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2”. *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (24 February 2005) para 180. See also *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (24 February 2005) para 178; *Güleç v. Turkey*, ECtHR, App. No. 21593/93 (27 July 1998) paras 71-73.

<sup>739</sup> Boškoski Defence Final Brief, para 262.

<sup>740</sup> *In re K.*, LJN: AF6988, Supreme Court (*Hoge Raad*) 02853/02 U NS 2004, 99, at 3.3.5. Paragraph 35 of this judgement, which is cited to in the Boškoski Final Brief at para 262 (stating that the situation is not an internal armed conflict), is the opinion of the Advocate General, not the Supreme Court, and is not binding on the Court. Although the European Court of Human Rights has issued a number of judgments in regard to human rights violations committed in Turkey in relation to the situation involving the PKK, as well as with regard to Northern Ireland and Chechnya, it has, in conformity with its institutional competence, limited itself to considering the legal obligations of States parties within the framework of the European Convention on Human Rights, and has refrained from directly legally qualifying the situations in terms of the possible applicability of international humanitarian law. See, e.g., *McCann and Others v. United Kingdom*, ECtHR, App. No. 18984/91 (27 September 1995); *Güleç v. Turkey*, ECtHR, App. No. 21593/93 (27 July 1998); *Ergi v. Turkey*, ECtHR, App. No. 23818/94 (28 July 1998); *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (24 February 2005); *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (24 February 2005).

<sup>741</sup> *Decision of the Constitutional Court of the Russian Federation on the constitutionality of Presidential Decree No. 2137 of 30 November 1994 on measures for the restoration of the Constitution and the rule of law on the territory of the Chechen Republic, of Presidential Decree No. 2166 of 9 December 1994 on repression of the activities of illegal armed units within the territory of the Chechen Republic and in the zone of the Ossetino-Ingushetian conflict, of Resolution No. 1360 of 9 December 1994 on ensuring the security and territorial integrity of the Russian Federation, the principle of legality, the rights and freedoms of citizens, and disarmament of illegal armed units within the territory of the Chechen Republic and contiguous regions of the northern Caucasus, and of Presidential Decree No. 1833 of 2 November 1993 on the basic provisions of the military doctrine of the Russian Federation.* Sobranie Zakonodatelstva Rossiyskoy Federatsii, 1995, No. 33, Article 3424.

of the armed forces, it had declared that the disarmament of the illegal regular armed units in the Republic, which were equipped with tanks, rocket installations, artillery systems and combat planes “is in principle impossible without the use of the forces of the army”.<sup>742</sup>

181. In Peru, the National Criminal Chamber held that activities of the armed group Peruvian Communist Party – Shining Path, and counter-actions to these by the Government forces, which resulted in more than 69,000 deaths and severe damage to public and private infrastructure, constituted an armed conflict and that Common Article 3 applied.<sup>743</sup> The Chilean Supreme Court recognised the applicability of Common Article 3 to the situation in Chile in 1973, having had regard to the Government’s decree of 12 September 1973 which qualified the internal situation as “a state of war” which had the effect of making certain penal provisions becoming applicable.<sup>744</sup>

182. The Supreme Court of the United States held in 2006 that the United States was in a state of armed conflict with the non-State group known as Al Qaeda on the basis that Common Article 3 applies when there is resort to armed force between a State and a non-signatory to the Geneva Conventions of 1949 which is party to an armed conflict.<sup>745</sup> In Israel, the Supreme Court held that “[s]ince the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle.”<sup>746</sup> In coming to this holding, it took into account that since the end of September 2000 until 2002, more than 600 Israeli citizens had been killed and more than 4,500 injured, and that “many” Palestinians had also been killed and wounded.<sup>747</sup> To counter the “terrorist” attacks, the Israeli Defence Forces had, *inter alia*,<sup>748</sup>

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<sup>742</sup> *Ibid.*, para 6.

<sup>743</sup> *Case of Abimael Guzmán Reinoso and others*, Peru, Expediente acumulado No. 560-03, Decision of 13 October 2006 (National Criminal Chamber), paras 467-470.

<sup>744</sup> Supreme Court of Chile, 9 September 1998; *Revista Fallos del Mes*, No. 478, pp. 1760-1769 (decision No. 3). Also in the South American context, see *Juan Carlos Abella (Tablada Case)*, Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, 18 November 1997, (Argentina) paras 155-156.

<sup>745</sup> *Hamdan, Salim Ahmed v. Rumsfeld, Donald H., Secretary of Defense, et al.*, United States, Supreme Court of the United States, Judgment of 29 June 2006, 126 S.Ct.2749 (2006), pp 66-68. The Supreme Court found that the phrase describing Common Article 3’s scope of application “bears its literal meaning and is used here in contradistinction to a conflict between nations”, which the Court claims is demonstrated by Common Article 2 of the Geneva Conventions, “which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory ‘accepts and applies’ those terms”. By contrast, Common Article 3 “affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict ‘in the territory of’ a signatory.” Thus, even though Al Qaeda is not a signatory to the Geneva Conventions, Common Article 3 nonetheless applies to a conflict to which it is a party. Although the Court acknowledges that the official commentaries to Common Article 3 indicate that “an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character,’ *i.e.*, a civil war”, the Court underlines that the commentaries make clear “that the scope of the Article must be as wide as possible”. In this regard, the Court drew attention to the fact that limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion,” was omitted from the final version of the Article, “which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations”. *Ibid.*, pp 66-68.

<sup>746</sup> *Ajuri v IDF Commander*, HCJ 7015/02; HCJ 7019/02, Israel, Supreme Court sitting as the High Court of Justice, Judgement of 3 September 2002, para 1.

<sup>747</sup> *Ibid.*

conducted special military operations since June 2002 “to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks”.<sup>749</sup>

183. These cases demonstrate that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists. The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed.

184. The Boškoski and Tarčulovski Defences have argued that since international law distinguishes between armed conflict and acts of “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”,<sup>750</sup> acts of a terrorist nature may not be taken into account in the determination of the existence of an armed conflict.<sup>751</sup> The implication of this argument would seem to be that all terrorist acts should be excluded from the assessment of the intensity of violence in FYROM in 2001.<sup>752</sup> Without prejudice to the question of the qualification of the acts of the NLA as terrorist in nature, the Chamber considers that this interpretation is a misreading of the jurisprudence of the Tribunal, reviewed below.

185. The Trial Chamber in *Tadić* relied on the ICRC Commentary to the Geneva Conventions of 1949 to explain that the elements of intensity and organisation of the parties may be used solely for the purpose, as a minimum, to distinguish an armed conflict from lesser forms of violence such as “terrorist activities”.<sup>753</sup> The part of the Commentary relied upon noted that the Conventions’ drafters did not intend the term “armed conflict” to apply “to any and every isolated event involving the use of force and obliging the officers of the peace to have resort to their weapons”.<sup>754</sup> Rather, Common Article 3 was to apply to “conflicts which are in many respects similar to an international war, but take place within the confines of a single country”, that is, where “armed forces” on either side are engaged in “hostilities”.<sup>755</sup> The essential point made by the Trial Chamber in *Tadić* is that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3. This conclusion reflected the Appeals Chamber’s determination in

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<sup>748</sup> The case concerned the additional measures that had been adopted by the Ministerial Committee for National Security on 31 July 2002, due to the recognition that the “special military operations did not provide an adequate response to the immediate need to stop the grave terrorist attacks.” *Ibid.*, at para 4.

<sup>749</sup> *Ibid.*, para 3.

<sup>750</sup> *Tadić* Trial Judgement, para 562; *Limaj* Trial Judgement, para 84.

<sup>751</sup> Boškoski Defence Final Brief, para 265; Tarčulovski Defence Final Brief, para 48.

<sup>752</sup> Tarčulovski Defence Final Brief, para 48: “[t]he Prosecution should have identified all those attacks that are terrorist in nature and cannot form part of the Chamber’s consideration regarding the existence of an armed conflict”.

<sup>753</sup> *Tadić* Trial Judgement, para 562.

<sup>754</sup> ICRC Commentary to Geneva Convention II, p 33.

*Tadić* that armed conflict of a non-international character exists when there is “*protracted* violence between governmental authorities and organized groups or between such groups within a State”.<sup>756</sup> In applying this test, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterised as terrorist in nature. This interpretation is consistent with the Appeals Chamber’s observation in *Kordić*, that “[t]he requirement of *protracted* fighting is significant in excluding mere cases of civil unrest or *single* acts of terrorism.”<sup>757</sup>

186. The element of “protracted” armed violence in the definition of internal armed conflict has not received much explicit attention in the jurisprudence of the Tribunal.<sup>758</sup> It adds a temporal element to the definition of armed conflict.<sup>759</sup> The Chamber is also conscious of Article 8(2)(d) of the Rome Statute of the International Criminal Court relating to serious violations of Common Article 3 which “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, *isolated and sporadic acts of violence* or other acts of a similar nature”.<sup>760</sup>

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<sup>755</sup> ICRC Commentary to Geneva Convention II, p 33.

<sup>756</sup> *Tadić* Jurisdiction Decision, para 70 (emphasis added); *Limaj* Trial Judgement, para 84; *Haradinaj* Trial Judgement, para 37.

<sup>757</sup> *Kordić* Appeals Judgement, para 341 (second emphasis added).

<sup>758</sup> While no Chamber has explicitly defined what is meant by the word “protracted”, there is a significant pattern of Trial Chambers examining incidents of violence outside the temporal limits of an indictment to determine whether armed violence is “protracted”, particularly when the period of indictment is less than one year. See e.g., *Tadić* Trial Judgement, paras 566-567 (finding that the intensity of fighting between various entities in Yugoslavia from 1991 rose to the level of an armed conflict with regard to an indictment period from May to December 1992); *Furundžija* Trial Judgement, paras 51-57; 59 (considering evidence relating to armed conflict between January to July 1993 with regard to an indictment period on or about 15 May 1993); *Čelebići* Trial Judgement, para 186 (finding that in Bosnia-Herzegovina as a whole there was continuing armed violence at least from 6 March 1992 until November 1995 with regard to an indictment period from May to December 1992); *Kunarac* Trial Judgement, para 567; *Kunarac* Appeals Judgement, paras 2, 58 (finding that there was an armed conflict from April 1992 until at least February 1993 with regard to an indictment period from 13 July until October 1992); *Milošević* Rule 98bis Decision, para 28 (finding that there was an armed conflict in the indictment period between 1 January and 24 March 1999, noting a “large scale offensive” by Serbian forces in 1998, and finding that the KLA conducted many operations against the police during 1996 and 1997); *Strugar* Trial Judgement, paras 217, 26-78 (finding that there was an armed conflict in the indictment period between 6 and 31 December 1991, including consideration of evidence of significant prior conflict at the same location in the months leading up to that period).

<sup>759</sup> In *Haradinaj*, the Trial Chamber determined that the criterion of protracted armed violence has been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. *Haradinaj* Trial Judgement, para 49.

<sup>760</sup> Article 8(2)(d) Rome Statute of the ICC (emphasis added). See *Milošević* Rule 98bis Decision, para 20; *Limaj* Trial Judgement, para 87. The language of this exclusion clause derives from Article 1(2) of Additional Protocol II, which provides that the Protocol does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict”. One commentator notes that this limitation to the applicability of the Protocol was instituted “out of concern not to favour common crime and banditry and to avoid a special regime of legal protection for activities which do not have anything to do with organised armed conflict.” Dieter Fleck, “International Humanitarian Law After September 11: Challenges and the Need to Respond,” *Yearbook of International Humanitarian Law* 6 (2003) p 58.



187. The view that terrorist acts may be constitutive of protracted violence is also consistent with the logic of international humanitarian law, which prohibits “acts of terrorism”<sup>761</sup> and “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”<sup>762</sup> in both international and non-international armed conflicts and to which individual criminal responsibility may attach.<sup>763</sup> It would be nonsensical that international humanitarian law would prohibit such acts if these were not considered to fall within the rubric of armed conflict.

188. In addition, the Chamber notes that some national courts have not excluded acts of a terrorist nature when considering the evidence of armed conflict. The National Criminal Chamber of Peru found that the threshold of Common Article 3 had been met in respect of the situation related to acts committed by the Shining Path, such as murder of civilians, acts of sabotage against embassies and public and private enterprises’ facilities, and armed ambushes against State forces and responses to these.<sup>764</sup> The Nigerian Supreme Court in 1972 rejected the defence of superior orders in respect of the deliberate killing of an unarmed person by non-uniformed members of the rebel forces known as the Biafran Army during the civil war, but did not discount this act as being part of the armed conflict.<sup>765</sup> The Supreme Court of the United States did not refrain from the determination that Common Article 3 applied to the armed conflict it identified between the United States and Al Qaeda in spite of the “terrorist” acts perpetrated by Al Qaeda or the US Government’s view that the latter was a terrorist organisation.<sup>766</sup>

189. The Supreme Court of Israel has also qualified the situation between Israel and “terrorist organizations” as armed conflict in a number of judgements.<sup>767</sup> In a 2006 judgement, the Israeli

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<sup>761</sup> Article 33(1) of Geneva Convention IV; Article 4(2)(d) of Additional Protocol II.

<sup>762</sup> Article 51(2) of Additional Protocol I; Article 13(2) of Additional Protocol II; Article 22 of the Hague Rules on Warfare (1923); *Galić Appeals Judgment*, para 90, affirmed the customary status of Articles 51(2) Additional Protocol I and 13(2) Additional Protocol II.

<sup>763</sup> *Galić Appeals Judgment*, paras 86 and 98; *D. Milošević Trial Judgement*, paras 873-882. See also *Prosecutor v. Norman et al.*, “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98”, Case No. SCSL-04-14, paras 109-112; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, 18 February 2005, Counts 1 and 2, respectively; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98”, 31 March 2006, para 54.

<sup>764</sup> *Case of Abimael Guzmán Reinoso and others*, Peru, Expediente acumulado No. 560-03, Decision of 13 October 2006 (National Criminal Chamber), paras 470-476.

<sup>765</sup> *Pius Nwaoga v. The State*, Nigeria, Supreme Court, 3 March 1972, All Nigeria Law Reports, Part 1, Vol. 1, p. 149; ILR vol. 52, 1979, p 494, at p 497 (“To our mind, deliberate and intentional killing of an unarmed person living peacefully inside Federal Territory as in this case is a crime against humanity, and *even if committed during a civil war* is in violation of the domestic law of the country, and must be punished) (Emphasis added).

<sup>766</sup> *Hamdan, Salim Ahmed v. Rumsfeld, Donald H., Secretary of Defense, et al.*, United States, Supreme Court of the United States, Judgment of 29 June 2006, 126 S.Ct. 2749 (2006), pp 66-68.

<sup>767</sup> *Ajuri v IDF Commander*, HCJ 7015/02; HCJ 7019/02, Israel, Supreme Court, Judgement of 3 September 2002, para 1; *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Israel, Supreme Court, Judgment of 14 December 2006, HCJ 769/02, para 16, also citing: *El Saka v. The State of Israel* (unpublished), HCJ 9255/00; *Kn’aan v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished), HCJ 2461/01; *Barake v. The Minister of Defence*, 56(2) PD, HCJ 9293/01; *Almandi v. The Minister of Defence*, 56(3) PD 30, HCJ 3451/02; *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished), HCJ 8172/02; *Mara’abe v. The Prime Minister of Israel*, HJC 7957/04.

Supreme Court recognised that a “continuous situation of armed conflict” existed between Israel and the various “Palestinian terrorist organizations” since the first *intifada*,<sup>768</sup> due to the “constant, continual, and murderous wave of terrorist attacks” and the armed response to these.<sup>769</sup> The Court observed that “in today’s reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law.”<sup>770</sup> Furthermore, the UN Commission of Inquiry on Lebanon concluded that “the hostilities that took place from 12 July to 14 August [2006] constitute an international armed conflict”, but noted “its *sui generis* nature in that active hostilities took place only between Israel and Hezbollah fighters”.<sup>771</sup> In its report, the Commission stated that the fact that Israel considered Hezbollah to be a terrorist organisation and its fighters terrorists did not influence its qualification of the conflict.<sup>772</sup>

190. These cases indicate that national courts and UN bodies have not discounted acts of a terrorist nature in their consideration of acts amounting to armed conflict. Nothing in the jurisprudence of the Tribunal suggests a different approach should be taken to the issue provided that terrorist acts amount to “protracted violence”. In view of the above considerations, the Chamber considers that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.

191. Further to what has just been said, the Boškoski and Tarčulovski Defences submit that a number of statements by States or international organisations condemning terrorist attacks perpetrated by the NLA in FYROM in 2001 constitute evidence that there did not exist an armed conflict.<sup>773</sup> The Chamber does not share this view. As previously noted in its decision of 27 February 2008,<sup>774</sup> such statements, while possibly indicative of State practice and *opinio juris* on questions of customary law, are of minimal relevance to factual determinations by the Chamber.

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<sup>768</sup> *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Israel, Supreme Court, Judgment of 14 December 2006, HCJ 769/02, para 16.

<sup>769</sup> *Ibid.*, quoting the supplement to the summary on behalf of the State Attorney of Israel on 26 January 2004.

<sup>770</sup> *Ibid.*, para 21.

<sup>771</sup> Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, paras 8-9 and 57.

<sup>772</sup> *Ibid.*, para 62.

<sup>773</sup> Boškoski Defence Final Brief, paras 264 and 268; Tarčulovski Defence Final Brief, paras 112-116.

<sup>774</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, “Decision on Boškoski Defence Motion for Admission of Exhibits from the Bar Table – ‘armed conflict’ and related requirements under Article 3 of the Statute”, 27 February 2008, para 6.

192. The Boškoski Defence submits that such statements would not have been produced if an armed conflict had existed in FYROM because had that been the case such acts, such as NLA attacks upon the security forces, would have been considered as legitimate military activities.<sup>775</sup> The Chamber is unable to agree with this view. The UN Security Council has, in its practice, condemned “terrorist acts” by rebel groups even in situations arguably amounting to internal armed conflict.<sup>776</sup> It is also common practice for States and organisations to characterise the acts of non-State groups as “terrorist” notwithstanding the possibility that the acts may have been committed in the context of an armed conflict.<sup>777</sup> Moreover, resolutions by the UN Security Council, and by States or their officials, are made on a political, not legal, basis, and cannot be directly interpreted as evidence of, or a legal interpretation of, a factual state of affairs, despite the fact that such resolutions may have legal consequences. The Chamber also notes that, contrary to the submission of the Boškoski Defence that “the community of states, [...] never took the view that the situation in FYROM amounted to an armed conflict”,<sup>778</sup> language used in Resolution 1345 of 21 March 2001 might suggest that the Security Council did view the situation in FYROM as amounting to armed conflict.<sup>779</sup> For instance, the Security Council recognised that the violence constituted a threat to the security and stability to the wider region, referred to “armed action against the authorities” and exhorted “all parties to act with restraint and full respect for international humanitarian law and human rights”.<sup>780</sup>

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<sup>775</sup> Boškoski Defence Final Brief, para 264.

<sup>776</sup> *E.g.*, Security Council Res. 1465 (2003), 13 February 2003 (condemning the bomb attack in Bogota, Colombia, attributed to FARC which killed a number of people and injured many others and which stated that such acts, as all acts of terrorism, are a threat to international peace and security). *See* Mirko Sossai, "The Internal Conflict in Colombia and the Fight Against Terrorism: UN Security Council Resolution 1465 (2003) and Further Developments," *Journal of International Criminal Justice* 3, 1 (2005), p 253. Colombian courts have not directly addressed the applicability of Common Article 3 or Additional Protocol II to the situation in Colombia, although the Constitutional Court has upheld the constitutionality of the government's ratification of the latter instrument. *See* Corte Constitucional, Sentencia C-225/95, 18 May 1995, in *Gaceta Constitucional*, 1995. Other examples of resolutions of the Security Council condemning terrorist acts allegedly perpetrated by non-State groups in situations that might be considered as armed conflict include: S/RES/1735 (2006) on Afghanistan; S/RES/1618 (2005) on Iraq; S/RES/1544 (2004) on Israel; S/RES/1435 (2002) on Israel; S/RES/1199 (1998) on Kosovo; S/RES/941 (1994) on Bosnia. *See also* A/RES/50/159 (1996) on Burundi.

<sup>777</sup> For instance, a number of non-State armed groups, apparently involved in internal armed conflicts, are listed on States' lists of terrorist organisations. *See e.g.* Council Common Position 2005/847/CFSP of 29 November 2005 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2005/725/CFSP; U.S. Department of State, “Terrorist Exclusion List”; U.S. Department of State, “Foreign Terrorist Organizations”; United Kingdom Home Office, “Proscribed Terrorist Groups” under the Terrorism Act 2000; Canada, “Current Listed Entities” pursuant to subsections 83.05(9) and 83.05(10) of the Criminal Code; Australia, “Listing of Terrorist Organisations” under the Security Legislation Amendment (Terrorism) Act 2002.

<sup>778</sup> Boškoski Defence Final Brief, para 268.

<sup>779</sup> On the interpretation of Security Council resolutions, *see Legal Consequences for States of the Continued Presence of South Africa in Namibia South-West Africa Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971 15, at 53, where the International Court of Justice identified as relevant factors the “language” of the resolution, “the discussions leading to it”, “the Charter provisions invoked” as well as “all circumstances that might assist in determining [its] legal consequences”.

<sup>780</sup> Exhibit 1D230, pp 11-12, paras 1, 4 and 7, respectively.

193. In view of these considerations, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the events in FYROM in 2001. It will treat the indicative factors identified above, together with the systemic consideration of the use of force by the State authorities, as providing useful practical guidance to an evaluation of the intensity criterion in the particular factual circumstances of this case.

(b) Organisation of the armed group

194. The jurisprudence of the Tribunal has established that armed conflict of a non-international character may only arise when there is protracted violence between governmental authorities and *organised* armed groups or between such groups within a State.<sup>781</sup> The required degree of organisation of such an armed group for the purpose of Common Article 3 has not been specifically defined in legal texts or in jurisprudence. Nevertheless, certain elements of this minimal level of organisation have been elaborated by the Tribunal's jurisprudence.

195. In *Tadić*, the Appeals Chamber distinguished between 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*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.”<sup>782</sup> The Chamber observed that “an organised group [...] normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority” and that its members do not act on their own but conform “to the standards prevailing in the group” and are “subject to the authority of the head of the group”.<sup>783</sup> Thus, for an armed group to be considered organised, it would need to have some hierarchical structure and its leadership requires the capacity to exert authority over its members.

196. The issue of the degree of organisation of an armed group was considered by the Trial Chamber in *Limaj* in deciding whether the Kosovo Liberation Army (KLA) was an organised armed group.<sup>784</sup> The Chamber rejected the more stringent tests for organisation submitted by the Defence based upon the “convenient criteria” of the ICRC Commentary and the submissions that an armed group must possess a method of sanctioning breaches of Common Article 3 or fulfil the conditions of Additional Protocol II, instead holding that “*some degree of organisation* by the

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<sup>781</sup> *Tadić* Jurisdiction Decision, para 70.

<sup>782</sup> *Tadić* Appeals Judgement, para 120 (emphasis added).

<sup>783</sup> *Tadić* Appeals Judgement, para 120.

<sup>784</sup> The question of whether the KLA was an organised group had also been considered in the *Milošević* Rule 98bis Decision, at para 23, in which the Trial Chamber held that “there is in fact a sufficient body of evidence pointing to the KLA being an organised military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms”.

parties will suffice to establish the existence of an armed conflict”.<sup>785</sup> The leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented.<sup>786</sup> National case law is also consistent with this minimal requirement of control. For instance, a Belgian military court refused to characterize the situation prevailing in Somalia in 1993 as an armed conflict to which Common Article 3 would apply on the basis that the groups involved were irregular, anarchic armed groups with no responsible command.<sup>787</sup>

197. While the jurisprudence of the Tribunal requires an armed group to have “some degree of organisation”, the warring parties do not necessarily need to be as organised as the armed forces of a State.<sup>788</sup> Neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.<sup>789</sup> Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in “protracted violence” is lower than the degree of organisation required to carry out “sustained and concerted military operations”. In this respect, it is noted that during the drafting of Article 8(2)(f) of the Rome Statute of the International Criminal Court covering “other” serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of Additional Protocol II to the section,<sup>790</sup> and instead accepted a proposal to include in the chapeau the test of “protracted armed

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<sup>785</sup> *Limaj* Trial Judgement, para 89 (emphasis added). As support for its position, the Trial Chamber noted a study submitted by the ICRC as a reference document to the Preparatory Commission for the establishment of the elements of crimes for the ICC, which stated that “The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria; the term ‘armed conflict’ presupposes the existence of hostilities between armed forces *organized to a greater or lesser extent*; there must be the opposition of armed forces and a *certain intensity* of the fighting”. ICRC Working Paper, 29 June 1999. Emphasis added.

<sup>786</sup> ICRC Commentary to Geneva Convention II, p 34 (observing that if a non-State group does not apply Common Article 3, “it will prove that those who regard its actions as mere acts of anarchy or brigandage are right”). See also ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, Report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2 to 6 December 2003, at p 19 (referring to “armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.”)

<sup>787</sup> *Ministre public and Centre pour l'égalité des chances et la lutte contre le racisme v. C... et B...*, Belgium, Military Court, Judgment of 17 December 1997, *Journal des Tribunaux*, 4 April 1998, pp 286-289.

<sup>788</sup> *Orić* Trial Judgement, para 254.

<sup>789</sup> Article 1(1) Additional Protocol II. This provision makes clear that the Protocol “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application”.

<sup>790</sup> See Anthony Cullen, “The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)”, *Journal of Conflict & Security Law*, 12, 3 (2008) pp 419-445 (explaining that delegates were particularly critical of the fact that this definition would exclude those conflicts which did not involve governmental authorities, as well as those

conflict”, as derived from the Appeals Chamber’s decision in *Tadić*.<sup>791</sup> This indicates that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II. This difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts, which mean that “there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol”.<sup>792</sup> By contrast, Common Article 3 reflects basic humanitarian protections,<sup>793</sup> and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.

198. Further guidance as to the degree of organisation required for parties to armed conflicts governed by Common Article 3 may be found in *Haradinaj*, in which the Trial Chamber, after having reviewed the practice of Trial Chambers in interpreting the criterion of organisation, concluded that “an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means”.<sup>794</sup> In order to ascertain whether an armed group might be sufficiently organised, the Trial Chamber examined the indicative factors taken into account by Trial Chambers, “none of which are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled”.<sup>795</sup>

199. Trial Chambers have taken into account a number of factors when assessing the organisation of an armed group. These fall into five broad groups. In the first group are those factors signalling the presence of a command structure, such as the establishment of a general staff or high command,<sup>796</sup> which appoints and gives directions to commanders,<sup>797</sup> disseminates internal regulations,<sup>798</sup> organises the weapons supply,<sup>799</sup> authorises military action,<sup>800</sup> assigns tasks to

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conflicts in which parties did not control territory, and hence would be an excessive limitation on the ICC’s jurisdiction).

<sup>791</sup> A/CONF.183/C.1/L.62 (13 May 1998). This version replaces the word “violence” with “conflict”.

<sup>792</sup> ICRC Commentary on Additional Protocol II, p 1353. Thus, for instance, caring for the wounded and the sick, or detaining prisoners and treating them decently, as provided in Articles 4 “(Fundamental guarantees)” and 5 “(Persons whose liberty has been restricted)”. In *Akayesu*, the ICTR Trial Chamber stated that “responsible command [. . .] entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority.” *Akayesu* Trial Judgement, para 626; see also *Musema* Trial Judgement, para 257.

<sup>793</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports 14 (1986), at para 218 (describing Common Article 3 as reflecting minimal standards applicable in all armed conflicts). See also ICRC Commentary to Geneva Convention I, p 50 (noting that the provision “merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the States in question, long before the Convention was signed”).

<sup>794</sup> *Haradinaj* Trial Judgement, para 60.

<sup>795</sup> *Haradinaj* Trial Judgement, para 60.

<sup>796</sup> *Limaj* Trial Judgement, para 94; *Haradinaj* Trial Judgement, paras 60, 65-68.

<sup>797</sup> *Limaj* Trial Judgement, paras 96, 98, 99.

<sup>798</sup> *Limaj* Trial Judgement, para 98.

<sup>799</sup> *Limaj* Trial Judgement, para 100; *Haradinaj*, para 60.

individuals in the organisation,<sup>801</sup> and issues political statements and communiqués,<sup>802</sup> and which is informed by the operational units of all developments within the unit's area of responsibility.<sup>803</sup> Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group;<sup>804</sup> the assignment of an official spokesperson;<sup>805</sup> the communication through communiqués reporting military actions and operations undertaken by the armed group;<sup>806</sup> the existence of headquarters;<sup>807</sup> internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders;<sup>808</sup> and the dissemination of internal regulations to the soldiers and operational units.<sup>809</sup>

200. Secondly, factors indicating that the group could carry out operations in an organised manner have been considered, such as the group's ability to determine a unified military strategy and to conduct large scale military operations,<sup>810</sup> the capacity to control territory,<sup>811</sup> whether there is territorial division into zones of responsibility<sup>812</sup> in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units;<sup>813</sup> the capacity of operational units to coordinate their actions,<sup>814</sup> and the effective dissemination of written and oral orders and decisions.<sup>815</sup>

201. In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members;<sup>816</sup> the providing of military training;<sup>817</sup> the organised supply of military weapons;<sup>818</sup> the supply and use of uniforms;<sup>819</sup> and the existence of communications equipment for linking headquarters with units or between units.<sup>820</sup>

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<sup>800</sup> *Limaj* Trial Judgement, para 46.

<sup>801</sup> *Limaj* Trial Judgement, para 46.

<sup>802</sup> *Limaj* Trial Judgement, paras 46, 101.

<sup>803</sup> *Limaj* Trial Judgement, para 97.

<sup>804</sup> *Limaj* Trial Judgement, para 98.

<sup>805</sup> *Limaj* Trial Judgement, paras 99, 102.

<sup>806</sup> *Limaj* Trial Judgement, para 103.

<sup>807</sup> *Milošević* Rule 98bis Decision, paras 23-24; *Limaj* Trial Judgement, para 104; *Haradinaj* Trial Judgement, para 65.

<sup>808</sup> *Limaj* Trial Judgement, para 111.

<sup>809</sup> *Limaj* Trial Judgement, para 110.

<sup>810</sup> *Limaj* Trial Judgement, para 129; *Mrkšić* Trial Judgement, paras 410, 417; *Haradinaj* Trial Judgement, para 87.

<sup>811</sup> *Limaj* Trial Judgement, para 158; *Haradinaj* Trial Judgement, paras 70-75.

<sup>812</sup> *Milošević* Rule 98bis Decision, paras 23-24; *Limaj* Trial Judgement, para 95.

<sup>813</sup> *Limaj* Trial Judgement, paras 106, 109.

<sup>814</sup> *Limaj* Trial Judgement, para 108; *Martić* Trial Judgement, paras 135, 344.

<sup>815</sup> *Limaj* Trial Judgement, para 105.

<sup>816</sup> *Limaj* Trial Judgement, para 118; *Haradinaj* Trial Judgement, paras 83-85.

<sup>817</sup> *Čelebici* Trial Judgement, para 118; *Limaj* Trial Judgement, para 119; *Haradinaj* Trial Judgement, para 86.

<sup>818</sup> *Čelebici* Trial Judgement, para 118; *Milošević* Rule 98bis Decision, paras 23-24; *Limaj* Trial Judgement, paras 121-122; *Haradinaj* Trial Judgement, paras 76-82.

202. In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms;<sup>821</sup> proper training;<sup>822</sup> and the existence of internal regulations and whether these are effectively disseminated to members.<sup>823</sup>

203. A fifth group includes those factors indicating that the armed group was able to speak with one voice,<sup>824</sup> such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries;<sup>825</sup> and its ability to negotiate and conclude agreements such as cease fire or peace accords.<sup>826</sup>

204. The Tarčulovski Defence submitted that the “terrorist” nature of the activities of the NLA and alleged violations of international humanitarian law militated against the NLA being considered as a party to an armed conflict because they showed that the “NLA did not have [the] authority to control the forces on the ground”.<sup>827</sup> The Chamber accepts that a high number of international humanitarian law violations by the members of an armed group may be indicative of poor discipline and a lack of hierarchical command in the group in some instances.<sup>828</sup> It is noted that one national court has held that a pattern of violations of rules of international humanitarian law such as terrorist attacks indicates a lack of responsible command under Article 1 of Additional Protocol II, although the court nonetheless found that Common Article 3 applied.<sup>829</sup> However, the Chamber also recognises that some terrorist attacks actually involve a high level of planning and a coordinated command structure for their implementation. In other words, this question is a factual determination to be made on a case-by-case basis.

205. Where members of armed groups engage in acts that are prohibited under international humanitarian law, such as “acts of terrorism”,<sup>830</sup> “acts or threats the primary purpose of which is to

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<sup>819</sup> *Limaj* Trial Judgement, para 123.

<sup>820</sup> *Limaj* Trial Judgement, para 124.

<sup>821</sup> *Limaj* Trial Judgement, paras 113-117; *Haradinaj* Trial Judgement, para 69.

<sup>822</sup> *Limaj* Trial Judgement, para 119.

<sup>823</sup> *Limaj* Trial Judgement, para 110.

<sup>824</sup> *Haradinaj* Trial Judgement, para 88.

<sup>825</sup> *Limaj* Trial Judgement, paras 125-129.

<sup>826</sup> *Halilović* Trial Judgement, para 164; *Hadžihasanović* Trial Judgement, paras 20, 23; *Haradinaj* Trial Judgment, para 88.

<sup>827</sup> Tarčulovski Defence Brief, para 73; paras 70-110.

<sup>828</sup> Studies indicate that most violations of international humanitarian law are committed in circumstances where clear instruction on the standards of this body of law is lacking and there is a lack of military discipline among soldiers. See Daniel Muñoz-Rojas and Jean-Jacques Frésard, ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations* (Geneva: ICRC, October 2004).

<sup>829</sup> *Case of Abimael Guzmán Reinoso and others* Expediente acumulado No 560-03, Peru, Judgment of the National Criminal Chamber (*Sala Pena Nacional*) of 13 October 2006; ILDC 670 (PE 2006), para 470.

<sup>830</sup> Article 33(1) of Geneva Convention IV; Article 4(2)(d) of Additional Protocol II.



spread fear in the civilian population”,<sup>831</sup> hostage-taking,<sup>832</sup> the use of human shields,<sup>833</sup> feigning protected status,<sup>834</sup> attacking historic or religious monuments or buildings<sup>835</sup> or using such objects in support of the military effort,<sup>836</sup> or serious violations of Common Article 3, they are liable to prosecution and punishment. However, so long as the armed group possesses the organisational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict. The Chamber cannot merely infer a lack of organisation of the armed group by reason of the fact that international humanitarian law was frequently violated by its members. In assessing this factor the Chamber needs to examine how the attacks were planned and carried out – that is, for example, whether they were primarily the result of a military strategy ordered by those leading the group or whether they were perpetrated by members deciding to commit attacks of their own accord.

206. In view of the above analysis, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the facts of the events in FYROM in 2001, using the indicative factors identified above as a practical guide to determining whether the criterion of organisation of the parties was met.

## 2. Findings

207. The Indictment alleges the existence of an armed conflict in FYROM between the FYROM Security Forces and the National Liberation Army (NLA), beginning in January 2001 and continuing through until late September 2001.<sup>837</sup> The Chamber will discuss below whether the Prosecution has demonstrated that the acts of violence that occurred in FYROM in the material time reached the level of intensity required by the jurisprudence of the Tribunal and that the NLA

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<sup>831</sup> Article 51(2) of Additional Protocol I; Article 13(2) of Additional Protocol II.

<sup>832</sup> Common Article 3(1)(b) to the Geneva Conventions; Article 34 Geneva Convention IV; Article 4(2)(c) Additional Protocol II. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge: CUP, 2005), Rule 96, pp 334-336.

<sup>833</sup> Article 51(7) of Additional Protocol I. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge: CUP, 2005), Rule 97, p 337; Rome Statute, Article 8(2)(b)(xxiii).

<sup>834</sup> Article 37 Additional Protocol I. This rule has customary character. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge: CUP, 2005), Rule 65, p 224. A similar rule is contained in Article 23(b) of the Hague Regulations annexed to Hague Convention IV of 1907, which contains the prohibition: “To kill or wound treacherously individuals belonging to the hostile nation or army”.

<sup>835</sup> Article 53(a) Additional Protocol I. See also Article 19(1) Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

<sup>836</sup> Article 53(b) Additional Protocol I.

<sup>837</sup> Indictment, para 52.

possessed the characteristics of an organised armed group within the meaning of the *Tadić* test to establish the existence of an armed conflict.

(a) Intensity of the conflict

208. While the existence of an armed conflict in the alleged period, or in any part of it, is disputed and is a most material allegation in this case, it is noted that the evidence concerning the events relied on as evidencing the intensity of the conflict is far from comprehensive, often incomplete, and in most cases, consists of or relies on media and other second-hand reports. Typically, it lacks detail relevant to a consideration of the allegation, such as the numbers of persons engaged in each event, its duration, types of weapons used, identity of the persons engaged or the unit (if any) to which they belonged; facts which are relevant to whether there were, indeed, violent acts by an organised group, *i.e.* the NLA, and not merely disorganised expressions of violence not associated with the NLA.

209. Although the Chamber received in evidence lengthy reports of two expert witnesses on the subject of armed conflict, namely, for the Prosecution, Mr Viktor Bezruchenko<sup>838</sup> and for the Tarčulovski Defence, Dr Blagoja Markovski,<sup>839</sup> and heard their oral testimony, the reliability of the analyses of both expert witnesses was put into question. In the case of the Prosecution expert witness, his involvement with the Prosecution case during the investigative stages<sup>840</sup> may have influenced the objective assessment of the facts relevant to a finding of the existence of armed conflict. The report of Mr Bezruchenko also relied heavily on media reports, which were generally vague and unconfirmed by other sources or on MoI reports that were not independently admitted as evidence. Likewise, the expert witness for the Tarčulovski Defence had been the head of the public relations service and the spokesperson of the army of FYROM during 2001<sup>841</sup> so that his objectivity in assessing the situation was obviously in doubt. The Chamber further observes that Dr Markovski's report and evidence appear to have been based on incorrect legal definitions which led to a substantial part of his report being of little relevance to the issue before the Chamber.

210. Other sources in evidence on the issue of armed conflict included reports of non-governmental and international organisations active in FYROM at the relevant time, such as the International Crisis Group, NATO and the OSCE, as well as internal reports of the MoI. These were generally considered reliable. It was noted that much of the information contained in the

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<sup>838</sup> Exhibit P466.

<sup>839</sup> Exhibit 2D101.

<sup>840</sup> Viktor Bezruchenko, T 6879-6898 (testifying to taking part in interviews with witnesses, including putting direct questions to them), T 6910-6913 (testifying to attending meetings with OTP related to the investigative aspects of the case), T 6913 (testifying to seizing material on behalf of OTP).

<sup>841</sup> Blagoja Markovski, T 10611; *see* Exhibit 2D100.

MoI's "White Book",<sup>842</sup> based on the events of 2001, are repetitions of facts asserted in the MoI report entitled "Information on the NLA activities in the territory of Macedonia",<sup>843</sup> rather than being independently verified.

211. A further problem with the evidence in relation to violent incidents of 2001 is that sources often refer to acts perpetrated by "terrorists", "armed Albanian groups" or "diversion terrorist groups" which may or may not be in reference to acts of the NLA. It has not been possible for the Chamber in all cases to verify whether the act may be properly attributed to the NLA. The Chamber takes into account the fact that certain incidents or clashes may have involved other groups or individuals who for various reasons undertook acts of violence in order to disrupt the peace during this period. With these deficiencies in mind, the Chamber will examine in the evidence of the events in FYROM of 2001 in chronological order.

212. In January 2001, there is evidence of two attacks on police stations carried out by armed Albanian groups in Aračinovo<sup>844</sup> and Tearce<sup>845</sup> in the Tetovo region, respectively. Concerning the attack on Tearce police station, the use of grenades,<sup>846</sup> and automatic weapons as well as a hand rocket-launcher or hand grenades was reported.<sup>847</sup> It is suggested that the NLA had taken responsibility for this attack.<sup>848</sup> The month of February saw an increase in FYROM military presence along the northern border with Kosovo.<sup>849</sup> At least three incidents were reported in the border village of Tanuševci.<sup>850</sup> There is evidence that an armed NLA group kidnapped a team of journalists, later releasing them unharmed.<sup>851</sup> On the same day, an army border patrol<sup>852</sup> came under attack from armed men wearing black camouflage gear and an exchange of fire ensued leaving several "members of the NLA" wounded.<sup>853</sup> The fighting in the Tanuševci area is alleged to have occurred as a result of the NLA's attempt to control access to the Skopska Crna Gora area.<sup>854</sup> There

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<sup>842</sup> Exhibit P45. In this document, incidents described are generally attributed to "terrorist groups" without any additional details.

<sup>843</sup> Exhibit 1D342.

<sup>844</sup> M056, T 2150; Zoran Jovanovski, T 4921. But *see* Exhibits P45, p 109 (*see* N005-7716); 1D342, p 7 (Ministry of Interior Department of Security and Counterintelligence report refers to the attack as having occurred a year earlier, on 11 January 2000).

<sup>845</sup> Exhibit 1D256, p 2; *see also* Risto Galevski, T 3732; Exhibits 1D227 (news report); 1D342, p 7; P45, pp 109, 326; P466, Section 5, p 1.

<sup>846</sup> Exhibit 1D227.

<sup>847</sup> Exhibits 1D342; P466, Section 5, p 1 (citing a news report of the AFP about the incident); Viktor Bezruchenko, T 6997-7002.

<sup>848</sup> Exhibit 1D256, p 3.

<sup>849</sup> Exhibit P466, Section 5, p 2; para 169.

<sup>850</sup> Exhibit P466, Section 5, p 2 and para 169; *see also* Exhibit 1D256, p 5.

<sup>851</sup> Exhibit 1D256, p 4; two witnesses, MoI and Macedonian government documents and Viktor Bezruchenko's report, citing news articles, all gave similar evidence regarding this incident; M084, T 1453; M037, T 818; Exhibits P466, Section 5, p 2; P45, p 109; 1D342, p 7.

<sup>852</sup> M037, T 827; the Macedonian Security Forces had one or two Hermelins patrolling the border area of Tanuševci and Ramno.

<sup>853</sup> Exhibit P466, Section 5, p 2.

<sup>854</sup> Exhibit P466, para 169 (citing an article from the *Jane's Intelligence Review*, Vol. 13, No. 6, pp 18-19).

is evidence that the Skopska Crna Gora road was used by the “terrorist” groups to transport weapons, drugs and people.<sup>855</sup> The casualties as a result of armed clashes and violent incidents throughout the months of January and February resulted in the deaths of at least four police officers.<sup>856</sup>

213. The month of March saw an increase of armed clashes between the FYROM forces, both army and police, and the NLA consisting of sporadic shooting, the use by the NLA of landmines, small scale fire fights, the bombarding by Macedonian forces of NLA positions, attacks with automatic weapons and the NLA firing upon police convoys.<sup>857</sup> There is evidence that conflict continued in the areas around Tanuševci.<sup>858</sup> It was reported that a convoy carrying at the time the newly appointed “State Advisor”, the Accused Ljube Boškoski, was attacked in the village of Brest, in the border area near Tanuševci, on 8 March.<sup>859</sup> The evidence suggests that conflict further spread to Tetovo and the Skopska Crna Gora region.<sup>860</sup> The President issued a number of decisions on the use of the security forces of FYROM, which ordered the Macedonian army to respond to the “armed attacks” of “diversion-terrorist groups”;<sup>861</sup> mobilized the 1<sup>st</sup> and 4<sup>th</sup> Guardist Battalion, engaged the Artillery Battalion of the 1<sup>st</sup> Infantry Brigade, put all the units of the army in full combat readiness;<sup>862</sup> specifically ordered an operation to “destroy the terrorists” in the area of Tetovo in order to regain control over the territory;<sup>863</sup> and another specific operation to “destroy the terrorists” in the area of Kumanovo.<sup>864</sup> Army reserves<sup>865</sup> as well as police reserves were mobilized.<sup>866</sup> Operation Ramno was set up in early March in order to coordinate and direct activities in reaction to the crisis.<sup>867</sup> The UN Security Council on 12 March issued a Presidential Statement condemning the violence by “ethnic Albanian armed extremists” and expressing concern about the threat this caused to the stability and security of FYROM and the wider region.<sup>868</sup>

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<sup>855</sup> M037, T 818.

<sup>856</sup> M056, T 2150; Zoran Jovanovski, T 4921; Exhibit 1D256, p 2.

<sup>857</sup> Exhibits 1D342, pp 7-8; 1D230; 1D343; P45, pp 110-112, 327-329.

<sup>858</sup> Exhibits P466, Section 5, pp 3-5; 1D342, p 7.

<sup>859</sup> Exhibit 1D340.

<sup>860</sup> See generally Exhibit P466, Section 5, pp 3-10; paras 170-172. Tetovo is located approximately 35 kilometres west of Skopje, is the second largest city in Macedonia and has a primarily ethnic Albanian population; see also Exhibit P45, p 110 (reporting that on 8 March, the Department of Internal Affairs Tetovo was attacked with a hand grenade mortar, causing material damage); Exhibits 1D256, p 6; P466, Section 5, p 6 (indicating that from 13 to 17 March, the NLA fought with various Macedonian forces in and around Tetovo).

<sup>861</sup> Exhibits P473.

<sup>862</sup> Exhibit P474.

<sup>863</sup> Exhibits 1D51; P475; 1D79 (under seal).

<sup>864</sup> 1D80 (under seal). See also M051, T 4173

<sup>865</sup> M051, T 4173; Exhibit P474.

<sup>866</sup> Exhibit P393; M084, T1453. Depending on the intensity of the conflict, the strength of the police reserve ranged from 5,101 to 10,211 persons, Exhibit P393.

<sup>867</sup> Exhibit 1D112; Petre Stojanovski, T 9116; Risto Galevski, T 3704 (testifying that all state and national security bodies were obliged to send information relating to the NLA and/or other “terrorist” groups to the headquarters, which was to disseminate the information to the members of the operative action).

<sup>868</sup> Exhibit 1D343.

Concerning clashes in the Tetovo area around mid-March, there is evidence that the NLA used small arms, light mortars and rocket propelled grenades,<sup>869</sup> as well as large calibre weapons, projectiles and hand grenades.<sup>870</sup> As a result of heavy fighting in the Tetovo area,<sup>871</sup> the FYROM government, on 20 March, called for a 24 hour cease fire, and an ultimatum was issued to the NLA to surrender or leave the country;<sup>872</sup> there is evidence that this cease fire was rejected.<sup>873</sup> While Viktor Bezruchenko's report, citing news articles, states that the NLA responded by declaring a unilateral cease fire,<sup>874</sup> the Chamber notes that there is also contrary evidence that the fighting continued, with a number of casualties reported.<sup>875</sup>

214. The Chamber has heard evidence that by around mid-March, conflict had spread to the Kumanovo area,<sup>876</sup> including the villages of Lipkovo and Alasevce.<sup>877</sup> The army launched an offensive on 25 March in the border area of Tetovo<sup>878</sup> as well as engaging the NLA near Lipkovo and the Skopska Crna Gora area between 26 and 31 March.<sup>879</sup> There is evidence that during the offensive on the Tetovo area, the army deployed T-55 tanks, 120 millimetre mortars and helicopter gunships in support of armed troops.<sup>880</sup> As a result of the offensive, the army claimed to have regained control of the Tetovo area.<sup>881</sup> The UN Security Council passed Resolution 1345 on 21 March, condemning the violence and welcoming the involvement of various international bodies in addressing the crisis.<sup>882</sup> International organizations became involved in monitoring, and preventing further violence.<sup>883</sup>

215. In April, five incidents of violence were reported,<sup>884</sup> including an ambush by the NLA near Vejce, in the Tetovo region, on 28 April, in which four police officers from Bitola and four

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<sup>869</sup> Exhibit P466, para 171.

<sup>870</sup> Exhibit P45, pp 110-111.

<sup>871</sup> Exhibits P45, p 111; P466, Section 5, p 7, citing news articles; 18 March, the Macedonian forces bombarded NLA positions with heavy artillery in the Skopska Crna Gora area; 20 March, FYROM soldiers were attacked in the watchtower in Gosince; further north, a FYROM patrol was attacked; heavy fighting in Tetovo continued on 20 March.

<sup>872</sup> Exhibit 1D225; *See also* Exhibit P466, Section 5, p 7, citing news articles.

<sup>873</sup> Exhibit 1D225.

<sup>874</sup> Exhibit P466, Section 5, p 7.

<sup>875</sup> Exhibits P45, pp 111-112; 1D342, pp 7-8.

<sup>876</sup> Exhibits 1D342; P45, pp 111- 112.

<sup>877</sup> Exhibits P45, p 111; P466, Section 5, p 6, citing news articles.

<sup>878</sup> Exhibit 1D256, pp 7-8.

<sup>879</sup> Exhibit P466, Section 5, p 9, citing news articles.

<sup>880</sup> Exhibit P466, Section 5, p 9.

<sup>881</sup> Exhibit 1D256, p 8 (N0025180).

<sup>882</sup> Exhibit 1D230 pp 11-12 (N0009019-N0009020); Viktor Bezruchenko testified that UN Secretary General Kofi Annan, the European Union and the United States adopted the same position as reflected in the Security Council Resolution, while Blagoja Markovski gave evidence that NATO and the OSCE had a similarly negative attitude towards violence in Macedonia. *See* Viktor Bezruchenko, T 7062-7063 and Blagoja Markovski, T 10632. *See also* Exhibit 2D70 (British Ambassador to FYROM condemning "the terrorists").

<sup>883</sup> *See generally* Exhibits 1D343; P45, pp 327-328; specifically *see* Exhibit 1D230.

members of the army were killed.<sup>885</sup> On 29 April, this attack was condemned in a statement released by the Presidency of the European Union.<sup>886</sup> The Chamber received evidence of major protests in Bitola on 31 April – 2 May in reaction to the NLA ambush.<sup>887</sup> At least 16 businesses and a number of homes belonging mainly to ethnic Albanians were damaged, looted or burned. A mosque was also reportedly subjected to attack.<sup>888</sup> As a result of the clashes throughout March and April 2001, at least 10 army members were killed,<sup>889</sup> and a number of policemen,<sup>890</sup> NLA fighters and civilians were injured.<sup>891</sup>

216. In May and June, the events in FYROM took a decidedly more serious turn.<sup>892</sup> There is evidence that on or around 3 May “militants” entered the villages of Vaksince and Slupčane in the Kumanovo region.<sup>893</sup> A mortar attack on an army checkpoint and an ambush of two FYROM soldiers were reported in these villages.<sup>894</sup> Macedonian forces launched offensives at the beginning and in the last week of May to “destroy the terrorist forces” in the Kumanovo region.<sup>895</sup> The offensives were supported by heavy weaponry, including APCs, helicopter gunships, and shelling.<sup>896</sup> The NLA also used a range of weaponry.<sup>897</sup> After the first offensive, the Government was said to be considering a declaration of a state of war;<sup>898</sup> it set the NLA a deadline of 17 May to withdraw or lay down their weapons and indicated a cease fire until that time.<sup>899</sup> Civilians were

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<sup>884</sup> Exhibit P466, Section 5, pp 10-11, citing Macedonian government reports and news articles; these attacks included an attack on an Macedonian Security Forces checkpoint near Tetovo, the blowing up of a vehicle by a mine, the firing on KFOR troops, the kidnap of a police officer and an ambush carried out by the NLA near Velce.

<sup>885</sup> Exhibits P45, pp 112-113; P466, Section 5, p 11, citing Macedonian government reports and news articles; *see also* Nazim Bushi, T 5792-5793; Gzim Ostreni, T 7595-7611.

<sup>886</sup> Exhibit 1D261.

<sup>887</sup> Exhibit P45, pp 112-113; Kristo Zdravkovski, Exhibit 1D125; *See also* 1D338, pp 3-4.

<sup>888</sup> Exhibit P466, pp 12-13; Kristo Zdravkovski, Exhibit 1D125.

<sup>889</sup> Exhibits 1D342, pp 7-8; P45, pp 110-112; P466, Section 5, p 3, 9-11 citing Macedonian government reports and news articles.

<sup>890</sup> Exhibits P45, pp 139-148; P466, Section 5, pp 8-11, citing Macedonian government reports, news articles.

<sup>891</sup> Exhibit P466, Section 5, pp 3-10, FN 23; P45, p 110-111; *see also* Exhibits 1D342; 1D230; 1D343.

<sup>892</sup> Exhibit 2D69.

<sup>893</sup> Exhibit P494, p 3.

<sup>894</sup> Exhibits P45, p 113; 1D342, p 9; P466, Section 5, p 13; a mortar attack was carried out on an army checkpoint in the Kumanovo area; in Vaksince, two soldiers were killed in an ambush and one was captured.

<sup>895</sup> Exhibits 1D50; P494 p 3; P466, Section 5, p 18; *see also* Gzim Ostreni, T 7469-7471, 7835, stating that there was an offensive launched on the NLA’s 113<sup>th</sup> Brigade located in villages of the Kumanovo region.

<sup>896</sup> Exhibit P466, Section 5, pp 13 and 18; *see also* Gzim Ostreni, T 7473 (testifying that up until this time there had been regular exchanges of fire between members of the NLA and the forces of the army and the police, but now the forces of the army and the police were applying artillery weaponry and helicopters); Exhibit P494, p 3.

<sup>897</sup> Exhibit P601; Blagoja Markovski, T 10718; *see also* Gzim Ostreni, T 7839 (discussing the weaponry used by the NLA during the Macedonian Security Forces’ Vaksince operation).

<sup>898</sup> Exhibit P466, Section 5, p 15 (citing media reports).

<sup>899</sup> Exhibit P466, Section 5, p 16 (citing a media report and “Information Received at the HQ Ramno”).

evacuated from the areas of fighting by the ICRC.<sup>900</sup> The NLA continued to attack army and police positions in the north-west of Tetovo throughout the month.<sup>901</sup>

217. On 22 May, the “Prizren Agreement” was signed by Ali Ahmeti as “political representative” of the NLA, Arben Xaferi, President of the DPA and Imer Imeri, President of the PDP (Party for Democratic Prosperity), both ethnic Albanian political parties in FYROM, setting out agreed common action with regard to resolving the concerns of the ethnic Albanian population in FYROM.<sup>902</sup> Further incidents of violence were reported after the second offensive at the end of May, in the villages of Matejče,<sup>903</sup> Opac,<sup>904</sup> in the vicinity of Nikuštak,<sup>905</sup> and near the Kosovo border,<sup>906</sup> as well as a mortar attack on the outskirts of the town of Kumanovo.<sup>907</sup> The NLA is reported to have used mortars and automatic rifles,<sup>908</sup> and to have launched a surface to air missile in an attempt to hit a helicopter belonging to the FYROM security forces<sup>909</sup> in these series of attacks. There is evidence that around this time, Macedonian authorities arrested 66 people, 32 of whom were charged with terrorist offences, 28 with illegal possession of weapons, one with organising an armed rebellion and one with attack on the constitutional order.<sup>910</sup> The offensives and armed clashes throughout the month of May resulted in the deaths of a number of NLA<sup>911</sup> and members of FYROM forces,<sup>912</sup> as well as civilians.<sup>913</sup> On 29 May, the Minister of the Interior, the Accused, Ljube Boškoski, established a working group to gather evidence on war crimes committed in the territory of FYROM.<sup>914</sup>

218. Armed incidents in the Kumanovo area continued from May into the beginning of June and throughout the remainder of the month.<sup>915</sup> Clashes in the Tetovo region also continued.<sup>916</sup> The

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<sup>900</sup> Exhibit P392; *See also* 1D156, p 5; Exhibit P466, Section 5, pp 16-17, the ICRC evacuated a total of 187 civilians from Lojane, Slupčane, Vaksince, Lipkovo and Orizari.

<sup>901</sup> Exhibit P466, Section 5, pp 14; 16; 17.

<sup>902</sup> Exhibit P560.

<sup>903</sup> Exhibits P45, p 115; 1D342 p 10; four civilians were kidnapped and held in the Matejče Mosque.

<sup>904</sup> Exhibits P45, p 114-115; 1D342, pp 9-10.

<sup>905</sup> Exhibits P45, p 115; 1D342, p 10; police positions in the vicinity of Nikuštak came under fire.

<sup>906</sup> Exhibits P45, p 115; 1D342, p 10; a water truck on the road from the village of Banjani to the northwest of Skopje close to the Kosovo border, was blown up by a mine and a Macedonian soldier was killed.

<sup>907</sup> Exhibit P466, Section 5, p 19.

<sup>908</sup> Exhibits P45, pp 114-115; 1D342, pp 9-10; Zoran Jovanovski, T4858, 4926.

<sup>909</sup> Exhibits P45, pp 114-115; 1D342, pp 9-10.

<sup>910</sup> Exhibit P466, Section 5, p 19, citing a “Request for investigation and proposal for undertaking custody measure of the Skopje Prosecuting Attorney’s Officer”, dated 28 November 2001.

<sup>911</sup> Exhibits P466, Section 5, p 13, pp 18-19; P600.

<sup>912</sup> Exhibits P45, pp 114-115; 1D342 p 9-10; Zoran Jovanovski, T4858, 4926.

<sup>913</sup> Exhibit P45, p 149.

<sup>914</sup> Exhibit 1D115.

<sup>915</sup> Exhibit P466, Section 5, pp 20-23. Despite fighting on 1 to 3 June, neither side managed to take control of Matejče. Fighting also occurred in Slupčane and Otlja on 2 June. In Ramno, on 4 June, a vehicle reportedly hit a mine. There were reports of incidents in Slupčane, Orizari, and Matejče, as well as shelling in the vicinity of Vistica. In Slupčane, the NLA claimed to have control of Matejče and to have retaken Vaksince. On 9 June Slupčane and Ozirare were attacked by Macedonian forces using tanks and artillery. *See also* Exhibit 1D342, p 10.

month of June marked a continuation and increase in the frequency of offensive attacks both by the Macedonian forces and the NLA and an expansion in the geographic scope of areas of fighting beyond Tetovo and Kumanovo into Aračinovo, and the surrounding area.<sup>917</sup> As a result of a surge of attacks in the beginning of June, Prime Minister Georgievski threatened on 6 June, again, to seek a parliamentary decision declaring a state of war.<sup>918</sup> Despite an NLA communiqué appealing for a bilateral cease fire to be agreed upon, fighting continued in the Kumanovo region into the second week of June.<sup>919</sup> On 8 June, an estimated number of 250 NLA members<sup>920</sup> entered the village of Aračinovo.<sup>921</sup> This presented a major security threat to the government and put the capital Skopje within mortar range of the NLA.<sup>922</sup> A large number of both ethnic Albanian and Macedonian civilians left Aračinovo and surrounding areas.<sup>923</sup> Meanwhile, incidents in and around Aračinovo continued.<sup>924</sup> It was also reported that the police in that vicinity began to distribute weapons to reservists.<sup>925</sup> Evidence was heard that police in other parts of the country were redeployed to the Kumanovo area around 11 June.<sup>926</sup> Another attempt at a cease fire followed on this day; both sides ceased fire.<sup>927</sup> During this cease fire, the NLA reportedly torched ethnic Macedonian and Serbian

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<sup>916</sup> Exhibit P466, Section 5, pp 21-23, 25 (fighting occurred in the mountains above Tetovo, the area of Selce, Brodec, Šipkovića, and Popova Šapka and there were clashes in Gajre just above Tetovo, The NLA opened fire on the Gradski Stadion area and police station as well as the Kuzman Josifovski barracks. Fighting continued in Tetovo, as well as Vejce, Crven Kamen, Orlovec, and Poroj). See also Exhibits 1D342, pp 10-11; P45, pp 115-117.

<sup>917</sup> Exhibit P466, p 20. See also Exhibit P488, a map obtained from the archive of the ministry of defence of Macedonia, prepared in early June 2001, with blue markings indicating government positions (1<sup>st</sup> Guardist Brigade and the 3<sup>rd</sup> Guardist Battalion in the extreme right) and red marking showing the positions of the NLA. The arrows indicate the axis of advance of the NLA from Kumanovo towards southeast, towards the capital; and from the west towards the capital. Viktor Bezruchenko, T 6543-6544.

<sup>918</sup> Exhibits P494, p 4; P466, Section 5, p 22.

<sup>919</sup> Exhibit P466, Section 5, p 22-23.

<sup>920</sup> Witnesses provided varying estimates as to how many NLA members had entered Aračinovo, but the more reliable sources put the number at around 250. Blagoja Markovski, T 10906 (testifying that 250-260 armed extremists had infiltrated Aračinovo); Exhibit P466, Section 5, p 23 (Ljube Boškoski said there were around 800 well-armed NLA guerrillas in Aračinovo and described the situation as "dramatic"); Exhibit 1D259, which appears to be a report of the US government, mentioned that there were 30 NLA members observed in Aračinovo on 8 June. Viktor Bezruchenko testified that the report was largely consistent with his analysis, although he believed that there were already NLA members inside Aračinovo prior to the sighting of the 30 men. He was also of the view that the "ferocity" of the fighting between the NLA and the Macedonian forces during the 10 days of occupation indicated that a much larger NLA force was present. Viktor Bezruchenko, T 7101-7106. Exhibit 1D162, p 4, a report of the MoI Analytics, Investigation and Information Sector, states that according to some assessments, there were 450-500 NLA members in Aračinovo.

<sup>921</sup> Exhibits 1D342, p 11; P45, p 116; 1D162, p 4.

<sup>922</sup> Exhibit 2D37 (Commander Hoxha of the NLA is quoted in this BBC report as saying: "I will begin to attack the police stations and the airport, the government and the parliament. Everything I can do with our 120-millimetre mortars."); M051, T 4202-4203; Blagoja Markovski, T 10676; Exhibit 1D162, pp 4-5.

<sup>923</sup> Exhibits 1D342, p 11; P45, p 116; P402, p 33.

<sup>924</sup> Exhibits P466, Section 5, p 25 (Macedonian forces' checkpoints in Stracinci and Brnjarci were attacked; a group of ethnic Macedonians had tried to form an armed group for protection and two ethnic Albanians were killed in Aračinovo, one by shooting and one beaten to death by police; in the village of Brnjarci, near Aračinovo, police reportedly shot and killed the driver of a Nissan Jeep, who had driven through a checkpoint and opened fire at policemen. A number of weapons were reported to have been found inside the car; P45, p 117; 1D342, p 12.

<sup>925</sup> Exhibit P466, Section 5, p 25; p 26, on 16 June, the MoI announced that it would recall weapons that had been issued to reservists in the previous week.

<sup>926</sup> Exhibit P468.

<sup>927</sup> The NLA issued a communiqué ordering a day long cease fire; Exhibits P511; P45, p 117; 1D342, p 11.



houses and a church in Matejče.<sup>928</sup> KFOR forces were reported to have detained 19 suspected NLA members and seized 27 anti-personnel mines, 40 machine-guns, six rocket-propelled grenades, 13 mortars, eight pistols and ammunition, uniforms, cash, food and water, and medical supplies.<sup>929</sup>

219. Orders were issued for the joint action of the MoI and the Civil Defence to defend the city of Skopje,<sup>930</sup> and to get in touch with MoI checkpoints and to secure key positions.<sup>931</sup> A Decision was issued to form the Defence Command for the city of Skopje, to which the 12<sup>th</sup> Infantry Brigade, the 16<sup>th</sup> Infantry Brigade, the 1<sup>st</sup> Guardist Brigade and the 8<sup>th</sup> Infantry Brigade would be subordinated.<sup>932</sup> The Brigades were mobilised to full military formation, with the possibility of using unassigned military conscripts.<sup>933</sup> According to Viktor Bezruchenko, this encompassed approximately 8,000 men.<sup>934</sup> A number of Decisions were passed in the first half of June by the President in order to prepare and mobilize various army units, including an order of 8 June, for the full mobilization of the 1<sup>st</sup> and 2<sup>nd</sup> – 1<sup>st</sup>/25<sup>th</sup> Light Infantry Brigade and of 9 June, for the full mobilization of the 128 millimetre *Ogan* Multiple Rocket Launcher Artillery Battalion of the 1<sup>st</sup> Mixed Artillery Regiment of the 1<sup>st</sup> Corps.<sup>935</sup> On 12 June, the Prime Minister issued a decision to form a Special Purpose Unit, composed of army and police units, tasked with halting and combating terrorist actions in Macedonia.<sup>936</sup> On 13 June, the President issued a further order for the mobilization of a number of Brigades and the defence of Ohrid.<sup>937</sup> On 15 June, the President issued a decision to form a temporary category “A” anti-terrorist unit, composed of both army and police units.<sup>938</sup> Yet another cease fire had been declared by the NLA from 14 June until 27 June.<sup>939</sup>

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<sup>928</sup> Exhibits P45, p 11; 1D342, p 11.

<sup>929</sup> Exhibit P466, Section 5, p 24.

<sup>930</sup> Exhibit 1D81, 11 June Order, (anti-aircraft defence, the military air force, fire support and artillery support upon call). See also Marijo Jurišić, T 3343; M-051, T 4146.

<sup>931</sup> Exhibit 1D82; see also Nikolče Grozdanovski, T 10399; 10405; 10458 (the witness testified that his battery was posted in the Ljubanci-Ljuboten area from 12 June 2001. It was deployed with the task of preventing the entry or advancement of the “terrorists” from the region of Matejče, Vaksince and Slupčane, towards Skopje). The General Staff were to commit the units and deploy them to the village of Orman, and to take up a defence zone according to Defence orders (Mitre Despodov, T 2628).

<sup>932</sup> Exhibit 1D99. Marijo Jurišić informed the Chamber that due to the fact that few military conscripts responded to the call-up, the requirements were lowered and persons who would not normally have been called-up were made part of the operation. In addition because the composition of the reserve forces of the units changed every 30 days it was difficult for the commanders to train and maintain effective control of the troops. (T 3345-3346)

<sup>933</sup> Exhibit 1D100.

<sup>934</sup> Viktor Bezruchenko, T 6106.

<sup>935</sup> Exhibit 1D58 (the villages of Rugjinca, Slupčane, Opač, Matejče and Strima); Decision by the President to prepare the units of the army and police in carrying out attacks against the NLA in the wider region of the mountain of Skopska Crna Gora; see also Viktor Bezruchenko, T 6095-6097; Exhibit P476; Exhibits P477; P478 (these orders allowed for the use of unassigned military conscripts). See also Viktor Bezruchenko, T 6102-6103 (testified that the 128 mm *Ogan* multiple rocket launcher is used to destroy enemy manpower in an open terrain).

<sup>936</sup> Exhibit 1D59.

<sup>937</sup> Exhibit P479; Viktor Bezruchenko, T 6110 (testified that the formation of city defence of Ohrid in the south might indicate that the city was considered to be under threat from the NLA).

<sup>938</sup> Exhibit 1D60; Viktor Bezruchenko stated that the decision to create the new group stemmed from the belief that additional forces trained and equipped for asymmetrical warfare were required to make a difference in the combat against the NLA. (Viktor Bezruchenko, T 6532-6533)

220. Despite this cease fire declaration, incidents of armed violence continued throughout the second half of June.<sup>940</sup> While limited attacks were reported to have occurred in the Tetovo, Aračinovo and Kumanovo areas on 19-20 June,<sup>941</sup> the evidence suggests there was an increase of clashes in the following days. On 21 June, a combat order was issued from the General Staff of the Macedonian army to the Special Tasks Unit to undertake operations in the wider area of Skopska Crna Gora.<sup>942</sup> The units were to be given support in the form of transport, combat helicopters and artillery support.<sup>943</sup> On 22 June, Macedonian forces launched an offensive in and around Aračinovo.<sup>944</sup> Helicopter gunships and artillery were reported to have been used.<sup>945</sup> The operation continued into the next day with heavy shelling preparing the way for the Macedonian forces to enter the village of Aračinovo where they engaged in house-to-house fighting.<sup>946</sup> On 24 June, the NLA attacked police checkpoints near Aračinovo.<sup>947</sup> There is evidence that an estimated 250 NLA members in Aračinovo were evacuated under escort of 50 U.S. and French KFOR vehicles to villages in the Lipkovo area by an agreement made on 24 June,<sup>948</sup> a process monitored by NATO and the European Union.<sup>949</sup> Sporadic shooting continued throughout this operation, resulting in the injury of one U.S. Embassy official.<sup>950</sup> Incidents of violence persisted on the following days.<sup>951</sup> A number of cease fires were put in place but proved unsuccessful.<sup>952</sup> Fighting between the police and the NLA resumed on 26 June and thereafter in the Tetovo<sup>953</sup> and Kumanovo areas.<sup>954</sup> On 27 June, the army shelled Nikuštak, where some of the evacuated NLA members were located.<sup>955</sup>

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<sup>939</sup> Exhibit P512.

<sup>940</sup> Exhibits 1D342, pp 12-13; P45, pp 118-119. On 18 June, attacks reportedly occurred in the area of the Jažhince border crossing; three armed persons in black uniforms opened automatic gunfire on police positions and there was also some fire from a house on the border with FRY in an incident which lasted half an hour. On 20 June, it was reported that the NLA attacked the “Rasce” police station and a patrol from that station in Raduša. On 21 June, the NLA, from Šipkovića, attacked the Macedonian forces at Popova Šapka with mortars and automatic weapons. On 23 June, a police patrol in Raduša was ambushed using automatic weapons and self-propelled rocket launchers.

<sup>941</sup> Exhibit P45, p 118; *see also* Exhibit P466, Section 5, p 26.

<sup>942</sup> Exhibit 1D314.

<sup>943</sup> Exhibit 1D314.

<sup>944</sup> Exhibits P45, p 118; 1D342, p 12; 2D101, para 149.

<sup>945</sup> Exhibits P495; P466, Section 5, p 27.

<sup>946</sup> Exhibit P495.

<sup>947</sup> Exhibits P45, p 119; 1D342, p 13; P466, Section 5, p 28.

<sup>948</sup> Exhibit P514 (agreement of 24 June); Gzim Ostreni, T 7495-7497; following an agreement between the NLA commander, Ali Ahmeti and NATO representatives.

<sup>949</sup> Exhibit P466, Section 5, p 28.

<sup>950</sup> Exhibit P466, Section 5, p 28.

<sup>951</sup> Exhibits P45, pp 119-120; 1D342, pp 13-14 (an attack on police checkpoints in Aračinovo; 25 June, an attack on the Macedonian forces stationed on Popova Šapka, using “120 mm calibre grenades”; further attacks reported in Tetovo, against police checkpoints located near the Tetovo Stadium and in the vicinity of the military barracks.

<sup>952</sup> Exhibit P466, Section 5, p 28 (news articles indicate that a limited cease fire was negotiated by NATO representatives but fighting resumed in Aračinovo after a few hours; another cease fire was attempted in the afternoon).

<sup>953</sup> Exhibits P45, pp 120-121; 1D342, p 14 (A police checkpoint, located between the villages of Lavce and Selce, near Tetovo, was attacked, injuring two reserve officers; reports of the NLA entering villages near Tetovo on 30 June, namely Jedoarce, Otunje, Varvara, and Setole, which are all predominantly ethnic Macedonian; it was

221. In beginning of July, there were at least 10 violent incidents throughout the Kumanovo, Tetovo and Raduša regions, consisting mainly of attacks upon army or police positions by “terrorist groups” as was the description used by FYROM official sources, attacks upon patrols or police convoys, and responses to these by the Macedonian forces, including by shelling and use of helicopter gunships.<sup>956</sup> “Terrorist groups” also set up blockades, control points and machine-gun positions.<sup>957</sup> Two army soldiers and one NLA member were killed, and at least eight FYROM soldiers and 28 civilians were wounded during this period.<sup>958</sup>

222. On 5 July, the government established a coordinating body, the Crisis Management Centre, that was responsible for managing measures for the peaceful solution of the crisis,<sup>959</sup> and that closely cooperated with the representatives of the international community such as NATO and the OSCE.<sup>960</sup> NATO representative Peter Feith brokered a cease fire between the NLA and Macedonian government.<sup>961</sup> This cease fire came into effect on 6 July and was observed, except in Raduša, where heavy weapons continued to be used by both sides.<sup>962</sup> The period 6 to 16 July was marked by relatively few violations of the cease fire, but various reports indicate that the number of violations was steadily increasing.<sup>963</sup>

223. On or about 9 July,<sup>964</sup> the Crisis Management Centre noted the “Plan and Programme to overcome the crisis in the Republic of Macedonia”<sup>965</sup> and the “Plan for Use of the Security Forces of RM”<sup>966</sup> which emphasised the need for offensive military operations to force the terrorists to abide by the cease fire, and in order to create “normal, peace-time conditions”. The plan also

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reported that the villagers were robbed and maltreated by the NLA; *see* also Exhibit P466, Section 5, p 30 (civilians threatened by the NLA to get them to leave the area).

<sup>954</sup> Exhibit P45, p 120; 1D342, p 14; P466, Section 5, pp 29-30 (military-police check point at Nikuštak – Umin Dol locality was attacked by the NLA, using projectiles which caused the cornfields to be set on fire; other checkpoints throughout the Tetovo area were attacked; mortars were fired by the NLA at the outskirts of Kumanovo, causing some damage to factories).

<sup>955</sup> Exhibit P466, Section 5, p 29.

<sup>956</sup> Exhibit P45, pp 121-124. *See* also Exhibits 1D342, p 15; P466, Section 5, pp 31-33.

<sup>957</sup> Exhibit P45, pp 123-124.

<sup>958</sup> Exhibits P45, pp 121-122; 1D342, p 15.

<sup>959</sup> Zoran Jovanovski, T 4961.

<sup>960</sup> *See* Exhibit P249; Henry Bolton, T 1604-1607.

<sup>961</sup> Gzim Ostreni, T 7497-7498; Henry Bolton, T 1606-1607. The Ministry of Defence implementing the cease fire ordered the units under its command to respond to fire only in self defence, and specified that anything beyond this would be a violation of the cease fire, Exhibit 1D272, p 1.

<sup>962</sup> Exhibit P466, Section 5, p 33.

<sup>963</sup> Exhibits P45, pp 124-126; P249, pp 12-14.

<sup>964</sup> Zoran Jovanovski testified that the draft plans were adopted by the coordinating body for crisis management on 9 July 2001. (Zoran Jovanovski, T 4965)

<sup>965</sup> Exhibit 1D171. This Plan observed that the threat posed by the NLA affected both FYROM and the wider region, and stated that it would not be resolved merely through “military/police means” and would also require political dialogue, that “appropriate means” should be used to defend FYROM, that a cease fire would be necessary to help resolve the crisis, and then disarmament, and that military operations were required to “isolate” the terrorists.

<sup>966</sup> Exhibits 1D174; 1D177.

incorporated “search and destroy” missions with the emphasis on the need for good intelligence so that operations could be designed to force the terrorists to react (and thereby be destroyed).<sup>967</sup>

224. Despite a new round of peace talks, from 16 July, there was an increase in the number of violations of the cease fire.<sup>968</sup> On 16-17 July, the Council of the European Union adopted a Common Position banning the issuing of visas to “extremists who endanger the peace and security of FYROM and threaten the sovereignty and territorial integrity of FYROM”.<sup>969</sup> From 23 July, the number of attacks upon FYROM forces’ positions significantly rose throughout the Tetovo region<sup>970</sup> and the latter responded by shelling NLA positions.<sup>971</sup> Another cease fire was brokered on 25 July by NATO, which required the NLA to pull back to the frontlines of 6 July.<sup>972</sup> In the estimation of the Crisis Management Centre, on the day of the 5 July cease fire, the NLA “exercised control”<sup>973</sup> over 21 villages<sup>974</sup> while after that cease fire they “exercised control” over 39 villages.<sup>975</sup> According to the Centre, between 5 and 24 July, the NLA had launched 93 attacks on the Macedonian security forces, killing one and injuring 16.<sup>976</sup> The vast majority of cease fire violations consisted of rifle shots, single shots, and attacks on the security forces,<sup>977</sup> 78 per cent of which occurred in the Tetovo area, 16 per cent in the Kumanovo area and 5 per cent in the Skopje area.<sup>978</sup>

225. Sporadic acts of violence continued despite the new cease fire throughout the main areas of fighting.<sup>979</sup> On 29 July, a convoy with the Accused Ljube Boškoski, travelling along the Tetovo-Skopje highway near Karpalak was subject to an “allegedly EAAG attack”.<sup>980</sup> The MoI submitted a request for investigation with request for pre-trial confinement to the investigative judge of Skopje Court 2 against NLA members for endangering territorial integrity, armed rebellion, diversion, as

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<sup>967</sup> The objective of the plan was to “restore the ARM to peacetime locations”. The plan referred to the need to “maintain combat readiness that is appropriate for the needs of a suitable response to subsequent terrorist actions”, as well as intensive preparation of the security forces for “combat against the armed extremist groups”, “security operations”, to prepare for “operations against the armed extremist groups that will not observe the cease fire”, the need to secure freedom of movement for non-military traffic, and the “use of force [...] at the necessarily [*sic*] level in order to prevent [...] minimal collateral damage to the civilian population”. Exhibit 1D177.

<sup>968</sup> Exhibits 1D342, pp 15-16; P45, pp 127-129.

<sup>969</sup> Exhibit 1D237, p 6.

<sup>970</sup> Exhibit P466, Section 5, p 36.

<sup>971</sup> Exhibits P466, Section 5, p 36.

<sup>972</sup> Exhibit P466, Section 5, p 37.

<sup>973</sup> The Crisis Management Centre defines its use of the term “exercising control” as meaning “establishing alternative structures of authority by the terrorists through restraining freedom of movement and maltreatment of citizens by establishing checkpoints; establishing ‘authority bodies’ in the so called ‘liberated’ territories”. Exhibit P249, p 3 (N0015594).

<sup>974</sup> Exhibit P249, pp 1- 2 (N0015592 -N0015593).

<sup>975</sup> Exhibit P249, pp 1- 2 (N0015592 -N0015593).

<sup>976</sup> Exhibit P249, pp 4-11 (N0015595 - N0015598).

<sup>977</sup> Exhibit P249, p 9 (N0015596).

<sup>978</sup> Exhibit P249, p 11 (N0015598).

<sup>979</sup> See Exhibits P45, pp 131-133; P466, Section 5, pp 37-38.

<sup>980</sup> Exhibits 1D370, p 1; P45, p 132.

well as genocide, war crimes against prisoners of war, and war crimes against the civilian population.<sup>981</sup>

226. In July, a large amount of weaponry being smuggled into FYROM was intercepted by KFOR.<sup>982</sup> Further, contrary to some evidence,<sup>983</sup> the Chamber finds that around 62 civilians and three soldiers of the Macedonian forces were kidnapped by the NLA,<sup>984</sup> other human rights violations occurred,<sup>985</sup> and threats were made against the civilian population in the areas around Tetovo.<sup>986</sup>

227. Fighting continued in and around Tetovo.<sup>987</sup> On 1 August, in the area of Gostivar, five men were killed and two wounded in fighting.<sup>988</sup> By 2 August, the NLA reportedly controlled almost all of Tetovo and the Tetovo-Jažince road.<sup>989</sup> By this time, the NLA had been supplied with some modern arms of western European and American origin.<sup>990</sup>

228. Between 5 and 8 August, in particular in the Tetovo region, NLA attacked various positions of the army and the police.<sup>991</sup> A number of incidents involved harassment of ethnic Macedonians, including kidnapping,<sup>992</sup> and forced expulsion.<sup>993</sup> The NLA also began to occupy villages around

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<sup>981</sup> Exhibit P391, Annex H (N0009930).

<sup>982</sup> On one occasion in July, KFOR on the Macedonian border with Kosovo found three arms caches with heavy weaponry and logistical material (Exhibit P466, Section 5, p 34). On at least two other occasions in July, KFOR detained up to 56 suspected NLA fighters and a 55 pack animals carrying weaponry such as anti-tank weapons, rocket launchers, assault rifles, rocket propelled grenades and ammunition (Exhibit P466, Section 5, p 33 and p 37.

<sup>983</sup> Gzim Ostreni, T 7533-7534; 7539; 7563.

<sup>984</sup> Exhibits P45, p 124; P466, Section 5, p 32; *See* also Exhibit 1D16; Exhibits 1D342, p 15; P466, Section 5, p 35 (reporting that three civilians were kidnapped from the village of Otusiste on 18 July by an 11 member NLA group led by "Commander Leka"). An ethnic Macedonian citizen was kidnapped from the village of Lešok on 22 July. *See* also Exhibits P466, Section 5, p 36-37; 1D18, p 2; P568 (reporting that at least 20 persons were abducted by the NLA from the Tetovo region on 23 July). *See* also P45, pp 130-132 (further abductions and incidents of mistreatment were reported throughout the region on 24 July and in subsequent days); Igno Stojkov, T 8986-8987.

<sup>985</sup> An email of the OSCE mission in Skopje to Ambassador Stoudmann dated 10 July refers to the increase of human rights violations by the NLA, including illegal detention of civilians, forced labour, forced conscription, use of juveniles in military operations, intimidations at a NLA checkpoints, ethnic cleansing, wanton destruction and using mines and initiating hostilities in civilian areas. Exhibit 1D16; Henry Bolton, T 1656-1658.

<sup>986</sup> *See* e.g. Exhibits P45, pp 121, 125, 128; 1D342, pp 14, 15; P466, Section 5, pp 33, 36, 37, 38; 1D267; 1D18; Mitre Despodov, T 2634.

<sup>987</sup> Exhibits P45, p 133.

<sup>988</sup> Exhibit P466, Section 5, p 40.

<sup>989</sup> Exhibit P466, Section 5, p 40.

<sup>990</sup> M051, T 4208; Exhibit 2D40, p 7.

<sup>991</sup> Exhibits 2D40; P45, p 134; P466, Section 5, p 40; P166 (on 5 August, an ARM camp where Belgian KFOR soldiers were also stationed was attacked by the NLA, as were army positions on Popova Šapka); Exhibit P466, Section 5, p 41 (on 6 August, FYROM forces' positions throughout the area of Lipkovo were attacked with heavy machine-guns and mortars); Exhibit P45, p 134 (the police station in Ratae was attacked by the NLA) and P466, p 42 (fighting occurred in Šarena Djamija in Tetovo, and around the region, particular reference to Neprošteno, Mala Recica, Kaletu, Stara Čaršija, Drenovac, Gajre, Popova Šapka).

<sup>992</sup> Exhibits 1D19; P466, Section 5, pp 41-42.

<sup>993</sup> Exhibit P466, Section 5, p 42.

Tetovo.<sup>994</sup> In a response by the FYROM forces, “Commander Teli” from the “115<sup>th</sup> Brigade” of the NLA and four other NLA members were killed in Skopje.<sup>995</sup>

229. On 8 August, the NLA ambushed a convoy on the Skopje-Tetovo highway near the village of Grupčin (Karpalak area), using grenade launchers and infantry weapons, and then set it on fire.<sup>996</sup> 10 FYROM soldiers were killed and three wounded in the attack.<sup>997</sup> A Hermelin APC was destroyed and several military vehicles were damaged.<sup>998</sup> NLA positions in the area were shelled by FYROM helicopter gunships in response.<sup>999</sup> In Prilep, from where most of the killed soldiers came,<sup>1000</sup> a group of people demanded weapons in order to attack a neighbouring ethnic Albanian village.<sup>1001</sup> The crowds set fire to a mosque and attacked Muslim-owned stores when this demand for weapons was denied.<sup>1002</sup> The military barracks in Prilep were stormed by the crowd.<sup>1003</sup> In Skopje, during riots, damage was done to property and facilities belonging to ethnic Albanians.<sup>1004</sup>

230. During the same period, the President issued an urgent resolution ordering the army to enter Tetovo “with the aim of preventing its fall into the hands of the terrorist groups of the self-styled NLA and protecting the lives, safety and property of the citizens of Tetovo”,<sup>1005</sup> and a decision in which the army was ordered “to timely and adequately return fire upon the terrorist positions – whenever they attack the security forces of the Republic of Macedonia and when the lives of the security forces are threatened”.<sup>1006</sup>

231. On 9 August, various attacks by the NLA in the Tetovo region and Raduša,<sup>1007</sup> resulted in two members of Macedonian security forces killed and ten injured, and five civilians injured. Macedonian security forces reportedly killed 11 suspected NLA fighters in an attack on a police checkpoint near the village of Galate close to Gostivar.<sup>1008</sup> It was reported that according to claims

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<sup>994</sup> Viktor Bezruchenko, T 6118-6119; Exhibits 2D40; P466, Section 5, p 42.

<sup>995</sup> Blagoja Markovski, T 10856; M051, T 4210-4211; Exhibit P466, Section 5, p 41. According to Peter Bouckaert, on 5 August 2001, the Macedonian police killed five persons at a home in Skopje during what was claimed to be a fierce gun battle with NLA members, T 2952.

<sup>996</sup> Exhibits 2D40; P482; Henry Bolton, T 1620-1625; Viktor Bezruchenko, T 6113-6117; M053, T 1985.

<sup>997</sup> Exhibits P45, p 134; P466, Section 5, p 41.

<sup>998</sup> Exhibit 2D40.

<sup>999</sup> Exhibit P466, Section 5, p 41.

<sup>1000</sup> Blagoja Markovski, T 10880; Exhibit P610.

<sup>1001</sup> Exhibit P466, Section 5, p 41.

<sup>1002</sup> Exhibits P610; P466, Section 5, p 41.

<sup>1003</sup> Blagoja Markovski, T 10880-10881; Exhibit 2D40, p 8.

<sup>1004</sup> Exhibits 1D127; P466, Section 5, p 41; Risto Galevski, T 3745-3746.

<sup>1005</sup> Exhibit P481.

<sup>1006</sup> Exhibit 1D52.

<sup>1007</sup> Exhibit 1D229.1.

<sup>1008</sup> Exhibit P466, Section 5, pp 42-43 (citing BBC reporting from Beta News Agency, Serbia).

of the MoI, the Macedonian forces retook control of the main Tetovo-Jažince road, which had been under the control of the NLA for the past month.<sup>1009</sup>

232. The events of 10-12 August in relation to the Ljuboten incident, including the land mine incident on 10 August near Ljubotenski Bačila, are discussed elsewhere in this Judgement. A number of violent incidents occurred elsewhere in the same period, in particular in Raduša, Gostivar, and in and around Tetovo.<sup>1010</sup> In villages near Skopje, the NLA fired at a FYROM fighter plane, narrowly missing it.<sup>1011</sup> In Raduša, heavy fighting continued and the FYROM security forces sent in helicopter gunships and Sukhoi SU-25 ground attack fighter planes to support the troops.<sup>1012</sup> Army positions in Raduša were also subjected to attack, where one tank was hit and set ablaze.<sup>1013</sup> President Trajkovski sent a letter on 11 August 2001 to Kofi Annan, Secretary-General of the United Nations, and to George Robertson, Secretary-General of NATO, stating that the security forces and the local population in the area of the village Raduša and the village Rogačevo were exposed to continual attack from infantry and artillery fire by the terrorists.<sup>1014</sup> Fighting continued in the Tetovo region.<sup>1015</sup> Firing and the presence of high numbers of NLA members was reported in Nikuštak, Matejče, Slupčane, Aračinovo, and Bojane.<sup>1016</sup> There are reports that the Skopje-Tetovo highway was temporarily closed due to the presence of the NLA. The FYROM Government announced a unilateral cease fire.<sup>1017</sup> Notwithstanding this announcement, it is clear that the operation in Ljuboten was conducted on 12 August involving both police and army forces.

233. On 13 August, the Ohrid Framework Agreement was signed by the main ethnic Macedonian and ethnic Albanian parliamentary parties,<sup>1018</sup> as well as the U.S. and the European Union as guarantors.<sup>1019</sup> The NLA was not a party to the Agreement. This Agreement established a “general, unconditional and open-ended cease fire” based on the principle of finding “peaceful political solutions”.<sup>1020</sup> It also laid down the obligations on parties to facilitate refugee return, rehabilitation and reconstruction and provided fundamental changes in the constitution of Macedonia, including its preamble as well as a number of important provisions related to the use of the Albanian language, educational rights in the native language, proportional representation in the

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<sup>1009</sup> Exhibit P466, Section 5, p 43 (citing BBC reporting from Beta News Agency, Serbia).

<sup>1010</sup> Exhibits P45, p 135; 1D13; P466, Section 5, p 43.

<sup>1011</sup> Exhibit 2D44, p 2.

<sup>1012</sup> Exhibits P466, Section 5, p 44; P605. Blagoja Markovski, T 10782; Risto Galevski, T 3761; Petre Stojanovski, T 9154-9155.

<sup>1013</sup> Exhibit P466, Section 5, p 45.

<sup>1014</sup> Exhibit 2D101, para 267.

<sup>1015</sup> Exhibit P466, Section 5, p 44.

<sup>1016</sup> Exhibits 2D39; P466, Section 5, pp 44-45.

<sup>1017</sup> Exhibit P466, Section 5, p 45.

<sup>1018</sup> Gzim Ostreni, T 7781-7782.

<sup>1019</sup> Exhibit P84; *See also* Exhibits 1D15; 1D345.

<sup>1020</sup> Exhibit P84

bodies of power, as well as the rearrangement of certain functions and administrative powers at the municipal level.<sup>1021</sup> The President sent a letter to the Secretary-General of NATO stating that NLA members would be offered an amnesty, with the exemption of those who had committed crimes under jurisdiction of the ICTY.<sup>1022</sup>

234. On 14 August, the NLA issued a communiqué that it had signed an agreement with NATO to disarm and disband, in accordance with the Ohrid Agreement.<sup>1023</sup> Fourteen persons detained in relation to the Ljuboten operation were taken before the Lower Court Skopje II and charged with the criminal offence of “terrorism”<sup>1024</sup> and decisions were issued to extend custody over the detainees for another 30 days.<sup>1025</sup> On or around 26 September, these terrorism charges were changed to “service in an Enemy Army”, a charge that only applies “during war or during an armed conflict”<sup>1026</sup> on the basis that the accused persons had allegedly “participated in armed conflict as combatants against the Republic of Macedonia” during which they had been involved in “intensive military actions using infantry and weapons and ammunition”.<sup>1027</sup>

235. Clashes continued to occur for a few days subsequent to the signing of the Ohrid Framework Agreement, although these were less intense than those prior to its signing.<sup>1028</sup> A splinter group, the Albanian National Army – ANA, joined some members of the NLA who rejected the terms of the Ohrid Agreement and announced that they would continue with attacks on FYROM forces.<sup>1029</sup>

236. Some days after the Ohrid Agreement was signed, NATO forces arrived to begin a weapons collection operation.<sup>1030</sup> In “Operation Essential Harvest”, involving 3,500 NATO troops,<sup>1031</sup> NATO estimated that the NLA had to hand over 3,333 weapons.<sup>1032</sup> The NATO report states that a total of 3,875 weapons were collected.<sup>1033</sup> In addition, 354 explosives were handed in, as well as 1,045 grenades and mines.<sup>1034</sup> Four APCs/tanks were also collected,<sup>1035</sup> although there is no evidence of these being used by the NLA.

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<sup>1021</sup> Exhibit P84.

<sup>1022</sup> Exhibit 1D193.

<sup>1023</sup> Exhibits P458; Exhibit P466, p 46. *See also* Exhibits 1D339; Nazim Bushi, T 5783; 6040.

<sup>1024</sup> Exhibit P81, p 111. *See supra*, paras 85-95.

<sup>1025</sup> Exhibits P25; P27; P54.049.

<sup>1026</sup> Exhibit P81, p 114.

<sup>1027</sup> Exhibit P46, pp 5 (E.T. 0463-8778); 11(E.T. 0463-8783).

<sup>1028</sup> Exhibits 1D23; P466, Section 5, pp 46-47. *See also* Exhibit 1D268, p 5.

<sup>1029</sup> Exhibits P485, p 19; P466, p 46.

<sup>1030</sup> Exhibit P516.

<sup>1031</sup> Exhibit P516.

<sup>1032</sup> Viktor Bezruchenko, T 7507.

<sup>1033</sup> Exhibit P519; Gzim Ostreni, T 7509; 7588-7589, 7825.

<sup>1034</sup> Exhibit P519.

<sup>1035</sup> Exhibit P519.



237. The number of clashes between the Macedonian forces and the NLA or ANA began to decrease towards the end of August and into September, although sporadic incidents in and around Tetovo, the Kumanovo area, and in Skopje occurred, resulting in the deaths of two ethnic Macedonian security guards, injuries to two civilians,<sup>1036</sup> and the destruction on 21 August of the 14<sup>th</sup> century St Atanasji monastery in Lešok.<sup>1037</sup> Sporadic incidents of violence and clashes continued throughout most of September,<sup>1038</sup> up until 26 September,<sup>1039</sup> when Ali Ahmeti announced that the NLA had officially disbanded, though some NLA or ANA attacks were reported after this date in the area of Tetovo.<sup>1040</sup> On 21 September, the UN Security Council adopted a second resolution on the situation in FYROM, in which it welcomed the signing of the Framework Agreement and called for the full implementation of Resolution 1345.<sup>1041</sup>

238. On 8 October 2001, the President declared that the government would grant an amnesty to all persons who had committed or who were accused of having committed criminal acts related to the conflict in the year 2001 up to 26 September, with the exception of those acts falling within the jurisdiction of the ICTY.<sup>1042</sup> On 26 October, President Boris Trajkovski wrote to the Prosecutor of the ICTY seeking an investigation into serious violations of international humanitarian law committed “in parts of the territory of the Republic of Macedonia, not under the control of the Macedonian security forces”.<sup>1043</sup> The Chamber heard evidence that in November 2001, three members of the MoI were killed in an ambush by the NLA or ANA in Trebos,<sup>1044</sup> and that an exchange of fire took place between a “terrorist group” or “several armed persons” and the army near Ljuboten on 3 December.<sup>1045</sup> In December, the President issued a number of decisions pardoning members of the NLA who were deprived of liberty, including all those involved in the Ljuboten events.<sup>1046</sup> An amnesty law to this effect was issued on 8 March 2002,<sup>1047</sup> which was passed for the “promotion of peace and overcoming the crisis”.<sup>1048</sup> The decree gave a full amnesty

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<sup>1036</sup> Exhibit P466, Section 5, pp 48-49.

<sup>1037</sup> Exhibits 1D268, p 5; 2D105; Henry Bolton, T 1664-1665.

<sup>1038</sup> Members of the NLA or ANA were involved in blocking the passage of five buses of displaced ethnic Macedonians trying to visit their families in the north-east of Tetovo, shootings at FYROM forces’ positions around Lipkovo and Tetovo, three bombs exploded in Skopje, fire was opened from villages near Tetovo towards police posts and FYROM forces’ positions and a convoy of displaced Macedonians in the neighbourhood of Drenovec. There was a clash between the NLA or ANA and the Macedonian forces at the Gosince watchtower in Skopska Crna Gora, and in Matejče, two houses of non-ethnic Albanians were burned down, Exhibit P466, Section 5, pp 50-51.

<sup>1039</sup> Exhibit P466, Section 5, pp 50-51.

<sup>1040</sup> Gzim Ostreni, Exhibit P497, p 12; *See also* Exhibit P466, Section 5, p 51.

<sup>1041</sup> Exhibit 1D346.

<sup>1042</sup> Exhibit P585, p 3 (N001-15917).

<sup>1043</sup> Exhibit P391, Annex A.

<sup>1044</sup> Zoran Jovanovski, T 4913-4914.

<sup>1045</sup> Zoran Jovanovski, T 4987-4988; Exhibits 1D180; 1D139.

<sup>1046</sup> Exhibit P50.045.

<sup>1047</sup> Exhibit P83.

<sup>1048</sup> Exhibit P585.

to all those “persons that have participated in the conflict”, with the exemption of those persons who have committed crimes falling within the jurisdiction of the ICTY.<sup>1049</sup>

239. The Chamber received differing evidence as to the total numbers of casualties as a result of the events of 2001. Varying sources indicate that 15<sup>1050</sup> to 24<sup>1051</sup> police officers and 35<sup>1052</sup> to 43<sup>1053</sup> to 60<sup>1054</sup> members of the army were killed. Gzim Ostreni testified that around 68 members of the NLA had been killed.<sup>1055</sup> The “White Book” documents 10 civilians killed,<sup>1056</sup> while the “Report on the activities of the Ministry of Interior for 2001” states that 16 civilians were killed.<sup>1057</sup> Some 150<sup>1058</sup> to 174<sup>1059</sup> police officers and 119<sup>1060</sup> to 211<sup>1061</sup> to 270<sup>1062</sup> army members were injured, while 61<sup>1063</sup> to 75<sup>1064</sup> to 100<sup>1065</sup> civilians were injured, and 20<sup>1066</sup> to 36<sup>1067</sup> civilians reportedly went missing. Although none of these figures are absolutely reliable, the Chamber takes note of them as a broad indication of the numbers of casualties produced by the events of 2001, the majority of which appeared to occur in June and August.

240. In terms of the numbers of persons displaced by the conflict, by the end of August, the United Nations Refugee Agency estimated that there were around 64,000 Macedonian refugees in Kosovo or southern Serbia, and around 70,000 internally displaced persons in Macedonia, 15,000 of whom were “micro-displaced” very short distances from original residence or sleeping in a location different from day time residence.<sup>1068</sup> Evidence suggests that most of the displacement occurred in late March, around 8 June,<sup>1069</sup> and in late July and early to mid August.<sup>1070</sup> FYROM sources put the

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<sup>1049</sup> Exhibit P83.

<sup>1050</sup> Exhibit P45, p 139.

<sup>1051</sup> Exhibit P393, p 2 (N005-0691-ET-02).

<sup>1052</sup> Exhibit P393, p 2.

<sup>1053</sup> Exhibit P45, pp 140-141.

<sup>1054</sup> Exhibit P45, p 8 (this figure may include the deaths of both army and police members, as reference is to “members of the security forces”).

<sup>1055</sup> Gzim Ostreni, T 7749.

<sup>1056</sup> Exhibit P45, p 148.

<sup>1057</sup> Exhibit P393, p 2.

<sup>1058</sup> Exhibit P45, pp 142-145.

<sup>1059</sup> Exhibit P393, p 2.

<sup>1060</sup> Exhibit P45, pp 146-148.

<sup>1061</sup> Exhibit P393, p 2.

<sup>1062</sup> Exhibit P45, p 8.

<sup>1063</sup> Exhibit P393, p 2.

<sup>1064</sup> Exhibit P45, pp 150-151.

<sup>1065</sup> Exhibit P45, p 8.

<sup>1066</sup> Exhibit P45, p 153.

<sup>1067</sup> Exhibit P45, p 8.

<sup>1068</sup> Exhibit 1D268, p 6.

<sup>1069</sup> Exhibit P466, Section 5, p 24 (citing reports of total movement of 40,000 persons since January, 2,700 registrations with aid agencies on 8 June and 7,000 people fleeing to Kosovo since Aračinovo fell).

<sup>1070</sup> Exhibit P466, Section 5, pp 37; 40-41; 45; 47.

number of Macedonian refugees at 80,000<sup>1071</sup> and the number of internally displaced persons at over 86,000.<sup>1072</sup>

241. According to the International Management Group (“IMG”), which carried out assessments on 13 September 2001 and 19 June 2002, 6,500 houses in the conflict-affected areas were damaged to varying degrees, the majority belonging to ethnic Albanian citizens.<sup>1073</sup> The IMG estimated the cost of basic rehabilitation for all the damaged houses to be around 33 million euros.<sup>1074</sup> The MoI estimated that there had been half a billion euros worth of direct or indirect damage to the economy and over 150 million euros worth of damage as result of arson, destruction and damage to houses and property of citizens, as well as to infrastructure.<sup>1075</sup>

242. The Chamber received varying analyses of whether the NLA exercised control over territory during 2001. This was complicated by the fact that different definitions of “control” were used by various sources.<sup>1076</sup> The “Report on the activities of the Ministry of the Interior of Macedonia” dated April 2002 indicates that the NLA were thought by the MoI to have “temporarily occupied” up to 20 per cent of the north-west part of Macedonia.<sup>1077</sup> While the NLA did not control any of the large towns or cities, the Chamber heard evidence that much of the mountainous areas with predominantly ethnic-Albanian villages were under the “control” of the NLA. The OSCE estimated that 135 to 140 villages were under NLA control, meaning that the police were unable to perform their jobs there.<sup>1078</sup> The degree of control did not reach the level of the exercise of governmental control,<sup>1079</sup> but the Macedonian forces were unable to enter these villages for prolonged periods of time. The Chamber received no satisfactory specific evidence to substantiate the claim that the NLA actually controlled the areas marked on the two maps produced by Gzim Ostreni – the “Operational Directive” of June<sup>1080</sup> and the map of 5 July given to NATO to show the territories

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<sup>1071</sup> Exhibit P393 (N005-0650-ET-01).

<sup>1072</sup> Exhibit P393 (N005-0691-ET-03).

<sup>1073</sup> Exhibit P390, p 3, para 11.

<sup>1074</sup> Exhibit P390, p 3, para 9.

<sup>1075</sup> Exhibit P393 (N005-0650-ET-01).

<sup>1076</sup> It is recalled that there is no specific definition of “control” of territory under the international humanitarian law instruments. The ICTR Trial Chamber in *Akayesu* found that territory in an armed group’s control is usually that which has eluded the control of the government forces. *Akayesu* Trial Judgement, para 626.

<sup>1077</sup> Exhibit P393 (N005-0650\_ET-01). *See also* Exhibit P249 (Report of the Crisis Management Centre), p 3 (N0015594) (defining the term “exercising control” as meaning “establishing alternative structures of authority by the terrorists through restraining freedom of movement and maltreatment of citizens by establishing checkpoints; establishing ‘authority bodies’ in the so called ‘liberated’ territories.”)

<sup>1078</sup> Henry Bolton, T 1608-1609. *See also* Exhibit 1D31, p 1 (OSCE report stating that “ethnic Albanian armed groups” had taken over “considerable areas” of the country).

<sup>1079</sup> Blagoja Markovski, T 10893.

<sup>1080</sup> Exhibit P487. Gzim Ostreni, T 7451-7452; 7458; 7777.

under the control of the NLA at the time of the cease fire<sup>1081</sup> – as opposed to merely being present in those areas.

243. While NLA armed actions had occurred at times during the first months of 2001, particularly in the more mountainous areas in the north west bordering Albania and the Kosovo region, the evidence described above attests to a significant escalation in the intensity of the events in Macedonia from May to mid-August 2001, when the Ohrid Framework Agreement was signed, although it does not always follow from the evidence that the “terrorist groups” involved in all the events were, in fact, the NLA. There was an increase in armed clashes to the point of almost daily incidents of violence, shooting and provocations by the NLA and the standard military response to these by the army or police or both.<sup>1082</sup> There was also a geographical expansion of areas of fighting from Tetovo, to Kumanovo-Lipkovo, around Skopje, and in Gostivar.<sup>1083</sup> Other relevant factors were the distribution and use of heavy weaponry by the Macedonian forces including combat helicopters and tanks;<sup>1084</sup> the growing variety of weapons used by the NLA; the mobilization of the army and units of the police to combat readiness; the calling up of reserve forces; the number of orders for military offensives to “destroy terrorists”;<sup>1085</sup> the besieging of towns, such as Tetovo (particularly in August) and villages such as Aračinovo (in June); the use of cease fires;<sup>1086</sup> the appeals to and intervention of international actors to help resolve the crisis by both sides; the institution of a peace agreement to end active hostilities;<sup>1087</sup> and the large number of displaced persons and refugees caused by the conflict. Some other indicative factors of armed conflict were also present: these included the attention of the UN Security Council which adopted a resolution in March condemning the “terrorist activities” and a further resolution in September welcoming the signing of the Ohrid Agreement;<sup>1088</sup> facilitation by the ICRC for the release of detainees on both sides and to pass messages to families of detainees;<sup>1089</sup> the prosecution by FYROM authorities of persons for service in the aid of an enemy army and other offences only applicable during armed conflict;<sup>1090</sup> and the granting of a broad amnesty to all those who participated in the conflict, with the explicit exception of those accused of war crimes who would come within the jurisdiction of the ICTY.<sup>1091</sup>

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<sup>1081</sup> Exhibit P515. Gzim Ostreni, T 7497-7498.

<sup>1082</sup> *See supra*, paras 216-234.

<sup>1083</sup> *See supra*, paras 216-234.

<sup>1084</sup> *See supra*, paras 214; 216; 219; 220; 222; 232.

<sup>1085</sup> Exhibits 1D79; P475; 1D80; 1D50; 1D58; 1D81.

<sup>1086</sup> *See supra*, paras 213; 216; 219; 220; 222; 232.

<sup>1087</sup> *See supra*, paras 233-234.

<sup>1088</sup> *See supra*, paras 214; 237; *see also* para 213.

<sup>1089</sup> Exhibit P607.

<sup>1090</sup> *See supra*, para 234; *see also* paras 217; 225.

<sup>1091</sup> *See supra*, para 238.

244. The Chamber takes into account that despite this clear escalation there remained relatively few casualties on both sides and to civilians (the highest estimates put the total number of those killed during 2001 as a result of the armed clashes at 168), and material damage to property and housing was of a relatively small scale. These low figures may indicate that, despite the use of heavy weaponry by the FYROM forces, there was generally restraint in the way in which it was used, which could suggest that the operations of the police and army were more directed to law enforcement. However, another factor relevant to the low casualties is that the armed clashes that occurred usually involved small numbers of forces and tended to be localised. While, as indicated earlier, the evidence does not always fully establish whether incidents or clashes were attributable to the “NLA” or to some independently acting groups of individuals, it is noted that in general the tactics favoured by the NLA were of a guerrilla nature in that often they involved a quick strike by a small force making full use of the terrain. Against such tactics there was limited scope for a massive military offensive which would normally produce greater casualties.

245. The evidence received reveals an inconsistency in the legal framework applied to the FYROM security forces in 2001. This may have been a reflection of a certain degree of confusion and even disagreement among different branches of government in regard to how best to deal with the situation.<sup>1092</sup> The Chamber takes into account the Order of the President to the army in early August – the period of the highest intensity during 2001 – to use force only in response to an attack by the “self-styled NLA” or in self defence,<sup>1093</sup> which might indicate that a law enforcement framework was being applied. However, in many regards, the legal and administrative framework that the Government of FYROM applied to its actions in 2001 reflected that which would be applicable during an armed conflict. Every order of the President in this year was issued pursuant to Article 79(2) of the Constitution, meaning that the President was acting in his capacity of Commander in Chief of the armed forces.<sup>1094</sup> The orders repeatedly called for the mobilization of police units, including reservists, which, according to the Official Book of Rules on the way of summoning and engaging members of the reserve ranks of the MoI, may be engaged “in military or emergency state” to protect the security of FYROM or to maintain public peace and order when “it has been disturbed to a greater extent”.<sup>1095</sup> The Law on Internal Affairs proscribes similar

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<sup>1092</sup> See *supra*, at paras 216; 218, the evidence demonstrating that the Prime Minister Georgievski threatened on at least two occasions in 2001 to seek a parliamentary declaration of war. Pursuant to Article 124 of the Constitution of Macedonia (Exhibit P91), a state of war exists when “direct danger of military attack on the Republic is impending, or when the Republic is attacked, or war is declared on it.” This language would seem to restrict the notion of war to those conflicts of an international character, rather than to those emanating from internal threats. See Blagoja Markovski, T 10628. See also Exhibit P464.

<sup>1093</sup> Exhibit 1D52.

<sup>1094</sup> Exhibit P91 (N0018982).

<sup>1095</sup> Exhibit 1D154, Article 2.

conditions under which the MoI may establish special units of the police,<sup>1096</sup> which were established on several occasions in 2001.

246. More significantly, under this law, combat activities cannot be engaged in by MoI employees unless there are “conditions of war situation”,<sup>1097</sup> yet police units were repeatedly called upon in 2001 to engage in such actions. Furthermore, the same law limited the use of a firearm by MoI employees to protect the lives of citizens, self defence purposes, to reject an attack to an object or person that is being secured, or prevent a person escaping who is committing a serious criminal act,<sup>1098</sup> and imposed the obligation to issue a warning prior to using a firearm<sup>1099</sup> as did the Decree on the use of means or coercion and firearms.<sup>1100</sup> Yet the army and police units were instructed on several occasions during 2001 to “destroy terrorists”<sup>1101</sup> and in one combat order, to cause as many losses as possible “in live force”.<sup>1102</sup> The Decree also provided that a firearm could not be used if that would endanger the lives of other citizens,<sup>1103</sup> but plans were made that emphasised the need for security forces to minimise civilian “collateral damage”.<sup>1104</sup> The orders for and actual use of force by the army and police during 2001 routinely went beyond the legal regulations applicable in peacetime during law enforcement operations.

247. A degree of ambiguity in the applicable legal framework may also be found in the way that captured NLA members were treated by the FYROM authorities. Although one order of the Ministry of Defence was issued to treat “military captured persons” in accordance with “the Geneva Convention”,<sup>1105</sup> the Chamber received no evidence that this was applied or whether it was supposed to apply to members of the NLA. The Chamber takes into account the fact that large numbers of male ethnic Albanians suspected of terrorism, including those from Ljuboten, were arrested and charged with criminal offences rather than merely detained without charge for the duration of the conflict as is the more usual practice in armed conflict. However, these persons were often charged with offences that would normally only apply during an armed conflict.<sup>1106</sup>

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<sup>1096</sup> Exhibit P86, Article 11.

<sup>1097</sup> Exhibit P86, Article 22.

<sup>1098</sup> Exhibit P86, Article 35.

<sup>1099</sup> Exhibit P86, Article 37.

<sup>1100</sup> Exhibit P95, Articles 3-6, 11-12, 22.

<sup>1101</sup> Exhibits 1D79; P475; 1D80; 1D50; 1D58; 1D81.

<sup>1102</sup> Exhibit 1D314, p 2.

<sup>1103</sup> Exhibit P95, Article 26.

<sup>1104</sup> Exhibit 1D177, p 3.

<sup>1105</sup> Exhibit 1D314, p 7.

<sup>1106</sup> For example, in May 2001, FYROM authorities arrested 66 people, 32 of whom were charged with terrorist offences, 28 with illegal possession of weapons, one with organizing an armed rebellion and one with attack on the constitutional order. (Exhibit P466, Section 5, p 19, citing a “Request for investigation and proposal for undertaking custody measure of the Skopje Prosecuting Attorney’s Officer”, dated 28 November 2001) In July, the MoI submitted a request for investigation with request for pre-trial confinement to the investigative judge of Skopje Court II against NLA members for endangering territorial integrity, armed rebellion, diversion, as well as genocide, war crimes against prisoners of war, and war crimes against the civilian population. Exhibit P391,

Moreover, the Amnesty Law that was passed on 8 March 2002 that absolved from prosecution all those persons who had “participated in the conflict”, with the exception of those who were accused of crimes within the jurisdiction of the ICTY, is an indication that the situation was one of armed conflict.<sup>1107</sup>

248. A significant consideration in support of a conclusion that the situation in FYROM had reached the level of an armed conflict is the extent of the civil disruption being experienced as evidenced by the extensive displacement of persons from their homes and villages, at least 64,000 of whom became refugees and 70,000 of whom were internally displaced.<sup>1108</sup>

249. The Chamber is satisfied that at the times material to the Indictment, the conflict in FYROM had reached the required level of intensity.

(b) Organisation of the armed group

250. The Indictment alleges that the two major warring parties in the alleged armed conflict were FYROM Security Forces (the army and police units) and the ethnic Albanian National Liberation Army (“NLA”).<sup>1109</sup>

251. The Chamber has heard evidence and is satisfied that the forces involved in Macedonia in 2001 included substantial forces of the Macedonian Army and the Macedonian Ministry of Internal Affairs, *i.e.* the police, which constitute “governmental authorities” within the meaning of the *Tadić* test.

252. The Prosecution has submitted that the evidence shows that the NLA was an organised and hierarchically structured armed group, with a functioning chain of command and logistics, able to engage in an internal armed conflict.<sup>1110</sup> Both Defences have disputed this claim. The Boškoski Defence has argued that the evidence does not establish that the NLA had the necessary organisational, fighting and logistical abilities to be regarded as a party to an armed conflict, in particular, because, it is argued, the NLA did not have the ability of an organised group to plan and carry out sustained and concerted military operations and to guarantee the implementation of

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Annex H (N000-9330). In September, the charges against the 14 persons arrested in Ljuboten on 12 August were changed to “service in an enemy army” or “service in an enemy military”, a charge that only applies “during war or during an armed conflict” (Exhibit P81, p 114 (N000-5518)) on the basis that the accused had allegedly “participated in armed conflict as combatants against the Republic of Macedonia” during which they had been involved in “intensive military actions using infantry and weapons and ammunition” (Exhibit P46, p 5 (E.T. 0463-8778).

<sup>1107</sup> Exhibit P585.

<sup>1108</sup> *See supra*, para 240.

<sup>1109</sup> Indictment, para 52.

<sup>1110</sup> Prosecution Final Brief, para 445.

humanitarian standards.<sup>1111</sup> The Tarčulovski Defence has argued that there is no credible documentary evidence to support the contention that the NLA was an organised armed group, and that the evidence of events on the ground does not indicate the actions of an organised military force.<sup>1112</sup>

253. In order to establish the level of organisation of the NLA the Prosecution has in particular sought to rely on the evidence of four main witnesses, namely Gzim Ostreni, Nazim Bushi, Viktor Bezruchenko and Franz-Josef Hutsch.

254. Gzim Ostreni<sup>1113</sup> had been a member of the Kosovo Liberation Army (KLA) and then of the Kosovo Protection Corps (KPC) from 1999 until 2001. He was actively involved in military activities in Kosovo during this period. In 2000 he had the position of chief of KPC headquarters and held the rank of “General Brigadier”.<sup>1114</sup> In late February 2001 Gzim Ostreni moved to Macedonia and, it is submitted, in March 2001 he joined the NLA as Chief of Staff.<sup>1115</sup> It is Gzim Ostreni’s evidence that at the time the NLA essentially consisted of a number of small groups operating without cooperation which needed direction and control.<sup>1116</sup> This was one of the functions he had to perform as Chief of Staff.<sup>1117</sup> Relying on his military background and his experience in Kosovo he prepared a number of internal regulations for the NLA.<sup>1118</sup> These will be discussed later in this section. He also authored press communiqués issued by the organisation.<sup>1119</sup>

255. The Chamber must assess Gzim Ostreni’s evidence bearing in mind the specific functions he had to perform and the fact that he was one of the most senior leaders of the NLA at the time. He was called to give evidence in support of the allegation that the NLA possessed the characteristics of an organised armed group, while it was his main task to ensure that the various existing armed groups functioned in an organised manner. In these circumstances the Chamber cannot exclude the possibility that Mr Ostreni was influenced in his evidence by his desire to demonstrate that his goals had been achieved. Further, Mr Ostreni authored or, as a member of the NLA General Staff, participated in the production of NLA communiqués issued in 2001 some of which presented an

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<sup>1111</sup> Boškoski Defence Final Brief, para 263.

<sup>1112</sup> Tarčulovski Defence Final Brief, paras 58-59.

<sup>1113</sup> The witness was warned that he was not obliged to answer questions if he believed that this might incriminate him, T 7414-7415.

<sup>1114</sup> Gzim Ostreni, Exhibit P497, para 15; Gzim Ostreni, T 7710.

<sup>1115</sup> Gzim Ostreni, Exhibit P497, paras 3, 15; Gzim Ostreni, T 7525; 7829. He was appointed to this position by an oral decision of Ali Ahmeti, the leader of the NLA. (Gzim Ostreni, T 7524-7525) When joining the NLA he was given the rank of general. (Gzim Ostreni, T 7523)

<sup>1116</sup> Gzim Ostreni, T 7525; 7728-7731; Gzim Ostreni, Exhibit P497, para 20.

<sup>1117</sup> Gzim Ostreni, Exhibit P497, para 20.

<sup>1118</sup> See for example Gzim Ostreni, T 7418; 7420-7423; 7430; 7436-7437.

<sup>1119</sup> Exhibits P505; P508.



exaggerated account of events occurring at the time.<sup>1120</sup> While these communiqués were written with the purpose of improving the morale of the NLA fighters and to give more weight to the organisation in the public eye (and, therefore, information contained in them may have been exaggerated), in the view of the Chamber, Mr Ostreni's involvement in producing press communiqués and in presenting the public image of the organisation appeared also to have influenced his evidence about the NLA given before the Chamber.

256. Mr Ostreni's evidence left the Chamber with a clear impression that his statements in court were often exaggerated or without a solid factual basis. Mr Ostreni estimated that at the peak of the conflict the NLA had approximately 5,000 members<sup>1121</sup> which in the Chamber's finding, does not correspond to the actual situation. He further testified that during the conflict the NLA lost a total of 68 people of whom 38 to 40 were persons in uniform, but was not able to confirm these numbers, nor to clarify whether the persons who died in Ljuboten were included in these numbers.<sup>1122</sup> Further, as will be discussed below, with respect to a number of issues pertaining to the level of organisation of the NLA, the evidence of Gzim Ostreni stood alone or was only supported by the evidence of Nazim Bushi, another NLA leader.

257. The totality of these circumstances persuades the Chamber that Mr Ostreni's evidence presented an exaggerated picture of the state of organisation of the NLA. The Chamber will treat this evidence with much circumspection.

258. Nazim Bushi also gave evidence regarding the organisation of the NLA. He testified that he became a member of the NLA in July 2001 and since then he served as "commander of 114<sup>th</sup> NLA Brigade".<sup>1123</sup> It was his evidence that his main task as commander was to establish the structure of the 114<sup>th</sup> Brigade, starting from battalions down to companies and platoons.<sup>1124</sup> He further testified that the 114<sup>th</sup> Brigade was composed of approximately 1,000 members, that it had two battalions and two special units, Arusha and Teli, named after their respective commanders.<sup>1125</sup> He testified

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<sup>1120</sup> Exhibit P505, a communiqué issued on 5 May 2001 and signed by the General Staff refers to NLA bringing down two military helicopters and to fierce battles whereas other evidence indicates that the intensity of the fighting was not at the level described in the communiqué and that the information about bringing down two helicopters was incorrect. See also Viktor Bezruchenko, T 7227-7232. Exhibit P508, a communiqué issued on 10 May 2001 bearing Gzim Ostreni's signature claims that the "Macedonian State has engaged all the military and police structures it has available in the ongoing combat". The communiqué then lists examples of forces it claimed were involved in the fighting and explains the NLA's view that "a state of emergency has been *de facto* brought into being within Macedonia", that "the complete engagement of the Macedonian armed forces [...] renders official the war with the UÇK" and its view as to why "the combat has developed along the Karadak-Shar line". Other evidence demonstrates that while there was fighting in some of the areas mentioned in the communiqué it is not possible to establish in each case that the fighting occurred or that the individual units were deployed as claimed.

<sup>1121</sup> Gzim Ostreni, T 7740; Gzim Ostreni, Exhibit P497, para 21.

<sup>1122</sup> Gzim Ostreni, T 7744-7745.

<sup>1123</sup> Nazim Bushi, T 5575-5576; 5611.

<sup>1124</sup> Nazim Bushi, T 5587.

<sup>1125</sup> Nazim Bushi, T 5587-5589.

that the Brigade staff was formed in only two or three days, although the process of formation of the Brigade was much more prolonged and indeed continued throughout the conflict.<sup>1126</sup> He denied that the 114<sup>th</sup> Brigade carried out joint operations with the 113<sup>th</sup> NLA Brigade, but accepted that the two Brigades coordinated their activities as far as the front line was concerned,<sup>1127</sup> whereas other evidence indicates the 114<sup>th</sup> Brigade may have been under the command of the 113<sup>th</sup> Brigade while it was in the process of formation.<sup>1128</sup>

259. The Chamber has difficulty fully accepting the evidence of Mr Bushi in many respects. His evidence regarding the number of members in his Brigade is in sharp contrast with other evidence received in the trial,<sup>1129</sup> which the Chamber accepts as more reliable. Despite his role as the “commander of the 114<sup>th</sup> Brigade”, Mr Bushi did not know how much ammunition and arms were required for this Brigade.<sup>1130</sup> He did not know the number of members the NLA had at the time and his estimates varied from 5,000 to 6,000 to 4,000.<sup>1131</sup> He repeatedly stated that his Brigade implemented NLA regulations<sup>1132</sup> (to be discussed in more detail below) whereas Gzim Ostreni testified that these were implemented only gradually according to the needs of each Brigade.<sup>1133</sup> Further, at the material time, the zone of responsibility of the 114<sup>th</sup> Brigade which Nazim Bushi said he commanded included Skopje and its outskirts,<sup>1134</sup> thus also the village of Ljuboten.<sup>1135</sup> Nazim Bushi’s consistent denial of NLA presence and activities in and around Ljuboten during the material time, which contradicts other evidence received in the trial, left the Chamber with the view that Mr Bushi had been prepared to diminish any role that NLA members may have played in these events. Considering all these factors the Chamber will treat the evidence of Nazim Bushi with considerable circumspection.

260. Franz-Josef Hutsch also gave evidence regarding the structure and the level of organisation of the NLA. As explained elsewhere in this Judgement the Chamber has not been able to accept the truth of the evidence of Mr Hutsch that he was in Ljuboten on 12 August 2001 and about his

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<sup>1126</sup> Nazim Bushi, T 5867-5868.

<sup>1127</sup> Nazim Bushi, T 5931-5932.

<sup>1128</sup> Exhibit P493, p 11.

<sup>1129</sup> According to Exhibit P493, p 11(NATO document), the 114<sup>th</sup> Brigade was thought to number some 200 fighters. It was also thought that the 114<sup>th</sup> Brigade may have been under the command of 113<sup>th</sup> Brigade and that its mission might include attacks on strategic military and political targets within the capital in conjunction with the 113<sup>th</sup> Brigade.

<sup>1130</sup> Nazim Bushi, T 5884.

<sup>1131</sup> Nazim Bushi, T 5930.

<sup>1132</sup> Nazim Bushi testified that the NLA Code of Conversation (Exhibit P456) was used to communicate between the 114<sup>th</sup> Brigade and with Gzim Ostreni; T 5584-5585; 5934. He also testified that the NLA adopted all the military standards and procedures when establishing the Brigades, T 6013-6015 and that he implemented disciplinary measures for violations of the standards.

<sup>1133</sup> Gzim Ostreni, T 7438.

<sup>1134</sup> Nazim Bushi, T 5575-5576; 5605.

<sup>1135</sup> Viktor Bezruchenko, T 7241.

purported observations on that and the surrounding days.<sup>1136</sup> In addition to this major issue of credibility, Franz-Josef Hutsch's evidence regarding the structure and organisation of the NLA was based on information provided to him by Gzim Ostreni,<sup>1137</sup> as well as information obtained at press briefings with Ali Ahmeti, information from undisclosed confidential sources, and meeting(s) with Ali Ahmeti and another NLA figure named Dreni Korabu.<sup>1138</sup> In view of these matters the Chamber is unable to rely on this evidence of Mr Hutsch.

261. To establish the level of organisation of the NLA the Prosecution also seeks to rely on the evidence of Viktor Bezruchenko. The Defence challenges the credibility of this witness and submits in particular that he was seriously involved in the investigation and prosecution of this case, that he was chosen as an expert witness for the Prosecution because of his views regarding the situation, and that large parts of his evidence amount to nothing more than advocacy for the Prosecution.<sup>1139</sup> Viktor Bezruchenko, as noted, a military analyst with the Office of the Prosecutor, testified as an expert witness for the Prosecution. He gave evidence that he was tasked by the Prosecution to cover in his report the issues related to the conflict in Macedonia in 2001, among other issues. The Chamber accepts, however, that it is more accurately expressed that he had been asked to prove the existence of an armed conflict in Macedonia in 2001 in relation to a case before this Tribunal.<sup>1140</sup> While simultaneously undertaking that task, he had been present during witness interviews by the Prosecution and in some cases asked questions during these interviews on behalf of the Prosecution.<sup>1141</sup> When, in the process of conducting his analysis, Mr Bezruchenko felt that he needed certain documents, he and colleagues from the Office of the Prosecutor prepared specific requests for assistance directed to the Macedonian authorities.<sup>1142</sup> He was assisted by members of the Prosecution team.<sup>1143</sup> While aspects of Mr Bezruchenko's report and evidence have been of value to the Chamber, because of the matters summarised above, the Chamber is unable to accept with full confidence that Mr Bezruchenko's judgement and conclusions are formed with the independence and impartiality appropriate for an expert witness. The Chamber will, therefore, focus instead on, and examine, the sources Mr Bezruchenko relied on in preparation of his report, as well as the other evidence, to reach its conclusion.

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<sup>1136</sup> See *supra*, para 18.

<sup>1137</sup> Franz-Josef Hutsch, T 2829.

<sup>1138</sup> Franz-Josef Hutsch, T 2822-2826.

<sup>1139</sup> Boškoski Defence Final Brief, paras 760-764.

<sup>1140</sup> *Prosecutor v Boškoski and Tarčulovski*, Case No: IT-04-82-T, "Decision on Prosecution's Urgent Application to Be Relieved from Disclosing Information pursuant to Rule 68(iv)", 30 October 2007, para 2.

<sup>1141</sup> Viktor Bezruchenko, T 6879-6998; 6645; 7146-7149; see also Exhibit P215.

<sup>1142</sup> Viktor Bezruchenko, T 6747-6752.

<sup>1143</sup> Viktor Bezruchenko, T 6750-6752.

262. One of the documents relied on in Mr Bezruchenko's report is Exhibit P485.<sup>1144</sup> The document is unsigned and undated; there is no indication as to which authority prepared it. The document includes charts depicting the structure of the NLA Brigades, lists of weapons allegedly in possession of the NLA, estimates as to the number of members of the NLA Brigades, lists of NLA leaders, lists of locations of alleged NLA training camps, and describes the NLA's goals, strategies, capabilities and weaknesses. There is no indication what the sources relied on in this document were or how the information there was collected. Viktor Bezruchenko believed that this document was prepared by the analytical section of the FYROM military intelligence in September 2001 on the basis of information collected by it.<sup>1145</sup> However, there is nothing in the document that could attribute it to this institution. In the absence of any evidence as to the author, date, and the nature of the information relied on in the document, the Chamber is unable to rely on this document.

263. Reliance was also placed on a document entitled the "Macedonia Briefing Pack".<sup>1146</sup> The part of this document which provides information about the NLA structure and its political and military leadership was prepared by Franz-Josef Hutsch on the basis of information he says he obtained from Gzim Ostreni, Ali Ahmeti, and sources whose identity Mr Hutsch refused to provide.<sup>1147</sup> In light of the view the Chamber has already expressed with respect to the evidence of Franz-Josef Hutsch and its reservations concerning Gzim Ostreni and Ali Ahmeti, the Chamber is unable to rely on this document without independent confirmation of its relevant content.

264. The Prosecution expert's report further cites documents produced by the MoI which are dated and titled, but unsigned.<sup>1148</sup> These reports are not in evidence and little is known as to how they were produced. The Chamber will rely on statements in the Prosecution expert's report based on such documents only to the extent that they are confirmed by other evidence. Further, reliance is placed on a book entitled the "War in Macedonia in 2001" published in FYROM by three high-ranking Macedonian military officials in 2006.<sup>1149</sup> The authors of this book did not give evidence in this trial. Their sources and the methodology used are unknown. Moreover, considering the political context in which this book was written and in particular that its authors were senior

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<sup>1144</sup> Exhibit P485 is cited 37 times in the section of the report (Exhibit P466) dealing with NLA.

<sup>1145</sup> Viktor Bezruchenko, T 6511-6512.

<sup>1146</sup> Exhibit P321 cited four times.

<sup>1147</sup> Franz-Josef Hutsch, T 2817, 2818-2819; 2822-2826; 2827-2830.

<sup>1148</sup> Rule 65ter document 1013 is an unsigned MoI report regarding the "Actions of the So-Called ONA/ONA-NLA in the Skopje Crisis Region" dated August 2001. The document is cited four times. Rule 65ter document 1012 is an unsigned report titled "Cross-Section of information on illegal channels for the entry of members of the so-called NLA from Kosovo and the transport of weapons (Illegal entry into Macedonia of members of the NLA from Kosovo)", dated 23 March. Rule 65ter document 936 is an unsigned report titled "Albanian Terrorists in the Tetovo Region", dated August 2001. The report is cited three times. Rule 65ter document 662 is an MoI document entitled "Information on the weapons held by the self-styled NLA in the RM" dated 23 August 2001. The document is cited seven times.

members of an institution itself heavily involved in the events in FYROM in 2001, the Chamber is unable to accept this document as an accurate and unbiased account in the absence of independent confirmation in other evidence.

265. The Prosecution expert's report also cites a number of unsigned and undated documents, which are not attributed to a specific agency or institution.<sup>1150</sup> These documents have not been admitted into evidence. The Chamber cannot give weight to them or to statements in the report which are supported by such documents.

266. With these considerations in mind the Chamber has reviewed the evidence and has been able to reach the following conclusions.

267. In June 2001 the NLA had approximately 2,000 to 2,500 fighters<sup>1151</sup> with some non-military support (food, lodging, transport, etc.) being provided by another 1,000.<sup>1152</sup> By August 2001 the NLA had four functioning, though not fully manned, Brigades – the 112<sup>th</sup>, 113<sup>th</sup>, 114<sup>th</sup>, and 115<sup>th</sup> – and two (the 111<sup>th</sup> and 116<sup>th</sup> Brigades) still in the process of becoming operational.<sup>1153</sup> The 112<sup>th</sup> Brigade operated in the area of Tetovo, the 113<sup>th</sup> in the Kumanovo area, the 114<sup>th</sup> in the Skopje area, and the 115<sup>th</sup> in the Raduša area.<sup>1154</sup>

268. Ali Ahmeti was the leader of the NLA. Although the manner in which he assumed this position was not fully verified in evidence,<sup>1155</sup> members of the NLA regarded him as the leader,<sup>1156</sup> as did members of the international community, as indicated by the fact that communications to the

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<sup>1149</sup> Exhibit P464. The authors of the book are the former Chief of General Staff Dr Mitre Arsovski and his colleagues Colonel Kuzev and General Damjanovski. Viktor Bezruchenko, T 6545.

<sup>1150</sup> Rule 65<sup>ter</sup> document 741, providing detail regarding the 114<sup>th</sup> Brigade is cited 10 times. The document, which appears to be a segment of a larger document, has no title; is undated and unsigned. Rule 65<sup>ter</sup> document 702, titled "The National Liberation Army in FYROM," is cited nine times. The document is unsigned and undated. Rule 65<sup>ter</sup> documents 663 and 927 are undated, unsigned. Each document is cited once. Rule 65<sup>ter</sup> document 664 (undated and unsigned list of 113<sup>th</sup> Brigade members) is cited five times. Rule 65<sup>ter</sup> document 661 is titled "Intelligence Data on the Ismet Jashari 113<sup>th</sup> Brigade, Links with the Kosovo Defence Corps, and the Involvement in it of Mujahedins from the Republic of Macedonia, Kosovo, Bosnia and the Islamic States". The document is undated and unsigned. It is cited three times. Rule 65<sup>ter</sup> document 669 is an unsigned, unattributed table entitled "Part of the weapons used by the NLA." The document is cited once. Rule 65<sup>ter</sup> document 935 is an unsigned, unattributed document entitled "The connections between the so-called LNA (*sic*) in Macedonia and the LAPMB in Southern Serbia." The document is cited once. Rule 65<sup>ter</sup> document 934, an unsigned, unattributed article entitled "Information about the NMK fund 'The Fatherland is calling' in financing the KLA, LNA (*sic*) and NLPMB" is cited once.

<sup>1151</sup> Exhibit P493, p 3 (NATO UCK/NLA Handbook); Exhibit 1D260 (Jane's Defence Magazine); Exhibit 1D342, p 5 (MoI document). The Chamber does not accept the evidence of Gzim Ostreni and Nazim Bushi that there were between 5,000 and 6,000 NLA members at the height of the conflict. (Gzim Ostreni, Exhibit P497; para 2; Nazim Bushi, T 5928). The Chamber also does not accept Viktor Bezruchenko's evidence that the NLA numerical strength as of May was around 2000 people (Viktor Bezruchenko, T 7094-7095), nor the post-war estimates by FYROM security experts of 8,000 NLA members cited in his report. (Exhibit P466, p 11)

<sup>1152</sup> Exhibit P493, p 3.

<sup>1153</sup> Exhibits P493; 1D342, p 5; *see also* Exhibit P466, para 93; Viktor Bezruchenko, T 6067; Exhibit P321.

<sup>1154</sup> Exhibit P493, pp 3, 11, 21.

<sup>1155</sup> Gzim Ostreni, T 7525; 7807; Exhibit 2D101, para 279; Blagoja Markovski, T 10639-10640.

<sup>1156</sup> Gzim Ostreni, T 7525-7526; 7807; Nazim Bushi, T 5585.

NLA were directed to him<sup>1157</sup> and that negotiations for cease fires, the withdrawal of troops, and disarmament were carried out with Mr Ahmeti.<sup>1158</sup> Gzim Ostreni was NLA's Chief of Staff; he was regarded as the deputy leader of the organisation and the military director.<sup>1159</sup>

269. The NLA issued a number of communiqués during the course of 2001, most of them signed by Ali Ahmeti.<sup>1160</sup> These communiqués were the NLA's primary vehicle of communication to the public. A communiqué of 9 March set out the goals of the group.<sup>1161</sup> One dated 9 May informed about the NLA's structure and hierarchy.<sup>1162</sup> The weaponry and manpower of the NLA was communicated in a communiqué of 10 May signed by Ostreni.<sup>1163</sup> A communiqué was issued proclaiming the appointment of Mevlud Aliu as NLA political representative in Turkey and the Middle East.<sup>1164</sup> There is no further evidence as to the existence of this political representative or any activities undertaken in Turkey or the Middle East, although Gzim Ostreni testified that almost all the countries of Europe as well as the United States had had political representatives appointed to them.<sup>1165</sup> Another communiqué explained that the NLA withdrawal from Aračinovo was voluntary and done on the basis of negotiations with the EU and NATO.<sup>1166</sup> On 14 August, Ahmeti issued a communiqué to inform about the agreement between the NLA and the NATO about the demilitarisation and disarmament of the NLA.<sup>1167</sup>

270. The evidence is inconsistent as to where the NLA headquarters was located. According to some sources, the NLA had a main headquarters in Prizren, Kosovo, which was reported to "lead and coordinate" the other headquarters in Vitina, General Janković, Uroševac, Grijilane, Pristina and in the villages of Stanić, Rushte and Stanevce, all in Kosovo.<sup>1168</sup> Other sources indicate that Šipkovića, which served as its headquarters of the 112<sup>th</sup> Brigade operating in the Tetovo area, could also have been the regional headquarters and the general headquarters.<sup>1169</sup>

271. Nazim Bushi and Gzim Ostreni testified that under the Brigades, there existed battalions, companies, platoons and squads, and that there was a functioning chain of command from Ali

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<sup>1157</sup> Exhibit P323.

<sup>1158</sup> Exhibits P514; P458; Gzim Ostreni, T 7495-7497.

<sup>1159</sup> Exhibits P493, p 34; 1D342, p 5.

<sup>1160</sup> Exhibits P520; P507; P508; P513; P457; P514; P509; P511; P512; P506; P510.

<sup>1161</sup> Exhibit P520.

<sup>1162</sup> Exhibit P507.

<sup>1163</sup> Exhibit P508.

<sup>1164</sup> Exhibit P513.

<sup>1165</sup> Gzim Ostreni, T 7493.

<sup>1166</sup> Exhibit P514.

<sup>1167</sup> Exhibit P458.

<sup>1168</sup> Exhibits 1D162, p 3; 1D342, p 5; P493, p 11; *see also* Gzim Ostreni, T 7713.

<sup>1169</sup> Exhibit P493, p 3. Consistent with this is Nazim Bushi's evidence that the NLA headquarters was in Prizren for a brief time, and then it was moved to Šipkovića. (Nazim Bushi, T 5579)

Ahmeti and Gzim Ostreni down to the individual member of the organisation in the field.<sup>1170</sup> NLA regulations prepared by Gzim Ostreni refer to a complex hierarchical structure, including units from the level of detachment to squad.<sup>1171</sup> While the Chamber cannot accept the entirety of this evidence, the existence of a hierarchical command structure is supported by Exhibit P493, a NATO document containing extracts from the “NLA Handbook”,<sup>1172</sup> which details the structures of Brigades, the NLA political leadership, the NLA military command (general headquarters), and the NLA command and control.<sup>1173</sup> NLA regulations prepared by Gzim Ostreni refer to functions of legal advisors, media and information officers.<sup>1174</sup> The evidence of Nazim Bushi that these officers existed<sup>1175</sup> is partly supported by information contained in an extract from NATO’s “NLA Handbook” that list the names and details of, *inter alia*, NLA information officers, Chief of the Information Services, logistics officers and a political ideologist and fundraiser.<sup>1176</sup>

272. To establish a functioning organisational system the Prosecution seeks to rely on a number of the rules and regulations which are said to have been applicable to the NLA in 2001.<sup>1177</sup> These informal regulations and rules, *inter alia*, purport to establish a chain of command defining the duties of each level;<sup>1178</sup> oblige unit commanders to ensure implementation of the regulations;<sup>1179</sup> lay down provisions on disciplinary measures such as detention or arrest;<sup>1180</sup> inform the Brigade commanders of their duty to respect civilians and civilian property<sup>1181</sup> as well as the obligation to observe the laws of war and international conventions during any military engagements;<sup>1182</sup> and recognise the jurisdiction of the ICTY over any crimes committed by NLA members.<sup>1183</sup> Gzim

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<sup>1170</sup> Nazim Bushi, T 5587-5588; Gzim Ostreni, T 7526. Nazim Bushi also stated that the NLA members were accorded ranks as part of a military setup, according to their rule book, T 5863.

<sup>1171</sup> Exhibits P498; P461. Nazim Bushi testified that his main task as commander was to establish the structure of the 114th Brigade, starting from battalions and down to companies and platoons, to be carried out pursuant to the rules of the NLA. (Nazim Bushi, T 5588)

<sup>1172</sup> This document is undated, but several references to September 2001 suggest that it was produced during NATO “Operation Essential Harvest”. Viktor Bezruchenko, T 7335.

<sup>1173</sup> Exhibit P493, pp 19; 23-30.

<sup>1174</sup> Exhibits P498; P461.

<sup>1175</sup> Nazim Bushi testified that there was a legal advisor who was part of an information centre shared between the 114<sup>th</sup> and 113<sup>th</sup> Brigades (T 5868-5869). He also testified that the officer for morale and information worked in this shared info centre in Karadak and their duty was to collect all the information during the day, go to the terrain, tour the army units and help raise the morale of the soldiers and inform them of what was going on (T 6004-6005). He further testified that Rivdan Bajrami was head of the military hospital (T 5589).

<sup>1176</sup> Exhibit P493, pp 31-36.

<sup>1177</sup> Exhibits P498; P499; P461; P456; P500.

<sup>1178</sup> Exhibit P498.

<sup>1179</sup> Exhibit P498.

<sup>1180</sup> Gzim Ostreni, T 7529; Exhibit P 498.

<sup>1181</sup> Gzim Ostreni, Exhibit P497, para 51.

<sup>1182</sup> Gzim Ostreni, Exhibit P497, para 51; Exhibit P487, p 4; *see also* Nazim Bushi, T 5582.

<sup>1183</sup> Exhibit P507.

Ostreni, who says he created the documents in March, April and May 2001, testified that he did indeed use KLA, KPC, Albanian and SRFY regulations as sources.<sup>1184</sup>

273. A review of these documents leaves the Chamber with the clear impression that some of these rules and regulations were merely copies of documents of the KLA, KPC, or other similar forces and had not been devised for or adapted to the circumstances in FYROM or the needs of the NLA. Even taking into account the fact that both the NLA and the KLA share the same acronym “UÇK” in Albanian,<sup>1185</sup> the Chamber notes that many references to “Kosovo” in the purported documents of the NLA<sup>1186</sup> supports the view that most of these were merely KLA documents with an NLA heading or front cover. For example, a document entitled “Order on the Internal Life of the NLA” provides for rules in the military barracks, dormitories and related issues,<sup>1187</sup> yet the evidence suggests that the NLA did not have such facilities in FYROM. Further, Exhibit P461, a document entitled “Regulation on the Competencies and Work of the Brigade Command”, which describes the functions and responsibilities of Brigade officers, *inter alia*, speaks of the obligation of members to “carry out their duties and obligations in line with the Constitution [...]”, whereas the goals of the NLA, as stated in the Prizren Agreement, included a change to the constitutional order of FYROM.<sup>1188</sup> Another document, entitled “Regulations for the Criteria Involved in the Classification of Information of Importance to the NLA which Must be Kept as Military or State Secret and Methods Entailed in the Preservation thereof” refers to the NLA’s “preparation for the defence and safety of the country”,<sup>1189</sup> whereas it is clear that at the time the NLA was in confrontation with FYROM security forces which by definition had the purpose to guarantee the safety and defence of the country, and the NLA could not be the custodian of “State Secrets”.

274. What remains pertinent to the Chamber is whether or to what extent these rules and regulations had actually been applied in practice by the NLA Brigades. In this regard, Nazim Bushi, the commander of the 114<sup>th</sup> Brigade, testified that he was familiar with the regulations<sup>1190</sup> and Gzim Ostreni testified that the Brigades followed the instructions by the General Staff and the NLA regulations.<sup>1191</sup> Although, apart from this, there is no direct evidence that these rules and regulations were distributed and implemented throughout the NLA units and structures, the NLA

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<sup>1184</sup> Gzim Ostreni, T 7418-7419.

<sup>1185</sup> National Liberation Army in Albanian is *Ushtria Çlirimtare Kombëtare* (acronym UÇK), while Kosovo Liberation Army in Albanian is *Ushtria Çlirimtare e Kosovës* (acronym UÇK).

<sup>1186</sup> Exhibit P461, p 9, item 6, para 4 (referring to the “defence of Kosovo”), p 22, item 12.1, para 7 (referring to the “Kosovo Guard”), p 28, item 13.1, para 11 (referring to the “Kosovo Guard”), p 29, item 14, para 3 (referring to the “War of Liberation in Kosovo”), para 6 (referring to the “Kosovo Guard”); Exhibit P500, p 4, item 17, para 1 (referring to the “defence of Kosovo”).

<sup>1187</sup> Exhibit P499.

<sup>1188</sup> Exhibit P461, p 3; *see also* Exhibits P560; P520; Gzim Ostreni, T 7444.

<sup>1189</sup> Exhibit P500, Article 15.

<sup>1190</sup> Nazim Bushi, T 5591-5598.



has been described in a NATO document prepared in 2001 and accepted as reliable as “a well armed, well disciplined and a highly motivated organisation” with “a highly developed basic level of organisation and discipline” which allows the group to function effectively at the tactical level.<sup>1192</sup> This suggests that while the full content of the purported “Rules” and “Regulations” of the NLA does not credibly reflect the degree of organisation of the NLA, there was nonetheless a basic system of discipline within the NLA that allowed it to function with some effectiveness.

275. Another group of documents, Exhibit P486 (“Development of Mobilization and Personnel and Materiel formation of the General Staff), Exhibit P459 (“Personnel and Materiel Formation of the Brigade”) and Exhibit P460 (“Personnel and Materiel Formation of the Infantry Battalion”), refer to the number of staff involved at various levels (General Staff, Brigade, and battalion, respectively) and are relied on by the Prosecution to establish the existing structure of the NLA. Apart from the evidence of Nazim Bushi and Gzim Ostreni that these charts were sent to the NLA Brigades,<sup>1193</sup> there is no direct evidence to support the assertion that the documents were effectively implemented in the NLA Brigades. However, indicative of the existence of a basic hierarchical structure is the extract from the NATO “NLA Handbook” that describes the size, basic command structure and likely available weapons of each Brigade.<sup>1194</sup>

276. In evidence are some organisational documents produced by the Brigades, or at the level of a battalion or a company,<sup>1195</sup> indicating that weapons and clothing were issued to and received by members of a squad. The Chamber accepts these documents as evidence of some lower-level organisation but not as proof of NLA-wide regulation per se.

277. Indicative of the level of organisation of an armed group is its ability to carry out military operations, including troop movements and logistics.<sup>1196</sup> As discussed earlier, the Chamber is satisfied that there was a marked increase in hostilities from May 2001, for the most part concentrated in the north-western part of the country. Most of these hostile incidents consisted of small-scale attacks on police patrols or police stations. Like other ethnic Albanian armed groups in the formative stages of an insurgency such as the KLA in Kosovo in 1998,<sup>1197</sup> the tactics of the

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<sup>1191</sup> Gzim Ostreni, T 7820.

<sup>1192</sup> Exhibit P493, pp 3; 12.

<sup>1193</sup> Nazim Bushi, T 5591-5594; Gzim Ostreni, T 7432-7434.

<sup>1194</sup> Exhibit P493.

<sup>1195</sup> Exhibit P501 (a chart titled “Soldier’s personal and collective weaponry card”); Exhibit P502 (a chart titled “Soldier’s personal card of clothing and other personal equipment”). Gzim Ostreni, T 7448-7451.

<sup>1196</sup> *See supra*, paras 200-201.

<sup>1197</sup> *See Limaj* Trial Judgement, paras 169-170 (noting that the KLA, being faced with Serbian forces that were superior in number, training and equipment, used effective guerrilla-type tactics, avoiding prolonged fixed engagements with Serb forces); *Haradinaj* Trial Judgement, para 87 (noting the evidence of two witnesses that the KLA in April 1998 was in the early stages of a standard insurgency movement or was a guerrilla army, mainly using hit and run tactics).

NLA consisted in large part of hit and run manoeuvres as demonstrated in the number of ambushes carried out in 2001. More serious or prolonged incidents also occurred, such as the 10 day NLA “occupation” of Aračinovo in June, and heavy clashes in Tetovo and Raduša in August.

278. The Prosecution points to the withdrawal of the 113<sup>th</sup> Brigade of the NLA from Aračinovo on 24 June, agreed upon by Ali Ahmeti with NATO and EU representatives,<sup>1198</sup> as evidence of a Brigade acting pursuant to General Staff orders. It cites in support an NLA communiqué announcing the withdrawal,<sup>1199</sup> which, as discussed elsewhere, occurred on 24 June 2001. Despite some evidence of violent incidents surrounding and consequent to this withdrawal,<sup>1200</sup> the Chamber accepts that the NLA did generally comply with the order from Mr Ahmeti to withdraw pursuant to his negotiations with representatives of NATO and the EU.

279. Evidence received by the Chamber indicates other instances where the NLA operated in an organised and coordinated fashion. A confidential daily report of the Security and Intelligence Sector of the Ministry of Defence dated 9 August 2001 records the information registered from radio links of terrorist groups in the Tetovo region, which includes a command from “Commander ILIR” to “all terrorist points” not to create panic but to wait for orders to be issued and an order “to act upon but not to spend a lot of ammunition”.<sup>1201</sup> The Tarčulovski Defence expert witness partially retracted his earlier statement that each NLA Brigade operated independently,<sup>1202</sup> according to their own plans,<sup>1203</sup> after being shown parts of his Report<sup>1204</sup> which mention the fact that Gzim Ostreni ordered Xhavid Asani, a member of the NLA's 114th Brigade, to carry out attacks on Rastak and Ljubanci on or about 10 August<sup>1205</sup> so confirming that Gzim Ostreni issued orders in the field to his subordinates. This order was also mentioned in a report of the Security and Intelligence Sector of the Ministry of Defence dated 13 August 2001.<sup>1206</sup> The Chamber also observes that on the day of the police operation in Ljuboten on 12 August 2001, word of the operation reached the NLA quickly and NLA forces set out from positions in the mountains above the village to provide assistance to the villagers.<sup>1207</sup> After a mortar and artillery engagement by army forces around Ljuboten in which the NLA incurred casualties, the NLA forces had to withdraw.<sup>1208</sup> This response by the NLA, however, does indicate a capacity for communication and

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<sup>1198</sup> Gzim Ostreni, T 7692; 7822-7824.

<sup>1199</sup> Exhibit P514.

<sup>1200</sup> See *supra*, paras 220-221.

<sup>1201</sup> Exhibit 2D40, p 3.

<sup>1202</sup> Blagoja Markovski, T 10633; 10844.

<sup>1203</sup> Blagoja Markovski, T 10844.

<sup>1204</sup> Exhibit 2D101, paras 371 and 379, footnote 255.

<sup>1205</sup> See also Exhibit 1D85, p 11.

<sup>1206</sup> Exhibit 2D39, p 3.

<sup>1207</sup> Exhibit P466, Section 5, p 45. See also *supra*, para 139.

<sup>1208</sup> Exhibit P466, Section 5, p 45. See also *supra*, para 139.

an ordered, effective military response. Further, while not universal, the NLA achieved substantial compliance with the cease fire following the signing of the Ohrid Agreement on 13 August 2001. NATO collected 3,875 weapons,<sup>1209</sup> which was about 500 more than they expected.<sup>1210</sup>

280. There are also some examples when at least some NLA troops on the ground appeared to fail to act in accordance with the position expressed by the NLA General Staff. On at least three occasions in June 2001 the NLA announced unilaterally, or agreed to, a cease fire; despite this fighting continued.<sup>1211</sup> With Peter Feith, NATO representative occupying the role of negotiator, a cease fire agreement was reached between the NLA and the Macedonian forces on 5 July.<sup>1212</sup> This came into effect on 6 July.<sup>1213</sup> While the period from the 6 to 16 July, immediately following the cease fire, remained calm, with relatively few violations of the cease fire,<sup>1214</sup> from 16 July there was a marked increase in the number of violations.<sup>1215</sup> According to the Crisis Management Centre, a body set up by the FYROM government,<sup>1216</sup> a total of 788 cease fire violations by the NLA were observed between 6 and 24 July.<sup>1217</sup> On 25 July, after heavy fighting in the Tetovo area,<sup>1218</sup> NATO

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<sup>1209</sup> Exhibit P519.

<sup>1210</sup> Viktor Bezruchenko, T 7507.

<sup>1211</sup> On 7 June the NLA made an announcement, via a communiqué that it will refrain from operations from 2400 hours on 7 June, "as long as it is not provoked by the military and police forces of the RM government." (Exhibit P510) According to Viktor Bezruchenko's report, fighting continued in the Kumanovo region on 7 and 8 June (Exhibit P466, Section 5, p 22-23), whilst on 8 June, fighting occurred in the Lipkovo region and there were attacks in Tetovo, including on electrical transmission lines. (Exhibits 1D342, p 11; P45, p 116; P466, Section 5, p 23 (in Popova Shapka and surrounding villages of Gajre and Shipkova)) According to MoI sources, NLA forces entered Aračinovo. (Exhibits 1D342, p 11; P45, p 116; 1D162) The NLA made an announcement, via a communiqué on 11 June, in which they agreed to a 24 hour cease fire, starting at 1400 hours on that day. (Exhibit P511) It was reported that the NLA torched houses and a church in Matejče during the cease fire. (Exhibits P466, Section 5, p 24; P45, p 117; 1D342, p 11) On 12 June, a Macedonian police vehicle was attacked on the Jažince-Tetovo road. This resulted in the wounding of six policemen. (Exhibits 1D342, p 11; P45, p 117) Macedonian Security Forces checkpoints in Stracinci and Brnjarci, near Aračinovo, were attacked and mortar rounds were fired at Macedonian Security Forces barracks in Tetovo. (Exhibit P466, Section 5, p 25) On 14 June, an NLA communiqué welcomed the intervention of NATO Secretary-General and EU representative for Foreign and Security Policy and announced a cease fire from 2400 hours on 14 June until 27 June. (Exhibit P512; Gzim Ostreni, T 7492-7493) On 18 June, attacks reportedly occurred in the area of the Jazhince border crossing. (Exhibits 1D342, p 12; P45, p 118; (three armed persons in black uniforms opened automatic gunfire on police positions and there was also some fire from a house on the border with FRY in an incident which lasted half an hour)) On 19-20 June, limited attacks were reported to have occurred in the Tetovo, Aračinovo and Kumanovo areas. (Exhibits P466, Section 5, p 26; P45, p 118) On 20 June, it was reported that the NLA attacked the "Rasce" police station and a patrol from that station in Raduša, Skopje. (Exhibits P45, p 118; 1D342, p 12) On 21 June, it was reported that the NLA attacked the Macedonian Security Forces at Popova Shapka with mortars and automatic weapons. (Blagoja Markovski, T 10787; Exhibit P45, p 118) Attacks continued in the Tetovo and Kumanovo regions and occurred near Raduša too. (Exhibit P466, Section 5, p 27) On 22 June, the Macedonian Security Forces launched a major offensive against Aračinovo and attacks by both the NLA and Macedonian Security Forces continued in the period thereafter. (Exhibits P45, pp 118-119; 1D342, pp 12-13; 2D101, para 149; P466, Section 5, p 27)

<sup>1212</sup> Gzim Ostreni, T 7497-7498; Exhibit 1D272; Henry Bolton T1606-1607.

<sup>1213</sup> Gzim Ostreni, T 7497-7498; Exhibit 1D272.

<sup>1214</sup> Exhibits P466, Section 5, pp 33-34; P45, pp 124-126; P249, pp 12-14.

<sup>1215</sup> Exhibits 1D342, pp 15-16; P466, pp 34-35; P45, pp 127-129.

<sup>1216</sup> Henry Bolton, T 1604.

<sup>1217</sup> Exhibit P249, pp 4-11; *see also* Risto Galevski, T 3743-3744.

<sup>1218</sup> Exhibits P466, Section 5, pp 36-37; P45, p 130. These exhibits indicate that the NLA attacked a Tetovo police station, the fire department, the army barracks, and a number of checkpoints. Combat continued in Poroj, Tearce, Jegunovce and Neraste. The main border crossing with Kosovo, Blace, was closed to all foreigners. Five civilians

brokered another cease fire.<sup>1219</sup> Nevertheless sporadic outbreaks of violence occurred in all the areas which had already experienced violence.<sup>1220</sup> At the beginning of August heavy fighting continued.<sup>1221</sup> On 9 August, Ali Ahmeti, who was on the ground, issued an oral order for the NLA to withdraw from Tetovo, in order to restore the situation, and allow the cease fire to remain in force. This order to withdraw was reportedly complied with,<sup>1222</sup> nevertheless attacks continued to occur elsewhere in FYROM.<sup>1223</sup> The general effect of this evidence may be seen to be that the NLA had developed some capacity to implement a cease fire, although its results were far from uniform or always successful. The lack of respect for cease fires could also be indicative of the fact that incidents and clashes at times did not involve NLA but instead other groups or individuals who for various reasons wanted to resort to violence and cause disruption. It is to be observed that there were also significant cease fire violations by Macedonian forces in the same period or other prohibited behaviour, even though these were conventionally organised and disciplined army and police forces.<sup>1224</sup>

281. Gzim Ostreni testified that the NLA was able to supply its units with weaponry and equipment, even though this was only achieved with difficulty.<sup>1225</sup> A number of sources pointed to the NLA having financial support from the ethnic Albanian diaspora, which funded the weaponry for most of the Brigades.<sup>1226</sup> Over the course of 2001, KFOR routinely intercepted large amounts of weaponry and other supplies being smuggled over the border into FYROM from Kosovo, as well as hundreds of suspected NLA members.<sup>1227</sup> According to Ostreni, the NLA had a variety of weapons, including “Strela-2M” AA portable missiles (used against aircraft), 60 millimetre, 82 millimetre and 120 millimetre mortars, 12.7 millimetre AA machine guns, sniper rifles, anti-tank rocket launchers, rocket propelled grenades and 120 millimetre howitzers.<sup>1228</sup> Nazim Bushi testified that the 114<sup>th</sup> Brigade in early July and late August had pistols, automatic rifles, sniper rifles, hand-held grenades, “Gulinov” automatic rifles, 12.7 millimetre launchers, cannons, OSA (manual rocket launchers) and 62 millimetre and 82 millimetre mortars.<sup>1229</sup> Other evidence

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were injured during NLA attacks in Neprosteno and Lešok. The Granit barracks and two FYROM security forces’ vehicles were destroyed.

<sup>1219</sup> Exhibit P466, Section 5, p 37.

<sup>1220</sup> See Exhibits P45, pp 131-133; P466, Section 5, pp 37-38.

<sup>1221</sup> See Exhibits P45, p 133-134; P466, Section 5, p 40-42.

<sup>1222</sup> Gzim Ostreni, T 7849-7851.

<sup>1223</sup> Exhibits P466, Section 5, p 43-44; P45, p 135; 1D13.

<sup>1224</sup> Exhibits P249, p 7 (N0015594) (report of the Crisis Management Centre noting that a small number of cease fire violations by the FYROM security forces had been reported in July); 1D19, p 2, para 2 (Human Rights Developments report referring to a lack of discipline observed in both parties to the conflict in the period 1-15 August 2001).

<sup>1225</sup> Gzim Ostreni, T 7820.

<sup>1226</sup> Gzim Ostreni, Exhibit P497, para 47; Exhibits 1D342, p 6; 1D255, p 2, P485, pp 13-14; 1D162, p 11.

<sup>1227</sup> Exhibit P466, Section 5, pp 6; 9; 22-23; 33; 34; 37; 41; 49.

<sup>1228</sup> Gzim Ostreni, Exhibit P497, para 44; see also P485, p 4.

<sup>1229</sup> Nazim Bushi, T 5589.

suggests that the NLA Brigades were armed with sniper rifles equipped with telescopic sights, a number of shotguns and access to belt fed light machine guns, man-portable air defence systems, 120 millimetre mortars, and that most members carried at least one grenade and a side arm or a knife.<sup>1230</sup> The evidence does not disclose the numbers of these weapons. As noted, in Operation Essential Harvest, NATO received 3,875 weapons from NLA members,<sup>1231</sup> but this is likely to be significantly less than the actual numbers possessed by the NLA at the height of the conflict.<sup>1232</sup> An email of the OSCE spill-over mission indicated that the NLA routinely used anti-tank mines and maybe anti-personnel mines.<sup>1233</sup>

282. The NLA lacked large scale transportation means, and largely relied on tractors or transported weapons and supplies by foot or with the use of donkeys and mules over the mountainous terrain.<sup>1234</sup>

283. Evidence suggests that new recruits were to have an inauguration ceremony and be given a military identification card.<sup>1235</sup> The Chamber did not receive specific evidence confirming such a process, although a media report of the Macedonian Radio and Television of 27 May 2001 referred to the commanders of the “terrorists” gathering the “identifications” of others in the group to avoid any legal procedure following the Vaksince operation,<sup>1236</sup> which might suggest that identification cards were distributed. An order was issued in August by the Chief of General Staff according to which proof of membership in the NLA was to be established via a central commission.<sup>1237</sup> There is no evidence suggesting that this was carried out before the NLA was disbanded.

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<sup>1230</sup> Exhibit P493, pp 3; 12; *see also* Exhibit P464, pp 3-4.

<sup>1231</sup> Exhibit P519. This consisted of 4 tanks/APCs, 17 air defence weapons, 161 support weapons, 483 machine guns, and 3210 assault rifles. NATO also collected 397,625 pieces of ammunition, consisting of 1045 mines and grenades, 354 explosives, 606 support weapons ammunition, and 395620 small arms ammunition.

<sup>1232</sup> Exhibit 1D260 (*Jane's Defence Magazine*) estimating that the NLA in August 2001 had 5,000-8,000 rifles, 15,000-39,000 obsolete rifles, 40,000-55,000 hand guns, 150-250 machine guns, 100-200 sniping rifles, 20-50 shoulder-launched surface to air missiles, 200-359 shoulder-launched anti-tank launchers, 100-200 mortars, more than 5,000 landmines, and thousands of grenades.

<sup>1233</sup> Exhibit 1D16, p 1.

<sup>1234</sup> Viktor Bezruchenko, T 7014-7018; 7334-7335; 1D162, p 11; 2D101, paras 336-337. Exhibit P604, a report of the MoI, Department of Security and Counter-Intelligence, entitled “Operational Information Which Suggests Possible Deterioration of the Security Situation in the Republic of Macedonia”, dated 11 March 2001, refers to the commanders of the NLA collecting money and transporting weapons and medicine for the NLA as well as storing or stockpiling food and uniforms for the NLA. According to Blagoja Markovski, the smuggling of illegal weapons from Kosovo into Macedonia was done by a handful of people, using animals for transport, under cover of darkness and fog (T 10860-10862).

<sup>1235</sup> The “Book of Regulations on the Internal Life of the National Liberation Army” states that new recruits would be subject to an inauguration ceremony where they would take a military oath. (Exhibit P498, p 15) According to Gzim Ostreni, new members were registered and given military identification cards with their personal details. (Gzim Ostreni, Exhibit P497, paras 40, 41)

<sup>1236</sup> Exhibit P600, p 2; Blagoja Markovski, T 10716-10717.

<sup>1237</sup> Exhibit P517.

284. NLA recruits underwent short military training.<sup>1238</sup> The evidence suggests that there was a training camp in Brodec.<sup>1239</sup> There is evidence that there were a higher number of training centres in FYROM<sup>1240</sup> which is confirmed by a report of the MoI Department of Analytics, Investigation and Information Sector,<sup>1241</sup> and also a training centre abroad<sup>1242</sup> which is not independently confirmed.

285. Further, there is some evidence that NLA members were required to wear uniforms during operations,<sup>1243</sup> although not all NLA members had a uniform. Some wore black clothing or other civilian clothes.<sup>1244</sup> There is also evidence that some NLA members would wear as a minimum the NLA Brigade insignia,<sup>1245</sup> but this could be impractical especially if civilian clothes were worn.

286. Notwithstanding particular deficiencies in some evidence which have been discussed, there remains a body of evidence, the general effect of which is to demonstrate that while initially, in January and February 2001, the NLA mainly composed individually formed and organised smaller local groups, struggling to secure appropriate weapons and armament and operating substantially on local initiative, there was progressively a development and maturing of the NLA.<sup>1246</sup> It grew significantly in membership, both by local recruitment and as volunteers came from abroad.<sup>1247</sup> The supply and distribution of weapons and armament became progressively more planned and coordinated and the quantity and variety of weaponry more extensive.<sup>1248</sup> Gradually and

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<sup>1238</sup> Exhibit 1D342, p 6; *see also* Gzim Ostreni, T 7827; 7613-7614; Nazim Bushi, T 5582; 5933; Exhibit P493, p 12.

<sup>1239</sup> Exhibit 2D57 is a photograph, which according to the testimony of Gzim Ostreni (T 7827), shows around 20 recruits in the training centre of Brodec during a visit of Ali Ahmeti. They do not wear uniforms yet, although most of them are wearing green T-shirts, nor do they have weapons. A group of 12 men are standing in the middle of the photograph wearing camouflage uniforms. Ostreni testified that as soon as uniforms were available, new recruits were given a uniform and also a weapon. *See also* Gzim Ostreni, Exhibit P497, paras 38, 40.

<sup>1240</sup> Viktor Bezruchenko, T 7292-7295.

<sup>1241</sup> Exhibit 1D162, p 5 (stating that in the second half of July, 3-4 day training camps took place in Lipkovo (for those to be deployed in the Kumanovo area) or in Poroj (for those to be deployed in the Tetovo area)).

<sup>1242</sup> Exhibit P464, p 7 of N006-3017-ET.

<sup>1243</sup> Nazim Bushi, T 5582; Gzim Ostreni, T 7826-7827.

<sup>1244</sup> Exhibits 2D64; 2D65; 2D66; 2D67. The Chamber received evidence that the NLA unit led by Commander Teli unit that was on an observation and reconnaissance mission was not wearing uniforms, but had uniforms with them when they were killed by Macedonian Security Forces forces in Skopje on 5 August 2001. Nazim Bushi testified that during free time, when they were resting, the NLA soldiers were allowed to wear civilian clothing. (Nazim Bushi, T 5943-5945; 5975-5976)

<sup>1245</sup> Exhibit P493.

<sup>1246</sup> *See supra*, paras 267-285.

<sup>1247</sup> Exhibits P493, p 3 (NATO report stating that the likely fighting strength was 2,000 to 2,500, with another possible 1,000 persons providing other support); 1D162, p 3 (report of the Analytics, Investigation and Information Sector of the MoI describing the development in the recruitment of the NLA in 2001).

<sup>1248</sup> Exhibit P466, Section 5, pp 6, 9, 22, 22-24, 33, 34, 37, 41, 49 (reporting numerous incidents involving KFOR intercepting NLA weaponry and other supplies and hundreds of suspected NLA members trying to cross the Kosovo border into FYROM).

progressively, uniforms and other equipment were becoming available.<sup>1249</sup> A limited system of basic training was implemented.<sup>1250</sup>

287. The evidence suggests that other local “terrorist”-type groups existed and functioned, probably independently of the NLA. Indeed the NLA appears to have drawn heavily on these as it formed and developed. It is clear that after the Ohrid agreement a splinter formation continued with armed aggression. The growing strength and organisation of the NLA had the effect, however, of limiting the number and effectiveness of sub-groups, especially by mid-2001. In the Chamber’s finding the NLA was making significant progress toward the full and effective establishment and implementation of a command structure and the organisation of its localised volunteer groups into Brigades and other more subordinate units. This substantial undertaking had not, however, been fully achieved by August 2001.

288. As part of this process, key personnel, such as Ali Ahmeti and Gzim Ostreni, the core of a General Staff and Brigade Commanders had commenced to function at least by May 2001. The nature of the activities of the NLA in the field demonstrates the measures just discussed were having an effect. The geographic spread of combat activities undertaken by the NLA as May progressed, and in the months of June, July and into August indicates not only the effect of growing NLA strength and armament, but also indicates a more planned and coordinated pattern of NLA operations. The overall picture is of an increasing NLA effectiveness at loosening the control of the FYROM government and its forces over what had become more obviously defined geographic areas, mainly in the north-west of the country.

289. It is not the case that the NLA at any time was a modern, well-organised and supplied, trained and disciplined, efficient fighting force. What is established by an extensive body of evidence from FYROM governmental, army and police sources was that the NLA managed to compel the government to commit the full weight of its substantial army including reserves, and the large police force including reserves, to the fight against the NLA. The NLA was seen by the Macedonian government as presenting a most grave threat to the very survival of the country. As contemporary assessments indicate, the country was on the verge of a civil war.<sup>1251</sup> The government sought the assistance of international agencies including NATO and diplomatic activity became intense, diplomatic activity which reached out to and involved the leadership of the NLA in negotiating a peaceful political resolution to the crisis. The NLA was sufficiently organised to enter

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<sup>1249</sup> A number of photos received in evidence show NLA members dressed either in black or green/camouflage T-shirts, often with the NLA insignia, boots, and caps, some holding weapons (Exhibits 2D54; 2D55; 2D56; 2D57; 2D58; 2D59; 2D60; 2D61; 2D62; 2D63; 2D64; 2D65; 2D66).

<sup>1250</sup> Exhibit 2D57 (showing a training camp in Brodec).

into cease fire agreements using international bodies as intermediaries, to negotiate and sign a political agreement setting out its common goals with ethnic Albanian political groups in FYROM, and to enter into and abide by an agreement with NATO to gradually disarm and disband.

290. The Chamber is persuaded that the effect produced by the NLA by August 2001, and the level of military success it had achieved against the much larger and better equipped Macedonian army and police force, together with its ability to speak with one voice, and to recruit and arm its members, are sufficient in the particular circumstances being considered, to demonstrate that the NLA had developed a level of organisation and coordination quite markedly different and more purposed from that which existed in the early months of 2001. This had enabled it to conduct military activities and to achieve a measure of military success over more than three months at a level which could not have been expected at the beginning of 2001. It is also of some relevance that it had come to be recognised and applied by the legal system of FYROM that a state of armed conflict existed at the times relevant to this Indictment. In respect of those times, and earlier, there were judicial investigations, charges, and convictions in respect of offences that depended on the existence of an armed conflict.

291. In the Chamber's finding therefore the evidence demonstrates that the NLA possessed by August 2001 sufficient of the characteristics of an organised armed group or force to satisfy the requirements in this respect of the jurisprudence of the Tribunal set out earlier in this Judgement.

### 3. Conclusion

292. Having regard to the law applicable and the analysis of the evidence made above, the Chamber is persuaded that in August 2001, at the times material to the Indictment, there was a state of internal armed conflict in FYROM involving FYROM security forces, both army and police, and the NLA.

#### **B. Nexus between the alleged acts of the accused and the armed conflict**

293. To meet the general requirements of Article 3 of the Statute, the Prosecution must establish a sufficient link between the alleged acts of the Accused and the armed conflict.<sup>1252</sup> The nexus requirement serves to distinguish war crimes from purely domestic crimes and also prevents purely random or isolated criminal occurrences from being characterized as war crimes. The armed conflict need not have been causal to the commission of the crime charged, but it must have played

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<sup>1251</sup> Exhibit P611 (the FYROM Defence Minister Vlado Buckovski, on 9 August, referring to the events at Karpalak, stated "Let this great tragedy be the beginning of the end of the war, and not the beginning of a bloody civil war.")

<sup>1252</sup> *Tadić* Trial Judgement, paras 572-573.



a substantial part in the perpetrator's ability to commit that crime.<sup>1253</sup> It is not required that the alleged crimes occur at a time and in a place where fighting is actually taking place.<sup>1254</sup> The temporal applicability of the laws and customs of war was described by the Appeals Chamber in the case of internal armed conflicts as lasting until a peaceful settlement is achieved.<sup>1255</sup> This finding is not to be understood as limiting the jurisdiction of the Tribunal to crimes committed until a peace agreement between the parties was achieved; rather, if armed violence continues even after such agreement is reached, an armed conflict may still exist and the laws and customs of war remain applicable. In determining whether a nexus between the acts of the accused and the armed conflict exists, reliance may be placed, *inter alia*, upon whether the perpetrator was a combatant, whether the victim was a non-combatant, whether the victim was a member of the opposing party, whether the act may be said to have served the ultimate goal of a military campaign, and whether the crime is committed as part of or in the context of the perpetrator's official duties.<sup>1256</sup>

294. In view of its findings made elsewhere in this Judgement, the Chamber is satisfied that the requisite nexus between the conduct alleged in the Indictment and the armed conflict has been established. In particular, the Chamber refers to its findings that the perpetrators of the crimes committed in Ljuboten on 12 August 2001 were Macedonian police,<sup>1257</sup> that the operation was led by a member of the police force,<sup>1258</sup> that the army provided artillery and other support for the operation,<sup>1259</sup> and that some victims may have been directly participating in hostilities.<sup>1260</sup> The village of Ljuboten was situated in an area where acts of violence in the conflict were being perpetrated at the relevant time, such as the mine incident in Ljubotenski Bačila on 10 August.<sup>1261</sup> Further, the temporal scope of the armed conflict covered and extended beyond 12 August and the Ohrid Framework Agreement of 13 August to at least the end of that month.

295. It is submitted by the Boškoski Defence that the Accused Ljube Boškoski did not know of the existence of an armed conflict at the relevant time and, therefore, lacked the required *mens rea*

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<sup>1253</sup> *Kunarac* Appeals Judgement, para 58; *Stakić* Appeals Judgement, para 342.

<sup>1254</sup> *Kunarac* Appeals Judgement, para 57. See also *Kunarac* Appeals Judgement, para 64, where the Appeals Chamber held that "the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties." The Appeals Chamber in the *Tadić* case held that international humanitarian law applies "in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place there*". *Tadić* Jurisdiction Decision, para 70 (emphasis added), reaffirmed in *Kordić* Appeals Judgement, para 319.

<sup>1255</sup> *Tadić* Jurisdiction Decision, para 70; *Kunarac* Appeals Judgement, para 57.

<sup>1256</sup> *Kunarac* Appeals Judgement, para 59.

<sup>1257</sup> See *infra*, paras 552-554. See also *supra*, para 42; 60-61.

<sup>1258</sup> See *infra*, para 560. See also *infra*, paras 552-554.

<sup>1259</sup> See *supra*, paras 40; 99.

<sup>1260</sup> See *infra*, para 348. See also *infra*, paras 336; 344-345.

<sup>1261</sup> See *supra*, para 102.

of the offences charged under Article 3 of the Statute.<sup>1262</sup> The Prosecution accepts that they are required to prove that both Accused knew or had reason to know of the factual circumstances of the conflict,<sup>1263</sup> referring in this regard to the discussion in the *Naletilić* Appeals Judgement, and submits that this requirement had been fulfilled.<sup>1264</sup> In that decision the issue arose in the context of Article 2 of the Statute. It was held that the Prosecution was obliged to prove the accused's knowledge of the facts pertinent to the internationality of an armed conflict.<sup>1265</sup> More fully it was said that this requires "at least that [the accused] had knowledge of the factual circumstances" on which Judges later concluded that an armed conflict was an international one.<sup>1266</sup> In this context what is required is that the accused has "sufficient awareness" of those factual circumstances.<sup>1267</sup> This discussion was in the context of Article 2 of the Statute and there is no specific jurisprudence with respect to the *mens rea* requirement of Article 3.<sup>1268</sup> However, because of a remark of the Appeals Chamber in *Naletilić*,<sup>1269</sup> the Chamber records its finding that, by virtue of their official functions and involvement in events, both Accused knew, or had reason to know of, the factual circumstances which demonstrate that there was an armed conflict in FYROM at the relevant time in 2001.

### C. The *Tadić* conditions

296. The jurisprudence of the Tribunal has consistently held that for an offence to fall under the scope of Article 3 of the Statute, four conditions must be met. Firstly, the violation must constitute an infringement of a rule of international humanitarian law. Secondly, the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met. Thirdly, the violation must be serious, that is to say that it must constitute a breach of a rule protecting important values

<sup>1262</sup> Bošković Defence Final Brief, paras 458-470; Closing Arguments, T 11178-11180.

<sup>1263</sup> Closing Arguments, T 11047-11048.

<sup>1264</sup> In particular, it is submitted that in the case of Bošković this requirement has been fulfilled by reason of the fact that he was "issuing orders, he was issuing press releases concerning military activities, he was on the ground on a regular basis" (Closing Arguments, T 11047-11048) and in the case of Tarčulovski, due to the fact that, as a police officer in the employ of the President, "he knew or, in the alternative, had reason to know the factual circumstances in Macedonia", particularly as he had seen "how his friends, his colleagues were killed in Ljubotenski Bacila" and that he had "even led an operation in Ljuboten where he said, 'This is a state of war'." (Closing Arguments, T 11047)

<sup>1265</sup> *Naletilić* Appeals Judgement, para 116.

<sup>1266</sup> *Naletilić* Appeals Judgement, paras 118; 119. Submissions of the Bošković Defence fail to have regard to this.

<sup>1267</sup> *Naletilić* Appeals Judgement, para 119.

<sup>1268</sup> The Chamber also recalls the decision of the Pre-Trial Chamber of 8 September 2006 in which the Pre-Trial Chamber held that there is no basis under the jurisprudence of the Tribunal for asserting that the *mens rea* in relation to the existence of an armed conflict is a jurisdictional prerequisite of Article 3 of the Statute. (*Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction", 8 September 2006, para 19)

and the breach must involve grave consequences for the victim. Finally, the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>1270</sup>

297. The crime of “wanton destruction of cities, towns or villages” is specifically listed under Article 3(b) of the Statute, and it is settled that the Tribunal has jurisdiction over this offence.<sup>1271</sup>

298. Murder and cruel treatment are based on prohibitions contained in Common Article 3(1)(a) of the 1949 Geneva Conventions which are part of the laws or customs of war. It is well established that Article 3 of the Statute is a “residual clause” which establishes jurisdiction over any serious violation of international humanitarian law not covered by Articles 2, 4, or 5 of the Statute.<sup>1272</sup>

299. It is settled jurisprudence that violations of Common Article 3 fall within the scope of Article 3 of the Statute. In particular, it is established that Common Article 3 forms part of customary international law and that violation of this provision entails criminal liability.<sup>1273</sup> The Appeals Chamber has accepted that serious violations of Common Article 3 would at once satisfy the four *Tadić* conditions.<sup>1274</sup>

300. The crimes of murder and cruel treatment undoubtedly breach a rule protecting important values and involving grave consequences for the victims.<sup>1275</sup> Thus, the Chamber finds that the four *Tadić* conditions are met in respect of these offences.

#### **D. Whether the victims were taking an active part in hostilities**

301. As Common Article 3 protects persons taking no active part in the hostilities,<sup>1276</sup> it must be established that the victims of the alleged violation were not taking an active part in the hostilities at the time the crime was committed.<sup>1277</sup>

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<sup>1269</sup> See *Naletilić* Appeals Judgement, para 120: “[...] the existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute [...]”.

<sup>1270</sup> *Tadić* Jurisdiction Decision, para 94. See also *Aleksovski* Appeals Judgement, para 20; *Kunarac* Appeals Judgement, para 66; *Mrkšić* Trial Judgement, paras 425-426.

<sup>1271</sup> *Hadžihasanović* Trial Judgement, para 38, citing *Hadžihasanović* Rule 98bis Appeals Decision, para 30.

<sup>1272</sup> *Tadić* Jurisdiction Decision, paras. 89-93; *Čelebići* Appeals Judgement, paras 125, 131, 133.

<sup>1273</sup> *Tadić* Jurisdiction Decision, para 129. While the Appeals Chamber found that Common Article 3 contains no explicit reference to criminal liability for violation of its provisions, it relied on the findings of the International Military Tribunal at Nuremberg, on State practice, national legislation, including the law of the former Yugoslavia, Security Council resolutions and the agreement reached under the auspices of the ICRC on 22 May 1992. Its finding was confirmed in the *Čelebići* Appeals Judgement, para 174.

<sup>1274</sup> *Tadić* Jurisdiction Decision, para 134; *Čelebići* Appeals Judgement, para 125; *Kunarac* Appeals Judgement, para 68.

<sup>1275</sup> *Strugar* Trial Judgement, para 219.

302. The Chamber refers to its findings made elsewhere that in relation to Count 1 (murder), four victims were taking no active part in the hostilities, while the Prosecution has not proved beyond a reasonable doubt that three others were not taking active part in hostilities at the time that they were killed.<sup>1278</sup> Hence Article 3 of the Statute applies only to the four victims taking no active part in hostilities.

303. With regard to Count 3 (cruel treatment), the Chamber is satisfied that none of the victims were taking an active part in hostilities at the time the crimes were committed. In particular it notes its findings that the crimes of cruel treatment were perpetrated on the victims while they were unarmed and in some form of detention.<sup>1279</sup> Even had some of these victims been participating actively in hostilities prior to their detention, which is contrary to the Chamber's finding, as soon as they were detained by the Macedonian police, and also because they were unarmed, they would have ceased to be taking an active part in hostilities, and thus would have come under the protection of Common Article 3.<sup>1280</sup>

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<sup>1276</sup> Common Article 3(1).

<sup>1277</sup> *Jelisić* Trial Judgement, para 34; *Čelebići* Appeals Judgement, para 420; *Kvočka* Trial Judgement, para 124; *Blagojević* Trial Judgement, para 540.

<sup>1278</sup> *See infra*, para 348.

<sup>1279</sup> *See infra*, paras 383-391.

<sup>1280</sup> Common Article 3(1) protects: “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by [...] detention [...]”.

## VI. THE CHARGES

### A. Murder (Count 1)

304. The Indictment alleges the criminal responsibility of Ljube Boškoski and Johan Tarčulovski for the murder of seven ethnic Albanian residents of Ljuboten; Rami Jusufi, Sulejman Bajrami, Muharem Ramadani, Atulla Qaili, Xhelal Bajrami, Bajram Jashari and Kadri Jashari. These allegations support one count of murder as a violation of the laws or customs of war recognized by Article 3(1)(a) of the Geneva Conventions of 1949 and punishable under Article 3 of the Statute.

#### 1. Law

305. The offence of murder as a violation of the laws or customs of war under Article 3 of the Statute requires proof of the following three elements: (1) the death of a victim, although it is not necessary to establish that the body of the deceased person has been recovered;<sup>1281</sup> (2) that the death was the result of an act or an omission of the perpetrator; and (3) that the perpetrator, at the time of the act or omission, intended to kill the victim or, in the absence of such a specific intent, in the knowledge that death was a probable consequence of the act or omission.<sup>1282</sup>

#### 2. Findings

##### (a) Rami Jusufi

306. As considered elsewhere in this Judgement, Rami Jusufi was shot at the entrance of his parents' house in Ljuboten on the morning of 12 August.<sup>1283</sup> He died in the house a short time later. He was buried on the following day in the yard of a relative's house.<sup>1284</sup> Approximately one month later, the family reburied him.<sup>1285</sup> His body was exhumed on 8 April 2002.<sup>1286</sup> DNA profiles confirmed that the body was that of Rami Jusufi.<sup>1287</sup> The autopsy, conducted on 9 April 2002 by the Institute of Forensic Medicine and Criminology in Skopje,<sup>1288</sup> recorded that a "perforation" was found in the lining of the peritoneum (abdominal cavity) to the left, corresponding to the level of the large intestine. In addition, a hole in the left thigh bone and perforation of the skin in the region

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<sup>1281</sup> See *Krnjelac* Trial Judgement, para 326. In *Kvočka* the Appeals Chamber further held that "[t]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible." (*Kvočka* Appeals Judgement para 260) See also *Tadić* Trial Judgement, para 240.

<sup>1282</sup> *Strugar* Trial Judgement, para 236; *Limaj* Trial Judgement, para 241; *Mrkšić* Trial Judgement, para 486.

<sup>1283</sup> See *supra*, para 43.

<sup>1284</sup> Elmaz Jusufi, Exhibit P8.1, para 42; Muzafer Jusufi, Exhibit P389, para 8.

<sup>1285</sup> Elmaz Jusufi, Exhibit P8.1, para 42.

<sup>1286</sup> Howard Tucker, Exhibit P443, p 4.

<sup>1287</sup> Howard Tucker, Exhibit P443, p 6.

of the groin were found. The opinion recorded is that the established “changes” were caused by a projectile discharged from a firearm, which “presumably” entered Rami Jusufi’s body in the region of the left lower third of the stomach, travelling from front to back, from right to left and from below to above.<sup>1289</sup> No bullets or fragments were retrieved from the body. The report does not express conclusions as to the cause of death. M171 testified, however, that on the basis of her expert medical experience with injuries to the abdomen inflicted by fire-arms, these types of injuries are not deadly, but serious, and can lead to death because of bleeding unless medical treatment is administered.<sup>1290</sup> In this case it is the evidence that obtaining medical treatment was impossible during the time that Rami Jusufi remained alive following the shooting, because of the activities of the armed police in the village in that period.<sup>1291</sup> In the Chamber’s finding Rami Jusufi died as a consequence of a gunshot wound.

307. The Defence contests the suggested circumstances of the death of Rami Jusufi. It is argued he could not have been shot while closing the door of the house,<sup>1292</sup> having regard to the height of the patio and outside door, because the bullet travelled upwards into the body of Rami Jusufi. Dr Jačovski suggested that *if* the person who was shooting at Rami Jusufi was crouching or lying down, he could have inflicted the bullet wound if only a metre or two from Rami Jusufi. As an alternative hypothesis, the distance could have been greater if Rami Jusufi was in a more elevated position, and the shooter lower.<sup>1293</sup> However, the two hypotheses advanced by Dr Jačovski assume that Rami Jusufi was standing upright when he was shot. The difference between the height from the ground of the entry and exit wounds is not great – four centimetres – as the autopsy report and photograph of his body taken at the house confirm. It is the evidence that he was attempting to close the front door when he was shot. He need not, therefore, have been standing upright. For this reason alone the Chamber does not find either hypothesis persuasive.

308. Further, the Defence argues that it would have been impossible for the shooter to hit a person in the doorway of the house, based on the location of the spent casings depicted in a photograph of the patio and entrance to the house.<sup>1294</sup> Marijo Jurišić indicated that when fired, a Kalashnikov (the standard police automatic rifle) discharges its casings in an arc to the right and slightly forwards for two to three metres from the position of the shooter.<sup>1295</sup> The witness suggested

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<sup>1288</sup> The autopsies of the remaining victims were likewise conducted by this Institute.

<sup>1289</sup> Exhibits 1D78, p 3; 1D208; *see also* Zlatko Jačovski, T 2397-2400; Exhibits 1D4; P9.

<sup>1290</sup> M171, T 3434.

<sup>1291</sup> Zenep Jusufi, T 448.

<sup>1292</sup> Tarčulovski Defence Final Brief, paras 253 and 254; Boškoski Defence Final Brief, para 292; *see also* Zlatko Jačovski, T 2400-2401; 2426-2427.

<sup>1293</sup> Zlatko Jačovski, T 2427.

<sup>1294</sup> Boškoski Defence Final Brief, para 292.

<sup>1295</sup> Marijo Jurišić, T 3359-3362, Exhibit 1D101. The trajectory of the casings is dependant however on the manner in which the weapon is held, *i.e.*, horizontal and vertical, and it must be aimed correctly.

that a shooter positioned two to three metres to the left of the casings depicted on the photograph would not be able to hit a person at or near the door of the house, because a wall would obstruct the shot.<sup>1296</sup> There is more than one difficulty with this opinion. The Chamber notes the evidence of Fatmir Kamberi that on 13 August, he saw bullet impacts in the entrance door of Rami Jusufi's house.<sup>1297</sup> In addition, there is evidence of more spent casings further back by a water fountain and fence.<sup>1298</sup> Spent casings may well have been displaced after the event. Significantly, the trajectory of a casing varies according to the manner in which the weapon is held when it is fired. Hence, the positioning of the casings in the photograph relied on cannot be determinative of this matter. The evidence does not exclude that Rami Jusufi could have been shot by a person from any number of positions close to the entrance of the house, whether or not the person was lying or crouching down. While on the basis of the evidence the Chamber is unable to establish the precise position from where Rami Jusufi was shot, it is satisfied and finds that he was shot from outside the house when he was at the entrance of the house.

309. The Defence has also suggested that the appearance of Rami Jusufi was interfered with after his death and before pictures of his body were taken, arguing that there was no blood on the t-shirt allegedly worn by Rami Jusufi at the time of his death.<sup>1299</sup> In support, the Defence refers to a remark made by Dr Zdravko Čakar who participated in Rami Jusufi's autopsy that while Rami Jusufi's t-shirt had two holes in it, there appeared no sign of blood on it.<sup>1300</sup> Rami Jusufi's April 2002 autopsy report reveals that when exhumed, he was wearing a white t-shirt and blue jeans.<sup>1301</sup> This matches the description of the clothes he wore when he was shot, as depicted on several photographs taken by the Muslim cleric (Hoxha) on 13 August 2001.<sup>1302</sup> Further, these pictures *do* show signs of blood on Rami Jusufi's t-shirt.<sup>1303</sup> It was Elmaz Jusufi's testimony that they did not change Rami Jusufi's clothes after he died, and that the wound had been tied up with a piece of sheet to prevent bleeding after he was shot.<sup>1304</sup> This could explain the absence of more blood on his clothes. The evidence does not support the allegation that there was interference with Rami Jusufi's appearance after he died.

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<sup>1296</sup> Marijo Jurišić, T 3362; Exhibit 1D101.

<sup>1297</sup> Fatmir Kamberi, T 4619; Exhibit P429.

<sup>1298</sup> Fatmir Kamberi, T 4617-4618; Exhibit P429, indicating with "2" the direction of the water fountain and fence two metres behind the photographed spent casings on 1D101.

<sup>1299</sup> Boškosi Defence Final Brief, para 293, citing to *inter alia*, Exhibit 1D104.

<sup>1300</sup> Howard Tucker, remarks by Dr Čakar made by the witness during the autopsy, T 5449-5450; Exhibit 1D208, p 6; *see also* autopsy report, Exhibit 1D78; Rami Jusufi was initially buried the day after his death, and then reburied a month later; *see supra*, para 44.

<sup>1301</sup> Exhibits 1D77; 1D78.

<sup>1302</sup> Zenep Jusufi, T 473; Elmaz Jusufi, T 483; 486; 535; Exhibits P4; P9; 1D104.

<sup>1303</sup> *See*, for example, Exhibits P4; P9; *see also* Exhibit 1D104, cited by the Defence in support that there was *no* blood on the t-shirt. The Chamber observes that while it is alleged in the Indictment that Rami Jusufi was in his pyjamas when he was killed, the evidence led by the Prosecution unequivocally refutes this.

<sup>1304</sup> Elmaz Jusufi, T 541-542.

310. Turning next to the question of whether Rami Jusufi was taking an active part in hostilities, the Chamber notes that it is the Defence's position that Rami Jusufi was an NLA member,<sup>1305</sup> and that during the events in Ljuboten, Fatmir Kamberi together with, *inter alia*, Rami Jusufi was giving "active resistance to the Security forces".<sup>1306</sup> It is furthermore submitted that Rami Jusufi's house, along with neighbouring houses, constituted an NLA position from which fire was directed at the Macedonian forces on 12 August 2001.<sup>1307</sup> The Defence relies on a UBK document dated 8 April 2002 containing information by "Operational Officers" of the MoI to support the claim that Rami Jusufi was an NLA member.<sup>1308</sup> This document did not exist at the time. It was produced months after the events. The "Operational Officers" said to have prepared it, and their sources, are unknown. The Chamber cannot place reliance on this document alone in the absence of more direct and credible confirmation of its contents. Further, it was put to Fatmir Kamberi during cross-examination that there was an NLA checkpoint in front of the house of Rami Jusufi,<sup>1309</sup> and that the witness, together with Rami Jusufi and others were outside at this check-point in the night of 11-12 August 2001.<sup>1310</sup> Fatmir Kamberi denied this.<sup>1311</sup> Despite this questioning, no evidence has been led in support of this allegation. The presence of a checkpoint in front of the house of Rami Jusufi is without foundation in the evidence, and is contrary to the evidence of Fatmir Kamberi which the Chamber accepts. For reasons given elsewhere in this Judgement, the Chamber has not accepted the evidence of two army witnesses, Captain Grozdanovski and M2D-008, that they had spotted outgoing firing from a row of houses belonging to members of the Jusufi family that morning. There is no other evidence to this effect.

311. It is submitted further that a belt found on the chest area of Rami Jusufi is suggestive of his non-civilian status.<sup>1312</sup> Why that should be so is not suggested in the evidence or the submissions. Howard Tucker testified that, as expressed by Dr Čakar, this belt was likely to have been placed around the body at the time of burial.<sup>1313</sup> There is no description of this belt. None of the photographs in evidence of the body of Rami Jusufi taken before his burial reveal a belt on his body.<sup>1314</sup> The Chamber, therefore, is unable to conclude that this belt was indeed used for military purposes or that it could indicate that Rami Jusufi was taking an active part in hostilities at the time

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<sup>1305</sup> Boškoski Defence Final Brief, para 294; Tarčulovski Defence Final Brief, para 257.

<sup>1306</sup> Tarčulovski Defence Final Brief, para 292.

<sup>1307</sup> Tarčulovski Defence Final Brief, para 257.

<sup>1308</sup> Both Defence teams rely on Exhibit 1D168. The Tarčulovski Defence Final brief cites to "P168" but its clear that this is a mistake and in fact is a reference to Exhibit 1D168.

<sup>1309</sup> Fatmir Kamberi, T 4578.

<sup>1310</sup> Fatmir Kamberi, T 4584.

<sup>1311</sup> Fatmir Kamberi, T 4578.

<sup>1312</sup> Boškoski Defence Final Brief, para 293, refers to a belt around his "waste" (*sic*); Tarčulovski Defence Final brief, para 255, referring to a belt found "below his clothes in the area of the chest".

<sup>1313</sup> Howard Tucker, T 5446-5448, Exhibit 1D208, p 4.

<sup>1314</sup> See Exhibits P4; P9; 1D104.



he was shot. The evidence does not support a finding that Rami Jusufi was anything other than an unarmed civilian, and in any event, not taking an active part in hostilities at the time that he was shot with fatal consequences. The Chamber finds accordingly.

312. It has been established elsewhere in this Judgement that a number of persons who entered the yard and shot at the house in which Rami Jusufi lived on the morning of 12 August at the time he was shot were members of the police.<sup>1315</sup> Taking into consideration, in particular, the fact that evidence discloses there was no resistance, the fact that Rami Jusufi was shot at close range from outside the house as he was at the open door, that he was unarmed at the time, in civilian clothes, and the number of bullets fired from the front yard and patio area at the house in the vicinity of the doorway in which Rami Jusufi was standing,<sup>1316</sup> the Chamber finds that those who fired at the house, *i.e.*, members of the police who were the actual perpetrators, did so with the intention to kill Rami Jusufi, or alternatively, with the knowledge that his death would be a probable consequence of their actions. The identity of these police members has not been established, nor does the evidence identify any one of them as the firer of the shot which caused the death of Rami Jusufi.

(b) Sulejman Bajrami

313. It has been established elsewhere in this Judgement that Sulejman Bajrami was in the group of men detained by the group of armed police and mistreated in front of Adem Ametovski's house. He was shot and killed nearby this house, after being seriously mistreated.<sup>1317</sup> The body of Sulejman Bajrami was buried in Ljuboten cemetery a few days after his death.<sup>1318</sup> His remains were exhumed on 15 April 2002.<sup>1319</sup> A DNA analysis established that this was the body of Sulejman Bajrami.<sup>1320</sup> The autopsy conducted on 16 April 2002 revealed injuries representing channels of a number of firearm wounds - in the head, on the ribs on the right and left side, the scapula (shoulderblade), as well as the upper arm and the upper leg bone.<sup>1321</sup> One projectile was found behind the scapula bone. Because of the advanced state of decay of the body, it was not possible to establish the precise cause of death.<sup>1322</sup> Sulejman Bajrami was wearing a black t-shirt

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<sup>1315</sup> See *supra*, paras 46-47.

<sup>1316</sup> See *supra*, para 43.

<sup>1317</sup> See *supra*, para 55.

<sup>1318</sup> See, for example, Exhibit 1D71.

<sup>1319</sup> Howard Tucker, Exhibit P443, p 9.

<sup>1320</sup> Howard Tucker, Exhibit P443, p 12.

<sup>1321</sup> Exhibit P449.

<sup>1322</sup> Exhibit P449, p 4; see also Exhibit 1D222, findings for body 1D/6, at N000-1628, stating that there were a minimum of (the remainder) of two bullets, of 7.62 millimetre calibre.

and navy blue jeans when he was shot.<sup>1323</sup> This description matches the clothes on his body when it was photographed by Henry Bolton on 14 August.<sup>1324</sup>

314. Concerning the status of Sulejman Bajrami, the Defence suggests that he was an NLA member,<sup>1325</sup> and that his killing was justified because he was trying to escape while in custody of the police forces.<sup>1326</sup> The Defence relies on a UBK document dated 8 April 2002 in support of their contention.<sup>1327</sup> This document suggests that Sulejman Bajrami was involved in the transfer of weapons and other goods for the NLA, and that some of these weapons were left in Ljuboten for the needs of the NLA.<sup>1328</sup> This information was provided by unidentified “Operational Officers” more than half a year after the events in Ljuboten. Their sources are unknown. The Chamber has already indicated it cannot place reliance on this document alone in the absence of more direct and credible confirmation of its contents. The same document also suggests that two of the victim’s brothers were NLA members.<sup>1329</sup> This suggestion is not substantiated in any way. Even were it true, it does not lead to the conclusion that the victim was also a member.

315. Sulejman Bajrami was one of the three men who had been sheltering with the women.<sup>1330</sup> There is no evidence about this event from any members of the armed police unit which was present at the time. The only other persons present were the 12 other male ethnic Albanian residents who, with Sulejman Bajrami, were lying face down, with their eyes and head covered, at the front of the house of Adem Ametovski. The evidence from these survivors varies and some appears unreliable. For the most part they could not see what happened. It was apparent that in many respects they have interpreted the sounds they heard to decide what occurred.

316. The father of Sulejman Bajrami was shot in the arm or hand by a policeman as he lay down on the ground.<sup>1331</sup> It appears he had been talking to his son Sulejman who was also kicked heavily in his head. He appeared to lose consciousness at least for a moment.<sup>1332</sup> Osman Ramadani then heard Sulejman Bajrami say that he could not bear this anymore, and he stood.<sup>1333</sup> Osman Ramadani then heard a policeman say “[l]et him go”, following which he heard a burst of

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<sup>1323</sup> Exhibits P450; P19.

<sup>1324</sup> Henry Bolton, T 1630-1632; Exhibits P239; P240; P241; P185.

<sup>1325</sup> Tarčulovski Defence Final Brief, paras 165, 211.

<sup>1326</sup> Boškoski Defence Final Brief, para 300; Tarčulovski Defence Final Brief, para 264.

<sup>1327</sup> Exhibit 1D168.

<sup>1328</sup> Tarčulovski Defence Final Brief, paras 165, 211.

<sup>1329</sup> M088, Exhibit P206, para 12; M092, Exhibit P215, paras 28, 29; M039, Exhibit P200.2, para 32, names “Shefact Bajrami” as an NLA member; *see also* Exhibit 1D167.

<sup>1330</sup> Sulejman Bajrami was one of the three men who were brought from the basement where the women were located. (M017, T 615-616; Osman Ramadani, Exhibit P197, para 26; Ismail Ramadani, Exhibit P188, para 12; Ismail Ramadani, T 1022)

<sup>1331</sup> M012, T 893, 949; Ismail Ramadani, Exhibit P188, para 22.

<sup>1332</sup> Ismail Ramadani, T 1022.

<sup>1333</sup> Osman Ramadani, Exhibit P197, para 33.

gunfire.<sup>1334</sup> He later saw Sulejman's body lying some 10 metres away on the road.<sup>1335</sup> Ismail Ramadani heard and interpreted these events a little differently. He too confirmed that Sulejman Bajrami was kicked in the head and that Sulejman stood and moved away. He suggested that Sulejman was trying to escape because of the pain.<sup>1336</sup> What Ismail Ramadani heard a policeman say was "[I]et him run for a while then we show him", following which Sulejman Bajrami was shot dead after running a few metres.<sup>1337</sup> There was some difference in accounts whether what was heard was walking or running. Other witnesses merely heard the gunshots. Later, as 10 of the men set off under armed guard to walk to Braca's house, they saw the body of Sulejman Bajrami lying dead on the roadway. There were witnesses who had said earlier that they saw Sulejman Bajrami moving away, but in court, confirmed that what they saw was his dead body.<sup>1338</sup> In the Chamber's view this appeared to be a matter of separating out what had actually been seen from the interpretation their minds had placed on the events.

317. An OSCE observer, Henry Bolton, conducted an inspection of the village on 14 August. During his visit he saw and photographed the body of Sulejman Bajrami which had been left *in situ* on the road. Mr Bolton expressed particular concern about the body of Sulejman Bajrami. Mr Bolton saw numerous spent casings near this body, and "gouge marks" in the centre of the bloodstain on the pavement, matters which were consistent with Sulejman Bajrami having been shot while lying on the road.<sup>1339</sup>

318. In the Chamber's finding, Sulejman Bajrami, having been heavily kicked in the head and his father having been just shot in the hand or arm, stood and then moved, either walking or running, along the road. While escape may have been on his mind, this was manifestly hopeless. He was among a very large group of well armed police. He was unarmed, and he alone sought to move. He had nowhere to go but along the road, in full view. His actions may well have been a consequence of the heavy blow he had received to his head.

319. The evidence confirms, in the Chamber's finding, that the hopelessness of his position was obvious to the police. His conduct did not present a real threat of escape. Instead, rather than stop him immediately, as the police could have done, Sulejman Bajrami was allowed to walk or run for a while, and then he was deliberately and repeatedly shot. The spent cartridge casings confirm that

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<sup>1334</sup> Osman Ramadani, Exhibit P197, para 33.

<sup>1335</sup> Osman Ramadani, Exhibit P198, para 22.

<sup>1336</sup> Ismail Ramadani, Exhibit P188, para 24.

<sup>1337</sup> Ismail Ramadani, Exhibit P188, para 25. These words were also put as "let him go away for a while. We will show him." (Ismail Ramadani, T 1022)

<sup>1338</sup> Vehbi Bajrami, T 1841-1843. See also M017, T 702-704; 626-628.

<sup>1339</sup> Henry Bolton, T 1808-1809; Exhibit 1D24, p 2.

this was at very close range. His death from the gunshots not only showed him who had the ultimate power, but also served to show the other detained men and in time the other villagers.

320. The evidence does not provide any basis for any conclusion other than that, at the time he was killed, Sulejman Bajrami was an unarmed civilian taking no active part in the hostilities. While his actions may have been interpreted as an attempt to escape, the attempt was not regarded by the police as posing any real risk of escape. Instead, he was allowed to move for a time and then, repeatedly and deliberately, he was shot and he died. He was shot with the intention of his death serving as an example. The murder of Sulejman Bajrami has been established.

(c) Muharem Ramadan

321. In the morning of 12 August Muharem Ramadan had been sheltering in the basement of Adem Ametovski's house. He was also in the group of men from the basement detained by armed police and mistreated in the front yard of the house. Together with Aziz Bajrami, Muharem Ramadan had been ordered to stay behind at this house, while the remainder of detained individuals were escorted under armed guard to Braca's house.<sup>1340</sup> Aziz Bajrami later relayed the information that Muharem Ramadan was then killed at the gate of Adem Ametovski's house.<sup>1341</sup>

322. Muharem Ramadan was buried in Ljuboten cemetery a few days after his death.<sup>1342</sup> His remains were exhumed on 18 April 2002.<sup>1343</sup> DNA comparison confirmed the identity of the body of Muharem Ramadan.<sup>1344</sup> Despite the state of decay of the body, the autopsy conducted on 19 April reveals the channel of firearm injuries in the area of the neck and in the area of the ribcage. The autopsy report indicates that this channel was from the direction of front to back and slightly upwards. A "defect" caused by an "explosive device" was found in the area of the lower third of the ribcage. A further channel of a firearm injury was found in the upper arm, from the right to the left, if the upper arm were to be in an inclined position.<sup>1345</sup> No specific cause of death is recorded. When exhumed, Muharem Ramadan was wearing a black leathery jacket, a brown shirt, a white t-shirt, black trousers with a brown leathery belt and brown knitted long pants with dark blue socks.<sup>1346</sup> The picture of the dead body of the victim taken by Henry Bolton on 14 August matches this description,<sup>1347</sup> save that it cannot be seen whether there is a t-shirt.

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<sup>1340</sup> See *supra*, para 57.

<sup>1341</sup> See *supra*, para 57.

<sup>1342</sup> See, for example, Exhibit 1D71.

<sup>1343</sup> Howard Tucker, Exhibit P443, p 12.

<sup>1344</sup> Howard Tucker, Exhibit P443, p 14.

<sup>1345</sup> Exhibit P451, pp 3-4.

<sup>1346</sup> Exhibit P451, p 1.

<sup>1347</sup> Exhibit P186; Henry Bolton confirms that he took this photograph, T 1633.

323. Henry Bolton saw the body of Muharem Ramadani *in situ* on a ramp leading to the courtyard of a house,<sup>1348</sup> which the Chamber observes to be that of Adem Ametovski, on 14 August. Mr Bolton's observations are recorded in an OSCE report of 16 August. He saw numerous spent casings around the body which led him to conclude that Muharem Ramadani had been shot at close range.<sup>1349</sup> Henry Bolton observed a severe injury on the chest which the witness thought was an exit wound from a high velocity bullet shot into the victim's back; he believed there to be two entry wounds to the victim's back.<sup>1350</sup> The defect caused by an explosive device noted at autopsy could be consistent with this but there is an apparent difference as to the direction of the bullets. The Chamber accepts the autopsy findings. The difference is not material to the Chamber's overall findings.

324. The Chamber notes that there is no specific evidence as to the circumstances in which Muharem Ramadani was killed. There is no support, however, in the evidence for the suggestion in the OSCE report that the death of Muharem Ramadani could have occurred during the operation by the Macedonian forces to "clear" the area of hostile forces on their way to the houses in the "north edge of town".<sup>1351</sup> The same suggestion is made in the report with respect to the body of Sulejman Bajrami. The source of that suggestion is not disclosed. It may be merely conjectural, or precautionary, as the author had no way of knowing what led to the shooting. It is contrary to the evidence which establishes that Muharem Ramadani had been sheltering with others in the basement of the house of Adem Ametovski, had waved a white cloth outside the basement window in fear of being killed by the approaching Macedonian police,<sup>1352</sup> and thereafter was in the custody of the police in the yard of the house.<sup>1353</sup>

325. Considering that Muharem Ramadani was in the custody of armed police in front of Adem Ametovski's house when last seen by persons independent of the police, that his body was found on the road at the entrance to the house, that he appeared to have been shot several times at close range, and that the injuries sustained as described in his autopsy were of such a nature as to have caused his death, the Chamber finds that Muharem Ramadani died from gunshot wounds on 12 August in front of Adem Ametovski's house, the fatal shots being fired by one or more unidentified members of the police who had him in their custody at the house.

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<sup>1348</sup> Henry Bolton, P236.1, para 16.

<sup>1349</sup> Henry Bolton, T 1691-1692; Exhibit 1D24, p 2.

<sup>1350</sup> Henry Bolton, T 1633-1634; 1697; Henry Bolton, Exhibit P236.1, para 16; Henry Bolton, Exhibit P236.2, para 8; Exhibit P186.

<sup>1351</sup> Exhibit 1D24, p 3.

<sup>1352</sup> Vehbi Bajrami, Exhibit P247.1, p 2; Osman Ramadani, Exhibit P197, para 30; *see supra*, para 51.

<sup>1353</sup> *See supra*, paras 54; 60.

326. Turning next to the status of Muharem Ramadani, the Defence submits that he was involved with the NLA. It is contended that the clothes he wore when killed are consistent with an NLA black uniform.<sup>1354</sup> He was not wearing a black NLA uniform or any part of such a uniform. The colour black of his leather jacket and trousers is not unusual clothing for men in the ethnic Albanian society. Other items of clothing were quite differently coloured. He had more than one layer of clothing which is commonplace among Albanians in high temperatures.<sup>1355</sup> Further, as with the deceased Rami Jusufi, the Defence appears to contend, without any evidentiary basis for the contention, that a belt depicted on a photograph of the body of Muharem Ramadani indicates a non-civilian status. The Chamber shares the view of Howard Tucker that he would not identify an item visible in the photograph of the deceased in the chest area as a belt.<sup>1356</sup> The Chamber notes that Mr Tucker did not inquire during either his investigation, or at the exhumation, what this item might be and there is no evidence whatever of its nature or purpose.<sup>1357</sup> The only belt noted in the autopsy report, or the report on the forensic examination of his clothing, is a brown leather belt worn with his trousers.<sup>1358</sup> In the Chamber's finding the evidence does not support a view that the one belt worn by the deceased served a military purpose, or indicates an NLA status, or *arguendo*, that this could support the view that the deceased was taking an active part in hostilities at the time he was fatally shot.

327. The Defence further suggests that Muharem Ramadani was involved in military activities against the Macedonian forces and that he fired at security forces.<sup>1359</sup> The Prosecution's position is that Muharem Ramadani was an unarmed civilian and submits further, that had he been taking active part in hostilities, he would have been *hors de combat* at the time that he was killed.<sup>1360</sup> It was contended by the Defence that the men in the basement of Adem Ametovski used a "carrabin" and an automatic rifle to fire at the police, which they later hid under a "fridge-freezer", this being the reason the police did not find these weapons when they searched the house on 12 August.<sup>1361</sup> The only support for this contention is a UBK report of an interview with an anonymous "operative source" more than half a year after the events in Ljuboten.<sup>1362</sup> The report did not exist in August 2001. The author of the report and the "operative source" are unknown. For reasons given earlier the Chamber cannot place reliance on such a document alone in the absence of more direct and credible confirmation of its contents. In addition, it is noted that this document does not refer to

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<sup>1354</sup> Boškoski Defence Final Brief, para 303; Tarčulovski Defence Final Brief, para 269.

<sup>1355</sup> Henry Bolton, T 1697-1698.

<sup>1356</sup> Howard Tucker, T 5448-5449.

<sup>1357</sup> Howard Tucker, T 5449.

<sup>1358</sup> Exhibits P451; P452.

<sup>1359</sup> Boškoski Defence Final Brief, para 303.

<sup>1360</sup> Prosecution Final Brief, para 103.

<sup>1361</sup> Tarčulovski Defence Final Brief, para 265, fn 615.

<sup>1362</sup> Exhibit 1D273.

Muharem Ramadani but rather an “unknown person, son of Muarem (*sic*) Ramadani”.<sup>1363</sup> The only weapon found in Adem Ametovski’s house was not a rifle, but a light shotgun which could be used for hunting birds. Mr Bolton who found and described the weapon noted that “the practical use of such a weapon compared to a rifle, which has a high velocity bullet, is very different”.<sup>1364</sup> This shotgun was under a bench in the basement on 14 August. There were no signs that the weapon had been moved or used. There were no empty shotgun or other cases or strike marks visible.<sup>1365</sup>

328. The evidence does not provide any basis for any conclusion other than that at the time he was shot and killed Muharem Ramadani was an unarmed civilian, not taking an active part in hostilities. The Chamber finds accordingly. The Chamber is satisfied, further, and finds, that the one or more police members who shot Muharem Ramadani causing his death acted with the intent to kill him or in the knowledge that his death was a probable consequence of this shooting.

(d) Atulla Qaili

329. As established, Atulla Qaili was amongst the men who were sheltering in the basement of Adem Ametovski’s house on 12 August; along with other detainees, he was transferred eventually to Mirkovci police station under armed guard. As discussed elsewhere in this Judgement, Atulla Qaili was gravely mistreated by members of the police while detained outside the house and at Braca’s house in Ljuboten, and later at Mirkovci police station.<sup>1366</sup> He was then taken from the police station to Skopje hospital on 13 August.<sup>1367</sup> A death certificate<sup>1368</sup> recorded his time of death as 1339 hours on 13 August.<sup>1369</sup> Atulla Qaili was buried by family members in Ljuboten cemetery a few days after his death. Representatives of the OSCE, HRW, and a number of local journalists were present at Qaili’s family house before the burial.<sup>1370</sup> His body was exhumed on 7 April 2002.<sup>1371</sup> Two autopsies were performed on Atulla Qaili; one following his death, on 14 August

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<sup>1363</sup> Exhibit 1D273.

<sup>1364</sup> Henry Bolton, T 1701-1702; Henry Bolton, Exhibit P236.1, para 17.

<sup>1365</sup> Henry Bolton, Exhibit P236.1, para 17. The Chamber accepts from the evidence that no weapons or shotgun or other cases were found when the house was searched by the police, *see* Ismail Ramadani, Exhibit P189, para 10.

<sup>1366</sup> *See supra*, paras 54; 74; 78.

<sup>1367</sup> Zlatko Jačovski, T 2304-2305; Exhibit P259, an official note dated 13 August submitted by Dragan Surlov from the Mirkovci police station indicating that Atulla Qaili had asked for medical assistance at 14:30 on 13 August, after which Surlov called an ambulance and Atulla Qaili was taken to the hospital; *see also* Blagoja Toskovski, T 4315-4316, Exhibit P261, an Official Note No. 537 dated 14 August 2001 submitted by the witness, indicates that Atulla Qaili died in the hospital on 13 August 2001, after being held at the Mirkovci police station from 0200 hours on 13 August 2001; the document reports that after his health condition deteriorated, the duty officer at the police station called the ambulance and he was taken to the Skopje City Hospital where he died later that day.

<sup>1368</sup> Zlatko Jačovski, referring to Exhibit P284, a document called “History of Illness” the witness testified that although the name is stated as “Abdulla Cajani” it was later recognized to be Atulla Qaili, T 2289.

<sup>1369</sup> Exhibit P287; Zlatko Jačovski confirmed another death certificate, issued by the witness, which stated that Atulla Qaili’s death was violent, T 2298; Exhibit P288 .

<sup>1370</sup> Betullah Qaili, Exhibit P383, paras 31, 35.

<sup>1371</sup> Howard Tucker, Exhibit P443, pp 4, 6.

2001, and one after his exhumation on 9 April 2002.<sup>1372</sup> The autopsy report of 14 August 2001 reveals a range of injuries covering virtually the entire body of Atulla Qaili. The cause of death was concluded to be violent and as a result of a trauma shock, which stopped the functioning of vital organs, due to repeated “dynamic dull-firm force” in the area of the head, body and limbs.<sup>1373</sup> The second autopsy report confirmed the findings established during the 2001 autopsy, of multiple fractures of the ribs, the left-hand side of the ribcage and the fracture at the base of the skull.<sup>1374</sup> Dr Zlatko Jačovski testified that these injuries were inflicted at the same time, but could not be specific about when they occurred.<sup>1375</sup>

330. The Boškoski Defence suggests that the police ensured that Atulla Qaili received immediate medical attention when his condition suggested the need for it; it is submitted that this demonstrates the “opposite sort of mindset” from the one required for murder.<sup>1376</sup> The Chamber cannot agree with this submission. The extent of at least some of his injuries and the gravity of his condition can only have been obvious to those continuing to beat him at Mirkovci police station. It is the case that he was taken to hospital, although the evidence does suggest that it was another policeman who acted to send him to hospital.<sup>1377</sup> The issue, however, is the intention or mindset of those beating Atulla Qaili, at the time of the beating. Even had the person or persons who beat Atulla Qaili later arranged for him to receive medical attention, that need not exclude that the person or persons had the necessary *mens rea* for murder at the time of the beating.

331. The evidence satisfies the Chamber, and it finds, from the extent and variety of the injuries to his body, that Atulla Qaili was repeatedly, extensively and most brutally beaten. Very considerable physical force was inflicted. Its effect was to cause death by the means set out in the report of the autopsy conducted on 14 August. The Chamber accepts from the evidence that Atulla Qaili had been mistreated before he reached Mirkovci police station. At the police station, however, he was further and severely beaten. The Chamber cannot exclude that some of the injuries noted in the autopsy report were inflicted before he reached the Mirkovci police station. It does not understand Dr Jačovski to exclude the injuries being inflicted over some hours by his statement from his findings in 2002 that the injuries were inflicted “at the same time”. The word “time” has a relative temporal context in the Chamber’s understanding. The Chamber finds that by

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<sup>1372</sup> Exhibits P49, p 14; 1D74, p 1, respectively.

<sup>1373</sup> Exhibit P49, p 31; *see also* Zlatko Jačovski, T 2263-2286; 2275-2277; Exhibits P14; P187, taken after the autopsy; *see also* Exhibits P280; P281; P282.

<sup>1374</sup> Exhibit 1D74, p 3.

<sup>1375</sup> Zlatko Jačovski, T 2333; T 2267; Exhibit 1D279.

<sup>1376</sup> Boškoski Defence Final Brief, para 315.

<sup>1377</sup> *See* Exhibit P259. The Chamber notes also that there are two hospital records in evidence recording that “Abdulla Cajani” was admitted to the clinic because of injuries resulting from a fall, Exhibits P283; P286. This is information that the doctor received when Abdulla Cajani (Atulla Qaili) was brought to the hospital on 13 August; *see also* Zlatko Jačovski, T 2295-2297; 2287-2288.



the last stages of the beatings of Atulla Qaili, which occurred at Mirkovci police station, the seriousness of the nature and effects of earlier mistreatment would necessarily have been obvious to the person or persons who continued it. The Chamber therefore concludes that this person or persons continued to beat Atulla Qaili in the knowledge that by doing so his death was a probable consequence of his or their actions.

332. The Chamber is not able to find, however, that the person or persons who mistreated Atulla Qaili before he reached the Mirkovci police station did so with the *mens rea* necessary to establish the offence of murder. In the absence of more direct evidence the issue of *mens rea* must be decided as a matter of inference, on this last hypothesis, the Chamber is not able to exclude the inference that the deliberate mistreatment inflicted before Atulla Qaili reached the police station may well have been inflicted without an intention to kill and without a realisation that death was a probable consequence of the mistreatment being inflicted.

333. The evidence further satisfies the Chamber that the mistreatment of Atulla Qaili in Ljuboten on 12 August was by one or more unidentified members of the police unit led by the Accused Johan Tarčulovski, which entered the village that morning. However, in the Chamber's finding, the beating of Atulla Qaili at the Mirkovci police station was not inflicted by members of that police unit, but by one or more unidentified members of the Macedonian police performing duties at the Mirkovci police station on 12 or 13 August 2001.

(c) Xhelal Bajrami, Bajram Jashari and Kadri Jashari

334. It has been established elsewhere in this Judgement, and is further detailed below, that Xhelal Bajrami, Bajram Jashari and Kadri Jashari were shot while running from the house of Qani Jashari in Ljuboten at around the time this house was approached by a Hermelin APC and police on 12 August.<sup>1378</sup> Their bodies were buried a few days after their deaths in Ljuboten cemetery.<sup>1379</sup> In April 2002, their remains were exhumed from the cemetery and autopsies were conducted.<sup>1380</sup>

335. The autopsy on the remains of Xhelal Bajrami was conducted on 15 April 2002. It revealed that 10 firearm projectiles were found in his body. They were on the back of his neck, the backside of his left shoulder, on the right breast cavity, in his diaphragm, in the pelvis area, on the right part of his body, and the inner side of the left thigh. Because of the state of decay of the body, the

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<sup>1378</sup> See *supra*, para 68.

<sup>1379</sup> See, for example, Exhibit 1D71.

<sup>1380</sup> Howard Tucker, Exhibit P443, pp 6-12; the remains of brothers ID/3 and ID/4 established to be those of Bajram Jashari and Kadri Jashari respectively, were exhumed on 11 April 2002, while the remains ID/5, established to be Xhelal Bajrami, were exhumed on 15 April 2002.

direction of the fire-arm channels could not be established.<sup>1381</sup> The autopsy report was not able to determine which of the gunshot wounds was the precise cause of death. An analysis of bullets retrieved from the remains of, *inter alia*, Xhelal Bajrami, performed by the Netherlands Forensic Institute (“NFI”), was able to establish that the bullets were 7.62 millimetre calibre, while the calibre of the lead core of one metal jacket as well as a fragment of sheet metal remained unknown.<sup>1382</sup> The Chamber notes that the NFI report could not rule out that this fragment might have stemmed from an explosive device.<sup>1383</sup> At the time of the autopsy Xhelal Bajrami was clothed in jeans with a black shirt and low rubber sandals.<sup>1384</sup> This matches the clothing of the body depicted on photographs taken of the body *in situ* on 14 August.<sup>1385</sup>

336. 26 rounds of live ammunition were found in the pockets of his clothing at the time of the autopsy.<sup>1386</sup> These were of 7.62 millimetre calibre, of either Chinese or Albanian production, in addition to one for which the country of manufacture was unknown.<sup>1387</sup> This is the calibre of the Kalashnikov AK47 firearm, a weapon in standard use by the Macedonian army and police, and by the NLA.<sup>1388</sup> The identified 7.62 millimetre calibre bullets found in the bodies of the other two of these three dead persons were different in manufacture from the cartridges found in Xhelal Bajrami’s pocket.<sup>1389</sup>

337. An autopsy performed on the remains of Bajram Jashari on 11 April revealed that two pieces of projectile and one whole projectile were found on the back of the neck;<sup>1390</sup> further, there were multiple firearm injuries in the area of the ribcage and the stomach, from at least six projectiles.<sup>1391</sup> In describing a number of fractures found in the body of this victim, the report states that they were the result of a number of firearm channels, some from the “direction from the front side towards the backside”, some from “the direction of the left to the right”, and some from the direction “from up towards down”.<sup>1392</sup> The direction of the channels “from up towards down”

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<sup>1381</sup> Exhibits P447, p 7; P448.

<sup>1382</sup> The report, Exhibit 1D222, ERN N000-1628, contains a note that the exhibits collected from body ID/5 contain the remains of a *minimum* of nine bullets.

<sup>1383</sup> Exhibit 1D222, p 6 and N000-1628, description of Exhibits from body ID/5, fragment BA-21, of which the report states that the calibre is unknown.

<sup>1384</sup> Exhibit 1D5, pp 5-6; *see* also Exhibit P448.

<sup>1385</sup> Henry Bolton, T 1694-1696; Exhibit 1D27; *see* also Exhibit P203, ERN N000-7828.

<sup>1386</sup> Exhibit 1D5, “Report on the Exhumations Conducted in Ljuboten and the Subsequent Autopsies”, dated 9 May 2002, p 6; Howard Tucker, T 5451; Howard Tucker, Exhibit P443, pp 9-11; Zlatko Jačovski, T 2401-2406; *see* also Exhibit 1D222, ERN N000-1630.

<sup>1387</sup> Exhibit 1D222, Body 1D/5, ERN N000-1630; Howard Tucker, T 5451.

<sup>1388</sup> *See* also Zoran Jovanovski, T 5107; Nazim Bushi, confirming that “most often” the NLA would use Kalashnikovs of Chinese or Russian origin, T 5930.

<sup>1389</sup> Exhibit 1D222, p 5, Body 1D/5.

<sup>1390</sup> Exhibit P444, ERN N000-4291 and N000-4294, refers to the “inner side of the back of the shirt”. Although unclear, the Chamber finds that this reference is to an injury of the body as opposed to damage to the shirt.

<sup>1391</sup> Exhibit P444, p 5; *see* also Exhibit 1D222, Body 1D/3, ERN N000-1627, stating that the exhibits from his body contain (the remains of) a minimum of five bullets; *see* also damage to his clothes, Exhibit P445.

<sup>1392</sup> Exhibit P444, p 5.

would suggest that Bajram Jashari received these gunshot wounds while lying on the ground. The autopsy report did not conclude which of the gunshot wounds was the precise cause of death. Three of the bullets found in his body were identified as 7.62 millimetre calibre, while the calibre of the remaining bullets and fragments remained unknown.<sup>1393</sup> The NFI report on the analysis of bullets and fragments retrieved from the bodies did not exclude the possibility that two of the fragments found in Bajram Jashari's body stemmed from "explosive devices".<sup>1394</sup> A photograph marked by Henry Bolton indicating where he observed the bodies of the three men to be lying on 14 August indicates that the body of Bajram Jashari was lying closest to the house of Qani Jashari.<sup>1395</sup> Bajram Jashari was clothed in a black jeans coat, a greenish-red shirt, and jeans<sup>1396</sup> when he was exhumed.<sup>1397</sup> This description matches the clothes depicted in the photographs taken on 14 August.<sup>1398</sup>

338. The autopsy on the remains of Kadri Jashari, conducted on 13 April 2002, revealed injuries in the area of the head, face, neck vertebrae and the right upper arm, caused by "explosive means", and injuries to the area of the left upper arm, the ribs and collar bones caused by projectiles.<sup>1399</sup> The exhibits collected from his body and analysed by the NFI contain the remains of a minimum of one bullet; the calibre of fragments collected remained unknown.<sup>1400</sup> The NFI report did not rule out the possibility that two fragments found in Kadri Jashari's body could have stemmed from explosive devices.<sup>1401</sup> His autopsy report did not establish which of the gunshot wounds or other injuries caused his death. Kadri Jashari was clothed in black trousers, a white t-shirt and a dark blue polyester coat when exhumed.<sup>1402</sup> This matches the clothes worn when the body was photographed on 14 August.<sup>1403</sup>

339. As discussed elsewhere in the Judgement, the evidence suggests that Xhelal Bajrami, Bajram Jashari and Kadri Jashari, together with M088 and M092 ran uphill across a field from the house of Qani Jashari. As they did so they were fired at by both the army and the police.<sup>1404</sup> It was the evidence of M092, one of the men fleeing the house of Qani Jahari, that they were being shot

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<sup>1393</sup> Exhibit 1D222, Body 1D/3, ERN N000-1627.

<sup>1394</sup> Exhibit 1D222, ERN N000-1626 and N000-1627, description of Exhibits from body ID/3; fragments BA-7 and BA-8.

<sup>1395</sup> Henry Bolton, T 1633-1638; Exhibit P242, marking BJ = Bajram Jashari, marking BY = Xhelal Bajrami and KJ = Kadri Jashari.

<sup>1396</sup> From photographs of the body, it appears the jeans were black.

<sup>1397</sup> Exhibit P445.

<sup>1398</sup> Henry Bolton, T 1636; Exhibit P244; *see also* Exhibit P203, ERN N000-7826.

<sup>1399</sup> Exhibit P446, p 4.

<sup>1400</sup> Exhibit 1D222, Body 1D/4, ERN N000-1627.

<sup>1401</sup> Exhibit 1D222, Body 1D/4, p 6 and ERN N000-1627, description of Exhibits from Body ID/4, fragments BA-11 and BA-13.

<sup>1402</sup> Exhibit P446 p 1.

<sup>1403</sup> Henry Bolton, T 1638; Exhibit P245; *see also* Exhibit P203, ERN N000-7827.

<sup>1404</sup> *See supra*, para 68.

from the army's positions at Malistena<sup>1405</sup> which the witness estimated to be at a distance of about one kilometre,<sup>1406</sup> as well as from the Macedonian forces from the Elezaj neighbourhood,<sup>1407</sup> at a distance of approximately 300 metres.<sup>1408</sup> This accords with other evidence discussed elsewhere in this Judgement of shooting from the army positions at Smok and Bomba, and by the police who were then approaching or at the home of Qani Jashari.<sup>1409</sup> The estimates of distance by the witness are unreliable however. Other evidence and maps indicate the distance to Smok and Bomba to be some 800 metres,<sup>1410</sup> and the distance from the road at the entrance to Qani Jashari's house to the furthest of the three dead bodies to be less than 300 metres.<sup>1411</sup> Photographs of the positions of the three bodies also indicate this.<sup>1412</sup>

340. While the police were much closer to the men as they ran, and many more police were firing at them, the autopsy results indicate that bullets entered the bodies from more than one direction. While Henry Bolton was no doubt correct, from his observation of the three bodies in the field, that there were entry and exit wounds consistent with the three men being shot from behind as they ran,<sup>1413</sup> *i.e.*, from the position of the police, other wounds identified at autopsy are not consistent with shooting from behind. Some wounds may well have been from army shooting. The calibre of those bullets and fragments that could be identified in the bodies is consistent with both police and army Kalashnikov rifles,<sup>1414</sup> though not with the larger calibre bullet fired from the sniper rifle used by the army at Smok.<sup>1415</sup>

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<sup>1405</sup> From a cross reference of maps, the location described by M092 as "Malistena" corresponds to the locations of the Smok and Bomba army positions; M092, T 1254-1256; Exhibit P216; Nikolče Grozdanovski, T 10463-10465; Exhibit P596.

<sup>1406</sup> M092, T 1297-1298; M092, Exhibit P215, para 19.

<sup>1407</sup> The Elezaj neighbourhood includes the houses of the Redžepi and Lutfiu families. This area seems to extend to the area of the house of Qani Jashari.

<sup>1408</sup> M092, Exhibit P215, para 19.

<sup>1409</sup> *See supra*, para 64.

<sup>1410</sup> *See* Exhibit P298.

<sup>1411</sup> M088 gave evidence that the distance between the house of Qani Jashari and the first line of bushes was about 500 metres away, Exhibit P206, para 25. From a photograph marked by Henry Bolton to indicate the position of the bodies of Xhelal Bajrami, Kadri Jashari and Bajram Jashari on the field by Qani Jashari's house, it appears that Kadri Jashari, the furthest of the three bodies from the house, was at approximately less than 300 metres from the house of Qani Jashari.

<sup>1412</sup> Henry Bolton, T 1633-1635; Exhibit P242.

<sup>1413</sup> Henry Bolton, Exhibit P236.1, para 18.

<sup>1414</sup> The NFI report on the analysis of bullets and fragments retrieved from the bodies of the alleged murder victims during their autopsies suggests that for those bullets that could still be identified, they originated from 7.62 millimetre calibre weapons, mainly used for semi-automatic rifles, assault rifles and machine-guns, Exhibit 1D222, p 5.

<sup>1415</sup> M2D-008, T 10563. This sniper rifle was of 7.92 millimetre calibre; Simon Eichner testified that the 7.92 millimetre bullet would not have been able to be shot from the Kalashnikov rifles because it differed in calibre, T 4471; Exhibit P425. No such bullet was identified in any of these bodies, *see* Exhibit 1D222, N000-1627-N000-1628; One 7.92 millimetre fragment had been retrieved at the time of the exhumation on 7 April 2002. It had been discovered near the surface of the ground near the grave of Rami Jusufi, but it could not be connected with his remains; *see* also Howard Tucker, Exhibit P443, p 4.

341. The autopsy reports each leave open that some wounds were from explosions, or explosive devices, rather than bullets. If this were the case, an explosive wound could have been caused by a Zolja rocket or a grenade as used by the police,<sup>1416</sup> or by a mortar or cannon shell fired by the army. However, no witness has described any sign of an explosion in the vicinity of any one of the three bodies. Evidence suggests that both the army and the police fired with a machine-gun at the running men but, if so, there is no evidence of the calibre of these weapons.

342. The autopsy reports do not make a finding which identifies any particular wound as the cause of death of any of the three men. Given the matters that have just been discussed, the Chamber accepts that at least some of the injuries which may have caused the death of Xhelal Bajrami, Kadri Jashari and Bajram Jashari were the result of police firing at the running men from the vicinity of the house of Qani Jashari. It cannot exclude, however, that at least some injury or injuries sustained by each of the three men were the result of fire directed at the men from the army positions of Smok and Bomba.

343. In the circumstances just identified it is not possible to determine that any one of the three men was killed by the police, rather than the army. The Indictment alleges that each of these three men was killed by police. It is the case, therefore, that the Prosecution has not proved beyond reasonable doubt that the injuries which caused the deaths of Xhelal Bajrami, Kadri Jashari and Bajram Jashari were inflicted by police fire. On this basis alone there could not be a conviction for murder on the Indictment in respect of the killing of any one of these three men.

344. The Chamber has noted more fully elsewhere in this Judgement that the OSCE representative who visited Ljuboten on 14 August saw no evidence of defensive positions or of an exchange of fire in the area of the nearly burnt buildings of the houses of Qani Jashari and other members of the Jashari family.<sup>1417</sup> The force of this evidence is diminished, however, because he did not visit the location until two days after the deaths and evidence of these matters could have been removed in that time. Mr Bolton also acknowledged that it was possible that one or more of the three men were carrying a firearm at the time of death.<sup>1418</sup> He did note that there were no bullet casings found near the bodies of the three men in the field.<sup>1419</sup> However, at the time he visited the village he was not able to see the three functional firearms<sup>1420</sup> said to have been found near the

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<sup>1416</sup> See *supra*, paras 48; 165.

<sup>1417</sup> Henry Bolton, Exhibit P236.1, para 19.

<sup>1418</sup> Henry Bolton, T 1706-1707, Exhibit 1D24, p 1.

<sup>1419</sup> Henry Bolton, Exhibit P236.1, para 19.

<sup>1420</sup> Exhibit P424, p 6. It is noted that Simon Eichner testified, with regards to the live ammunition retrieved from the field at Qani Jashari's house together with the weapons, that 40 of the cartridges could have been shot from either the Kalashnikov guns, while there were also live cartridges that stemmed from the Thompson sub-machine gun, T 4544-4545; Exhibit P242. The Chamber notes that it was concluded by the witness that none of the fragments he was provided for analysis, also retrieved from the scene, could have been fired by the Thompson sub-machine

bodies, together with ammunition for those weapons. The Chamber has already described its concerns about aspects of this evidence but they do not displace it from consideration. Further, and significantly, it was not known by Mr Bolton at the time of his visit that 26 live rounds of 7.62 millimetre calibre ammunition, suitable for two of the three weapons, would later be found in the pockets of the clothing Xhelal Bajrami was then wearing. Even so, the OSCE report based on his findings acknowledges, on the basis of what Mr Bolton had seen and heard, that the deaths of these three men were “less suspicious and probably related to legitimate military action.”<sup>1421</sup>

345. Of course the Chamber has now been able to consider the very considerable body of oral and written evidence about these matters which enables a more full evaluation of the circumstances surrounding the deaths of Xhelal Bajrami, Kadri Jashari and Bajram Jashari. Given all this is now known, as has been detailed in this Judgement, there is, in the finding of the Chamber, a reasonable doubt whether these three men were taking an active part in the armed hostilities at the time they were shot. The view is open on the evidence that there had been firing at the police or army from the house of Qani Jashari, and earlier from other Jashari houses, and that, as the armed police approached the house of Qani Jashari, the five men ran from the back of the house across the field towards the shelter of trees carrying with them three weapons and ammunition. The Prosecution has not been able to prove beyond reasonable doubt, therefore, that these three men were not taking an active part in the armed hostilities at the time they were killed.

### 3. Conclusion

346. Leaving aside for the present the question of the individual responsibility of the two Accused, the Chamber finds that the elements of Count 1, Murder, have been established in respect of the victims Rami Jusufi, Sulejman Bajrami, and Muharem Ramadani.

347. The elements of Murder have also been established in respect of the victim Atulla Qaili, however, in view of issues to be considered later, the Chamber notes its finding that this is not in respect of actions by the police in the village of Ljuboten, but in respect of later actions by different police at the Mirkovci police station.

348. In the Chamber’s finding, however, in the case of Xhelal Bajrami, Kadri Jashari and Bajram Jashari, the evidence does not establish beyond reasonable doubt that police fire killed these three men, rather than army fire which is not charged in the Indictment. In addition, the Prosecution has

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gun, T 4470. It could not be ruled out that some of the retrieved 7.62 millimetre fragments could have stemmed from either or both of the Kalashnikov guns, while some of the 7.62 millimetre calibre fragments had some “class characteristics” which excluded the two Kalashnikovs as the rifles from which the bullets could have been fired, T 4471.

<sup>1421</sup> Exhibit 1D24, p 2.

not proven beyond reasonable doubt that, at the time they were killed, these men were not taking an active part in armed hostilities. For these reasons a conviction for Murder cannot be entered in respect of the deaths of each of these three men.

## **B. Wanton destruction (Count 2)**

### 1. Law

349. Count 2 of the Indictment charges the Accused with wanton destruction of cities, towns or villages, punishable as a violation of the laws or customs of war under Article 3(b) of the Statute.

350. Article 3(b) of the Statute codifies two crimes: “wanton destruction of cities, towns or villages not justified by military necessity” and “devastation not justified by military necessity”. The two offences have been treated together by a number of instruments of international humanitarian law,<sup>1422</sup> and the Chamber sees no material difference between the elements of these two crimes.<sup>1423</sup> Only the first crime is charged in the present case.

351. The elements of the crime of “wanton destruction not justified by military necessity” were identified by the jurisprudence of this Tribunal, as follows:<sup>1424</sup>

- (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.

352. The first element – that the destruction occurred on a “large scale” – requires that a considerable number of objects were damaged or destroyed. However, it does not require destruction in its entirety of a city, town or village.<sup>1425</sup> The Trial Chamber in the *Hadžihasanović* case held that the requirement is met when either a large quantity of property has been destroyed or

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<sup>1422</sup> See *Strugar* Trial Judgement, para 291, footnote 934 referring to the “List of War Crimes” prepared by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, which was presented to the Preliminary Peace Conference in Paris on 29 March 1919, Article 6(B) of the Nuremberg Charter, Article II, para 1(b) of the Control Council Law No. 10, and Articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

<sup>1423</sup> See also *Strugar* Trial Judgement, paras 290-297; *Brdanin* Trial Judgement, paras 591-593; *Martić* Trial Judgement, para 91.

<sup>1424</sup> *Kordić* Trial Judgement, para 346; *Kordić* Appeals Judgement, para 74; *Naletilić* Trial Judgement, para 579; *Strugar* Trial Judgement, para 292; *Hadžihasanović* Trial Judgement, para 43; *Martić* Trial Judgement, para 90.

<sup>1425</sup> See e.g. *Naletilić* Trial Judgement, paras 584, 596. See also *Strugar* Trial Judgement, para 294; *Orić* Trial Judgement, para 585; *Martić* Trial Judgement, para 92.

when the value of a single object is sufficiently great.<sup>1426</sup> Partial destruction of property may be considered to be sufficient, as long as acts of partial destruction are committed on a large scale.<sup>1427</sup>

353. The second requirement is that the act is “not justified by military necessity”. Military necessity may be usefully defined with reference to the definition of military objectives in Article 52 of Additional Protocol I.<sup>1428</sup> Before dealing with the definition of military objectives in more detail, it is important to emphasise that only the targeting of objects which qualify as military objectives may be justified by military necessity. The principles of distinction and protection oblige the warring parties to distinguish between military and civilian objectives at all times and direct attacks only against military objectives.<sup>1429</sup> As the Appeals Chamber held, these principles establish an “absolute prohibition on the targeting of civilians”<sup>1430</sup> and “the prohibition against attacking civilians or civilian objects may not be derogated from because of military necessity.”<sup>1431</sup> Damage to civilian property or civilian casualties may be considered to be legitimate only if they are incidental to the conduct of military operations which are directed against military objectives.<sup>1432</sup>

354. Article 52 of Additional Protocol I defines military objectives, as follows:

In so far as objects are concerned, military objectives are 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.

355. The Chamber takes further note of Article 52(3) of Additional Protocol I which stipulates that in cases of doubt whether an object, which is normally dedicated to civilian purposes, such as a house or other dwelling, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Appeals Chamber has made clear that although Article 52(3) is addressed to militaries about to launch an attack, in a criminal case, this provision does not affect the Prosecution’s burden of proving that an object was indeed dedicated to civilian purposes.<sup>1433</sup>

356. An object may offer a “definite military advantage” within the meaning of Article 52 of Additional Protocol I, if it effectively contributes to military action. Whether a military advantage can be achieved through the destruction of an object must be decided “in the circumstances ruling at the time”. An object shall not be attacked when it is not reasonable to believe in the circumstances

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<sup>1426</sup> *Hadžihasanović* Trial Judgement, para 43.

<sup>1427</sup> *Hadžihasanović* Trial Judgement, para 44.

<sup>1428</sup> *Strugar* Trial Judgement, para 295; *Galić* Trial Judgement, para 51; *Orić* Trial Judgement, paras 587-588.

<sup>1429</sup> *Galić* Appeals Judgement, para 190.

<sup>1430</sup> *Blaškić* Appeals Judgement, para 109; *Galić* Appeals Judgement, para 190.

<sup>1431</sup> *Kordić* Appeals Judgement, para 54; *Galić* Appeals Judgement, para 130.

<sup>1432</sup> *Galić* Appeals Judgement, para 190.

<sup>1433</sup> *Kordić* Appeals Judgement, para 53; *Blaškić* Appeals Judgement, para 145.



of the “person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”<sup>1434</sup>

357. When assessing whether the destruction of property was “justified by military necessity”, the principle of proportionality enshrined in Article 51 of Additional Protocol I must also be taken into account.<sup>1435</sup> The principle of proportionality is inherent to military necessity<sup>1436</sup> and was already reflected in early definitions of military necessity.<sup>1437</sup> Damage to property must not be disproportionate to the concrete and direct military advantage anticipated before the attack.<sup>1438</sup> In other words, unnecessary or wanton use of force against persons and property is prohibited.<sup>1439</sup> In determining whether an attack on military objectives was proportionate, it is necessary to adopt the perspective of a person in the circumstances of the actual perpetrator contemplating the attack and making reasonable use of the information available to him.<sup>1440</sup>

358. As regards the *mens rea* of the crime of wanton destruction under Article 3(b) of the Statute, it is required that the perpetrator acted “with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction”,<sup>1441</sup> that is either direct or indirect intent must be proved.<sup>1442</sup> This Chamber will proceed on the basis that the *mens rea* requirement is met when the perpetrator acted with either direct or indirect intent; indirect intent may be expressed as requiring knowledge that destruction was a probable consequence of his acts.

## 2. Findings

359. It is alleged that 14 houses in the village of Ljuboten, listed in Schedule A appended to the Indictment, were damaged as a result of fires set by the police unit commanded by Johan

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<sup>1434</sup> *Galić* Trial Judgment, para 51; *Strugar* Trial Judgement, para 295.

<sup>1435</sup> *Kupreškić* Trial Judgement, para 524; *Galić* Appeals Judgement, para 190; *Galić* Trial Judgement, para 58. The principle of proportionality is already reflected in early definitions of military necessity.

<sup>1436</sup> *Galić* Trial Judgement, para 58, fn 104.

<sup>1437</sup> Article 14 of the 1863 Lieber Code defines military necessity as consisting “in the necessity of those measures which are *indispensable* for securing the ends of war.” (Emphasis added, *see* also Articles 15, 16 and 22 of Lieber Code). Furthermore, Article 23(g) of the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention IV 1907 stipulate that destruction of property must be “*imperatively demanded* by the necessities of war.” (Emphasis added, *see* also with reference to the Lieber Code and to Article 23 (g) of the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention IV 1907, *Jaworski*, Military Necessity and Civilian Immunity, in: Chinese JIL 2003, pp 179-180).

<sup>1438</sup> *Galić* Appeals Judgement, para 190.

<sup>1439</sup> *Kordić* Appeals Judgement, para 686 citing Christopher Greenwood [in] Dieter Fleck (ed.): *The Handbook of Humanitarian Law in Armed Conflicts*, 1995, p 30, para 130.

<sup>1440</sup> *Galić* Trial Judgement, para 58.

<sup>1441</sup> *See supra*, footnote 1424.

<sup>1442</sup> *Strugar* Trial Judgement, para 296; *Martić* Trial Judgement, para 94.

Tarčulovski and which passed through the village on 12 August 2001. Some of the damage is also alleged to have been caused by the use of hand grenades and small arms.<sup>1443</sup>

360. In the following paragraphs reference will be made to assessments made by the International Management Group (“IMG”). On 13 September 2001, representatives from the IMG visited Ljuboten and assessed damage caused to 78 houses. They met with village leaders and residents, who identified the damaged houses. The houses were photographed. Damage was assessed in accordance with the IMG “Assessment Methodology for Housing” and expressed as a percentage of total destruction. The experts from the IMG only assessed the extent of damage and did not consider how and when the damage had been caused.<sup>1444</sup> The Chamber accepts as sound and reliable the assessments of damage made by the IMG.

361. There is evidence that some houses in the village of Ljuboten contained stored inflammable agricultural materials.<sup>1445</sup> For example, Xhevdet Jusufi’s house contained many bags of wheat, which caused it to continue to produce smoke for a week after 12 August 2001.<sup>1446</sup> However, it is not the evidence that any of the houses alleged in the Indictment as having been wantonly destroyed accidentally caught fire.

362. The Chamber heard evidence that some houses in Ljuboten sustained damage on 16 or 17 August 2001. Reports by local police authorities describe a few such cases. Reference is made to the house of Dimo Acevski and three unidentified houses that were set on fire on 17 August 2001.<sup>1447</sup> A report by the OSCE also refers to houses burnt down on 16 and 17 August 2001. The report indicates that in the area of the Church, the house of an ethnic Macedonian burned on the night of 16-17 August 2001 and up to three ethnic Albanian houses burned on 17 August 2001.<sup>1448</sup> Thus, one or more houses in this area listed in the Indictment could have been burned on 16 or 17 August and not on 12 August 2001, as alleged in the Indictment. The Chamber will take this into consideration when discussing the evidence in respect of specific houses from this area of Ljuboten.

363. On 12 August 2001, as discussed elsewhere, the house of Alim Duraki was set on fire by the police unit that entered the village.<sup>1449</sup> The IMG assessed the overall resulting damage to Alim

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<sup>1443</sup> Indictment, para 24. Schedule A provides the pseudonyms of owners of the 14 allegedly damaged houses. Their names were provided in confidential Annex B to Prosecution Pre-Trial Brief.

<sup>1444</sup> Jorgen Engel, Exhibit P390.

<sup>1445</sup> Marijo Jurisić T 3363; Sherafedin Ajrullai T 4022-4023; Nikolče Grozdanovski T 10453-10454.

<sup>1446</sup> Exhibit P426, para 20.

<sup>1447</sup> Exhibits P134; P135.

<sup>1448</sup> Exhibit 1D32, page 1; Exhibit P334; Peter Bouckaert T 3021; 3037; Exhibit P426, paras 21-22.

<sup>1449</sup> *See supra*, para 45.

Duraki's house as being at a level of 25%.<sup>1450</sup> The damage to the roof was assessed to be in the category equating to the highest individual level of damage for that part of the house.<sup>1451</sup>

364. It is not open on the evidence to conclude that Alim Duraki's dwelling was used at the time, or at all, for military purposes or that its destruction would offer a military advantage to the police who set it on fire. The Chamber concludes that the setting of the house of Alim Duraki on fire by the police on 12 August 2001 caused it to sustain damage, which was not justified by military necessity.

365. As discussed elsewhere, on 12 August 2001, Agim Jusufi's house was set on fire by the police unit that entered the village.<sup>1452</sup> The IMG assessed that Agim Jusufi's house suffered 64% damage.<sup>1453</sup> The damage to the roof and windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, whilst the damage to the internal construction was assessed to be in the second most serious individual category.<sup>1454</sup>

366. A nearby house of Qenan Jusufi was also set on fire that morning by the police.<sup>1455</sup> The IMG assessed that Qenan Jusufi's house suffered 57% damage.<sup>1456</sup> The damage to the roof was assessed to be in the category equating to the highest individual level of damage for those parts of the house, whilst the damage to the internal construction was assessed to be in the second most serious individual category.<sup>1457</sup>

367. Another nearby house, that of Sabit Jusufi, was also set on fire that morning by the police.<sup>1458</sup> The IMG assessed that Sabit Jusufi's house suffered 64% damage.<sup>1459</sup> The damage to the roof and windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, whilst the damage to the internal construction was assessed to be in the second most serious individual category.<sup>1460</sup>

368. Another nearby house owned by Xhevxhet Jusufovski was also set on fire that morning by the police.<sup>1461</sup> The IMG assessed that Xhevxhet Jusufovski's house suffered 44% damage.<sup>1462</sup> The

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<sup>1450</sup> Exhibit P410, page 3; Exhibit P412.08.

<sup>1451</sup> Exhibit P410, page 3; Exhibit P409.

<sup>1452</sup> *See supra*, para 45.

<sup>1453</sup> Exhibit P410, page 3; Exhibit P412.03.

<sup>1454</sup> Exhibit P410, page 3; Exhibit P409.

<sup>1455</sup> *See supra*, para 45.

<sup>1456</sup> Exhibit P410, page 3; Exhibit P412.07.

<sup>1457</sup> Exhibit P410, page 3; Exhibit P409.

<sup>1458</sup> *See supra*, para 45.

<sup>1459</sup> Exhibit P410, page 3; Exhibit P412.04.

<sup>1460</sup> Exhibit P410, page 3; Exhibit P409.

<sup>1461</sup> *See supra*, para 45.

<sup>1462</sup> Exhibit P410, page 3; Exhibit P412.06.

damage to the roof was assessed to be in the category equating to the highest individual level of damage for that part of the house.<sup>1463</sup>

369. As discussed in detail elsewhere in this Judgement, the Chamber has considered carefully, but has not been able to accept the truth of evidence that army personnel positioned on the mountain above Ljuboten on the morning of 12 August 2001 observed firing in the direction of the army positions from the vicinity of the houses of the Jusufi family. There is no evidence of firing from any of these houses against members of the police unit that entered the village on that morning. In the Chamber's finding it is not properly open on the evidence to conclude that any one of the houses of Agim Jusufi, Qenan Jusufi, Sabit Jusufi and Xhevshet Jusufovski was used for military purposes at the time, or that the destruction of any of them would offer a military advantage to the police who set them on fire, or to the army forces in the area. In this last respect the Chamber has found that army positions did fire on an area, where there were ethnic Albanian houses, a little distance from the Orthodox Church at about 0800 hours that morning. The evidence, especially as to the damage to these houses and supporting the finding that the police set fire to them, does not provide a basis for the possibility that this firing by the army caused the damage to these houses detailed above. The Chamber finds that the damage sustained to these four houses when they were set on fire by the police on 12 August 2001 was not justified by military necessity.

370. The IMG assessed Muhamer Rashiti's and Isni Fazliev's houses to have suffered 64% damage.<sup>1464</sup> No evidence was adduced regarding the circumstances in which the houses were damaged. However, as indicated earlier, representatives of the IMG visited the village of Ljuboten a month after the events relevant to the Indictment. In the absence of any more specific evidence the Chamber cannot conclude that these houses were damaged on 12 August 2001 as a result of acts alleged in the Indictment. For these reasons, the Chamber is unable to conclude that the crime of wanton destruction, as charged in the Indictment, was committed in respect of the houses of Muhamer Rashiti and Isni Fazliev.

371. The house of Nazim Murtezani suffered 24% damage.<sup>1465</sup> Peter Bouckaert testified that during his visit to Ljuboten, on 23 August 2001, he saw the compound of Nazim Murtezani to be burnt, including the home. On the exterior wall of the compound he saw traces of gunshot fire.<sup>1466</sup> He did not see any other damage caused by shelling and concluded that the house was burnt.<sup>1467</sup> There is other evidence that, on 10 August 2001, a mortar shell fell on a gravel track between the

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<sup>1463</sup> Exhibit P410, page 3; Exhibit P409.

<sup>1464</sup> Exhibit P410; Exhibits P412.05; P412.18.

<sup>1465</sup> Exhibits P410; P412.23.

<sup>1466</sup> Peter Bouckaert, T 2984; Exhibit P347.

<sup>1467</sup> See *supra*, footnote 156.

houses of Nazim Murtezani and Nevzat Murtezani.<sup>1468</sup> This would explain the traces of gunshot fire on the compound wall. The Chamber finds that on 12 August 2001 the house of Nazim Murtezani was damaged when it was set on fire by police.

372. The report on events in Ljuboten prepared by Human Rights Watch states that on 12 August 2001, the house of Abdullah Lutfiu was burned by the police.<sup>1469</sup> The IMG recorded in its report that the damage to that house was at a level of 57%.<sup>1470</sup> The damage to the roof, windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, while the internal construction was assessed to be in the second most serious individual category.<sup>1471</sup> The reports of Human Rights Watch and IMG are consistent on the issue of damage caused to the house of Abdullah Lutfiu. The Chamber finds that this damage was caused when the house was set on fire by police who advanced through the village of Ljuboten on 12 August 2001.

373. The house of Harun Rexhepi (Redžepi) was burned by the police on 12 August 2001.<sup>1472</sup> The IMG assessed the house to have suffered 58% damage. The damage to the roof, windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, while the internal construction was assessed to be in the second most serious individual category.<sup>1473</sup>

374. The house of Ismet Rexhepovski (Rexhepi, Redžepi) was burned by the police on 12 August 2001.<sup>1474</sup> The IMG assessed the house of Ismet Rexhepovski (Rexhepi, Redžepi) to have suffered 57% damage. The damage to the roof, windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, while the internal construction was assessed to be in the second most serious individual category.<sup>1475</sup>

375. In making the findings set out above concerning the houses of Abdullah Lutfiu, Harun Rexhepi (Redžepi), Ismet Rexhepovski (Rexhepi, Redžepi) and Nazim Murtezani the Chamber has also considered the evidence, dealt with more specifically elsewhere in this Judgement, that army personnel in positions above the village observed firing in their direction from the area near the Mosque, an area which, loosely described, could include the locality in which these four houses are found. There is, however, no evidence of firing from any of these four houses towards the police as

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<sup>1468</sup> Exhibit P197, para 14.

<sup>1469</sup> Exhibit P352, ERN U000-0105.

<sup>1470</sup> Exhibit P410.

<sup>1471</sup> Exhibits P410; P409; P412.19.

<sup>1472</sup> *See supra*, para 49.

<sup>1473</sup> Exhibits P410; P409; P412.20.

<sup>1474</sup> *See supra*, para 49.

<sup>1475</sup> Exhibits P410; P409; P412.21.

they advanced through the village in the morning of 12 August 2001. The evidence, especially as to the damage to the houses and supporting the finding of the Chamber that the police set fire to them, which was done separately and by police close to the houses, does not provide any basis on which it could be concluded that any of the houses were then being used for military purposes, or that the destruction of any of them, would offer a military advantage to the police who set them on fire. Nor does the evidence leave open the possibility that the damage to any of these houses was caused by the army. The Chamber concludes that the setting on fire of each of these four houses by the police on 12 August 2001 resulted in the houses sustaining damage, which was not justified by military necessity.

376. The IMG assessed that Qani Jashari's house suffered 60% damage. The damage to the roof, windows and doors was assessed to be in the category equating to the highest individual level of damage for those parts of the house, while the internal construction was assessed to be in the second most serious individual category.<sup>1476</sup>

377. As established earlier, the house of Qani Jashari came under fire from police using automatic rifles and a machine gun. Shortly thereafter, the house was set on fire by the police.<sup>1477</sup> There is also evidence that the army unit of Captain Grozdanovski fired at the house of Qani Jashari and its vicinity with mortar shells, a sniper rifle and a machine gun.<sup>1478</sup> The Chamber accepts that the army fired at persons running from the house across the field toward trees which, taken alone, leaves open the possibility that at least some damage to the house, such as bullet impacts, may have been caused by the army. No damage to the house resulted from shelling.<sup>1479</sup> As discussed elsewhere, the Chamber has found on the evidence that police set fire to the house that morning after the men had run from it into the field. The evidence also establishes that there was extensive firing by the police at the house.<sup>1480</sup>

378. It is at least open on the evidence that the house of Qani Jashari may have been used for a time during the morning of 12 August by three or five persons to fire on the army positions of Smok and Bomba and to fire at the police advancing through the village. That is so even though no member of the police or army was injured by any such fire. Had there been such firing, there was apparent military justification for the police and the army firing on the house. The house may be considered to have made "an effective contribution to military action"<sup>1481</sup> and an attack on the

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<sup>1476</sup> Exhibits P410; P409; P412.46.

<sup>1477</sup> See *supra*, para 68.

<sup>1478</sup> See *supra*, para 155.

<sup>1479</sup> See *supra*, paras 155-156.

<sup>1480</sup> See *supra*, paras 67-68.

<sup>1481</sup> See *supra*, para 354.

house to offer a “definite military advantage”.<sup>1482</sup> However, it was later, and only after the five men had fled from the rear of the house, leaving it unoccupied, that, as the Chamber has found, the police deliberately set alight the unoccupied house. There is no evidence that the police believed that armed fighters were still in the house, or may have been in the house, when it was set alight. Even had that been the case, given the observed flight of occupants, the absence of firing from the house, the large number of well armed police, and the demonstrated ability of the police to approach the house to set it alight, it is not apparent that the police acted out of any sense of military necessity or justification to set the house alight. Rather, in the finding of the Chamber, the action of the police in setting fire to the house was to destroy it, no doubt because it was thought it had been used by persons they thought to be NLA when acting against the police. In the circumstances the action of the police in setting fire to the house was not justified by military necessity.

379. The houses of two other members of the Jashari family, Afet Jashari and Ramush Jashari, which are in the row of some four houses of the Jashari family situated nearby the house of Qani Jashari, but on the opposite side of the road, were each assessed by IMG as having suffered 30% damage.<sup>1483</sup> There is evidence that the army unit of Captain Grozdanovski fired with a machine gun and a sniper rifle<sup>1484</sup> at houses in this row of houses some time before they fired at persons running from the house of Qani Jashari. There is also evidence that another army position fired at one of these houses with a cannon, although the Chamber does not accept this. It is the evidence that this was a return of fire by the army as outgoing firing had been observed in or around houses in the row of houses.<sup>1485</sup> While the Chamber is not able to make a finding that this is so, for reasons given elsewhere, it does accept that this may have been so. Were that the case the firing by the army may well have inflicted some damage to houses in this row including the houses of Afet Jashari and Ramush Jashari. It is the evidence, however, that the firing observed from this row of houses ceased and persons from these houses crossed the road to the house of Qani Jashari from which firing was then resumed. The events described a little earlier concerning the house of Qani Jashari, and persons who fled from the back of it across the field, then followed. No further firing from the row of houses was then observed. There is no evidence of outgoing firing from the house of Afet Jashari, or Ramush Jashari, or from any house in the row, at the time the police arrived at this location or thereafter. After their arrival at this location the evidence establishes, in the Chamber’s finding, that the police set fire to the houses of Afet Jashari and Ramush Jashari, and fired at them with Zolja missiles.<sup>1486</sup> There is no indication in the evidence that either house was occupied at the

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<sup>1482</sup> See *supra*, para 354.

<sup>1483</sup> Exhibits P410; P412.48; P412.47.

<sup>1484</sup> Nikolče Grozdanovski, T 10429; 2D90.

<sup>1485</sup> See *supra*, para 155.

<sup>1486</sup> Exhibit P238, p 2.

time. While on the army evidence, if correct, there may have been firing from the two houses at an earlier time, there is no evidence that the police had reason to think that armed fighters were still in either house, or may have been in either house, when each was deliberately set alight. It is not apparent that the police acted out of any sense of military necessity or justification to set each of these houses alight. Rather, in the finding of the Chamber, as in the case of the house of Qani Jashari, the action of the police in setting fire to each of the houses was to destroy them. In the circumstances the actions of the police in setting fire to each of the houses was not justified by military necessity.

### 3. Conclusion

380. The Chamber finds that on 12 August 2001, the houses of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevxhet Jusufovski, Abdullah Luftiu, Harun Redžepi (Rexhepi), Ismet Rexhepi (Rexhepovski), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari were damaged as a result of being set on fire by the police advancing through the village of Ljuboten. The Chamber further finds that at least the houses of Sabit Jusufi, Qenan Jusufi, Agim Jusufi, Ismet Rexhepovski (Redžepi, Rexhepi), Harun Redžepi (Rexhepi), Qani Jashari, Afet Jashari, and Ramush Jashari were set on fire using gasoline or other incendiary material. Some of these houses also suffered damage caused by police gunfire. In the case of the houses of Qani Jashari, Afet Jashari and Ramush Jashari some damage may also have been caused by army gunfire, but not by mortar or cannon shells. Given the size of the village of Ljuboten, the number of damaged houses may be properly seen as considerable, sufficient, in the Chamber's view, to constitute damage on a "large scale" in the relevant sense. In none of these cases was damage justified by military necessity, except possibly for some firearm damage to the houses of the Jashari family. The circumstances demonstrated by the evidence establish, in the Chamber's finding, that in each case the police acted with intent to destroy the property to which they set fire. It follows that the crime of wanton destruction, charged in Count 2, is established.

#### **C. Cruel treatment (Count 3)**

381. It is alleged in the Indictment that between 12 and 15 August 2001 during and following the entry into Ljuboten by a police unit, over 100 ethnic Albanian male residents of the village were detained and subjected to the intentional infliction of severe pain or suffering by beatings, humiliation, harassment and psychological abuse in Ljuboten, at two police checkpoints near the village and in five police stations in Čair municipality and Skopje, as well as at Skopje court and hospital. Attached as Schedule B to the Indictment are details of the victims, the dates, locations and description of the acts of cruel treatment to which they are alleged to have been subjected. These allegations support one count of cruel treatment charged against the Accused Ljube



Boškoski. The allegations of cruel treatment against the Accused Johan Tarčulovski are limited to acts of mistreatment alleged to have occurred at Adem Ametovski's house and at Braca's house.<sup>1487</sup>

### 1. Law

382. Cruel treatment under Article 3 of the Statute is defined as an intentional act or omission causing serious mental or physical suffering or injury to, or constituting a serious attack on human dignity upon, a person taking no active part in the hostilities. The perpetrator must have acted with a direct intent to commit cruel treatment, or with indirect intent, *i.e.* in the knowledge that cruel treatment was a probable consequence of his act or omission.<sup>1488</sup>

### 2. Findings

383. The Chamber has already established that on 12 August 2001 in Ljuboten village police reservists entered the basement of Adem Ametovski's house where 10 male ethnic Albanian residents of Ljuboten had been sheltering as there had been shelling since 10 August and subjected them to beatings in front of Adem Ametovski's house. The Chamber has also found that three further male ethnic Albanian residents of Ljuboten who were sheltering in the adjacent house of Zija Ameti were forced to join this group of men and were subjected to beatings. The group of men in front of Adem Ametovski's house were beaten, injured or threatened with knives and guns, and kicked by members of the police.<sup>1489</sup> The Chamber is satisfied that these acts were serious enough to constitute cruel treatment. At the time of these incidents the police were armed and significantly outnumbered the group of ethnic Albanian residents who were unarmed. The beatings took place repeatedly while the residents were forced to lie on the ground with their eyes and faces covered. The Chamber is satisfied, therefore, that the perpetrators of these acts had the requisite *mens rea*. The Chamber notes that at the time the victims were in the custody of the police and unarmed, and, therefore, were not taking an active part in hostilities.

384. Leaving aside for the present the question of the individual criminal responsibility of the two Accused, the Chamber is satisfied that the allegations of cruel treatment in front of Adem Ametovski's house have been established with respect to the following individual victims listed in Schedule B to the Indictment: M012,<sup>1490</sup> Hamdi Ametovski,<sup>1491</sup> Adem Ametovski,<sup>1492</sup> Aziz

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<sup>1487</sup> Indictment, para 42.

<sup>1488</sup> *Čelebići* Appeals Judgement, para 424; *Blaškić* Appeals Judgement, para 595; *Strugar* Trial Judgement, para 261; *Limaj* Trial Judgement, para 231; *Mrkšić* Trial Judgement, para 516.

<sup>1489</sup> *See supra*, paras 50; 52-54.

<sup>1490</sup> M012, T 888-889; M017, T 622-625; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Ismail Ramadani, Ismail Ramadani, Exhibit P188, paras 12, 17; Exhibit P108; Ismail Ramadani, T 1038; Vehbi Bajrami, Exhibit P 247.1, p 3.

Bajrami,<sup>1493</sup> M017,<sup>1494</sup> Nevaip Bajrami,<sup>1495</sup> Vehbi Bajrami,<sup>1496</sup> Atulla Qaili,<sup>1497</sup> Beqir Ramadani,<sup>1498</sup> Ismail Ramadani,<sup>1499</sup> Muharem Ramadani,<sup>1500</sup> Osman Ramadani,<sup>1501</sup> and Sulejman Bajrami.<sup>1502</sup>

385. The Chamber has also recorded its further findings elsewhere in this Judgement that most of the men in this group were then taken, barefoot and under armed police guard, with their eyes and faces still covered, to a place by the road outside Braca's house at an entrance to the village, where they were subjected to further beatings by the police who had escorted them from the house of Adem Ametovski. The beatings were so severe that some of the men lost consciousness. When one of them regained consciousness he discovered that he no longer had his trousers or underwear on.<sup>1503</sup> In the Chamber's finding these acts too are so serious as to constitute cruel treatment and manifestly were carried out with the requisite *mens rea* and in circumstances in which the victims were not taking an active part in hostilities.

386. Leaving aside for the present the question of the individual criminal responsibility of the two Accused, it has been established that M012,<sup>1504</sup> Hamdi Ametovski,<sup>1505</sup> Adem Ametovski,<sup>1506</sup>

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<sup>1491</sup> M012, T 946-947; M017, T 622-625; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1492</sup> M012, T 888-889, 946-947; Exhibit P17; M017, T 622-625; Ismail Ramadani, Exhibit P188, paras 12, 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1493</sup> M012, T 889-889; 949; M017, T 622-625; Ismail Ramadani, Exhibit P188, paras 17, 22, 23; Ismail Ramadani, T 1038; 1022-1023; Osman Ramadani, Exhibit P197, para 32.

<sup>1494</sup> M012, T 889-889; 946-947; Exhibit P17; M017, 622-625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1495</sup> M012, T 888-889; 946-947; Exhibit P17; M017, T 622-625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1496</sup> M012, T 888-889; 946-947; M017, T 622-625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1497</sup> M012, T 888-889; 947; Exhibit P17; M017, T 622- 625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 26, 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1498</sup> M017, T 622-625; Ismail Ramadani, Exhibit P188, para 17; Osman Ramadani, Exhibit P197, para 32.

<sup>1499</sup> M012, T 888-889; 894; Exhibit P17; M017, T 622-625; Ismail Ramadani, Exhibit P188, paras 17, 19; Ismail Ramadani, T 1038; Exhibits P194; P195; Osman Ramadani, Exhibit P197, paras 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1500</sup> M012, T 888-889; Exhibit P17; M017, T 622-625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1501</sup> M012, T 888-889; 946-947; M017, T 622-625; Ismail Ramadani, Exhibit P188, para 17; Ismail Ramadani, T 1038; Osman Ramadani, Exhibit P197, paras 31-32; Osman Ramadani, T 1870; Vehbi Bajrami, Exhibit P247.1, p 3.

<sup>1502</sup> M012, T 888-889; M017, T 622-625; Ismail Ramadani, Exhibit P188, paras 17, 22; Ismail Ramadani, T 1022; Osman Ramadani, Exhibit P197, paras 32, 33.

<sup>1503</sup> See *supra*, para 74.

<sup>1504</sup> M012, T 897-898; M017, T 630; Ismail Ramadani, Exhibit P188, para 34; Osman Ramadani, Exhibit P197, para 36; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1505</sup> M012, T 897; M017, T 630; Osman Ramadani, Exhibit P197, paras 36, 38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.Đ; Ismail Ramadani, Exhibit P188, paras 32-34.

M017,<sup>1507</sup> Nevaip Bajrami,<sup>1508</sup> Vehbi Bajrami,<sup>1509</sup> Atulla Qaili,<sup>1510</sup> Beqir Ramadanani,<sup>1511</sup> Ismail Ramadanani,<sup>1512</sup> and Osman Ramadanani<sup>1513</sup> were subjected to this further cruel treatment at Braca's house.

387. The evidence also establishes, in the Chamber's finding, that from Braca's house these residents were taken to Mirkovci police station where they were detained for a further two days and subjected to further acts of cruel treatment, including being beaten by police of the Mirkovci police station with rifle butts, baseball bats and batons, threatened with knives and guns, and kicked and hit by the police with fists and weapons.<sup>1514</sup> The Chamber is satisfied that the perpetrators of the acts of cruel treatment at Mirkovci police station acted with the requisite *mens rea*. The victims were clearly not taking an active part in hostilities. Leaving aside for the present the question of the individual criminal responsibility of the Accused, it finds that the allegation of cruel treatment at Mirkovci police station has been established with respect to the following individuals: M012,<sup>1515</sup> Hamdi Ametovski,<sup>1516</sup> Adem Ametovski,<sup>1517</sup> M017,<sup>1518</sup> Atulla Qaili,<sup>1519</sup> Nevaip Bajrami,<sup>1520</sup> Vehbi Bajrami,<sup>1521</sup> Beqir Ramadanani,<sup>1522</sup> Ismail Ramadanani,<sup>1523</sup> and Osman Ramadanani.<sup>1524</sup>

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<sup>1506</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, para 36 -38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1507</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 36-38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1508</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 36 -38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1509</sup> M012, T 897; Osman Ramadanani, Exhibit P197, paras 36 -38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872; M017, T 630.

<sup>1510</sup> M012, T 897; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 36 -38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872; M017, T 630.

<sup>1511</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 36-38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1512</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 36-38; Vehbi Bajrami, Exhibit P247.1, p 3; Vehbi Bajrami, T 1872.

<sup>1513</sup> M012, T 897; M017, T 630; Ismail Ramadanani, Exhibit P188, paras 32-34; Osman Ramadanani, Exhibit P197, paras 37-39; Vehbi Bajrami, T 1872.

<sup>1514</sup> *See supra*, paras 77-78.

<sup>1515</sup> M012, T 900-901; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1516</sup> M012, T 901-902; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1517</sup> M012, T 901-902; M017, T 636-638.

<sup>1518</sup> M012, T 900; M017, T 636-638; 714-715; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1519</sup> M012, T 905-906; 954; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 35, 43; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1520</sup> M012, T 900; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1521</sup> M012, T 900; M017; T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1522</sup> M012, T 900; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1523</sup> M012, T 900; M017, T 636-638; Ismail Ramadanani, Exhibit P188, paras 37-38; Osman Ramadanani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

388. As also discussed earlier, a number of Ljuboten residents who sought to leave the village on 12 August 2001 were stopped at Buzalak checkpoint where the men, who had been separated from the women and children, were subjected to beatings by police manning that checkpoint. From there these men were transported to Butel police station, Karpoš police station, Bit Pazar police station, or Proleće police station and there detained. At each of these police stations the residents were repeatedly subjected to further mistreatment by police. At each of these locations the police were armed, the residents were unarmed and had been detained, and were subjected to beatings repeatedly by police present at these locations. Given these factors the Chamber is satisfied that these acts were carried out with the requisite *mens rea*, and that the victims were taking no active part in the hostilities. Leaving for the present the question of the individual criminal responsibility of the two Accused, the Chamber is satisfied that the allegation of cruel treatment has been established at least with respect to the following individuals listed in Schedule B to the Indictment: at Buzalak checkpoint, Hazbi Ajrullai,<sup>1525</sup> Sherafedin Ajrullai,<sup>1526</sup> Murtezan Murtezani,<sup>1527</sup> Ramiz Xhavid,<sup>1528</sup> Betjulla Zendeli,<sup>1529</sup> Suat Zendeli,<sup>1530</sup> and Sulejman Zendeli;<sup>1531</sup> at Butel police station, Sherafedin Ajrullai;<sup>1532</sup> at Proleće police station, Isni Ali,<sup>1533</sup> Vehap Ali,<sup>1534</sup> Burhan Murtezani,<sup>1535</sup> Murtezan Murtezani,<sup>1536</sup> Aziz Redžepi,<sup>1537</sup> Rametulla Zendeli,<sup>1538</sup> and Sulejman Zendeli;<sup>1539</sup> at Bit Pazar police station, Isni Ali,<sup>1540</sup> Aziz Redžepi,<sup>1541</sup> Latif Saliu,<sup>1542</sup> Rametulla Zendeli,<sup>1543</sup> and Sulejman Zendeli;<sup>1544</sup> and at Karpoš police station Sherafedin Ajrullai<sup>1545</sup> and Arben Murseli.<sup>1546</sup>

389. The evidence further established, as discussed elsewhere in this Judgement, that from the police stations detailed above, many Ljuboten residents were taken to Skopje Court II, which is

<sup>1524</sup> M012, T 900; M017, T 636-638; Ismail Ramadani, Exhibit P188, paras 37-38; Osman Ramadani, Exhibit P197, paras 45-46; Vehbi Bajrami, Exhibit P247.1, pp 3-4.

<sup>1525</sup> Sherafedin Ajrullai, Exhibit P403, para 8; Sherafedin Ajrullai, T 4028-4029.

<sup>1526</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>1527</sup> Isni Ali, Exhibit P263, para 8; Sherafedin Ajrullai, Exhibit P403, paras 8-9; Sherafedin Ajrullai, T 4029; Aziz Redžepi, T 4674.

<sup>1528</sup> Aziz Redžepi, Exhibit P432, para 17; Aziz Redžepi, T 4674.

<sup>1529</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>1530</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>1531</sup> Sherafedin Ajrullai, Exhibit P403, para 8.

<sup>1532</sup> Sherafedin Ajrullai, Exhibit P403, paras 11, 13, 15.

<sup>1533</sup> Aziz Redžepi, Exhibit P432, paras 19-22; 24-27; *see also* Isni Ali, Exhibit P263, paras 9-11.

<sup>1534</sup> Aziz Redžepi, Exhibit P432, para 29; *see also* Isni Ali, Exhibit P263, paras 9-11.

<sup>1535</sup> Isni Ali, Exhibit P263, paras 9-11.

<sup>1536</sup> Isni Ali, Exhibit P263, paras 9-10; Isni Ali, T 2007-2010; 3463-3464.

<sup>1537</sup> Isni Ali, Exhibit P263, paras 10.

<sup>1538</sup> Isni Ali, Exhibit P263, paras 10.

<sup>1539</sup> Isni Ali, Exhibit P263, paras 10.

<sup>1540</sup> Isni Ali, Exhibit P263, paras 11-13.

<sup>1541</sup> Isni Ali, Exhibit P263, paras 11-13.

<sup>1542</sup> Isni Ali, Exhibit P263, paras 11-13.

<sup>1543</sup> Isni Ali, Exhibit P263, paras 11-13.

<sup>1544</sup> Isni Ali, Exhibit P263, paras 11-13.

<sup>1545</sup> Sherafedin Ajrullai, Exhibit P403 paras 15; Sherafedin Ajrullai, T 4034-4036.

<sup>1546</sup> Sherafedin Ajrullai, Exhibit P403, paras 15-18.

under the authority of the Minister of Justice, not Ljube Boškoski. Court police were staff of the Ministry of Justice.<sup>1547</sup> There is evidence capable of establishing that there at least the following residents listed in Schedule B to the Indictment may have been subjected to further acts of violence: Isni Ali,<sup>1548</sup> M012,<sup>1549</sup> Hamdi Ahmetovski,<sup>1550</sup> Vehbi Bajrami,<sup>1551</sup> Beqir Ramadani<sup>1552</sup> and Osman Ramadani.<sup>1553</sup> The allegations of cruel treatment in Skopje Court II are only brought against the Accused Ljube Boškoski under Article 7(3) of the Statute. It has not been established that Ljube Boškoski exercised effective control over the persons who carried out these acts or that subordinates of Ljube Boškoski aided and abetted or facilitated in any way the commission of these acts. The allegations of cruel treatment in Skopje Court II, therefore, are dismissed on this basis.

390. As discussed in more detail elsewhere, four residents were transported from Mirkovci police station to Skopje City Hospital,<sup>1554</sup> which is under the authority of the Ministry of Health, not the Accused Ljube Boškoski. Security at hospitals was not within the Ministry of Interior.<sup>1555</sup> While there is evidence capable of establishing that M017,<sup>1556</sup> Nevaip Bajrami,<sup>1557</sup> and Ismail Ramadani<sup>1558</sup> may have been subjected to further mistreatment there, this evidence is very limited and is not specific as to the persons who carried out these acts.<sup>1559</sup> It has not been established that Ljube Boškoski exercised effective control over the persons who carried out these acts or that subordinates of Ljube Boškoski aided and abetted or facilitated in any way the commission of these acts. The allegations of cruel treatment at Skopje City Hospital are, therefore, dismissed on this basis.

### 3. Conclusion

391. Leaving aside for the present the question of the individual criminal responsibility of the Accused, the Chamber is satisfied that the charges of cruel treatment at Adem Ametovski's house, Braca's house, Mirkovci police station, Buzalak checkpoint, Butel police station, Proleće police station, Bit Pazar police station and Karpoš police station have been established with respect to the individuals referred to above.

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<sup>1547</sup> Risto Galevski, T 3786; Exhibit P92, Article 17. *See also infra*, para 517.

<sup>1548</sup> Isni Ali, Exhibit P263, para 13; Isni Ali, T 2012-2013, 3476, 3496-3497.

<sup>1549</sup> M012, T 917, T 909.

<sup>1550</sup> M012, T 908-909.

<sup>1551</sup> M012, T 908-909.

<sup>1552</sup> M012, T 908-909.

<sup>1553</sup> M012, T 908-909.

<sup>1554</sup> *See supra*, para 79.

<sup>1555</sup> Risto Galevski, T 3786. *See also infra*, para 517.

<sup>1556</sup> M017, T 637-640; Ismail Ramadani, T 1026; Ismail Ramadani, Exhibit P188, paras 48-49.

<sup>1557</sup> M017, T 638-640, Ismail Ramadani, T 1026-1027; Ismail Ramadani, Exhibit P188, paras 48-49.

<sup>1558</sup> M017, T 638-640, Ismail Ramadani, T 1026-1027; Ismail Ramadani, Exhibit P188, paras 48-49.

## VII. RESPONSIBILITY

### A. Law

#### 1. Responsibility under Article 7(1)

392. Article 7(1) of the Statute provides:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The case against the Accused Johan Tarčulovski, as charged in the Indictment, is confined to Article 7(1).

393. The Appeals Chamber has held that Article 7(1) “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”<sup>1560</sup> However, criminal liability not only attaches to the physical perpetrator of a particular crime but in certain circumstances, it extends to those who participate in and contribute to its commission in various ways.<sup>1561</sup>

#### (a) Committing through participation in a joint criminal enterprise

394. The Indictment alleges that the Accused Johan Tarčulovski is individually criminally responsible for the crimes charged through his participation in a joint criminal enterprise (“JCE”).

395. The jurisprudence of the Tribunal has established three categories of JCE. The *actus reus* of a participant in a JCE is common to all three categories. First, a plurality of persons is required.<sup>1562</sup> They need not be organised in a military, political, or administrative structure.<sup>1563</sup> Secondly, the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute, must be established.<sup>1564</sup> There is no need for the plan, design or purpose to have been previously arranged or formulated. Nor does JCE liability require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime. The common plan or purpose may materialise extemporaneously and

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<sup>1559</sup> See *supra*, para 79. Two witnesses gave evidence in this respect. M017 testified that he was mistreated by a doctor and policemen, T 639, while another witness specified that the persons who mistreated him were reservists not known to him, Ismail Ramadani, Exhibit P188, para 49. The basis for these identifications is unclear.

<sup>1560</sup> *Tadić* Appeals Judgement, para 188.

<sup>1561</sup> *Kordić* Trial Judgement, para 373; *Tadić* Appeals Judgement, para 192.

<sup>1562</sup> *Vasiljević* Appeals Judgement, para 100.

<sup>1563</sup> *Tadić* Appeals Judgement, para 227; *Stakić* Appeals Judgement, para 64.

<sup>1564</sup> *Tadić* Appeals Judgement, para 227; *Vasiljević* Appeals Judgement para 100.

be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE.<sup>1565</sup> Thirdly, the accused must have participated in the common design,<sup>1566</sup> either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose.<sup>1567</sup> The accused's contribution need not be necessary, in a sense of *sine qua non*, to achieve the common criminal purpose;<sup>1568</sup> indeed, the accused's contribution to the common purpose does not even need to be substantial, as a matter of law.<sup>1569</sup> However, the contribution of the accused in the common plan should at least be a significant one,<sup>1570</sup> and not every type of conduct amounts to a sufficiently significant contribution to the common purpose to impute criminal liability to the accused for crimes committed.<sup>1571</sup> The presence of the participant in the JCE at the time the crime is committed by the principal offender is not required.<sup>1572</sup>

396. As to the *mens rea*, the requirements of the three categories of JCE differ. In the first, basic type of JCE the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators.<sup>1573</sup> In the second type, not charged in the present case, embracing the so-called "concentration camp" cases, or systemic JCE, the accused has knowledge of the system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.<sup>1574</sup> The third type concerns cases in which one of the participants commits a crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Secondly, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take that risk by joining or continuing to participate in the enterprise.<sup>1575</sup> Whether the crimes committed outside the common purpose of the JCE were "a natural and foreseeable consequence thereof" must be assessed in relation to the knowledge of a particular accused, *i.e.* the Prosecution must prove that the accused had sufficient knowledge that the additional crimes were a natural and foreseeable consequence.<sup>1576</sup>

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<sup>1565</sup> *Tadić* Appeals Judgement, para 227; *Krnjelac* Appeals Judgement, para 97, *Vasiljević* Apprals Judgement, paras 100, 109; *Brdanin* Appeals Judgement, paras 415, 418.

<sup>1566</sup> *Tadić* Appeals Judgement, paras 196; 202-203; 227-228.

<sup>1567</sup> *Tadić* Appeals Judgement, para 227.

<sup>1568</sup> *Kvočka* Appeals Judgement, para 98.

<sup>1569</sup> *Kvočka* Appeals Judgement, para 97.

<sup>1570</sup> *Brdanin* Appeals Judgement, para 430.

<sup>1571</sup> *Brdanin* Appeals Judgement, para 427.

<sup>1572</sup> *Krnjelac* Appeals Judgement, para 81.

<sup>1573</sup> *Tadić* Appeals Judgement, paras 220, 228.

<sup>1574</sup> *Tadić* Appeals Judgement, paras 202-203; 227-228.

<sup>1575</sup> *Tadić* Appeals Judgement, paras 204; 227-228; *Kvočka* Appeals Judgement, para 83.

<sup>1576</sup> *Kvočka* Appeals Judgement, para 86.

397. The perpetrators carrying out the *actus reus* of the crimes set out in the indictment do not have to be members of the JCE. What matters in such cases is whether the crime in question forms part of the common purpose<sup>1577</sup> and whether at least one member of the JCE used the perpetrator acting in accordance with the common plan.<sup>1578</sup> In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person knows of the existence of the JCE, *i.e.* of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.<sup>1579</sup> When the direct perpetrator commits a crime beyond the common purpose of the JCE, but which is its natural and foreseeable consequence<sup>1580</sup> the accused may be found responsible if he participated in the common criminal purpose with the requisite intent and if, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.<sup>1581</sup>

(b) Planning

398. The *actus reus* of “planning” requires that one or more persons plan or design, at both the preparatory and execution phases, the criminal conduct constituting one or more crimes, provided for in the Statute, which are later perpetrated.<sup>1582</sup> Such planning need only be a feature which contributes substantially to the criminal conduct.<sup>1583</sup> As regards the *mens rea*, the accused must have acted with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan.<sup>1584</sup>

(c) Instigating

399. The term “instigating” has been defined to mean “prompting another to commit an offence.”<sup>1585</sup> Both acts and omissions may constitute instigating, which covers express and implied

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<sup>1577</sup> *Brdanin* Appeals Judgement, paras 410, 418.

<sup>1578</sup> *Brdanin* Appeals Judgement, paras 413, 430.

<sup>1579</sup> *Brdanin* Appeals Judgement, para 410.

<sup>1580</sup> *Brdanin* Appeals Judgement, paras 413, 431.

<sup>1581</sup> *Brdanin* Appeals Judgement, para 411.

<sup>1582</sup> *Brdanin* Trial Judgement, para 268; *Krstić* Trial Judgement, para 601; *Stakić* Trial Judgement, para 443; *Kordić* Appeals Judgement, para 26, citing *Kordić* Trial Judgement, para 386.

<sup>1583</sup> *Kordić* Appeals Judgement, para 26; *Limaj* Trial Judgement, para 513.

<sup>1584</sup> *Kordić* Appeals Judgement, para 31.

<sup>1585</sup> *Krstić* Trial Judgement, para 601; *Akayesu* Trial Judgement, para 482; *Blaškić* Trial Judgement, para 280; *Kordić* Appeals Judgement, para 27; *Kordić* Trial Judgement, para 387; *Limaj* Trial Judgement, para 514.



conduct.<sup>1586</sup> There must be proof of a nexus between the instigation and the perpetration of the crime, which is satisfied where the particular conduct substantially contributes to the commission of the crime. It need not be proven that the crime would not have occurred without the instigation.<sup>1587</sup> As regards the *mens rea*, it must be shown that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed as a result of that instigation.<sup>1588</sup>

(d) Ordering

400. The *actus reus* of “ordering” requires that a person in a position of authority instructs another person to commit an offence.<sup>1589</sup> Closely related to “instigating”, this form of liability additionally requires that the accused possess the authority, either *de jure* or *de facto*, to order the commission of an offence.<sup>1590</sup> That authority may reasonably be implied from the circumstances.<sup>1591</sup> Further, there is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.<sup>1592</sup> With regard to the *mens rea*, the accused must have intended to bring about the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed as a consequence of the execution or implementation of the order.<sup>1593</sup>

(e) Aiding and abetting

401. “Aiding and abetting” is a form of accomplice liability<sup>1594</sup> which has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.<sup>1595</sup>

402. With respect to the *actus reus*, a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct was a condition precedent to the commission of the crime need not be established.<sup>1596</sup> However, it needs to be shown that the

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<sup>1586</sup> *Brdanin* Trial Judgement, para 269; *Blaškić* Trial Judgement, para 280.

<sup>1587</sup> *Kordić* Appeals Judgement, para 27.

<sup>1588</sup> *Kordić* Appeals Judgement, para 32.

<sup>1589</sup> *Kordić* Appeals Judgement, para 28, citing *Kordić* Trial Judgement, para 388; *Semanza* Appeals Judgement, para 361.

<sup>1590</sup> *Brdanin* Trial Judgement, para 270; *Mrkšić* Trial Judgement, para 550.

<sup>1591</sup> *Brdanin* Trial Judgement, para 270; *Limaj* Trial Judgement, para 515.

<sup>1592</sup> *Kamuhanda* Appeals Judgement, para 76, citing *Kordić* Trial Judgement, para 388; see also *Blaškić* Trial Judgement, para 281; *Limaj* Trial Judgement, para 515; with respect to proving an order by circumstantial evidence, see also *Galić* Appeals Judgment, paras 170 -171.

<sup>1593</sup> *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30; *Brdanin* Trial Judgement, para 270.

<sup>1594</sup> *Tadić* Appeals Judgement, para 229.

<sup>1595</sup> *Krstić* Trial Judgement, para 601; *Aleksovski* Appeals Judgement, para 162, citing *Furundžija* Trial Judgement, para 249; *Blagojević and Jokić* Appeals Judgement, para 127; *Mrkšić* Trial Judgement, para 551.

<sup>1596</sup> *Blaškić* Appeals Judgement, para 48, *Limaj* Trial Judgement, para 517.

assistance provided by the accused had a substantial effect on the commission of the crime,<sup>1597</sup> which requires a fact-based inquiry.<sup>1598</sup> Such assistance may occur before, during or after the principal crime has been perpetrated.<sup>1599</sup> Further, an omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting.<sup>1600</sup> While it has been found that the mere presence at the scene of a crime will not usually constitute aiding and abetting, the presence of a superior, for example, may operate as an encouragement to the actual perpetrator and may bestow legitimacy on the crime.<sup>1601</sup> Such encouragement may consist of tacit approval of a person in a position of authority and physically present at the crime scene, even where he had no duty to act.<sup>1602</sup>

403. The *mens rea* required is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence,<sup>1603</sup> a knowledge which need not have been explicitly expressed and may be inferred from all the relevant circumstances.<sup>1604</sup> The aider and abettor need not share the *mens rea* of the principal; he must, however, be aware of the essential elements of the crime ultimately committed by the principal, including of his state of mind.<sup>1605</sup> While it has been held that it need not be shown that the aider and abettor was aware of the specific crime that was intended or committed, provided that he was aware that one of a number of crimes would probably be committed, and one of those crimes is in fact committed,<sup>1606</sup> the Appeals Chamber recently confirmed that this ruling does not extend the definition of *mens rea* of aiding and abetting.<sup>1607</sup>

## 2. Responsibility under Article 7(3) of the Statute

404. Article 7(3) of the Statute provides:

The fact that any of the acts referred to in Article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to

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<sup>1597</sup> *Blaškić* Appeals Judgement, para 48, *Furundžija* Trial Judgement, para 249, *Kunarac* Trial Judgement, para 391, *Limaj* Trial Judgement, para 517.

<sup>1598</sup> *Blagojević* Appeals Judgement, para 134.

<sup>1599</sup> *Blaškić* Appeals Judgement, para 48; *Krnjelac* Trial Judgement, para 88; *Brdanin* Trial Judgement, para 271; *Limaj* Trial Judgement, para 517.

<sup>1600</sup> *Blaškić* Appeals Judgement, para 47. See also *Krnjelac* Trial Judgement, para 88; *Kunarac* Trial Judgement, para 391; *Mrkšić* Trial Judgement, para 553.

<sup>1601</sup> *Brdanin* Appeals Judgement, paras 273, 277. *Limaj* Trial Judgement, para 517.

<sup>1602</sup> *Haradinaj* Trial Judgement, para 145. See also *Brdanin* Appeals Judgement, paras 273, 277.

<sup>1603</sup> *Furundžija* Trial Judgement, para 249; *Tadić* Appeals Judgement, para 229; *Blaškić* Appeals Judgement, para 49; *Vasiljević* Appeals Judgement, para 102; *Brdanin* Appeals Judgement, para 484; *Blagojević* Appeals Judgement, para 127.

<sup>1604</sup> *Čelebići* Trial Judgement, para 328; *Tadić* Trial Judgement, para 676; *Limaj* Trial Judgement, para 518.

<sup>1605</sup> *Aleksovski* Appeals Judgement, para 162; *Vasiljević* Appeals Judgement, para 102; *Tadić* Appeals Judgement, para 229.

<sup>1606</sup> *Blaškić* Appeals Judgement, para 50, citing *Blaškić* Trial Judgement, para 287; *Furundžija* Trial Judgement, para 246; *Brdanin* Trial Judgement, para 272.

<sup>1607</sup> *Blagojević* Appeals Judgement, para 222.

take the reasonable and necessary measures to prevent such acts or to punish the perpetrators thereof.

The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of customary international law,<sup>1608</sup> applicable to both international and internal armed conflicts.<sup>1609</sup> This basis of criminal responsibility is usually referred to as superior or command responsibility. It encompasses all forms of criminal conduct by subordinates, not only the “committing” of crimes in the restricted sense of the term, but also all other modes of participation in crimes envisaged under Article 7(1) of the Statute.<sup>1610</sup>

405. The case against the Accused Ljube Boškoski, as charged in the Indictment, is confined to aspects of Article 7(3). He is charged for his alleged failure to punish his subordinates who have committed the crimes charged in the Indictment or who have aided and abetted others to commit those crimes.

406. To hold a superior responsible under Article 7(3) of the Statute, the jurisprudence of the Tribunal has enumerated three elements which must be satisfied:

1. the existence of a superior-subordinate relationship;
2. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
3. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>1611</sup>

(a) Superior-subordinate relationship

407. The doctrine of command responsibility is ultimately predicated upon the position of command over and the power to control the acts of subordinates. It is this position which forms the legal basis for the superior’s duty to act, and for his corollary liability for a failure to do so.<sup>1612</sup>

408. The existence of the position of command may arise from the formal or *de jure* status of a superior, or from the existence of *de facto* powers of control. It derives essentially from the “actual

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<sup>1608</sup> *Čelebići* Appeals Judgement, para 195; *Mrkšić* Trial Judgement, para 557. For the failure to punish, see *Blaškić* Appeals Judgement, para 85; *Halilović* Trial Judgement, para 94.

<sup>1609</sup> For application of the principle of command responsibility to internal armed conflicts, see *Prosecutor v Hadžihasanović*, Case No. IT-01-47-AR72, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para 31.

<sup>1610</sup> *Blagojević* Appeals Judgement, paras 280-282; *Orić* Appeals Judgement, para 21.

<sup>1611</sup> *Čelebići* Trial Judgement, para 346, *Blaškić* Appeals Judgement, para 484; *Aleksovski* Appeals Judgement, para 72. See also *Kordić* Appeals Judgement, para 827; *Blaškić* Trial Judgement, para 294; *Kvočka* Trial Judgement, para 314; *Halilović* Trial Judgement, para 56; *Mrkšić* Judgement, para 558.

<sup>1612</sup> *Aleksovski* Appeals Judgement, para 76; *Mrkšić* Trial Judgement, para 559.

possession or non-possession of powers of control over the actions of subordinates.”<sup>1613</sup> In determining the degree of control to be exercised by the superior over the subordinate, the Appeals Chamber endorsed the effective control standard, which it defined as the material ability to prevent or punish criminal conduct.<sup>1614</sup> The existence of a superior-subordinate relationship does “not [...] import a requirement of *direct* or *formal* subordination”.<sup>1615</sup> Likewise, there need not be a permanent relationship of command and subordination.<sup>1616</sup> Further, the Chamber recalls that “the test of effective control [...] implies that more than one person may be held responsible for the same crime committed by a subordinate.”<sup>1617</sup>

409. Article 7(3) of the Statute is not only applicable to military commanders, but also to civilian superiors.<sup>1618</sup> Civilian superiors incur criminal responsibility pursuant to Article 7(3) of the Statute under the same circumstances as military commanders.<sup>1619</sup>

410. In certain circumstances, and in particular in armed conflict, civilian superiors may exercise a wide *de facto* authority alongside their *de jure* authority over subordinates. It is, therefore, necessary to carefully examine both the *de facto* and the *de jure* authority and the effective control exercised by the civilian superior in the particular circumstances of the case.<sup>1620</sup>

411. Although the issue will always turn on the particular facts of the case<sup>1621</sup>, a number of factors have been identified, albeit not exhaustively, from which effective control may be inferred. These include the official position held by the accused, his capacity to issue orders whether *de jure* or *de facto*, the procedure for appointment, the position of the accused within the military or

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<sup>1613</sup> *Čelebići* Trial Judgement, para 370; *Mrkšić* Trial Judgement, para 560.

<sup>1614</sup> *Čelebići* Appeals Judgement, para 256. The Appeals Chamber has rejected the argument that a superior may be held criminally liable on the basis of his powers of influence as it held that “substantial influence as a means of control in any sense which falls short of possession of effective control over subordinates” (*i.e.* possession of material ability to prevent or to punish) has no standing of rule of customary law, especially such that may trigger criminal liability. *See Čelebići* Appeals Judgement, para 266. *See also Halilović* Appeals Judgement, para 59: “concept of effective control over a subordinate [...] is the threshold to be reached in establishing a superior-subordinate relationship”.

<sup>1615</sup> *Čelebići* Appeals Judgement, para 303. *See also Halilović* Appeals Judgement, para 59.

<sup>1616</sup> *Strugar* Trial Judgement, para 362; *Kunarac* Trial Judgement, para 399; *Mrkšić* Trial Judgement, para 560.

<sup>1617</sup> *Blaškić* Trial Judgement, para 303, referring to *Aleksovski* Trial Judgement, para 106; *see also Strugar* Trial Judgement, para 365; *Mrkšić* Trial Judgement, para 560.

<sup>1618</sup> *Čelebići* Appeals Judgement, para 195; *Čelebići* Trial Judgment, paras 356, 378; *Aleksovski* Trial Judgement, para 75; *Aleksovski* Appeals Judgement, para 76; *Kordić* Trial Judgement, para 416; *see also Bagilishema* Appeals Judgement, para 51; *Kajelijeli* Appeals Judgement, para 85; *Nahimana* Appeals Judgement, para 605.

<sup>1619</sup> *Čelebići* Appeals Judgement, paras 223-226; *Bagilishema* Appeals Judgement, para 50 holding that the: “[e]ffective control test applies to all superiors, whether *de jure* or *de facto*, military or civilian.” *See also Krnojelac* Trial Judgement, para 94; *Brdanin* Trial Judgement, paras 281-282.

<sup>1620</sup> *Kordić* Trial Judgement, paras 421-422; *Brdanin* Trial Judgement, para 281.

<sup>1621</sup> Whether the superior possessed effective control is a matter of evidence not of substantive law, *Orić* Appeals Judgement, para 20. *See also Blaškić* Appeals Judgement, para 69.

political structure and the actual tasks that he performed.<sup>1622</sup> The possession of *de jure* power may not in itself suffice for the finding of effective control.<sup>1623</sup> While the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates.<sup>1624</sup>

(b) Mental element: the superior knew or had reason to know

412. Strict liability does not attach to the principle of command responsibility; it must, therefore, be proven that the superior knew or had reason to know that his subordinates were committing or were about to commit crimes. An assessment of the mental element required by Article 7(3) of the Statute is determined on the specific circumstances of each case and the specific situation of the accused at the relevant time.<sup>1625</sup>

413. A superior's actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed; it may, however, be established by circumstantial evidence,<sup>1626</sup> including the number, type and scope of illegal acts, time during which the illegal acts occurred, number and type of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and the location of the commander at the time.<sup>1627</sup>

414. In determining whether a superior "had reason to know" that his subordinates were committing or about to commit a crime, it must be shown that specific information was in fact available to him which would have provided notice of offences committed or about to be committed by his subordinates.<sup>1628</sup> It is not required that he actually acquainted himself with the information, it must only have been available to him.<sup>1629</sup> The superior may not be held liable for failing to acquire such information in the first place.<sup>1630</sup> However, the information in fact available need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes.<sup>1631</sup> It is sufficient that the superior be in possession of sufficient information, even general in nature, to

<sup>1622</sup> *Kordić* Trial Judgement, paras 418-424. See also *Halilović* Appeals Judgement, para 204: "orders do not *per se* prove effective control; the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators."

<sup>1623</sup> *Čelebići* Appeals Judgement, para 197; *Galić* Trial Judgement, para 173.

<sup>1624</sup> *Orić* Appeals Judgement, paras 91-92. See also *Hadžihasanović* Appeals Judgement, para 21.

<sup>1625</sup> *Čelebići* Appeals Judgement, para 239, *Halilović* Trial Judgement, para 70.

<sup>1626</sup> *Čelebići* Trial Judgement, para 386; *Strugar* Trial Judgement, para 368; *Mrkšić* Trial Judgement, para 563.

<sup>1627</sup> *Čelebići* Trial Judgement, para 386. See also *Kordić* Trial Judgement, para 427; *Blaškić* Trial Judgement, para 307; *Strugar* Trial Judgement, para 368; *Mrkšić* Trial Judgement, para 563.

<sup>1628</sup> *Čelebići* Trial Judgement, para 393; *Mrkšić* Trial Judgement, para 564.

<sup>1629</sup> *Čelebići* Appeals Judgement, para 239.

<sup>1630</sup> *Blaškić* Appeals Judgement, paras 62-63, *Čelebići* Appeals Judgement, para 226, 241.

<sup>1631</sup> *Čelebići* Trial Judgement, para 393; *Mrkšić* Trial Judgement, para 564.

be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.<sup>1632</sup> If the superior *deliberately* refrains from obtaining further information, even though he had the means to do so, he may well be considered to have “had reason to know” of the crimes.<sup>1633</sup>

(c) Necessary and reasonable measures

415. A superior’s duty to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof relates directly to his possession of effective control, *i.e.* to his material ability to take such measures. A superior may be held liable for failing to take measures, even in the absence of explicit legal capacity to do so, if it is proven that it was within his material ability to take such measures.<sup>1634</sup> As held by the Appeals Chamber “‘necessary’ measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and ‘reasonable’ measures are those reasonably falling within the material power of the superior.”<sup>1635</sup> Accordingly, what constitutes “necessary and reasonable measures” is not a matter of substantive law but of evidence<sup>1636</sup> and is to be determined on the basis of the particular circumstances of the case.<sup>1637</sup>

416. Article 7(3) of the Statute contains two distinct legal obligations: to prevent the commission of the offence and to punish the perpetrators.<sup>1638</sup> These are not alternative obligations.<sup>1639</sup> The duty to prevent arises from the time a superior acquires knowledge, or has reason to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime.<sup>1640</sup> A superior is required to act from the moment that he acquires such knowledge.<sup>1641</sup>

417. With regard to the scope of a superior’s duty to punish, the Appeals Chamber held recently that whether the measures taken by a superior were solely of a disciplinary nature, criminal nature,

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<sup>1632</sup> *Čelebići* Trial Judgement, para 393; *Kordić* Trial Judgement, para 437; *Mrkšić* Trial Judgement, para 564; *Hadžihasanović* Appeals Judgement, para 27.

<sup>1633</sup> See *Čelebići* Appeals Judgement, para 226; *Blaškić* Appeals Judgement, para 406; *Halilović* Trial Judgement, para 69.

<sup>1634</sup> *Čelebići* Trial Judgement, para 395; *Kordić* Trial Judgement, para 443; *Mrkšić* Trial Judgement, para 565; see also *Blagojević* Trial Judgement, para 793; *Brdanin* Trial Judgement, para 279; *Stakić* Trial Judgement, para 461.

<sup>1635</sup> *Orić* Appeals Judgement, para 177; *Halilović* Appeals Judgement, para 63.

<sup>1636</sup> *Orić* Appeals Judgement, para 177; *Hadžihasanović* Appeals Judgement, para 33.

<sup>1637</sup> *Blaškić* Appeals Judgement, para 72; *Halilović* Trial Judgement, para 74; *Hadžihasanović* Appeals Judgement, para 33. See also *Halilović* Appeals Judgement, para 63: “‘necessary’ measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent and punish) and ‘reasonable’ are those reasonably falling within the material powers of the superior.”

<sup>1638</sup> *Blaškić* Appeals Judgement, para 83; *Hadžihasanović* Appeals Judgement, para 259.

<sup>1639</sup> *Blaškić* Appeals Judgement, para 83; *Mrkšić* Trial Judgement, para 566.

<sup>1640</sup> *Kordić* Trial Judgement, paras 445-446; *Orić* Trial Judgement, para 326; *Hadžihasanović* Trial Judgement, paras 125, 126. See also *Blaškić* Appeals Judgement, para 83.

or a combination of both, cannot in and of itself be determinative of whether a superior has discharged his duty.<sup>1642</sup> What is relevant is whether the superior took measures to punish which were “necessary and reasonable” in the circumstances, and not whether those measures were of a disciplinary or criminal nature.<sup>1643</sup> A superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities.<sup>1644</sup>

418. A superior’s duty to punish the perpetrators of a crime may encompass an obligation to conduct an effective investigation with a view to establishing the facts.<sup>1645</sup> The obligation to investigate translates into an obligation on the part of the superior to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities.<sup>1646</sup> It has been held in the jurisprudence of the Tribunal that civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings.<sup>1647</sup>

## **B. Findings on the responsibility of Ljube Boškosi**

### **1. Role of Ljube Boškosi in the events of 12 August**

419. There is evidence that between three and five weeks prior to the events in Ljuboten, the Head of OVR Čair received a telephone call from the Accused Ljube Boškosi who said that the other Accused Johan Tarčulovski would come to the office of the Head of OVR Čair, and that, in case Johan Tarčulovski needed assistance, the head of OVR Čair should provide it.<sup>1648</sup> The following day, Johan Tarčulovski came to the office of the Head of OVR Čair and said that he was sent by the minister (*i.e.* Ljube Boškosi) and they exchanged telephone numbers.<sup>1649</sup> The Chamber has considered this evidence most carefully. It is not confirmed in any way by other evidence. By virtue of the demeanour of M052 as he dealt with this issue, generally, and the potential on the evidence for M052 to have had a significant role in respect of the Ljuboten operation on 12 August,

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<sup>1641</sup> *Strugar* Trial Judgement, para 373; *Limaj* Trial Judgement, para 527; *Mrkšić* Trial Judgement, para 566.

<sup>1642</sup> *Hadžihasanović* Appeals Judgement, para 33.

<sup>1643</sup> *Hadžihasanović* Appeals Judgement, para 142.

<sup>1644</sup> *Hadžihasanović* Appeals Judgement, para 154.

<sup>1645</sup> *Strugar* Trial Judgement, para 376; *Limaj* Trial Judgement, para 529; *Mrkšić* Trial Judgement, para 568.

<sup>1646</sup> *Kordić* Trial Judgement, para 446; *Blaškić* Trial Judgement, para 335; *Strugar* Trial Judgement, para 376; *Limaj* Trial Judgement, para 529; *Halilović* Trial Judgement, paras 97, 100; *Halilović* Appeals Judgement, para 182; *Mrkšić* Trial Judgement, para 568.

<sup>1647</sup> *Aleksovski* Trial Judgement, para 78; *Brdanin* Trial Judgement, para 281.

<sup>1648</sup> M052, T 8245-8247.

<sup>1649</sup> M052, T 8250-8251.

the Chamber is unable to accept the honesty and reliability of this evidence which it considers may well have been influenced by M052's interest to distance himself from responsibility for the events.

420. On 11 August 2001, Ljube Boškosi was in Raduša.<sup>1650</sup>

421. Upon receiving information that "something was happening around Ljuboten", on 12 August 2001, around 1000 hours, Police General Risto Galevski telephoned Ljube Boškosi through the duty operation centre and asked whether Boškosi knew what was going on in Ljuboten.<sup>1651</sup> There is also evidence that the President called Ljube Boškosi in the morning regarding events in Ljuboten,<sup>1652</sup> and ordered him to go to Ljuboten.<sup>1653</sup>

422. A number of witnesses testified that Ljube Boškosi visited the Chinese Wall checkpoint located next to Braca's house and the yard outside Braca's house on 12 August 2001.<sup>1654</sup>

423. M052 gave evidence that, prior to Ljube Boškosi's arrival at Braca's house, Johan Tarčulovski had told him that the minister had approved the release of a Hermelin APC for the purpose of transporting wounded or killed people.<sup>1655</sup> The Chamber is unable to accept the tenor and implication of this evidence to the effect that Boškosi approved the use of the Hermelin APC because M052's strong self-interest to distance himself from responsibility for the events that day appeared to the Chamber to influence his evidence. Also, it would not be likely that it was for Minister Boškosi to give an approval of such a relatively minor operational matter.

424. Ljube Boškosi arrived at the Chinese Wall checkpoint accompanied by his body-guard Blagoja Jakovski,<sup>1656</sup> and a TV crew, composed of journalist Eli Čakar and a cameraman,<sup>1657</sup> who followed him throughout the visit<sup>1658</sup> and recorded much of the visit on a video tape.<sup>1659</sup>

425. While Eli Čakar placed their arrival at the checkpoint considerably later,<sup>1660</sup> the main body of evidence persuades the Chamber that Ljube Boškosi arrived at the checkpoint some time around 1200 hours and left before the end of the operation, which was completed around 1345 hours. The

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<sup>1650</sup> Blagoja Jakovski, T 3976-3977; Risto Galevski, T 3858-3859.

<sup>1651</sup> Risto Galevski, T 3765-3766.

<sup>1652</sup> Blagoja Jakovski, T 3978-3979; Zlatko Keskovski, T 10022-10026; Zoran Trajkovski, T 5558-5559.

<sup>1653</sup> Zoran Trajkovski, T 5558-5559.

<sup>1654</sup> Eli Čakar, Exhibit P441, paras 16-19, 21-22; Eli Čakar, T 5157-5159; 5161; 5177-5178; 5190; M017, T 630-635; M052, T 8278-8284; M053, T 1912-1914; 1932; 1977-1978; M037, T 752; 796-798; Blagoja Jakovski, T 3937-3941; 3998; Osman Ramadani, Exhibit P197, paras 37-38,43; Ismail Ramadani, Exhibit P188, para 32; Exhibit 189, p 5.

<sup>1655</sup> M052, T 8288-8289.

<sup>1656</sup> Blagoja Jakovski, T 3937-3941.

<sup>1657</sup> Eli Čakar, Exhibit P441, paras 10 and 16. *See* also M052, T 8279-8280; M053, T 1913.

<sup>1658</sup> Eli Čakar, T 5178; 5190; 5202-5204.

<sup>1659</sup> Exhibit P442; Eli Čakar, Exhibit P441, para 6; Eli Čakar, T 5158-5159.



entire visit, both at the checkpoint and in the yard of Braca's house, lasted approximately one hour and a half.<sup>1661</sup>

426. At the checkpoint, Ljube Boškoski was greeted by the Head of OVR Čair.<sup>1662</sup> In the evidence, it was suggested, somewhat strangely, that he briefed the Minister on the strength of checkpoints.<sup>1663</sup> Thereafter, Ljube Boškoski and his party entered the yard of Braca's house next to the checkpoint.<sup>1664</sup> In the yard, their attention was directed in particular towards Ljuboten.<sup>1665</sup> While the individual houses of Ljuboten may not be seen from Braca's house,<sup>1666</sup> smoke was still rising from the village. There was occasional shooting.<sup>1667</sup> It is suggested that there was some shooting from the village towards the house,<sup>1668</sup> but the Chamber is concerned about the reliability of this evidence. It is not greatly assisted by the television footage in evidence, because the Chamber accepts that the actual recording at Braca's house was later supplemented, at least with respect to the sound, to create an impression of greater military activity.<sup>1669</sup>

427. According to the journalist Eli Čakar, Boškoski was informed, at the time they entered the yard,<sup>1670</sup> that terrorists had entered from Kosovo and there was an action on-going to arrest them.<sup>1671</sup> While in the yard, the Head of OVR Čair<sup>1672</sup> informed Boškoski about the ongoing "situation"<sup>1673</sup> or "action."<sup>1674</sup> It was said that the security forces had managed to break up the terrorist groups that had launched attacks from Ljuboten<sup>1675</sup> (as to which no persuasive evidence has been led before the Chamber), with only one casualty among the members of the security forces.<sup>1676</sup>

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<sup>1660</sup> Eli Čakar said that the witness and Boškoski did not leave Skopje before 1400 hours, arrived at Braca's house around 1500 hours, and did not come back before 1700 hours, Exhibit P441, para 14; T 5172; 5176; 5179.

<sup>1661</sup> M052, T 8277-8278; Blagoja Jakovski, T 3939-3941; 3998; Osman Ramadani, Exhibit P197, para 43. *See also* M052, T 8280; 8281; Eli Čakar, Exhibit P441, para 12; Eli Čakar, T 5178; 5190; M053, T 1977-1978.

<sup>1662</sup> M052, T 8278-8279; M053, T 1977-1978; Blagoja Jakovski, T 3937-3941; 3990; 3991.

<sup>1663</sup> M052, T 8278.

<sup>1664</sup> Eli Čakar, Exhibit P441, para 17; Eli Čakar, T 5161; *See also* M037, T 797; Ismail Ramadani, Exhibit P188, para 32; Exhibit P189, para 17; Osman Ramadani, Exhibit P197, para 37.

<sup>1665</sup> Eli Čakar, T 5196-5197. *See also* M037, T 797; Exhibit P442.

<sup>1666</sup> *See* Blagoja Jakovski, T 3937; Eli Čakar, T 5181; 5196-5197.

<sup>1667</sup> Eli Čakar, Exhibit P441, para 17; Eli Čakar, T 5181; 5196.

<sup>1668</sup> Blagoja Jakovski, T 3993; 3996; M052, T 8545-8546. *See also* Exhibit P442, in which it can be seen that people are crouching behind the wall surrounding the yard of Braca's house.

<sup>1669</sup> Eli Čakar, Exhibit P441, paras 29-33; Exhibit P442.

<sup>1670</sup> Eli Čakar, Exhibit P441, para 18.

<sup>1671</sup> Eli Čakar, Exhibit P441, para 18. *See also* Exhibit P442.

<sup>1672</sup> M037, T 798; 840; 843; 875. *See also* Exhibit P378, page 3; Blagoja Jakovski, T 3991; 3993.

<sup>1673</sup> M053, T 1978.

<sup>1674</sup> Exhibit P441, para 18.

<sup>1675</sup> Eli Čakar, Exhibit P441, para 35; Exhibit P442.

<sup>1676</sup> Eli Čakar, Exhibit P441, para 35; Exhibit P442. This concerned a reserve who accidentally shot himself, *see supra*, para 69.

Boškoski also received a number of reports from others at Braca's house.<sup>1677</sup> There is no evidence that Boškoski was informed at this stage about "terrorists" having been killed during the action.

428. There is evidence that while Ljube Boškoski was inside the yard of Braca's house, a group of four to six reserve police, who had participated in the action in the village that day, and who were from the "Kometa" agency, brought a group of 10 persons to a position in front of the gate to Braca's house.<sup>1678</sup> Boškoski was informed that a group of "terrorists" who had entered from Kosovo had been captured and arrested during the action, their ID cards had been seized, and that they would be brought to the police station.<sup>1679</sup> Boškoski was also shown three weapons that had been taken from the arrested "terrorists."<sup>1680</sup> However, the weapons were said by police to have come from an entirely different source.<sup>1681</sup> In the Chamber's finding these detainees were the residents from the yard of Adem Ametovski. Their bad condition is recorded elsewhere in this Judgement.<sup>1682</sup> The Chamber records here its finding that, in particular, one of the residents was in a very bad physical condition, and that others had red marks from beatings.<sup>1683</sup> These persons were forced to lie outside the gate with their faces down,<sup>1684</sup> with t-shirts over their heads.<sup>1685</sup> Eli Čakar saw this group as she left Braca's house with Boškoski,<sup>1686</sup> at a distance of 10-15 metres.<sup>1687</sup> On this basis, the Chamber accepts and finds that Ljube Boškoski saw this group of detainees at the gate. The Chamber is not able to accept, however, that detainees were beaten as Ljube Boškoski stood watching,<sup>1688</sup> a suggestion not confirmed by any other witnesses present. Further, while Boškoski may have noticed aspects of their condition, it is not necessarily the case that he would have concluded from what he saw, as the detainees lay on the ground and with their faces down with T-shirts over their heads, that any of them had been seriously beaten or mistreated. There is no evidence to suggest that Ljube Boškoski was told anything about their condition.

429. Police General Risto Galevski gave evidence that in the afternoon he ordered the Posebna special police unit to go to Ljuboten in order to create a buffer between ethnic Macedonian villagers

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<sup>1677</sup> M052 said Boškoski spoke with police officers, T 8316-8317, and reserves, T 8281. Eli Čakar gave evidence that Boškoski spoke with a group wearing camouflage uniform wearing masks, Exhibit P441, para 21. *See also* M053, T 1977-1978.

<sup>1678</sup> M052, T 8282-8284. *See also* M017, T 630-631; Exhibit P20.

<sup>1679</sup> Eli Čakar, Exhibit P441, paras 18-19. *See also* Exhibit P442.

<sup>1680</sup> Eli Čakar, Exhibit P441, para 25. *See also* M037, T 798; 840; 845. These weapons were in the Hermelin APC, or on the ground next to the Hermelin APC, M037, T 798; Eli Čakar, Exhibit P441, para 22. *See also* Exhibit P442. After seeing the weapons, Boškoski nodded his head, M037, T 798-799; 840-841.

<sup>1681</sup> *See supra*, para 76.

<sup>1682</sup> *See supra*, para 74.

<sup>1683</sup> M052, T 8283; 8285; 8286.

<sup>1684</sup> M017, T 630; M012, T 976. *See also* M052, T 8284; Osman Ramadani, Exhibit P197, para 37; Ismail Ramadani, Exhibit P188, para 32.

<sup>1685</sup> M017, T 633; M012, T 898; Osman Ramadani, Exhibit P197, para 40.

<sup>1686</sup> Eli Čakar, Exhibit P441, para 22. *See also* Eli Čakar, Exhibit P441, para 23; Exhibit P442; Eli Čakar, T 5162; 5163.

<sup>1687</sup> M052, T 8284; Exhibit P20; M037, T 799.

from neighbouring villages, especially Ljubanci, and the villagers from Ljuboten who were seeking to leave Ljuboten on foot for Skopje. Violent clashes were foreseen. He says that beforehand he consulted with Ljube Boškoski, Goran Mitevski, Ljupčo Bliznakovski and other senior MoI officials.<sup>1689</sup> There is no specific evidence that Ljube Boškoski gave any order in this respect.

430. In the evening<sup>1690</sup> of 12 August 2001, Macedonian TV broadcast a report of the visit by Ljube Boškoski to Braca's house.<sup>1691</sup> The comments provided in this broadcast were based on information given by Ljube Boškoski.<sup>1692</sup> It was said in the report that the security forces had succeeded in breaking up the terrorist groups that had launched attacks from Ljuboten.<sup>1693</sup> This broadcast was brought to the attention of international organisations, such as Human Rights Watch.<sup>1694</sup>

## 2. Notification to the investigative judge

431. According to an official note by Investigative Judge Ognen Stavrev,<sup>1695</sup> on 12 August 2001 at 1730 hours the duty investigative judge was informed by the MoI duty operations centre that there were "several killed members of the paramilitary of the Albanian terrorists" in the area of Ljubanci and Ljuboten villages, and further that the safety of the investigation authorities could not be guaranteed due to ongoing military clashes between the paramilitary forces and the security forces. The investigative judge informed the public prosecutor.<sup>1696</sup> On 14 August 2001 at 1330 hours the investigative judge on duty was informed by the MoI that there were several corpses in the area of the Ljuboten village, and that it probably concerned "members of the terrorist organisation NLA/KLA, perished in combat activities carried out with RM security forces on 12 August 2001."<sup>1697</sup> Investigative Judge Stavrev arrived at Čair police station shortly thereafter, together with the deputy public prosecutor and Zlatko Jačovski from the Forensic Medicine Institute, but no on-site investigation was conducted in Ljuboten as the Head of OVR Čair said that the security forces could not guarantee their safety. It was said that the security forces had not entered Ljuboten and firearms could still be heard from the village.<sup>1698</sup> Investigative Judge Stavrev

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<sup>1688</sup> Ismail Ramadani, Exhibit P188, para 32.

<sup>1689</sup> Risto Galevski, T 3629; 3766-3767.

<sup>1690</sup> Exhibit P352, p 2.

<sup>1691</sup> Eli Čakar, T 5192; Exhibit P442.

<sup>1692</sup> Eli Čakar, Exhibit P441, para 35; Eli Čakar, T 5179-5180.

<sup>1693</sup> Exhibit P442.

<sup>1694</sup> Exhibit P352, pp 2-3.

<sup>1695</sup> Exhibit 1D6.

<sup>1696</sup> Exhibit 1D6; Zlatko Jačovski, T 2353. *See also* Petre Stojanovski, T 9167-9168.

<sup>1697</sup> Exhibit 1D6.

<sup>1698</sup> Exhibit 1D6. *See also* Vilma Ruskovska, Exhibit P235, para 10. The lack of safety was further explained in an official note prepared by the deputy public prosecutor on 15 August: "No representatives of the security forces are stationed there, to guarantee the security of the investigative group; there are only two police checkpoints around

arrived with an investigation team one more time on 14 August 2001, but the Head of OVR Čair once again declared that there were shootings, and that the dead bodies were already buried.<sup>1699</sup> It should be noted that there was no specific notification of destruction of houses in Ljuboten or of any mistreatment of detained villagers or suspects in Ljuboten, at Braca's house, at Buzalak checkpoint, in various police stations, the Skopje court or in the Skopje hospital. Further, no names of potential witnesses, either residents or police, were provided to the investigative judge.

432. The Chamber notes that there is no evidence of ongoing military clashes in Ljuboten or that firearms could still be heard, on either 13 or 14 August. To the contrary, the OSCE representative Henry Bolton visited Ljuboten on 14 August, without difficulty, to inspect the scene of the activities on 12 August and the dead bodies which were still *in situ*, and he heard and saw nothing of armed clashes or firearms.<sup>1700</sup> He indicated to people in the village that they should bury the dead bodies.<sup>1701</sup>

433. On 14 August 2001, OVR Čair also informed the public prosecutor of the death of one of the detained residents, Atulla Qaili in the Skopje City Hospital on 13 August 2001, that he had been detained in Mirkovci police station prior to being sent to hospital, and that it was the duty officer at the police station who had called the ambulance.<sup>1702</sup> An autopsy of Atulla Qaili was conducted by the Forensic Medicine Institute on 14 August 2001.<sup>1703</sup> It fully set out the extent of the severe injuries to his body and that they were caused by repeated "dynamic dull-firm force" in the area of the head, body and limbs.<sup>1704</sup> It should be noted, however, that the autopsy protocol was not subsequently obtained by the public prosecutor or the judiciary, apparently because "the competent court failed to pay for the conducted post mortem", nor was there any attempt by them to obtain it.<sup>1705</sup> On 16 August 2001, the investigative judge took measures aimed at ascertaining the identity of Atulla Qaili,<sup>1706</sup> which initially had been wrongly recorded.<sup>1707</sup> The following day, the criminal police of MoI sought to identify Atulla Qaili by comparing fingerprints,<sup>1708</sup> and the result was subsequently transmitted to the investigative judge.<sup>1709</sup>

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the village, but there are also groups of terrorists with sniper-guns and infantry firearms. Because of this situation on the ground, we agreed with the competent investigative judge to cancel the site investigation," Exhibit 1D72.

<sup>1699</sup> Exhibit 1D6.

<sup>1700</sup> Henry Bolton, T 1740-1742.

<sup>1701</sup> Henry Bolton, Exhibit P236.1, para 22.

<sup>1702</sup> Exhibits P46.16; P261. *See also* Petre Stojanovski, T 9180.

<sup>1703</sup> Exhibit P54.059.

<sup>1704</sup> *See supra*, para 329.

<sup>1705</sup> *See infra*, para 443.

<sup>1706</sup> Exhibit 1D67.

<sup>1707</sup> Exhibit P49, p 19, ERN N001-0095.

<sup>1708</sup> Exhibit 1D69. *See also* Exhibit P54.059.

<sup>1709</sup> Exhibit 1D70.

### 3. Investigative efforts at the Ministry of Interior

#### (a) Commission established on 13 August 2001

434. By 13 August 2001, various information had reached representatives of the international community and the media that in Ljuboten on 12 August there had been clashes with citizens, shelling by the police, and that there were some five to 15 persons killed.<sup>1710</sup> It was said that concern generated by this information was sufficient reason for the decision of Ljube Boškoski to formally establish a commission on that day to:<sup>1711</sup>

- I. [...] consider the circumstances and analyze the activities undertaken by the security forces of the Ministry of Internal Affairs to repel the armed attacks by terrorist groups on 12.08.2001 in the village of Ljuboten-Skopje, comprised of:
  1. Goran Mitevski – Director of the Bureau for Public Security, chairman;
  2. Risto Galevski – Head of Department for Police, member, and
  3. Živko Petrovski – Head of the Department for Criminal Police, member.
- II. Based upon data, reports and other available materials from the relevant services of the Ministry of Internal Affairs, as well as upon information obtained in conversation with members of the Ministry, the Commission from item I of this decision has the task to review the circumstances and analyze the activities undertaken by the security forces of the Ministry of Internal Affairs to repel the armed attacks of terrorist groups on 12.08.2001 in the village of Ljuboten-Skopje.
- III. The Commission is obliged immediately to start carrying out the tasks determined in item II of this Decision and to prepare a report about the determined facts, with an opinion about the grounds, justification and regularity of the activities undertaken by the security forces of the Ministry.
- IV. The report from part III of this decision shall be submitted to the Minister of Internal Affairs.

435. The commission submitted its five-page report to Ljube Boškoski on 4 September 2001.<sup>1712</sup> Regarding the events on 12 August 2001, the commission noted that “through military actions, the joint security forces broke up the terrorist groups”, and that they had been “provoked” to take action “to repulse the attacks and break up the terrorist groups.”<sup>1713</sup> Some 73 persons had been arrested.<sup>1714</sup> In the opinion of the commission:

The actions taken by the security forces of the Ministry of the Interior to repulse the armed attacks of terrorist groups, on 12 August 2001, in Ljuboten village, Skopje, were well-founded, justified, and correctly taken, while the occurrence was recorded of the presence to an insignificant, tolerant

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<sup>1710</sup> Risto Galevski, T 3869-3870. Risto Galevski also gave evidence that already in the afternoon on 12 August there was information of injured villagers, of which some received treatment in hospital, T 3766-3767. *See also* Exhibit P362.

<sup>1711</sup> Exhibit P73; Risto Galevski, T 3869-3870.

<sup>1712</sup> Exhibit P378. *See also* Risto Galevski, T 3589-3590.

<sup>1713</sup> Exhibit P378, pp 2, 3.

<sup>1714</sup> Exhibit P378, p 3.

degree of individual overstepping of the limits of the prescribed powers, by a small number of members of the Ministry of Interior, actively participated in the incident in question.

Given the objectively justifiable absence of written documentation from the on-site investigation and autopsy of the bodies found in the village of Ljuboten, Skopje, and in order to achieve comprehensiveness and all-inclusiveness, it is necessary for the authorities in the Republic of Macedonia to undertake legal action, the exhumation of the bodies, in the presence of experts, and of representatives of interested international organisations which will have as a result the taking of all necessary legal actions towards confirmation of all the relevant facts and receipt of an answer to the open substantive question about this event.<sup>1715</sup>

436. The Chamber observes that, according to one commission member, the commission was not a body conducting an investigation, but “a task force that needed to initiate the mechanisms available to the Ministry of Interior.”<sup>1716</sup> While the witness did not elaborate on this, it is quite apparent from the content of the report that the approach by the commission was very limited. Most notably, the report did not directly address some specific events, such as the circumstances in which deaths occurred, property destruction in Ljuboten on 12 August 2001, mistreatment of detainees in Ljuboten and police stations and elsewhere, or whether the security forces of the MoI that were deployed in Ljuboten on that day or in the police stations had been involved in any of these activities.<sup>1717</sup> Further, the report appears to create the impression that the security forces repulsed “terrorist” attacks, whereas, the evidence shows it was the security forces that attacked.<sup>1718</sup> This, of course, reflects the misunderstanding apparent in the original terms of reference to the commission. By its report, however, the commission did identify the need for exhumations of the buried as a step towards confirmation of the relevant facts and acknowledged that “the open substantive question of this event” remained unanswered.

437. The work of this commission was conducted in a very superficial way. At no point did the commission make a visit to Ljuboten. It was submitted by the Defence that only an investigative team led by an investigative judge could go on a crime scene to gather information.<sup>1719</sup> The Chamber appreciates that while it was within the competence of the public prosecutor and the investigative judge to order or to conduct an on-site investigation for the purposes of criminal investigation, the commission could have visited Ljuboten for its own purposes. It was not conducting a criminal investigation and, therefore, would not interfere in the work of the investigative judge or others investigating possible criminal conduct.

438. The commission stated in the report that, as well as gathering written documentation in the Ministry of Interior for its purposes, those assisting it from the Ministry “held a discussion with

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<sup>1715</sup> Exhibit P378, pp 4-5.

<sup>1716</sup> Risto Galevski, T 3581.

<sup>1717</sup> Even though these issues were tasks of the Commission, *see* Exhibit P73; Risto Galevski, T 3868-3869.

<sup>1718</sup> *See supra*, para 42.

<sup>1719</sup> Boškoski Defence Final Brief, paras 135-141.

additional members of the Ministry who had taken an active part in the events of this case.”<sup>1720</sup> The head of the police, and a member of the commission, General Risto Galevski, stated that “several people were interviewed in the police stations.”<sup>1721</sup> There is, however, no reference to specific interviews in the report or attached to it. Risto Galevski did not interview anyone in the course of the commission’s work,<sup>1722</sup> and confirmed that the commission did not interview any ethnic Albanian resident of Ljuboten.<sup>1723</sup> He did not know whether any detainee was interviewed.<sup>1724</sup> Further, Ljuboten residents,<sup>1725</sup> including those who had been detained by the police,<sup>1726</sup> and, with one possible exception,<sup>1727</sup> police officers involved in the Ljuboten events<sup>1728</sup> who testified before the Chamber, said they had never been contacted by the commission for an interview.

439. On this basis, the Chamber concludes that the commission did not view the scene of the events in Ljuboten, or seek to interview residents in Ljuboten, detainees arrested in Ljuboten on 12 August or any police who participated in the operation in Ljuboten. The Chamber finds that the commission had the authority and the capacity, by virtue of their mandate and the functions of its members by virtue of their positions in MoI, to seek to do such things. It did not even identify the members of the police who entered the village or who dealt with detained residents at checkpoints or in police stations.<sup>1729</sup> It is contended that the residents did not approach the commission or the police. However, no attempt was made by the commission or those assisting it, to approach them for an interview.

440. In course of a very extensive report which dealt with many issues in FYROM, and which was communicated to the Government of FYROM late in March 2002, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a body of the

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<sup>1720</sup> Exhibit P378, p 1.

<sup>1721</sup> Risto Galevski, T 3787-3790. *See also* Petre Stojanovski, T 9195-9197; 9375-9376. Petre Stojanovski gave evidence that he interviewed heads of police stations where detainees were held, but that none of them confirmed that any mistreatment had taken place. He provided no further details regarding these interviews.

<sup>1722</sup> Risto Galevski, T 3583-3584.

<sup>1723</sup> Risto Galevski, T 3587-3588.

<sup>1724</sup> Risto Galevski, T 3845.

<sup>1725</sup> Aziz Redžepi, T 4691.

<sup>1726</sup> M017, T 739; Sherafedin Ajrullai, T 4055; Ejup Hamiti, T 4433; Sedat Murati, T 4064; M012, T 919-920; Osman Ramadani, T 1103; Osman Ramadani, Exhibit P198, para 40.

<sup>1727</sup> M083, T 1438-1439.

<sup>1728</sup> M084, T 1482; M037, T 871; M052, T 8369.

<sup>1729</sup> Risto Galevski asserted that there were lists for all deployed persons (which could be found at OVR Čair for those police forces, and in a special unit sector in the Ministry for the Posebna Unit), T 3842-3844. Risto Galevski suggested that the members of the commission could have spoken to MoI members who had been present in Ljuboten on 12 August 2001 to obtain information on how many people were killed, T 3871-3873, but this was conjectural and there is nothing to indicate that this actually occurred and the report of the commission does not reflect what he suggests.

Council of Europe, commented on issues which are directly relevant to this trial.<sup>1730</sup> Regarding the Ljuboten case, it was said that:

[I]t would appear that Ministry of the Interior officials did not take steps to protect and preserve evidence and to carry out a criminal investigation despite being under the strict legal obligations to do so under the Code of Criminal Procedure.<sup>1731</sup>

With respect to the conclusion of the commission, it was noted that:

Notwithstanding the assessment by the ad hoc Committee of the Ministry of the Interior, medical evidence collected by the delegation was consistent with allegations of ill-treatment of the persons deprived of their liberty in the context of or following the operation of Government security forces in Ljuboten.<sup>1732</sup>

441. It is not known precisely when this report was brought to the attention of Ljube Boškoski, but the Chamber assumes from the nature of the report that he would have become aware of it. The CPT expressed views which are quite similar to those which the Chamber has reached in this Judgement, especially about the failure of the police to adequately investigate the events in and consequential to Ljuboten on 12 August 2001 and the following days.

442. The CPT report was very wide ranging. The FYROM government submitted a 12-page detailed response.<sup>1733</sup> The copy of this in evidence is undated, but as it refers to events in October 2002 it is apparent that its completion took some time. Wide ranging comments provided by the Ministry of Interior have been included by the government, and also comments by the Ministry of Health, the State Judicial Council and the Public Prosecutor. It is clear from this response that attention was given to the report of CPT by Ljube Boškoski's ministry.

443. Among the many matters dealt with by the Ministry of Justice are the cases related to Ljuboten (item 28), including the case of "AQ", *i.e.* Atulla Qaili (item 34).<sup>1734</sup> Under the general caption of Information requested in the Report, there is a short comment by the State Judicial Council saying it has not received any requests and petitions that would relate to treatment of detained persons, referring to torture and other unlawful treatment.<sup>1735</sup> No comment is offered on the activities of the judiciary in connection with the deaths in Ljuboten and of Atulla Qaili. The First-Instance Court Skopje II provided information detailing the persons from Ljuboten, against whom criminal cases had been opened for "Service in Enemy Army" and noting the release of all of

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<sup>1730</sup> Exhibit P380.1

<sup>1731</sup> Exhibit P380.1 Report to the Government of FYROM on the visit to FYROM carried out by CPT from 21 to 26 October 2001, para 64.

<sup>1732</sup> Exhibit P380.1, para 30.

<sup>1733</sup> Exhibit 1D372; Response of the Government of FYROM to the report of CPT on its visit from 21 to 26 October 2001.

<sup>1734</sup> Exhibit 1D372 (N001-4809-N001-4811).

<sup>1735</sup> Exhibit 1D372 (N001-4808).



these persons following the granting of an immunity in December 2001.<sup>1736</sup> The First-Instance Office of the Public Prosecutor for Skopje also advised that information on the Atulla Qaili case was provided on 13 August 2001. He was among the suspects for the offence of Association for enemy activity. He was not brought before the investigative judge because he was in hospital where he later died. A post mortem forensic examination was conducted by order of the investigative judge. However, the “Dissection Protocol of this procedure was not obtained, because the competent court failed to pay for the conducted post mortem.” Having noted the exhumation in April 2002 it was said “the reasons of death will be disclosed upon receipt of the results of the said exhumation...”.<sup>1737</sup>

444. Absent, however, from the Government’s response is any identification of the investigative efforts of the police or any explanation of the absence of them, or any explanation of the failure of the public prosecutor or the investigative judge to deal with the reported deaths from Ljuboten and the death of Atulla Qaili, other than the failure of the court to pay for the autopsy report of Atulla Qaili. The response goes on to record that jurisdiction in respect of five cases, including Ljuboten, had been assumed by the ICTY.

445. Had the CPT report and the response of the FYROM been considered by Ljube Boškoski during the Indictment period, there would have been an obvious need for Ljube Boškoski to take action, in particular because of the absence of any response to the allegation of failure by the police within his responsibility. That was not the case, however, because the response of FYROM was some months after the Indictment period, which ended in May 2002 when the ICTY Prosecutor asserted responsibility to investigate and prosecute in respect of Ljuboten, and it has not been established that Ljube Boškoski had notice of the CPT report before then.

(b) Other information received by Ljube Boškoski in August/September 2001

446. On 14 August 2001,<sup>1738</sup> Ljube Boškoski met with the Head of the OSCE mission Ambassador Carlo Ungaro it is suggested because there was by then information in the public domain that some people were killed in Ljuboten, and that this information came from the OSCE.<sup>1739</sup> Prior to this meeting, Ljube Boškoski had criticized the OSCE in strong terms in the media.<sup>1740</sup> In a statement to the Macedonian TV after the meeting Ljube Boškoski said they had

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<sup>1736</sup> Exhibit 1D372 (N001-4809).

<sup>1737</sup> Exhibit 1D372 (N001-4811).

<sup>1738</sup> See Exhibit P362. See however, Risto Galevski indicating that this meeting took place on 13 August 2001, T 3770; 3859-3860.

<sup>1739</sup> Risto Galevski, T 3770; 3859-3860; Exhibit P362. See also Exhibit 1D203.

<sup>1740</sup> Exhibit P352, p 18. See also Peter Bouckaert, T 2993; 3003-3005.

discussed the issue of the five<sup>1741</sup> dead bodies in Ljuboten, the security situation, and that the initial indications by the police were that:

the deceased were members of a terrorist group that fired at the security forces of the Republic of Macedonia, which again serves to prove that a massacre did not occur in the village of Ljuboten and that there was no killing of civilians, but of a terrorist-extremist group.<sup>1742</sup>

Further, Ljube Boškoski stated that the five bodies had been buried by village residents that same afternoon and that:

Macedonian security forces were not allowed to approach the dead in order to do the investigation.<sup>1743</sup>

[...] all that remains now is to establish whether they were from Ljuboten itself, or whether those terrorists were also imported, as I said before, from Kosovo or from other parts of the former Yugoslavia or Europe, and this was most probably done with the aim of concealing the traces of the crime they committed. In order to discover the truth, the public prosecutor will need authorisation to perform an exhumation in accordance with legal procedure if we want the truth to be confirmed.<sup>1744</sup>

447. In the period following the Ljuboten events, four reports related to those events reached Ljube Boškoski.<sup>1745</sup> These reports were submitted to him between 14 and 17 August 2001, and included information on the five dead bodies that were found in Ljuboten by the OSCE on 14 August 2001, that they were subsequently buried, and that unsuccessful attempts were made to conduct an on-site inspection.

448. On 5 September 2001, Human Rights Watch (HRW) issued a report related to the events in Ljuboten from 10 to 12 August 2001.<sup>1746</sup> The major part of the report contains a purported narrative of events in Ljuboten on 12 August 2001 relevant to the charges in the present case.<sup>1747</sup> The sources of the report cited are interviews conducted by a representative of HRW, Peter Bouckaert, with Ljuboten residents between 18 and 29 August 2001, press reports, and a visit by Bouckaert to the village of Ljuboten on 23 August 2001.<sup>1748</sup> These accounts speak of killings of a number of persons and bombing, firing and burning of several houses in Ljuboten on 12 August

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<sup>1741</sup> This would appear to be inconsistent with the Chamber's finding that 7 persons were murdered, the Chamber does not consider it that way, as it may very well be that the information would not be complete shortly after the event.

<sup>1742</sup> Exhibit P362. *See also* Exhibit 1D203.

<sup>1743</sup> Exhibit 1D203. *See also* Exhibit 1D202.

<sup>1744</sup> Exhibit P362.

<sup>1745</sup> Exhibits 1D361; 1D364; 1D373; 1D374.

<sup>1746</sup> Exhibit P352, "Crimes against civilians. Abuses by Macedonian Forces in Ljuboten, August 10-12, 2001"; Exhibit P353; Peter Bouckaert, T 2991-2992.

<sup>1747</sup> Exhibit P352, pp 5-17.

<sup>1748</sup> Exhibit P352. *See also* Peter Bouckaert: The information included in the report came, in particular, from his interviews with eyewitnesses, victims, journalists, observers, political figures as well as public statements made Macedonian officials and his own observation during his visit to Ljuboten on 23 August 2001, T 2992. *See also* Peter Bouckaert, T 3098-3099. The MTV broadcast of 12 August 2001 was also relied upon, and was in fact the only evidence to suggest that Ljube Boškoski had been "intimately involved" in the operation and that the people involved had been under his authority, Peter Bouckaert, T 3074; 3078.

2001. They also speak of mistreatment of detainees in Ljuboten and at Buzalak checkpoint on 12 August 2001, in the hospital and in the police stations of Butel, Karpoš and Proleće on 12 August 2001 and the following days. It was also reported that one detainee, Atulla Qaili, subsequently died in hospital, having been beaten prior to his death. It was specifically reported that police belonging to the MoI under the authority of Ljube Boškoski had been involved in these actions, and that Ljube Boškoski had been present “during the entire operation”.<sup>1749</sup>

449. While the report was submitted to various authorities in Macedonia, it is not confirmed that the report was sent directly to the MoI.<sup>1750</sup> Peter Bouckaert did not try to contact Ljube Boškoski before publication of the report.<sup>1751</sup>

450. Ljube Boškoski did, however, respond to the allegations in the HRW report, by two press statements. Prior to the publication of the report, the English newspaper The Sunday Telegraph received information about its anticipated content,<sup>1752</sup> and in an article published in that newspaper on 26 August 2001, reference was made to the coming accusations by HRW, *inter alia*, that villagers described the Ljuboten operation as “a three-day police operation in which civilians were tortured and shot dead in cold blood,” and that, referring to a national television broadcast “Ljube Boškoski was present during the whole operation of the Macedonian security forces.”<sup>1753</sup> A BBC article of 27 August 2001, referred to Ljube Boškoski’s comments to these claims on Macedonian Radio:<sup>1754</sup>

I vigorously reject the accusations against the Interior Ministry and against the regular and reserve police forces, which have demonstrated unprecedented courage in defending Macedonia’s sovereignty and territorial integrity in the past six months.

After the HRW report was published, it was referred to in various newspaper articles and it was also reported that various Macedonian authorities saw HRW as being biased.<sup>1755</sup> A BBC article of 6 September 2001, reported Ljube Boškoski as saying, in response to the report, that:<sup>1756</sup>

I will press charges to the Court for Human Rights in Strasbourg, because the claims of the Human Rights Watch organisation undermine not only the dignity of the Macedonian Ministry of Interior but also my personal dignity.

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<sup>1749</sup> Exhibit P352, p 15. *See supra*, footnote 1748. Peter Bouckaert quoted the newscaster on the Macedonian State Television in the HRW report when he stated that Ljube Boškoski had been present “during the entire operation”, Peter Bouckaert, T 3075.

<sup>1750</sup> Peter Bouckaert, T 2994.

<sup>1751</sup> Peter Bouckaert, T 3069; 3076.

<sup>1752</sup> Peter Bouckaert, T 3007-3008.

<sup>1753</sup> Exhibit P354.

<sup>1754</sup> Exhibit P355.

<sup>1755</sup> Exhibit P356 (The New York Times, 5 September 2001); Exhibit P357 (Associated Press, 5 September 2001); Exhibit P358 (The Times, 6 September 2001).

<sup>1756</sup> Exhibit P359.

451. The Chamber finds that by virtue of the HRW report, if he had not been fully aware earlier, Ljube Boškoski knew of the serious allegations about the conduct of police in Ljuboten on 12 August and following. While the report in some aspects contradicts the detailed evidence presented in this trial, which is discussed in this Judgement,<sup>1757</sup> the nature and seriousness of the allegations, and the existence of an apparent factual basis for them, were sufficient on their own to put Ljube Boškoski on notice of the likelihood of illegal acts by his subordinates.

(c) Other matters

452. In November 2001, while providing his comments to the Government on a draft resolution proposed by a group of members of Parliament of the Party for Democratic Prosperity condemning the events and use of force by members of MoI, Ljube Boškoski stated that abuse by police had been investigated by the department of internal control of MoI, in which respect the Chamber notes that there appears to have been no record of this and there is no evidence to confirm this. He added that the number of cases of abuse was “obviously incomparable and not disturbing in number” with the number of attacks on police officers.<sup>1758</sup>

453. On 3 September 2001, on the request of the investigative judge, the Head of OVR Čair submitted an overview of the events from 10 to 13 August 2001 in Ljuboten. This overview included information that, *inter alia*, on 12 August 2001, “armed forces acted in aim to break up and capture the terrorist group acting from the village of Ljuboten,” and some 70 persons were arrested.<sup>1759</sup>

454. Following this, on 7 September 2001, the director of the public security bureau (PSB) in the MoI proposed that there be an exhumation.<sup>1760</sup> The Deputy Public Prosecutor acted on this to request an exhumation on 11 September 2001.<sup>1761</sup> At a meeting on 14 September 2001 the Investigative Judge Dragan Nikolovski and the Deputy Public Prosecutor requested from the MoI information on the location of the graves and the identity of those buried to prepare an exhumation.<sup>1762</sup> However, it was not until April 2002 that an exhumation of the men killed in Ljuboten on 12 August 2001, and of Atulla Qaili who died in hospital on 13 August 2001, was

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<sup>1757</sup> See *supra*, para 140.

<sup>1758</sup> Exhibit P531.

<sup>1759</sup> Exhibits P50.009; P50.010.

<sup>1760</sup> Exhibits 1D47; P102; 1D33. See also Exhibit 1D73.

<sup>1761</sup> Exhibit 1D47; Dragoljub Čakić gave evidence that in the capacity as deputy public prosecutor, he submitted such a proposal to the investigative judge around 15 August, Exhibit P388, para 7. The Chamber notes, however, that the investigative judge only refers to a proposal by MoI dated 7 September 2001 and a proposal by the deputy public prosecutor dated 11 September 2001, Exhibit 1D47.

<sup>1762</sup> Exhibit 1D73.

undertaken under the supervision of the Investigative Judge and the Deputy Public Prosecutor. Representatives of the ICTY Prosecutor were present.<sup>1763</sup>

455. In the months that intervened between September 2001 and April 2002 there were some meetings involving the investigative judge, the public prosecutor or his deputy, the ICTY Prosecutor or her representative, and others. In meetings in November 2001, the Deputy Public Prosecutor identified difficulties facing investigators into the Ljuboten deaths, such as security problems and the inability to visit the crime scene,<sup>1764</sup> and the problem of obtaining information from Albanian witnesses.<sup>1765</sup> On 30 January 2002 the Investigative Judge said that they had information that persons had been killed but no information regarding their identities.<sup>1766</sup> In March 2002, however, the Deputy Public Prosecutor provided the names of the deceased to the investigative judge and proposed that a request for exhumation and on-site investigation be issued.<sup>1767</sup>

456. At the meeting on 28 November 2001, the Deputy Public Prosecutor indicated, as noted at the time:

[...] the investigation into Ljuboten had already been opened, despite the lack of information necessary to do so. They had been waiting for the information from the Ministry of Interior for some time. However, he did say that he had been in contact with Professor Duma at the Institute of Forensics Science (Skopje).

They had not been able to visit the scene of the killings to conduct an “on site” investigation or visit the site of the graves of the victims. No interviews had been conducted with the relatives of the victims or any other investigation with other potential witnesses (security concerns). He emphasized that he and his colleagues were willing to commence the investigation as soon as the situation permits. But he was not prepared to go to the area until the security issues had been resolved. Mr Sokić explained that he had already experience of being “blown up” during such an exercise and considered himself fortunate to have survived.<sup>1768</sup>

Regarding the investigation of the Ljuboten case, the same deputy public prosecutor gave evidence that:<sup>1769</sup>

Our objective was not to clarify what happened at Ljuboten. Our objective was only to carry out an exhumation, and to identify the persons buried in the local cemetery in the village of Ljuboten.

Another deputy public prosecutor, Vilma Ruskovska, stated in evidence that:<sup>1770</sup>

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<sup>1763</sup> Exhibit P55.20.

<sup>1764</sup> Exhibit 1D197.

<sup>1765</sup> Exhibit 1D196.

<sup>1766</sup> Exhibit 1D37.

<sup>1767</sup> Exhibits P55.10; P55.11. The Chamber notes that already on 14 August 2001 a resident of Skopje provided names of the deceased persons in Ljuboten to OVR Čair, Exhibit P148. There is, however, no evidence to suggest that Ljube Boškoski was aware that MoI had such information and that it had not been passed on to the judiciary.

<sup>1768</sup> Exhibit 1D197.

<sup>1769</sup> Dragoljub Čakić, Exhibit P388, para 8.

<sup>1770</sup> Vilma Ruskovska, Exhibit P235, para 13.

There were no efforts made to talk to or interview any of the police officers which were deployed in Ljuboten. In normal circumstances, I could summon police officers to testify. But during the war in 2001, police officers always refused to testify about this kind of cases. Every time that we tried to bring a police officer to testify, we would be told: "He is officially away from his position, and cannot respond." It was an institutional problem. At that time, we had no support from the Ministry of Interior for bringing police to testify.

The ICTY Prosecutor had pursued inquiries into the events in Ljuboten during the later months of 2001 and in 2002. Meetings were held with the President,<sup>1771</sup> the public prosecutor,<sup>1772</sup> the Minister of Justice,<sup>1773</sup> the investigative judge and other representatives of the government. During a visit to FYROM on 8 May 2002, the ICTY Prosecutor informed the Macedonian authorities that she had decided to assume primacy over five cases in FYROM, including the Ljuboten case.<sup>1774</sup> The public prosecutor of FYROM opined, however, that they would not cease their investigations absent a deferral request from a Trial Chamber of this Tribunal.<sup>1775</sup> Of course, it was not for the ICTY Prosecutor to assert primacy; that is a judicial procedure. Hence, on 4 October 2002, a Trial Chamber of this Tribunal issued a decision requesting the deferral of, *inter alia*, the Ljuboten case to the ICTY.<sup>1776</sup>

457. The Chamber notes, however, that the Indictment only charges Ljube Boškoski with responsibility for failure to punish until the beginning of May 2002.<sup>1777</sup> This appears intended to reflect the purported assertion of primacy by the then ICTY Prosecutor communicated on 8 May 2002, as noted above.

458. In the finding of the Chamber, and anticipating also matters that follow, the involvement of the ICTY Prosecutor in the present case had no impact on Ljube Boškoski's obligation, or his ability, to punish his subordinates, in the sense accepted in the jurisprudence of this Tribunal, for the crimes charged in this Indictment until May 2002.

(d) Other "investigations"

(i) Working group on war crimes

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<sup>1771</sup> See Exhibit 1D206; Howard Tucker, T 5429-5431.

<sup>1772</sup> Exhibit 1D206; Howard Tucker, T 5421-5424. It might be that ICTY had their attention on the Ljuboten case already in August 2001, *see* Exhibit 1D204. It appears that the ICTY Prosecutor opened her investigation on 20 November 2001, Exhibit 1D366, or even on 9 November 2001, Exhibit P391, ERN N000-9885.

<sup>1773</sup> Exhibit 1D195.

<sup>1774</sup> Exhibit P391. *See* also Exhibit 1D201.

<sup>1775</sup> Exhibit P391, Annex F (letter from Mr. Dzikov to the ICTY Prosecutor dated 14 August 2002); Exhibit P391, Annex H (letter from Mr Dzikov to ICTY Prosecutor dated 2 September 2002).

<sup>1776</sup> Exhibit 1D218.

<sup>1777</sup> Indictment, para 15. In the Prosecution's Final Brief this is clarified to 14 May 2002, para 388 (referring to Exhibit P391, p 18, ERN N000-9900).

459. The Boškoski Defence referred to the action of Ljube Boškoski, who, on 29 May 2001,<sup>1778</sup> had established a working group to gather evidence on war crimes committed in the territory of FYROM.<sup>1779</sup> However, this working group did not start working on the Ljuboten case until 2002.<sup>1780</sup> Ljube Boškoski was kept informed of the work of the working group.<sup>1781</sup>

460. Witness Igno Stojkov, a member of the working group,<sup>1782</sup> gave evidence that, relevantly to this case, the task was to obtain and file all documents and data related to the Ljuboten events; what happened on that day, whether and where persons were brought in, who they were and what happened to them.<sup>1783</sup> It was found that in the police stations there were no reports from aggrieved parties.<sup>1784</sup> The investigating team spoke with police officers who said the events were documented in official notes that had been sent to the analytics department in the Čair police station. The team asked to have official interviews with the police officers, but they refused to do so.<sup>1785</sup> Some contact was established with people from Ljuboten, but when more detailed information was requested, these people did not want to have contact with police bodies.<sup>1786</sup> The working group did not go to the hospital to collect medical documents because it was considered not to be their task.<sup>1787</sup> According to Igno Stojkov, the final case file of Ljuboten included only the visit to the Mirkovci and Čair police stations, and an official note of the activities of the working group.<sup>1788</sup> This Ljuboten file was transferred along with all other files to the department of analysis in the MoI.<sup>1789</sup>

461. The working group was not tasked to address all relevant issues, and had limited powers, insufficient to gather evidence for possible criminal proceedings. The working group could not use information unless it was recorded in the Ministry,<sup>1790</sup> therefore, the working group was not authorised to contact Albanian politicians, the OSCE or other organisations,<sup>1791</sup> or verify information gathered by, *inter alia*, international organisations.<sup>1792</sup> It was not even authorised to contact the department of analysis in the MoI which had collected evidence from various services in

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<sup>1778</sup> See Exhibit 1D116.

<sup>1779</sup> Exhibit 1D115.

<sup>1780</sup> Igno Stojkov, T 9043.

<sup>1781</sup> Igno Stojkov, T 8957.

<sup>1782</sup> Igno Stojkov, T 8874-8876; 8878; 8953; Exhibit 1D116.

<sup>1783</sup> Igno Stojkov, T 9031.

<sup>1784</sup> Igno Stojkov, T 8900-8901; 9031.

<sup>1785</sup> Igno Stojkov, T 8897; 9023. See also T 8900; 8905; 8931.

<sup>1786</sup> Igno Stojkov, T 8937.

<sup>1787</sup> Igno Stojkov, T 8929.

<sup>1788</sup> Igno Stojkov, T 8939; 9044-9045. The unofficial conversations with police officers were not recorded, Igno Stojkov, T 9045-9046.

<sup>1789</sup> Igno Stojkov, T 9046-9047. Igno Stojkov gave evidence that the case file on Ljuboten was never finalised, T 8943; 9019; 9049.

<sup>1790</sup> Igno Stojkov, T 9037.

<sup>1791</sup> Igno Stojkov, T 9053-9054.

<sup>1792</sup> Igno Stojkov, T 9050; 9051-9053.

the Ministry.<sup>1793</sup> The Chamber notes, however, that these limitations on the authority and powers of this working group existed by virtue of the terms on which it had been established by Ljube Boškoski. He could have expanded the working group's authority and powers. He did not do so, although the evidence does not suggest that he was asked to do so.

462. The Chamber notes that police officers involved in the Ljuboten events who testified before the Chamber said that they had not been contacted by Macedonian authorities concerning the Ljuboten events.<sup>1794</sup> Moreover, while saying that he contacted persons in Ljuboten, Igno Stojkov was not prepared to reveal their names.<sup>1795</sup> These contacts therefore cannot be verified. The evidence discloses that the working group did not carry out any effective investigation into the Ljuboten events. At the most, it only collected some existing documents from police stations.<sup>1796</sup>

(ii) The work of Ms Sofija Galeva-Petrovska

463. Sofija Galeva-Petrovska, a lawyer, but at the time a very junior apprentice in the MoI,<sup>1797</sup> appears to have come to the favourable attention of Ljube Boškoski, who, at a meeting at the end of April 2002,<sup>1798</sup> told Director Mitevski that the witness should be engaged on the Ljuboten case.<sup>1799</sup> Her task, according to her evidence, was to collect the material which the MoI had pertaining to the Ljuboten case, prepare a chronology of the events, and hand this over to the directors and the minister.<sup>1800</sup> Ljube Boškoski suggested that a particular head of a sector in MoI would be able to answer questions she had about specific issues so that she would not "sway too much in this matter."<sup>1801</sup> On 1 June 2002, Galeva-Petrovska was promoted to the position as advisor within the cabinet of Ljube Boškoski.<sup>1802</sup>

464. Sofija Galeva-Petrovska said she collected the material by making contact with a number of senior officials in the MoI,<sup>1803</sup> as well as the Director of the Forensic Medicine Institute, Professor Aleksej Duma,<sup>1804</sup> and Investigating Judge Dragan Nikolovski.<sup>1805</sup> According to Ms Galeva-Petrovska, they all provided her with information, both written material and orally.<sup>1806</sup>

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<sup>1793</sup> Igno Stojkov, T 9017.

<sup>1794</sup> M084, T 1482; M037, T 871; M052, T 8369.

<sup>1795</sup> Igno Stojkov, T 9033-9034.

<sup>1796</sup> Igno Stojkov, T 9065-9066.

<sup>1797</sup> Sofija Galeva-Petrovska, T 8687-8689. Sofija Galeva-Petrovska was employed in the Ministry of Interior from 1 April 2002, T 8714; 8767.

<sup>1798</sup> Sofija Galeva-Petrovska, T 8697.

<sup>1799</sup> Sofija Galeva-Petrovska, T 8698; 8774.

<sup>1800</sup> Sofija Galeva-Petrovska, T 8702; 8778; 8784.

<sup>1801</sup> Sofija Galeva-Petrovska, T 8703-8704; 8803.

<sup>1802</sup> Sofija Galeva-Petrovska, T 8690; 8693; 8770.

<sup>1803</sup> Sofija Galeva-Petrovska, T 8696; 8699; 8702; 8709-8710; 8738; 8739; 8748-8750; 8751; 8752; 8792-8793; 8820; 8846-8847.

<sup>1804</sup> Sofija Galeva-Petrovska, T 8732; 8812; 8825.



465. The Chamber has not been presented with any written material of Ms Galeva-Petrovska's activities that could have substantiated her evidence. There are no minutes of any of the many meetings she said she had with senior officials in the MoI and others providing her information.<sup>1807</sup> Moreover, while the witness stated that she handed over all the material to the public prosecutor in August/September 2002,<sup>1808</sup> she also said that until then it was in a register in a file in a chronological order.<sup>1809</sup> However, no record of the documents the witness said she collected or of her activities has been given in evidence. Her account is not confirmed by other evidence that the Chamber accepts.

466. Ms Galeva-Petrovska is currently an employee in the Ministry of Interior.<sup>1810</sup> She was a member of the same political party as Ljube Boškoski<sup>1811</sup> and in the course of her evidence gave the distinct impression that she felt she should support his interests. The Chamber notes that even six years after the events, the witness, quite remarkably, purported to remember a number of specific documents she received in the course of her work and from whom.<sup>1812</sup> Similarly remarkably, the witness purported to remember specific discussions in detail six years later.<sup>1813</sup> It is also her evidence that while she was told by Mr Duma, the Head of the Forensic Medicine Institute, that information she had requested could not be given in writing to the MoI, but only to the court,<sup>1814</sup> nevertheless she was orally provided with that information by Mr Duma.<sup>1815</sup> Further, oral information she alleges she received from Mr Uslinkovski, Head of the Sector of Forensics in MoI, is in conflict with autopsy reports of the Forensic Medicine Institute.<sup>1816</sup> At the least, the allegations of oral disclosure are surprising, especially for a person with the responsibilities of Mr Duma, and when, as is suggested, it was given to a very new and junior apprentice in the staff of the Ministry. The Chamber notes that the Ljuboten event was a very important event, and for which Ljube Boškoski had come under international pressure for his involvement and failure to

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<sup>1805</sup> Sofija Galeva-Petrovska, T 8734-8735; 8736; 8825; 8841.

<sup>1806</sup> Sofija Galeva-Petrovska, T 8696; 8700; 8702; 8709-8710; 8720; 8728-8729; 8733; 8740-8741; 8745; 8748-8750; 8825; 8846-8847.

<sup>1807</sup> Sofija Galeva-Petrovska, T 8814.

<sup>1808</sup> Sofija Galeva-Petrovska, T 8756-8757; 8814.

<sup>1809</sup> Sofija Galeva-Petrovska, T 8754-8755.

<sup>1810</sup> Sofija Galeva-Petrovska, T 8695.

<sup>1811</sup> Sofija Galeva-Petrovska, T 8774.

<sup>1812</sup> Sofija Galeva-Petrovska, T 8704-8706 (Exhibit 1D136 from Ms Jovanovska); 8716 (Exhibit P46.16 from Mr Mitevski); 8716-8718 (Exhibit P23 from Mr Stojanovski); 8717-8718 (Exhibit P46.15); 8723 (Exhibit P102, a proposal for exhumation from Mr Mitevski); 8724 (Exhibit 1D46 from Mr Mitevski); 8724-8725 (Exhibit 1D47 from Mr Mitevski); 8726 (Exhibit 1D73 from Mr Uslinkovski); 8730 (Exhibit P55.20 from the sector for forensics police); 8743 (Exhibit P50.010 from Mr Stojanovski); 8743-8744 (Exhibit P261 from Mr Stojanovski).

<sup>1813</sup> Sofija Galeva-Petrovska, T 8721-8722.

<sup>1814</sup> Sofija Galeva-Petrovska, T 8732.

<sup>1815</sup> Sofija Galeva-Petrovska, T 8732-8733; 8735-8736.

<sup>1816</sup> Sofija Galeva-Petrovska gave evidence that Mr Uslinkovski said that some of the bodies were dressed in camouflage t-shirts, T 8730-8732. She also gave evidence that Mr Duma and Mr Nikolovski confirmed this, T 8825. There is no such information in the autopsy reports (Exhibits P49, P444-P452, 1D5, 1D74, 1D77 and 1D78).

investigate. Nevertheless, the witness suggests she was given full responsibility for collecting all evidence relating to the case. For these reasons, including its assessment of her credibility, and the absence of independent confirmation, whether documentary or oral, the Chamber is not able to accept as reliable the evidence of Ms Galeva-Petrovska as to the enquiries she made and the information she received. To the extent that she may well have gathered available existing records of the MoI dealing with matters relating to Ljuboten and associated events, these records are not now available to assist the Tribunal in this trial, and the Chamber is not able to conclude that they were given by Ms Galeva-Petrovska to the public prosecutor as she suggested. In any event her work commenced only a few days before the end of the Indictment period, and, as she described it, her role was to gather material so that the public prosecutor could forward it to the ICTY Prosecutor.<sup>1817</sup> In these circumstances whatever she did is of little direct relevance to the actions of Ljube Boškoski from 12 August 2001 until May 2002.

(iii) The Zoran Jovanovski Commission

467. On 18 June 2001, Ljube Boškoski issued a decision to set up a commission to:

investigate the validity of the reports by ethnic Albanians in the Republic of Macedonia that members of the Ministry of the Interior overstepped their authority.<sup>1818</sup>

According to Zoran Jovanovski,<sup>1819</sup> the Committee worked on preventive measures, but the Committee did not receive any complaint on specific events or persons.<sup>1820</sup>

4. Responsibility of Ljube Boškoski

(a) Organisational structure of the Ministry of Interior

468. The Ministry of Interior (“MoI”) dealt with, *inter alia*, matters which concern the implementation of the system for state and public security,<sup>1821</sup> including maintaining peace and order and preventing and detecting crimes.<sup>1822</sup>

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<sup>1817</sup> Sofija Galeva-Petrovska, T 8814.

<sup>1818</sup> Exhibit 1D113. Zoran Jovanovski also participated in another commission set up on 7 March 2003, by Ljube Boškoski’s successor, Hari Kostov, led by Zoran Jovanovski, to inquire into the Ljuboten events, *see* Exhibit P379.05. That commission was not able to conclude what happened in Ljuboten, nor who was responsible, Zoran Jovanovski, T 5026-5028; 5050; 5060. *See also infra*, para 556-557.

<sup>1819</sup> Not related to Zoran Jovanovski, a.k.a. Bučuk.

<sup>1820</sup> Zoran Jovanovski, T 4886-4887.

<sup>1821</sup> Exhibit P92, Article 16(1).

<sup>1822</sup> Exhibit P86, Article 1. *See also* Exhibit P86, Article 2.

469. The Minister of Interior was the head of the internal organisation of the MoI.<sup>1823</sup> Immediately beneath the minister at the top echelon of the MoI, were the deputy minister and the state secretary.<sup>1824</sup>

470. The Rule Book on the Organisation and Work of the Ministry of Internal Affairs (“Rule Book on Organisation”) sets out the internal organisation of the MoI, without the security and counter-intelligence division, “the organisational forms and their scope of work, the management of organisational forms, the responsibility in executing the work and tasks, and other issues in regard to the organization and work of the Ministry”.<sup>1825</sup> The formal structure of the MoI was depicted in a diagram, which formed an integral part of this rule book.<sup>1826</sup>

471. The public security bureau (PSB) and the security and counter-intelligence division (or state security) (UBK), were bodies within the structure of MoI.<sup>1827</sup> Several witnesses suggested that the PSB and the UBK were entirely distinct from the Ministry;<sup>1828</sup> the Chamber is not able to accept this suggestion. Both the UBK and the PSB are managed by a director,<sup>1829</sup> who is appointed and dismissed by the government<sup>1830</sup> on the proposal by the Minister of Interior.<sup>1831</sup> The directors of each of the UBK and the PSB are members of the collegium, which with the deputy minister, the managers of the police and the criminal police departments, and the state secretary, constitute an advisory body to the Minister.<sup>1832</sup> The nature of the responsibilities of the UBK for security and counter-intelligence would explain the particular provisions made for its functioning.<sup>1833</sup> Some evidence appeared to suggest that the collegium collectively was the decision making body of the Ministry and even that the Minister could not make a decision that did not have the support of the collegium.<sup>1834</sup> It is clear from the statutory provision, however, that the collegium is merely an advisory body to the Minister.<sup>1835</sup>

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<sup>1823</sup> Exhibits 1D107, Article 2; *See infra*, paras 510; 514.

<sup>1824</sup> Exhibits 1D107, Article 28; 1D65; M056, T 2132.

<sup>1825</sup> Exhibit 1D107, Article 1. *See also* Risto Galevski, T 3647-3648; 3653; Zoran Jovanovski, T 4864.

<sup>1826</sup> Exhibits 1D107, Article 28; 1D65. *See also* Petre Stojanovski, T 9111.

<sup>1827</sup> Exhibit P92, Article 16(2); Vesna Dorevska, T 9409-9410. For PSB in particular, *see* Exhibit 1D107, Article 28; Exhibit 1D65. For UBK in particular, *see* Exhibit P86, Article 2.

<sup>1828</sup> Petre Stojanovski, T 9077; Risto Galevski, T 3650-3653; Exhibit 1D310, paras 29 and 71; Slagjana Taseva, T 9701-9704; 9742-9743; 9750-9751; Vesna Dorevska, T 9642-9643.

<sup>1829</sup> Exhibits 1D107, Article 2(2); P86, Article 13(3).

<sup>1830</sup> Vesna Dorevska, T 9411; 9517; 9520. *See also* Zoran Jovanovski, T 4866; M083, T 1413-1414; Tatjana Groševa, T 4749-4750; Petre Stojanovski, T 9110; Slagjana Taseva, T 9709-9710; 9740-9741; Exhibit 1D105. *See also* Exhibit P552, Article 96(7).

<sup>1831</sup> Risto Galevski, T 3648-3650; Vesna Dorevska, T 9411; 9517; 9520.

<sup>1832</sup> Exhibit 1D107, Article 26(1) and (2).

<sup>1833</sup> *See* Exhibit 1D297.

<sup>1834</sup> Vesna Dorevska, T 9566; Zoran Jovanovski, T 4855-4856; 4869; 5104. *See also* Sofija Galeva-Petrovska, T 8862.

<sup>1835</sup> Exhibit 1D107, Article 26(1).

472. For the execution of the work under the competence of the PSB, there were the police department, the criminal police department and a number of independent organisational forms.<sup>1836</sup>

The tasks of the police were to:

perform the work on directly maintaining the public peace and order, regulation and control of traffic on the roads, control over the crossing of the state border, security of specific persons and facilities, security of the lakes, as well as other matters determined in article 1 of the Law on Internal Affairs, whose nature and conditions require that they are performed by the uniformed officers of the Ministry.<sup>1837</sup>

473. The tasks of the criminal police were:

the activities on preventing criminal offences, finding out and apprehension of perpetrators of the criminal offences, crime-technical activities, control over the stay and movement of the foreigners, inspection and supervision in protection from fires and explosives, as well as other activities from Article 1 of this Law.<sup>1838</sup>

474. The uniformed police<sup>1839</sup> and the criminal police made up the regular police.<sup>1840</sup> They were regularly employed, received salary for their work,<sup>1841</sup> and according to the law, along with the Minister, they were “authorised officials” in the MoI.<sup>1842</sup> The rights and obligations of the authorised officers, and the manner in which they were to conduct their work were set out in rule books issued by the Minister of Interior.<sup>1843</sup> Some witnesses gave evidence that not every authorised officer had all the authorisations accorded to the authorised officers in the law.<sup>1844</sup> In particular, it was asserted that the Minister was not authorised to carry out operative tasks, such as the tasks of the criminal police.<sup>1845</sup> There is, however, no legal provision which provides that the Minister is in any way limited in his capacities as authorised officer.<sup>1846</sup> While these tasks would normally be carried out by his subordinates, it appears to the Chamber that the Minister was formally authorised to carry out the tasks accorded to an “authorised official” in the Ministry.

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<sup>1836</sup> Exhibit 1D107, Articles 3 and 28; Exhibit 1D65, p 3. *See also* Petre Stojanovski, T 9081; Zoran Jovanovski, T 4865; Vesna Dorevska, T 9421.

<sup>1837</sup> Exhibits 1D107, Article 4(1); P86, Article 8. *See also* Zoran Jovanovski, T 4865; Risto Galevski, T 3645-3647.

<sup>1838</sup> Exhibit P86, Article 12. *See also* Exhibit 1D107, Article 5; Zoran Jovanovski, T 4865.

<sup>1839</sup> Exhibit P86, Article 8; M037, T 751. *See, however,* Exhibit P86, Article 10(1): “The policemen could accomplish the activities mentioned in Article 8 of this law in civilian clothes as well as if the immediate supervisor or the employee authorized by him ordering this”. *See also* M037 testifying that a uniformed officer could be redeployed to one of the internal affairs departments or sectors by the minister or a person authorized by him, T 750-751.

<sup>1840</sup> Zoran Jovanovski, T 4865. *See also* Exhibit P86, Articles 8-10 and 12; M083, T 1415-1417.

<sup>1841</sup> M083, T 1415-1417. For the position of the police reservists, *See infra*, paras 492-494.

<sup>1842</sup> Exhibit P86, Article 24. *See also* M037, T 810; Risto Galevski, T 3647-3648; Petre Stojanovski, T 9086. *See infra*, paras 513.

<sup>1843</sup> Exhibit P86, Article 25 *et seq.*; Exhibit P96.

<sup>1844</sup> Tatjana Groševa, T 4745; Vesna Dorevska, T 9433-9434; Slagjana Taseva, T 9723-9726.

<sup>1845</sup> Risto Galevski, T 3647-3648; Vesna Dorevska, T 9434; Slagjana Taseva, T 9723-9729; Petre Stojanovski, T 9106.

<sup>1846</sup> Vesna Dorevska said that the competencies of authorised officers were regulated in by-laws, such as the Rule Book on Organisation and Systemisation of Workplaces, T 9432. The Chamber notes that such a rulebook is not in evidence.

475. The managers of the police department and the criminal police department were subordinated to the director of the PSB and accountable to him.<sup>1847</sup>

476. At the material time, the director for the PSB was General Goran Mitevski.<sup>1848</sup> The manager of the police department was General Risto Galevski,<sup>1849</sup> and his deputy was Colonel Zoran Jovanovski.<sup>1850</sup> The manager of the criminal police department was Živko Petrovski.<sup>1851</sup>

477. Within the MoI was also the sector for security<sup>1852</sup> to which the PSOLO police station was subordinated. This sector provided security to persons such as the President, ministers and diplomats and various buildings such as the Parliament, government buildings and embassies.<sup>1853</sup> At the material time, Zlatko Keskovski was the head of the sector for security.<sup>1854</sup> The Accused Johan Tarčulovski was employed as police officer in the MoI,<sup>1855</sup> more specifically, his normal duties were in the sector for security in the security team of the wife of President Boris Trajkovski.<sup>1856</sup> Zoran Trajkovski (not the President) was chief of the personal security of Ljube Boškosi.<sup>1857</sup> The minister gave orders personally to Trajkovski regarding his security.<sup>1858</sup>

478. Within the MoI was also the department for defence preparations,<sup>1859</sup> and the sector for analysis and research.<sup>1860</sup> The latter sector processed information received from the regional sectors (SVRs), and made weekly or daily reports which were forwarded to senior security officials and the minister, depending on the subject matter and the situation.<sup>1861</sup>

(i) Regional and local organisational units of the Ministry of Interior

479. For the execution of internal affairs, (*i.e.* within FYROM), 11 regional sectors had been established, including the sector for internal affairs for the City Skopje (SVR Skopje).<sup>1862</sup>

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<sup>1847</sup> Exhibits 1D107, Article 28; 1D65, p 3; Vesna Dorevska, T 9531; 9532-9534. *See also* Exhibit 1D107, Articles 21(2) and 22; Zoran Jovanovski, T 5077; Petre Stojanovski, T 9213-9215.

<sup>1848</sup> Zoran Jovanovski, T 4866; M056, T 2132; Vesna Dorevska, T 9418; Exhibit 1D105.

<sup>1849</sup> Risto Galevski, T 3642-3643; 3576; Zoran Jovanovski, T 4832-4833; 4866.

<sup>1850</sup> Zoran Jovanovski, T 4832-4833; 4863; 4866.

<sup>1851</sup> Risto Galevski, T 3846-3848.

<sup>1852</sup> Exhibit 1D107, Articles 6, 6.5 and 28; Exhibit 1D65. *See also* Zlatko Keskovski, T 9958; 10071. The sector was composed of, *inter alia*, section for security of the President of FYROM, Exhibit 1D107, Article 6.5.1.

<sup>1853</sup> Zlatko Keskovski, T 10037-10038; M083, T 1412-1413. *See also* Zoran Jovanovski, T 4847; Exhibit 1D118.

<sup>1854</sup> Zlatko Keskovski, T 9948.

<sup>1855</sup> Exhibit P533. *See also* Zlatko Keskovski, T 10033-10034; Blagoja Jakovoski, T 3962.

<sup>1856</sup> Zoran Trajkovski, T 5549. *See also* Exhibit 1D315.

<sup>1857</sup> Zoran Trajkovski, T 5502; 5527-5528.

<sup>1858</sup> Zoran Trajkovski, T 5503-5504.

<sup>1859</sup> Exhibit 1D107, Article 6.8.

<sup>1860</sup> Exhibit 1D107, Article 6.1.

<sup>1861</sup> Tatjana Groševa, T 4803-4805.

<sup>1862</sup> Exhibit 1D107, Article 8. *See also* Exhibit 1D107, Article 28; M053, T 1957; Vesna Dorevska, T 9423; Petre Stojanovski, T 9082.

480. The managers of the uniformed police and the crime police in the Ministry had coordinating and support functions in relation to these regional sectors.<sup>1863</sup> Contrary to some evidence,<sup>1864</sup> in the Chamber's view, it was provided by law that these sectors were subordinated to the Ministry,<sup>1865</sup> a situation to be expected as the regional sectors were to carry out the tasks of the Ministry of which the Ministry, under the Minister, was in charge.<sup>1866</sup>

481. On a daily basis, the department of analysis at SVR Skopje forwarded information that it received from the OVRs to the sector for analysis in Ministry in a condensed form concentrating on the most important events.<sup>1867</sup>

482. SVR Skopje had various sections, *inter alia*, duty operations centre, section for defence preparations, department for combating organised and general crimes, department for criminal techniques, and department for public peace and order (OJRM<sup>1868</sup>).<sup>1869</sup> SVR Skopje was also subdivided in departments along the lines of certain geographic municipalities of the City of Skopje, *inter alia*, OVR/department for internal affairs-Centar, OVR/department for internal affairs-Karpoš, OVR/department for internal affairs-Kisela Voda, and OVR/department for internal affairs-Čair.<sup>1870</sup>

483. The Head of SVR Skopje at the material time was Zoran Efremov.<sup>1871</sup> Efremov was superior to all the heads of the various OVRs,<sup>1872</sup> and the police stations in the OVRs.<sup>1873</sup> In SVR Skopje, the head of the uniformed police at the time was Ljupčo Bliznakovski, who was also Efremov's deputy,<sup>1874</sup> and accountable to the head for public law and order in the police department.<sup>1875</sup> Efremov's deputy for operative affairs and the criminal police was Petre Stojanovski.<sup>1876</sup>

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<sup>1863</sup> Kristo Zdravkovski, T 10233; Vesna Dorevska, T 9532-9534.

<sup>1864</sup> Vesna Dorevska, T 9533-9534.

<sup>1865</sup> Exhibit 1D107, Articles 22 and 28.

<sup>1866</sup> *See infra*, para 513. *See also* M053, T 1957; Vesna Dorevska, T 9423; Petre Stojanovski, T 9082; M084, T 1487.

<sup>1867</sup> Tatjana Groševa, T 4803-4805. *See also* M052, T 8242-8244; Exhibit 1D107, Article 9.9. *See various reports from SVR in the period 26 June 2001-15 August 2001: Exhibits P103; 1D126; 1D127; 1D128; 1D129; 1D131; 1D133; 1D374.*

<sup>1868</sup> *See* M052, T 8602-8607.

<sup>1869</sup> Exhibit 1D107, Article 9.1-9.12.

<sup>1870</sup> Exhibits 1D107, Article 9.13-9.17; 1D107, p 22; M037, T 809; M083, T 1411-1412; M084, T 1487. *See also* M053, T 1976-1977; Petre Stojanovski, T 9242.

<sup>1871</sup> M053, T 1976-1977; Petre Stojanovski, T 9088.

<sup>1872</sup> Vesna Dorevska, T 9531; M052, T 8417-8420. *See also* Exhibit 1D107, p 22.

<sup>1873</sup> M084, T 1486.

<sup>1874</sup> Risto Galevski, T 3687; 3776; Petre Stojanovski, T 9148. *See also* M084, T 1487; M052, T 8240.

<sup>1875</sup> Zoran Jovanovski, T 5077. *See also* Risto Galevski, T 3629; 3763-3766.

<sup>1876</sup> M052, T 8415-8416; 8460; Petre Stojanovski, T 9074. *See also* M084, T 1487.

484. While there is evidence that the Head of OVR Čair was directly subordinated to Ljupčo Bliznakovski and Petre Stojanovski,<sup>1877</sup> Petre Stojanovski denied this and said that the head of SVR Skopje was the direct superior of and issued instructions to the head of OVR Čair, and that Stojanovski only followed the situation in the OVRs from the point of view of the criminal police and secured support e.g. in respect of forensic activities, equipment for on-site investigations, and suggested solutions to the head of the SVR.<sup>1878</sup> The Chamber finds that the head of SVR was the direct superior to the head of the OVR, but that Petre Stojanovski also exercised a superior function to the head of OVR Čair in that in some situations, he would, as the deputy of Efremov, issue orders to the head of OVR Čair.<sup>1879</sup> It would indeed be likely that a deputy would have the power to issue orders. For SVR Skopje specifically, given that it is the capital of FYROM, it would be apparent that Efremov alone would not be able to issue all orders to all the OVRs in the City of Skopje.

485. Petre Stojanovski also testified that Ljupčo Bliznakovski could not issue orders to the OVRs,<sup>1880</sup> but the Chamber is unable to accept this evidence. Petre Stojanovski had a clear self-interest in testifying this way for the purpose of weakening the hierarchical link between the SVR and OVR, in particular during the material events. Further, as in the case of Petre Stojanovski, it would not be practical that a deputy of Efremov could not issue orders to units for which Efremov was responsible. Other witness testimony supports this view.<sup>1881</sup>

486. As a general observation the Chamber notes that in most cases these evidentiary conflicts over the command authority within the structures of the Ministry appeared to reflect the personal interest of some witnesses to avoid responsibility for the actions of less senior persons which have significance in this case.

487. The OVRs had a duty to inform the SVR about happenings in the territory of the OVR.<sup>1882</sup> OVR Čair would regularly report to SVR Skopje,<sup>1883</sup> *i.e.* every 12 hours.<sup>1884</sup>

488. As for reporting, once duty was completed, police officers would write either Official Notes or reports and submit them to their superiors in the police station.<sup>1885</sup> The police stations reported

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<sup>1877</sup> M052, T 8417-8420.

<sup>1878</sup> Petre Stojanovski, T 9083-9085; 9088; 9230-9234.

<sup>1879</sup> Petre Stojanovski, T 9232-9234.

<sup>1880</sup> Petre Stojanovski, T 9148-9149.

<sup>1881</sup> M052, T 8239; 8602-8607.

<sup>1882</sup> Petre Stojanovski, T 9087-9088.

<sup>1883</sup> See various reports in the period 10-14 August 2001, *inter alia*, Exhibits P98; P106; P107; P108; P109; P110; P113; P114; P115; P116; P117; P124; P126; P127; P144; P146; P147; P148; P152; P153; P154; P155; P157; P182; P254; P397; P440; 1D289. See also Tatjana Groševa, T 4803-4804.

<sup>1884</sup> M053, T 1948.

<sup>1885</sup> M053, T 1415. See also Petre Stojanovski T 9310-9311; 9317; Exhibits P95, Article 27; P111; P112; P125; P136; P396; 1D84; 1D145.

to OVR on a daily basis.<sup>1886</sup> Contrary to some evidence,<sup>1887</sup> the Chamber finds that the police stations and the operative section within the OVRs had the primary responsibility with respect to criminal offences and perpetrators.<sup>1888</sup>

(ii) Special police units

489. Article 11 of the Law on Internal Affairs prescribed:<sup>1889</sup>

In order to prevent the security of Republic of Macedonia in war, emergency situation or when the public peace and order are deranged in larger scale, the Minister can establish police units for accomplishing certain tasks, from the policemen and police candidates, police cadets older than 18 years of age, students, students of police courses, employees of training institutions of the Ministry of Interior and reserve personnel assigned to the police.

490. It appears that there were three special police units existing in 2001; the “Tiger” unit, the “Posebna” (Special) unit and the Rapid Intervention Battalion Unit also known as the “Lions” Unit.

491. The “Tiger” unit of some 120 men<sup>1890</sup> existed in August 2001.<sup>1891</sup> Indeed, it had been commanded by Toni Mandarovski from 30 April 1999 until Ljube Boškoski replaced him with Goran Zdravkovski on 25 May 2001.<sup>1892</sup> At the time of the events in Ljuboten it was under the direct command of Ljube Boškoski as Minister.<sup>1893</sup> The Posebna unit had existed for many years at the time of the events in Ljuboten.<sup>1894</sup> It comprised regular police officers,<sup>1895</sup> who, on the order of the Minister to activate the Posebna unit, were redeployed from their normal duties to the unit.<sup>1896</sup> It functioned within the sector for special units of the Ministry. A “Rapid Intervention Police Battalion” was formally established in the Ministry by Ljube Boškoski on 6 August 2001.<sup>1897</sup> It

<sup>1886</sup> M052, T 8239; 8602-8607. See also various reports in the period 10-14 August 2001, *inter alia*, Exhibits P36; P37; P105; P145; P150; P151; P158; P159; P160; P161; P162; P163; P164; P257; P258; P259; P395; P398; P399; P400; 1D288.

<sup>1887</sup> M052, T 8602-8607.

<sup>1888</sup> Vilma Ruskovska, T 1539; Petre Stojanovski, T 9100. See also M053, T 1958.

<sup>1889</sup> Exhibit P86, Article 11.

<sup>1890</sup> M056, T 2094.

<sup>1891</sup> M051, T 4191. See also Zoran Jovanovski, T 4891.

<sup>1892</sup> See Zoran Trajkovski, T 5518; Exhibit 1D44.

<sup>1893</sup> Exhibit 1D107, Article 7.1; Exhibit 1D65; Risto Galevski, T 3666.

<sup>1894</sup> Zoran Jovanovski, T 4896; 4900; Risto Galevski, T 3684-3685; Exhibit 1D57. Exhibit P75 is a decision dated 26 June 2001 “to establish a special /posebna/ unit of the police of the Ministry of Internal Affairs.” In para 15 of the decision it was said that the decision to set up the posebna unit of 1993 (Exhibit 1D57) ceased to exist. No witness suggested, however, that this implied that the Posebna unit did not exist in August 2001, rather, witnesses suggested that this decision indicated an increase of the members of the Posebna unit, Risto Galevski, T 3683-3684; 3686; Vesna Dorevska, T 9402-9404.

<sup>1895</sup> Zoran Jovanovski, T 4896; Risto Galevski, T 3683-3684. See also Exhibit 1D57, para 3.

<sup>1896</sup> Zoran Jovanovski, T 4896; Exhibit 1D57, para 10.

<sup>1897</sup> Exhibit P74, para 8. On the same day, Ljube Boškoski issued a decision appointing the Rapid Intervention Battalion and the Special Tasks Unit to the temporary joint unit against terrorism composed of members of the Ministry of Interior and the army, Exhibit P275.



was placed under the command of the head of the sector of special units,<sup>1898</sup> and was formally redesignated as “Lions-Rapid Intervention Battalion” on 5 September 2001.<sup>1899</sup> There is a conflict in the evidence whether the formal establishment on 6 August 2001 merely recognised what was already the reality,<sup>1900</sup> or whether the “Lions” did not become fully operational until after the events in Ljuboten.<sup>1901</sup>

(iii) The position of police reservists in the Ministry of Interior

492. In normal circumstances all police duties were carried out by regular police.<sup>1902</sup> The reserve forces were called:<sup>1903</sup>

in conditions of war or emergency situation, in order to prevent the security of Republic of Macedonia or maintain the public peace and order when it is deranged in larger scale.

493. All persons of age, once having served conscription military service, had their reserve military deployment position. Their deployment position could be within the army of FYROM, the police or in the civilian defence.<sup>1904</sup> While both army and police reservists were registered on a list in the Ministry of Defence,<sup>1905</sup> the reservists allocated to the MoI were also registered on a list in the department of defence preparations in the MoI who kept their files and took care of their training.<sup>1906</sup> A member of the police reserve could be removed at the request of the department of defence preparations in the MoI.<sup>1907</sup> They would, however, remain as a member of the reserves military of the Ministry of Defence and subject to its control.<sup>1908</sup>

494. According to the relevant laws and regulations, police reservists would be engaged and summoned as required by the MoI,<sup>1909</sup> act under its authority,<sup>1910</sup> and wear police uniforms.<sup>1911</sup> Reservists were “authorised officials” while conducting duties and tasks of the Ministry.<sup>1912</sup> Action

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<sup>1898</sup> Exhibit P74, para 1.

<sup>1899</sup> Exhibit 1D61.

<sup>1900</sup> Nasim Bushi, T 5896; Viktor Bezruchenko, T 6713; Henry Bolton, Exhibit P236.1, para 32.

<sup>1901</sup> Viktor Bezruchenko, T 6712; Exhibit P82; Exhibit 1D359. Based on Exhibit 1D153 the Chamber accepts that persons were formally assigned to the “Lions” unit only in November 2001.

<sup>1902</sup> M083, T 1415-1417.

<sup>1903</sup> Exhibit P86, Article 45(2). *See also* Exhibits 1D154, Articles 1 and 2; 1D356, Article 2; Risto Galevski, T 3714-3715; Vesna Dorevska, T 9456; Miodrag Stojanovski, T 6822-6825.

<sup>1904</sup> Risto Galevski, T 3714-3715. *See also* M083, T 1415-1417; M053, T 1959-1960; Vesna Dorevska, T 9457; 9458; Blagoja Markovski, T 10670; Exhibit 1D98, Article 81.

<sup>1905</sup> Vesna Dorevska, T 9492; Blagoja Markovski, T 10670; 10672; Exhibit 1D351.

<sup>1906</sup> Exhibit 1D107, Article 6.8.

<sup>1907</sup> Blagoja Markovski, T 10673. *See also* Vesna Dorevska, T 9489-9491; 9641-9642; Exhibits 1D350; 1D351.

<sup>1908</sup> Vesna Dorevska, T 9642; 9644.

<sup>1909</sup> Exhibit P86, Article 45(2).

<sup>1910</sup> Exhibit 1D154, Article 2(2). *See also* Slagjana Taseva, T 9719-9720.

<sup>1911</sup> Exhibit P86, Article 45(3).

<sup>1912</sup> Exhibit P86, Article 46(2). *See also* Slagjana Taseva, T 9724.

to call up police reservists for duty was by the Minister of Interior following an order of the President and the Security Council.<sup>1913</sup>

495. Some evidence suggested variously that, apart from being registered by the MoI, in order to become a reservist it was necessary to have an identity card,<sup>1914</sup> respond to a summons or to volunteer in case the summons were public, go through a brief training,<sup>1915</sup> be checked for any criminal record,<sup>1916</sup> be given a weapon and a uniform,<sup>1917</sup> and receive remuneration.<sup>1918</sup> Such requirements did not follow from the relevant regulations. In many respects they may merely reflect administrative practice. In this respect, members of the police reserve who entered the village of Ljuboten on 12 August 2001, and those who were performing duties at police stations at that time, had all been armed, uniformed and equipped at police stations. While it is suggested that a few of them had criminal records, this is not established by the evidence, nor is it possible to determine that any convictions any of them may have had were not “spent” by time under the law of FYROM, or were of a category that could bar them from service in the police reserve. At the material time, they performed duty as members of the police reserve. As regards Čair police station on 10 and 11 August, criminal records of volunteers were checked before weapons were issued.<sup>1919</sup>

496. The Minister of Interior had the power to determine to which unit a member of the police reserve was deployed when mobilised.<sup>1920</sup> When a reservist was deployed at a police station, the responsibility for that person, including the assignment of tasks and responsibilities, was assumed by the commander of that police station.<sup>1921</sup> In 2001, 300-350 reserve police officers were enrolled in OVR Čair.<sup>1922</sup>

(iv) “Kometa”

497. “Kometa” was a private security agency which belonged to Zoran Jovanovski a.k.a. Bučuk.<sup>1923</sup> “Kometa” was not part of the Macedonian army or police. A contract between the MoI and “Kometa” provided for “Kometa” to offer security services to the Ministry and five licences

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<sup>1913</sup> Risto Galevski, T 3716. *See also* Vesna Dorevska, T 9489; M053, T 1959-1960; Slagjana Taseva, T 9718-9719; M083, T 1417; M084, T 1453; Exhibits P86, Article 46(1); P393, ERN N005-0625 (mobilisation order issued on 4 March 2001)

<sup>1914</sup> Risto Galevski, T 3717-3718. *See also* M053, T 1964; Zoran Jovanovski, T 4917-4918.

<sup>1915</sup> Zoran Jovanovski, T 4917-4918. *See also* M053, T 1983; Miodrag Stojanovski, T 6822-6825.

<sup>1916</sup> M084, T 1455-1456; M083, T 1418-1419.

<sup>1917</sup> Risto Galevski, T 3717-3718; Petre Stojanovski, T 9115-9116. *See also* M053, T 1964; 1968-1969; Zoran Jovanovski, T 4917-4918; Vesna Dorevska, T 9614.

<sup>1918</sup> Exhibit 1D310, para 46. *See, however,* Zoran Jovanovski testifying that a reservist could be engaged for less than one month without compensation from the Ministry, T 4918.

<sup>1919</sup> M084, T 1461-1462; Exhibit P231.

<sup>1920</sup> Exhibit P74.

<sup>1921</sup> M053, T 1968-1969; 1990. *See also* M084, T 1460; M083, T 1445; Vesna Dorevska, T 9489.

<sup>1922</sup> M053, T 1972.

<sup>1923</sup> M056, T 2146-2147.

were issued to the agency in this respect.<sup>1924</sup> On 25 and 26 July 2001, automatic rifles and ammunition and police uniforms were issued to employees of “Kometa” who came to PSOLO.<sup>1925</sup> The evidence also reveals that persons sent from “Kometa” were equipped at OVR Čair on 10 and 11 August 2001. In the Chamber’s finding, these events indicate that, the men sent from “Kometa” were on the MoI list of police reserves, who, on reporting to the Ministry for reserve duty, either as a volunteer or having been personally summoned, had been accepted for active service as a member of the police reserve.<sup>1926</sup>

(b) The *de jure* and *de facto* powers of Ljube Boškoski

498. Ljube Boškoski was the Minister of Interior of FYROM from May 2001 till November 2002.<sup>1927</sup>

499. It is alleged in the Indictment that at the material time Ljube Boškoski, in his capacity as Minister of Interior, exercised *de jure* and *de facto* command and control over regular and reserve police, including all special police units, within FYROM.<sup>1928</sup>

500. A very great deal of oral and documentary evidence was received and much time was occupied in dealing with what may be summarised as the role and the powers of Ljube Boškoski, both *de jure* and *de facto*, as the Minister of Interior at the times material to the Indictment. Much of this dealt with the formal structure of MoI and its functioning. The Chamber does not find it necessary to detail exhaustively this evidence and related submissions because, in its view, very little has proved material.

501. As had been indicated, the only basis alleged in the Indictment on which Ljube Boškoski could be convicted of the offences charged is pursuant to the provisions of Article 7(3) of the Statute, *i.e.* command responsibility. It is primarily in this context that so much attention was focussed on his role and powers as Minister.

502. A primary contention of the Boškoski Defence is that Ljube Boškoski was neither *de jure* nor *de facto* a superior, within the meaning of Article 7(3) of the Statute, of the police that entered Ljuboten on the morning of 12 August 2001, nor over Johan Tarčulovski, nor over the police at the

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<sup>1924</sup> Exhibit P534.

<sup>1925</sup> Miodrag Stojanovski, T 6791-6792; Exhibit P436.

<sup>1926</sup> Members of the police reserve had been called up by the predecessor of Ljube Boškoski, M084, T 1453; Exhibit P393, ERN N005-0625, and re-mobilised by Ljube Boškoski, Exhibit 1D91. *See also* Zoran Jovanovski, T 4920; Risto Galevski, T 3719-3720; Blagoja Markovski, T 10663-10664; Petre Stojanovski, T 9117-9120.

<sup>1927</sup> Exhibit P43, fact 3.

<sup>1928</sup> Second Amended Indictment, paras 11-12.

police checkpoints, police stations, the court or in the hospital, referred to in the Indictment.<sup>1929</sup> Further, it is submitted, that Ljube Boškoski had no power to punish any of these persons within the meaning of Article 7(3).<sup>1930</sup>

503. The detailed evidence and submissions in support of this, essentially, was to the effect that under the Constitution and the laws of FYROM the Minister of Interior was a political figurehead, whose responsibilities and functions were much directed to his activities in the government, but with little real powers or functions within the MoI, save in those limited cases where a law expressly conferred on the Minister a particular function or power.<sup>1931</sup> This rather surprising position was most seriously and skilfully advanced. In particular, much attention was given to the organisational divisions and structures within the MoI, each with their own leadership and seniority, reporting and accountability structures, and the many detailed provisions of laws which conferred responsibility for the performance of particular powers or functions on particular office holders or particular divisions and structures within the MoI.<sup>1932</sup> Emphasis was placed on the contention that, even at the most senior levels within the MoI, the authority to issue orders and perform other functions could not be exercised across divisions and structures, but only downward within the division or structure.<sup>1933</sup> Attention was also directed to legislative provisions which expressly provided for the Minister to perform a particular function or power.

504. These aspects of the legislative and administrative structure were advanced in support of the contention that all powers and functions had effectively been divested from the Minister to various officials in his Ministry.<sup>1934</sup> Only in those few cases where a power or function was expressly conferred on the minister did he have an ability to act himself.

505. It seemed to be an effect of this view that for the most part the Minister essentially received reports from or through the heads of each division or structure which enabled him to know what significant matters were occurring, and to have an overview of the performance of the many divisions and structures, so that he might offer his advice to his subordinates in the MoI who had the responsibility to act in a particular matter, and so that, in turn, he could keep the government, the President and the Parliament, as appropriate, informed and raise matters for their attention or decision as necessary.<sup>1935</sup>

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<sup>1929</sup> Boškoski Defence Final Brief, paras 82, 108, 381-417, 433-455. Closing arguments, T 11063-11065, 11070-11071, 11075-11076.

<sup>1930</sup> Boškoski Defence Final Brief, paras 73-74, 436.

<sup>1931</sup> Boškoski Defence Final Brief, paras 9, 13,16-18, 44-53, 83-94,124. Closing arguments, T 11076, 11081.

<sup>1932</sup> Boškoski Defence Final Brief, paras 6-17, 47, 99-100.

<sup>1933</sup> Boškoski Defence Final Brief, paras 12, 99, 103, 108, 123.

<sup>1934</sup> Boškoski Defence Final Brief, paras 20-21.

<sup>1935</sup> Boškoski Defence Final Brief, paras 16, 56.

506. Some particular emphasis was placed on a statutory provision that ministers *manage* the work of their respective ministries, this term being construed as providing for the Minister to perform only what may be viewed as merely an administrative role, which was devoid of any real power to determine, control or direct the work of the Ministry.<sup>1936</sup>

507. In the Chamber's view, the contentions of the Defence in this respect, and the evidence in support, cannot be accepted. It involved a fundamental misapprehension of the intention and effect of relevant legislation of FYROM. Were effect to be given to the views advanced, it could significantly limit the effectiveness and efficiency of the parliamentary democracy by which FYROM is governed. The Chamber draws attention to only a few legislative provisions.

508. The Law on the Government of FYROM provides in Article 11(1):

The President of the Government manages the work of the Government; he/she is responsible for its operation and the implementation of cooperation with other bodies, public enterprises and institutions.<sup>1937</sup>

The notion of *manages* is here used in respect of the President "of the Government"(sic). This serves to highlight the impracticality and legal deficiencies of the notion that *manages* should be read in the narrow and in essence powerless administrative manner proposed. Ironically, it is also somewhat contradictory to the position of the Defence which appeared to accept that the President had wide powers to direct Ministers and Ministries by virtue of his being the ultimate repository of authority in the government of the FYROM.<sup>1938</sup>

509. The same Law on Government goes on to provide in Article 13:

A minister manages independently the ministry to which he/she is elected, monitors and is responsible for the implementation of the laws and other regulations.<sup>1939</sup>

It is apparent that in this law, *manages* is used in respect of both the President and a Minister. In each provision the context is the ultimate control of the function of the government or of one of its ministries. In each case *manages* is used to describe the role of the President or the Minister, respectively, each of whom is to be accountable to the Parliament and the people for the proper functioning of the whole government, in the case of the President, or Ministry, in the case of a Minister. This context strongly indicates that the notion of *manages* cannot be restricted merely to administrative supervision without real power to determine and direct the functions being managed. This is made more evident by the words that follow in Article 13 by which the minister who

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<sup>1936</sup> Boškoski Defenec Final Brief, paras 16, 56.

<sup>1937</sup> Exhibit P551, Article 11(1).

<sup>1938</sup> Closing Arguments, T 11093-11094.

<sup>1939</sup> Exhibit P551, Article 13.

manages *independently* the Ministry, is *responsible* for the implementation of the laws and other regulations. The emphasis on “independently” is not consistent with the contention that the Minister is essentially merely the channel of communication from his officers in the Ministry who (rather than the Minister) have the responsibility to exercise most powers and functions. The inconsistency is more manifest as the minister is expressly made responsible for the implementation of the laws and other regulations. On the Defence contention, however, that is precisely what the various officials in the Ministry are directly (and exclusively of the Minister) charged with doing, in respect of each statutory power or function conferred on an official or the position he or she holds.

510. The true intention of the legislative scheme for the government may be seen even more clearly in the Law on the Organisation and Work of Government Bodies which provides:

Article 47(1):

The work of the Ministry is managed by a minister.<sup>1940</sup>

Article 49(1):

The minister represents the ministry, organises and secures the lawful and efficient completion of work and tasks; submits regulations and other acts for which he is authorised and undertakes other measures from the competence of the ministry in accordance with the law; decides on the rights, duties and responsibilities of state employees and other individuals employed by the ministry who do not have state employee status, unless otherwise stated by law.<sup>1941</sup>

It is apparent from these two directly related provisions that the scope of the management of a ministry by a minister includes the securing of the lawful and efficient completion of the work of the ministry. The Minister has the duty to secure that the work performed in his Ministry is performed lawfully and efficiently. Of necessity this requires that, consistently with any express statutory requirements, the Minister be able to order and determine the work to be performed in his Ministry, direct the officials performing the tasks of the Ministry, (including those powers and functions conferred on particular officials by statutory provisions,) and to enforce compliance with his directions.

511. The understanding detailed above is also consistent with the primary, ordinary and literal meaning of *manage*, *i.e.* to control and direct affairs.

512. With particular reference to an argument of the Boškoski Defence, the express conferral of a power or function on an official of the MoI, by a law, occurs and is to be understood in the context

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<sup>1940</sup> Exhibit P92, Article 47(1). See also Exhibit 1D107, Article 2.

<sup>1941</sup> Exhibit P92, Article 49(1).

of the statutory provisions just considered. By such an express conferral, the Minister of Interior is not denied the capacity to require the lawful and efficient performance of that power or function.

513. It is for these reasons that the Chamber is satisfied that Ljube Boškoski, as Minister, had the *de jure* power to control and direct the police, and any other operative employees of the MoI, including members of the reserve and special police units, in respect of the operation conducted in Ljuboten on 12 August 2001, and consequential events at police checkpoints and police stations. This *de jure* power also extended to ensuring that those police responsible for investigating what had occurred, including those who were required to act at the direction of the judiciary or to assist the public prosecutor, *i.e.* the criminal police in MoI,<sup>1942</sup> performed their functions efficiently and lawfully. In particular, this power to control and direct extended to the Accused Johan Tarčulovski, who was then an employee of the MoI, normally performing his duties in connection with the security of the President's wife.<sup>1943</sup>

514. Ljube Boškoski was the minister of a structured, disciplined and heavily regulated ministry in a government that was functioning effectively and which had available the full and normal supportive structures of government, including judiciary, police and military agencies. There is no doubt he was in a position to effectively enforce his ministerial powers to the extent he chose.<sup>1944</sup> The evidence further demonstrates how active he was in doing so.<sup>1945</sup>

515. For the purposes of Article 7(3) of the Statute the Chamber finds that Ljube Boškoski was the superior of the personnel of the MoI, referred to above.<sup>1946</sup> He had, and could effectively exercise, the required command responsibility.

516. In addition to the finding just recorded, the Chamber would also record its finding that the evidence also demonstrates that, in respect of the matters just considered, if Ljube Boškoski had not been invested with the necessary *de jure* power then, *de facto*, he would have and could effectively exercise the equivalent power. The evidence satisfies the Chamber of the strength of his personality and energy, and the success he enjoyed in influencing and guiding the personnel of the Ministry,

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Exhibit P86, Article 12; Zoran Jovanovski, T 5008; 5114; Petre Stojanovski, T 9099.

<sup>1943</sup> See *supra*, para 477.

<sup>1944</sup> See for example Exhibit P92, Articles 49 and 55; Vesna Dorevska, T 9407; 9435-9436; 9555; Petre Stojanovski, T 9246-9248.

<sup>1945</sup> See for example Exhibits P64; P65; P71; P72; P74; P77; P80; P82; P85; P271; P278; P468; P469; P470; P471; 1D61; 1D62; 1D65; 1D66; 1D358; 1D359; Vesna Dorevska, T 9548; Slagjana Taseva, T 9720.

<sup>1946</sup> See *supra*, para 513.

and in securing their deferment to his proposals, and the sense of loyalty he gained and the cooperation he achieved at all levels of the Ministry.<sup>1947</sup>

517. The Chamber records its findings, however, that as the Minister of Interior, Ljube Boškoski had no function or capacity in respect of the army or its personnel. These fell within the responsibility of the Minister of Defence.<sup>1948</sup> Further, Ljube Boškoski had no ministerial function or capacity in respect of the judiciary, the public prosecutor or the judicial police who provided security at court houses. Similarly, Ljube Boškoski had no ministerial function or capacity in respect of staff, including security staff or guards, at hospitals or prisons. These fell within the responsibility of the Minister of Justice.<sup>1949</sup>

518. A great deal of time and evidence was also directed to the issue whether Ljube Boškoski had the necessary powers to punish within the meaning of Article 7(3) of the Statute. It was submitted that he had no power to punish for criminal conduct by police.<sup>1950</sup> Under the applicable FYROM laws it was for the judiciary to investigate and to punish, the public prosecutor having responsibilities in support of the judicial function.<sup>1951</sup> Further, with regard to disciplinary procedures within the MoI, it was submitted that the Minister had no power to institute disciplinary proceedings or to punish for disciplinary breaches as those responsibilities and powers were invested in others.<sup>1952</sup> Further, with respect to reserve police, it was submitted that no procedure or powers to punish for disciplinary breaches existed. In essence members of the reserve were not employees, and the disciplinary system, it was contended, dealt only with employees.<sup>1953</sup>

519. With respect to criminal conduct by police, and the law and jurisprudence which the Chamber has considered earlier in this Judgement, it is clear that in the context of Article 7(3) and, in particular, in the case of a superior who does not have personal power to punish subordinates, such as political leaders, what is required is that there be a report to the competent authorities which is likely to give rise to an investigation or the initiation of appropriate proceedings.<sup>1954</sup> The superior's responsibility is to take active steps to ensure that offenders will be punished.<sup>1955</sup> These issues will be considered in more detail.

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<sup>1947</sup> Exhibits P277; P278; P401; Zoran Trajkovski, T 5505-5506; Blagoja Jakovski, T 3917-3918; Zoran Jovanovski, T 4854.

<sup>1948</sup> Exhibit P92, Article 15.

<sup>1949</sup> Exhibit P92, Article 17; Exhibit P90, Article 103 *et seq.*; Vilma Ruskovska, T 1557; Risto Galevski, T 3785-3786.

<sup>1950</sup> Boškoski Defence Final Brief, paras 31-32, 73, 190-194.

<sup>1951</sup> Boškoski Defence Final Brief, paras 22-25, 28, 34-35, 131-147. Closing arguments, T 11081, 11099.

<sup>1952</sup> Boškoski Defence Final Brief, paras 231-237, 240-242.

<sup>1953</sup> Boškoski Defence Final Brief, paras 3, 209-212, 250-253.

<sup>1954</sup> *See supra*, para 418.

<sup>1955</sup> *See supra*, para 417.



520. With respect to the prospect of disciplinary proceedings within the MoI, the Chamber would observe that, for the reasons just expressed, it is not necessary that the Minister have the personal power to punish or sanction. If there are established bodies or procedures for disciplinary measures the responsibility of the minister as the superior is to report to the appropriate authorities as discussed earlier. In this respect, contrary to a Defence submission,<sup>1956</sup> the Chamber finds that not only did the Minister have the power to make decisions on a proposal prepared by the disciplinary commission under the Collective Agreement.<sup>1957</sup> He could also initiate proceedings before this commission.<sup>1958</sup> Further, the Chamber is not able to accept the evidence and submissions that reserve police are not subject to the established disciplinary procedures. The evidence and submissions to this effect appear to take too narrow a view of the statutory scheme by which reserves, when called up for duty, are engaged as other police, although remunerated pursuant to special statutory scheme for reserves, and the true effect of provisions such as Article 46(2) of the Law on Internal Affairs, which provides:

During the time of conducting the duties and tasks, the members of the reserve composition have the responsibilities and authorisations of authorised officials, as mentioned in Article 24 of this law.<sup>1959</sup>

Article 24 provides:

The employees of the Ministry who have special responsibilities and authorisations determined by law are authorised officials.

It also provides that all police and operative employees of the Ministry are authorised officials.<sup>1960</sup>

521. In the Chamber's view, however, there is no need for it to reach any final decision with respect to disciplinary proceedings within the MoI or whether reserve police may be punished for disciplinary breaches. In this case the conduct alleged in this Indictment is the murder of residents of Ljuboten, infliction of grave violence on residents, and the destruction of the homes and property of residents. These are each criminal conduct, punishable as such under the laws of FYROM. To seek to deal with criminal conduct of this nature merely as an internal disciplinary breach would be an entirely inadequate measure for the punishment of any police who might have perpetrated the alleged offences.

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<sup>1956</sup> Boškoski Defence Final Brief, paras 231-237.

<sup>1957</sup> Exhibit P382, Articles 148 and 149.

<sup>1958</sup> While the power to initiate such proceedings had been conferred upon his subordinates, this was by authorisation of the Minister, Exhibit P382, Article 143(5) and (6). Therefore, the Minister retained the power to make proposals before the disciplinary commission.

<sup>1959</sup> Exhibit P86, Article 46(2).

<sup>1960</sup> Exhibit P86, Article 24(2).

522. In the view of the Chamber the relevant issue presented by the circumstances of this case is whether Ljube Boškosi took adequate measures to ensure that the alleged criminal conduct by police was brought to the attention of the appropriate authorities so that it would be investigated with a view to criminal charges and appropriate punishment. That being so the matters raised concerning internal disciplinary procedures need not be further considered.

(c) Knowledge and action by Ljube Boškosi

523. The circumstances disclosed by the evidence have been set out in detail earlier in this Judgement. It is not shown to be the case that Ljube Boškosi observed any criminal conduct by police during his visit to Ljuboten on 12 August 2001. The evidence indicates that he was at Braca's house for well over an hour. In that time he heard firing and could see houses burning.<sup>1961</sup> In the Chamber's finding he also saw for a short time a group of 10 persons under police guard outside Braca's house. These persons were laying face down with their heads covered. He had been told they were terrorists who had been captured. While it is established that these people had been seriously mistreated earlier by police, and in some cases as they lay outside the yard of Braca's house, it cannot be concluded from the evidence that Ljube Boškosi saw mistreatment, or should have deduced from the appearance of the 10 that there had been criminal mistreatment.<sup>1962</sup>

524. The smoke from the village demonstrated that houses were burning, but the mere viewing of the scene by Ljube Boškosi and information that there had been an armed engagement between security forces and "terrorists" did not provide reason for him to believe or suspect there had been deliberate arson or other wanton destruction of property by police.

525. Ljube Boškosi did not see any person being shot. The evidence does not suggest he was told that men had been killed. He was told a number of "terrorists" had been captured in the course of the action of the morning. In support of the information given to him that morning, he was shown three firearms and ammunition which he was told had been seized from the arrested terrorists.<sup>1963</sup> This would only add further veracity to the nature of the information given him that there had been a successful action against terrorists in the village that morning in which a number of terrorists had been captured. His comments to the television reporter at Braca's house suggest that this was his general understanding of what had occurred that morning.<sup>1964</sup>

526. There is no evidence to suggest that Ljube Boškosi saw, or was told of on 12 August, mistreatment by police of residents at checkpoints, or mistreatment by police of residents of

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<sup>1961</sup> See *supra*, para 426.

<sup>1962</sup> See *supra*, paras 428.

<sup>1963</sup> See *supra*, paras 428.

Ljuboten at police stations, events which seem to have occurred later that day. It is also the evidence that Ljube Boškosi was not at Ljuboten “throughout” the action that day as some subsequent media and other reports have suggested.<sup>1965</sup> The evidence indicates that at the earliest Ljube Boškosi arrived in Ljuboten in the closing stages of the morning’s action,<sup>1966</sup> and that he was only at the Braca’s house location on the outskirts of the village from which the village could not be properly viewed.<sup>1967</sup> There is no basis to conclude that he had observed the whole of the day’s events.

527. The evidence does indicate, however, that media and diplomatic figures quickly heard different accounts of the day’s events, and by the next day, rumours were circulating in media and other circles that there had been clashes with citizens, shelling by the police and a number of persons killed. The Chamber is entirely satisfied that these very grave allegations quickly came to the attention of Ljube Boškosi. The Chamber accepts that because of these, Ljube Boškosi acted on the same day, 13 August 2001, to establish a commission to enquire into the events of 12 August in Ljuboten.<sup>1968</sup> Because of those rumours, Henry Bolton of the OSCE visited the village on 14 August.<sup>1969</sup> On the same day, however, Ljube Boškosi spoke with OSCE Ambassador Carlo Ungaro because of his concern related to the OSCE’s reaction to the rumours that circulated.<sup>1970</sup> These rumours apparently continued to gather force to such an extent that on 23 August 2001, Peter Bouckaert of HRW went to the village to investigate.<sup>1971</sup> His report which came to the attention of Ljube Boškosi, as well as newspaper articles reflecting his report, clearly identified allegations of murder, police brutality and destruction of property.<sup>1972</sup> By this point, there was clearly every justification for the need for a proper investigation of what had occurred because of the clear strength of the allegations that serious crimes had been committed by police in Ljuboten on 12 August. As the Chamber has found earlier in this Judgement, for the purposes of Article 7(3) of the Statute, in the Chamber’s view, Ljube Boškosi as the superior of the police had knowledge which at the least required investigation. The commission which had been established on 13 August and which reported on 4 September 2001 was not sufficient to satisfy the need to investigate. The terms of reference of this commission were factually erroneous, suggesting that the security forces acted in response to a terrorist attack, and were narrowly framed.<sup>1973</sup> The commission had no legal duty to investigate competently. The eventual report by very senior

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<sup>1964</sup> Exhibit P442; Eli Čakar, Exhibit P441, para 35.

<sup>1965</sup> *See supra*, para 425.

<sup>1966</sup> *See supra*, para 70.

<sup>1967</sup> *See* Blagoja Jakovoski, T 3937-3941; Eli Čakar, T 5181; 5196.

<sup>1968</sup> *See supra*, para 434.

<sup>1969</sup> Exhibit 1D24; Henry Bolton, Exhibit P236.1, paras 11, 13.

<sup>1970</sup> *See supra*, para 446.

<sup>1971</sup> Peter Bouckaert, T 2926; 2960; 3024-3026; Peter Bouckaert, Exhibit P322, paras 29-33.

<sup>1972</sup> *See supra*, paras 448; 450-451.

officers of the MoI suggests deliberate obscurity and dishonest omission which is highly indicative of the attitude prevailing within the ranks of the police.

528. The establishment of the commission of inquiry by Ljube Boškosi on 13 August indicates action which could be advanced as meeting his obligation pursuant to Article 7(3), although, evidence suggests that Ljube Boškosi was mainly motivated by political considerations<sup>1974</sup> in order to deflect domestic and international criticism at the time.

529. It is the case, however, that events took a different turn. As a result the issue is not whether, by further or more determined inquiry, Ljube Boškosi should have learned of conduct by police which required him to report the matter to the authorities responsible for the investigation of criminal matters. Instead, a report was actually made to the responsible authorities, the investigative judicial authority and the public prosecutor. The evidence does not indicate that this report was made at the direction of Ljube Boškosi. It was, however, made by police officers of his ministry, late on 12 August 2001, in the course of the performance of their normal duties.<sup>1975</sup> Importantly, the Accused was informed of this and that an investigation team with the investigative judge had been set up and attempts had already been made to conduct an on-site investigation in Ljuboten.<sup>1976</sup> The evidence does not suggest that the precise terms of the police report to the investigative judge and the public prosecutor were provided to Ljube Boškosi and there is no reason to consider that he should have sought them. The terms of the report, however, conveyed that several dead bodies had been found in Ljuboten and that they had probably been killed during the combat activities by security forces.<sup>1977</sup> It did not make specific reference to alleged beatings. It did refer to combat activities, but made no express reference to the destruction of property. However, it directly brought the deaths to the attention of the authorities responsible for the investigation of criminal offences and while suggesting one cause, left open the cause of death. There was a further report made, to the same appropriate judicial authorities on 14 August 2001 following the death in hospital on 13 August of a person detained by the police in Ljuboten on 12 August 2001, Atulla Qaili.<sup>1978</sup> These two reports by police of the deaths in Ljuboten on 12 August 2001 and of the death of Atulla Qaili on 13 August 2001 ought, in the ordinary course, to have led an investigative judge and the public prosecutor to conduct a proper investigation as anticipated by law in such circumstances.<sup>1979</sup> In the ordinary course, such an investigation would also have caused the investigative judge and the public prosecutor to become aware, officially, of

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<sup>1973</sup> Exhibit P73.

<sup>1974</sup> See Exhibit P402, ERN N000-9661.

<sup>1975</sup> Exhibit 1D6.

<sup>1976</sup> Exhibits 1D373; 1D374. See also Exhibit P402, ERN N000-9659.

<sup>1977</sup> Exhibit 1D6.

<sup>1978</sup> Exhibit P46.16.

the closely interrelated allegations of police criminal conduct in Ljuboten, and thereafter, at police checkpoints and police stations, and an investigation of those allegations ought to have followed. However, as detailed earlier in the Judgement, there was not a normal enquiry.<sup>1980</sup>

530. A significant factor in this failure, in the finding of the Chamber, was the repeated but unfounded assertion by the Head of OVR Čair to the investigative judge and the public prosecutor to the effect that continuing security problems in Ljuboten made it too dangerous for the investigative judge and others to visit the village to undertake normal investigations.<sup>1981</sup> A further factor is the complete absence of statements from police concerning the events in the village that morning, the deaths, and the injuries to Atulla Qaili. The evidence before the Chamber indicates that the identities of the police who entered the village on the morning of 12 August 2001 were never provided to the public prosecutor or the investigative judge. They remain unidentified to this day. No normal police investigations were carried out on the day, before the investigative judge and the public prosecutor were notified, or thereafter,<sup>1982</sup> of the scenes of the deaths in the village. There were no forensic examinations of the scenes, which would have been necessary in order to enable the public prosecutor and the judiciary to conduct their investigations. This also made the task of this Tribunal far more difficult. The bodies of the dead men were left where they fell. It is also the case that no information was provided to the investigative judge and the public prosecutor as to how and when Atulla Qaili suffered the fatal injuries, and no witnesses or police responsible for the detention of Atulla Qaili were identified. Nor were names of witnesses to his injuries provided. While the investigative judge ordered an autopsy, the report of the findings of this autopsy did not reach the investigative judge or the public prosecutor, and neither authority

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<sup>1979</sup> Exhibit P88, Chapters XV and XVI.

<sup>1980</sup> See *supra*, paras 431; 433; 454-456.

<sup>1981</sup> Exhibits 1D6; 1D190.

<sup>1982</sup> The Law on Internal Affairs provides in Article 12 that the criminal police are to conduct the activities of, *inter alia*, “finding out and apprehension of perpetrators of the criminal offences”, and by reference to Article 1 “prevention of criminal acts, detection and apprehension of perpetrators and their handing over to competent bodies”, Exhibit P86. There is evidence to suggest, despite these provisions, that the police could not act to investigate unless directed by the Investigative Judge or the Public Prosecutor: Zoran Jovanovski, T 5041-5043; Petre Stojanovski, T 9092; 9094; 9179. See also Vilma Ruskovska, T 1538. However, as an example, Article 144(3) of the Law on Criminal Procedure, Exhibit P88, does not support this. This provision proceeds on the basis that sufficient information is provided to the public prosecutor which will enable the evaluations set out to be performed. The provision enables the public prosecutor to enlist the aid of the Ministry if more is needed. This does not contradict the authority of the public prosecutor to take over and direct the criminal procedure under Articles 42 and 45 of the Law on Criminal Procedure. See also Exhibit P88, Article 142 (1) and (2), by which the Ministry of Interior is to collect all reports which could be of use for the successful conduct of the criminal proceedings, and for this purpose undertake necessary measures and actions. Further, Exhibit P88, Article 142(6) provides: “On the basis of the gathered information, the Ministry of the Interior composes a criminal report in which it itemises all of the evidence it has obtained. [...] If the organs of internal affairs learn of new facts or evidence after the submission of the criminal report, they are obliged to collect the necessary reports and to dispatch them to the public prosecutor as an addition to the criminal report.” See also Exhibit P96, Article 167. Further, in any event, much investigation essential to preserve the crime scene, and exhibits, and to identify potential witnesses, was able to be done at Ljuboten on 12 August 2001, before the report was made to the

followed this up.<sup>1983</sup> Among the many matters this report detailed the many and grave physical injuries from repeated violent force which led to his death.<sup>1984</sup>

531. Apart from a very few who provided some information to the police,<sup>1985</sup> it appears to be the case that no residents went to the police to lodge complaints concerning the deaths, and the mistreatment or the destruction of property. Nor were statements obtained from residents of the village who had knowledge of the events, the subject of the present charges, and no statements of residents or names of potential witnesses were provided by the police to the investigative judge or the public prosecutor. The reason offered in evidence for these failures is that the residents would not cooperate with the police.<sup>1986</sup> If that were the case, it is understandable, given the conduct of some police that had been established in this trial. It is significant, however, that the police did not seek the cooperation of the residents or even attempt to obtain statements.

532. The Chamber notes the success of the efforts of Henry Bolton of OSCE on 14 August, and Peter Bouckaert of HRW before and on 23 August, to secure assistance from residents as they sought to make some investigation of what had occurred. The fact that they represented independent agencies may have been a significant factor in what they were able to achieve, and the information they received might have been untested and unreliable in some respects, but their experience serves at least to show that the security situation was not that serious that an investigation could not have been attempted.

533. Of course, it was within the legal authority of the investigating judicial authorities and the public prosecutor to have been more insistent that these normal avenues of enquiry were pursued by the police. While the reports by police of the continuing security problem may provide a reason why this was not done, the evidence also indicates that a view may have prevailed that efforts to insist on a proper investigation were inappropriate because of the security position in the country at the time. As the investigating judicial authorities and the public prosecutor were not the subject of the ministerial authority of Ljube Boškoski, the Chamber has no reason to attempt to reach any final conclusion on these issues. It is sufficient to record that there was a serious failure to adequately investigate the reports made by the police to the investigating judicial authority and the public prosecutor.

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investigative judge and the public prosecutor, and at a time when the presence of a large body of armed police could ensure that these steps could be taken, yet nothing was done.

<sup>1983</sup> See *supra*, para 443.

<sup>1984</sup> Exhibit P49, pp 14, 31.

<sup>1985</sup> See Exhibits P148; 1D189; 1D190.

<sup>1986</sup> Petre Stojanovski, T 9191.

534. As has been indicated, police under the authority of OVR Čair were significantly neglectful of their normal responsibilities in respect of these investigations. There is no evidence which indicates that this occurred at the direction of Ljube Boškoski or even that he was aware of it. It is apparent that, like the investigative judge and the public prosecutor, reports reaching Ljube Boškoski noted that investigations could not be undertaken in Ljuboten because of the security situation.<sup>1987</sup> There is no basis for concluding that he knew this to be false, or that he was aware during the Indictment period of the failure of the police to perform their normal functions.<sup>1988</sup>

535. Further steps were open to Ljube Boškoski to have ensured that he was more fully informed, or to have ensured that the responsible police performed their duties so that the investigative judge and the public prosecutor were in a better position to determine what really had occurred and whether criminal charges against any of the police were justified. The evidence does not indicate that Ljube Boškoski would have been strongly motivated in that way, even if he had been aware of the deficiencies of the police. While these matters might be relevant to the political accountability of Ljube Boškoski for the conduct of police relating to the events in and following Ljuboten, they are not determinative of his criminal responsibility under Article 7(3) of the Statute, for the conduct of some police.

(d) Conclusions

536. As has been indicated, the knowledge of Ljube Boškoski of the allegations concerning criminal conduct by the police in Ljuboten on 12 August 2001 and in what followed was sufficient at least to put him on notice that crimes may have been committed by the police. There was sufficient information available to him that the police may have committed crimes. As their superior, Ljube Boškoski was obliged to report this to the competent authorities responsible for investigating possible criminal conduct so that the matter could be fully investigated and offenders punished if this was justified. For the purposes of Article 7(3) his obligation to punish offending subordinates would be satisfied, if the report to the appropriate authorities was likely to trigger an investigation into the alleged criminal conduct. Two reports were made, in the course of their ordinary duties, by police of the Ministry of Interior, to the investigating judicial authority and to the public prosecutor. Ljube Boškoski was informed that the judicial authorities had been notified and that an investigation was being attempted.<sup>1989</sup> Given the nature of the events and the functions in law of these authorities, while the reports were not full or accurate and did not detail all likely criminal conduct, they were, in the view of the Chamber, such that they were likely to trigger an

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<sup>1987</sup> Exhibits 1D373; 1D374.

<sup>1988</sup> See *supra*, paras 440-445.

<sup>1989</sup> See *supra*, para 447.

investigation. Indeed, by law they should have caused a judicial investigation, supported by the public prosecutor, into each of the deaths in the course of which the investigative judge and the public prosecutor ought to have become officially aware of the allegations of the closely related misconduct of police involving cruel treatment and wanton destruction so as to be able to determine whether criminal charges were justified. In fact, there was not a satisfactory investigation by the responsible authorities. No criminal proceedings were instituted against any police. There are a number of reasons for this but failures by police in OVR Čair to perform their duties adequately and a want of determination by the responsible authorities are the primary factors. Ljube Boškosi had no authority or powers in respect of the responsible authorities, which were outside the MoI. It is not shown that the failure of police to perform their duties is attributed to his orders, or was known to Ljube Boškosi at the relevant time, or that it should have been anticipated by him. It is not established, therefore, that further reporting or other action by Ljube Boškosi to satisfy his obligation under Article 7(3) of the Statute was required. It is not shown that he failed to take the necessary and reasonable measures. While the circumstances disclosed by the evidence reveal a serious failure of the functioning of the judicial and police organs of FYROM at that time, it has not been established by the Prosecution that Ljube Boškosi is criminally responsible for what occurred.

### **C. Findings on the responsibility of Johan Tarčulovski**

#### **1. Role of Johan Tarčulovski**

537. In 2001, Johan Tarčulovski served in the security unit of the Ministry of Interior. Normally his responsibility was to provide security for the wife of the then President of FYROM, Boris Trajkovski.<sup>1990</sup> Zlatko Keskovski was the Head of Section for Security of the President and Johan Tarčulovski's superior.<sup>1991</sup> The President personally selected Johan Tarčulovski, as he believed that only a person he knew well could take such a position.<sup>1992</sup> Zlatko Keskovski testified that Johan Tarčulovski enjoyed the high confidence of the President. Tarčulovski was often present at the house of the President.<sup>1993</sup>

538. As discussed earlier, on 25 and 26 July 2001, at the police station PSOLO, a number of weapons and uniforms were issued to, among others, persons from the "Kometa" security agency.<sup>1994</sup> At the time of the arrival at PSOLO of the people from "Kometa", Johan Tarčulovski

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<sup>1990</sup> Zlatko Keskovski, T 9969-9970; Exhibit 1D317.

<sup>1991</sup> Zlatko Keskovski, T 9948; 9968-9970; Exhibit 1D317.

<sup>1992</sup> Zlatko Keskovski, T 9977-9980.

<sup>1993</sup> Zlatko Keskovski, T 9980.

<sup>1994</sup> See *supra*, para 497.



was seen in the yard of the police station.<sup>1995</sup> Miodrag Stojanovski had stated to a commission of enquiry into the events in Ljuboten that this “Kometa” group was led by Johan Tarčulovski. However, in his evidence he departed from this account of the event, by suggesting that he would not have been able to determine whether the group was led by Johan Tarčulovski, because Stojanovski was in his office at the moment of their arrival.<sup>1996</sup> Miodrag Stojanovski also went on further to seek to justify his changed position by suggesting that the presence of Johan Tarčulovski at PSOLO at the time was not unusual, as Tarčulovski performed his duties in the residence of the President, which was located near PSOLO, and he came to PSOLO quite often.<sup>1997</sup> A Defence witness, Zlatko Keskovski, sought to support this position stating that PSOLO was guarding the entrance to the residential complex of the President and Prime Minister and it would have been a standard daily activity for a security officer to visit PSOLO in connection with his duty to secure the President’s residence.<sup>1998</sup> However, after this event at PSOLO in July 2001, as discussed elsewhere, Johan Tarčulovski was seen on other occasions together with persons from the “Kometa” agency,<sup>1999</sup> which lends some support to the view that his presence at PSOLO at the time the “Kometa” group arrived to receive weapons and uniforms was not a coincidence, as originally indicated by Miodrag Stojanovski. Further, as Johan Tarčulovski confirmed to a Commission of Inquiry in 2003, he had personally selected these persons who were armed and equipped at PSOLO.<sup>2000</sup> The Chamber was not impressed by the credibility of either Stojanovski or Keskovski in respect of this evidence, which appeared very much to be contrived in the interests of Johan Tarčulovski, an assessment which is significantly affirmed by other evidence as to the role of Johan Tarčulovski on other occasions in connection with men from the “Kometa” agency, including their arming and equipping at OVR Čair.<sup>2001</sup>

539. It was also the evidence of Zlatko Keskovski that on 10 August 2001, Johan Tarčulovski phoned him to request leave of absence, saying that a person close to him was killed in the land mine incident at Ljubotenski Bačila.<sup>2002</sup> Zlatko Keskovski informed the President about it. The President and Keskovski ordered Johan Tarčulovski to come to Skopje.<sup>2003</sup> It was the evidence of Zlatko Keskovski that Johan Tarčulovski arrived in the President’s office in the afternoon of that day. The President offered his condolences. Zlatko Keskovski went on to say that on this occasion the President ordered Johan Tarčulovski to go and remain in the area of Ljubanci and inform him of

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<sup>1995</sup> Miodrag Stojanovski, T 6784; 6803-6804; 6833.

<sup>1996</sup> Miodrag Stojanovski, T 6840-6841.

<sup>1997</sup> Miodrag Stojanovski, T 6833.

<sup>1998</sup> Zlatko Keskovski, T 10037-10038.

<sup>1999</sup> *See supra*, para 106.

<sup>2000</sup> Exhibits P379.01; 379.02.

<sup>2001</sup> *See supra*, para 106.

<sup>2002</sup> Zlatko Keskovski, T 10001.

<sup>2003</sup> Zlatko Keskovski, T 10002.

developments in that area. He also said, however, that Tarčulovski was granted several days of leave.<sup>2004</sup> Johan Tarčulovski comes from the village of Ljubanci.<sup>2005</sup>

540. In an apparent attempt to support his evidence that the President asked Johan Tarčulovski to provide him information on developments in the area of Ljubanci, Zlatko Keskovski stated that subsequently the President appeared to be aware of the situation in that area. Zlatko Keskovski suggested that on that basis he concluded that the President was receiving information from Johan Tarčulovski.<sup>2006</sup> Zlatko Keskovski also described an instance when he was sent by the President to a place presumably to indicate that it was not unusual for the President to use security officers for the purpose of reporting to him.<sup>2007</sup>

541. In the Chamber's assessment, in addition to the view it has already expressed about the credibility of one aspect of the evidence of Zlatko Keskovski, there is a conflict in his evidence about Johan Tarčulovski's role in Ljubanci on 10-12 August. On the one hand, it is his evidence that Tarčulovski was ordered to go and remain in the Ljubanci area and to report to the President about developments there. Yet, on the other hand, he says the President granted several days' leave to Tarčulovski. The Chamber is not able to accept the truth of this evidence of Zlatko Keskovski that Johan Tarčulovski went to Ljubanci at his own request because of the death of a person. The Chamber finds that Johan Tarčulovski was sent to Ljubanci. It cannot make a positive finding whether he was ordered by the President or another of his superiors in the Ministry such as Zlatko Keskovski. The facts to which the Chamber now turns, together with what has been considered so far, persuades the Chamber, and it finds, that Johan Tarčulovski was ordered to lead the police in a planned operation in Ljuboten which eventually took place under Tarčulovski's leadership on the morning of 12 August 2001.

542. As discussed earlier, on 10 August 2001, Johan Tarčulovski was at the Čair police station. He was with Zoran Krstevski and Goče Ralevski. He met with the Head of OVR Čair Ljube Krstevski and secured transportation for a group of people wearing police reservists' uniforms who had arrived in the yard of the police station. There were persons from the "Kometa" agency in the group.<sup>2008</sup> Subsequently, Johan Tarčulovski went from Čair to Ljubanci, together with the group just mentioned who had been provided with transport by OVR Čair. At least some of the group were later transported to a former children's holiday resort near Ljubanci, where they spent the

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<sup>2004</sup> Zlatko Keskovski, T 10003-10004.

<sup>2005</sup> M052, T 8256.

<sup>2006</sup> Zlatko Keskovski, T 10005-10007.

<sup>2007</sup> Zlatko Keskovski, T 10142-10143.

<sup>2008</sup> *See supra*, para 107.

night and no doubt the next night.<sup>2009</sup> The children's holiday resort was being used by the army. Johan Tarčulovski was seen at the children's holiday resort that evening.<sup>2010</sup>

543. On the evening of 10 August 2001, Johan Tarčulovski participated in a meeting held at the command post of the 3rd Guardist Battalion in Ljubanci. As established earlier, Ljube Krstevski the Head of OVR Čair and Major Despodov from the army, among other people, attended the meeting. Johan Tarčulovski discussed with the other participants an operation to enter the village of Ljuboten. It was said that Johan Tarčulovski had planned the operation.<sup>2011</sup> A military report refers to the operation as "the action of Johan Tarčulovski".<sup>2012</sup> He undertook to arrange with the President for an order pursuant to which Major Despodov's troops could provide fire support to the operation.<sup>2013</sup> The operation was to have been conducted on the morning of 11 August, but he postponed it for a day.

544. In the afternoon hours of 11 August 2001, a group of police reserves led by Johan Tarčulovski conducted a reconnaissance of the village of Ljuboten.<sup>2014</sup> At around 1700 or 1800 hours, Johan Tarčulovski returned to the command post of the 3rd Guardist Battalion and inquired with Major Despodov whether he had received any orders in relation to the planned operation. It is the evidence that, subsequently, Johan Tarčulovski had Major Despodov speak on the telephone to a person he identified as the President. There is also evidence that during that conversation the President gave general instructions to the Major regarding the planned operation and indicated that he would talk to General Mitrovski and call Despodov again.<sup>2015</sup> In his dealings that day with Major Despodov, Johan Tarčulovski told Despodov that the action would take place with or without the assistance of Despodov's troops, which indicates the authority exercised by Johan Tarčulovski.<sup>2016</sup> A military report at the time also quotes him saying "... tomorrow at 0430 hours I will start the action", the assumption of full authority to decide is obvious.<sup>2017</sup>

545. There is evidence which, although not in itself conclusive, is consistent with Johan Tarčulovski having slept at the children's holiday resort in Ljubanci. Prior to the hearing in this trial, Lieutenant Jurišić was shown a photo board on which he recognised a man he believed was present at the children's holiday resort, although he was not certain.<sup>2018</sup> The photo, which the

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<sup>2009</sup> See *supra*, para 110.

<sup>2010</sup> M084, T 1478-1479.

<sup>2011</sup> M052, T 8270.

<sup>2012</sup> Exhibit P303.

<sup>2013</sup> See *supra*, paras 111-112.

<sup>2014</sup> See *supra*, para 124.

<sup>2015</sup> See *supra*, paras 126-130.

<sup>2016</sup> See *supra*, para 125.

<sup>2017</sup> Exhibit P303.

<sup>2018</sup> Marijo Jurišić, T 3305-3307; Exhibit P368; Thomas Kuehnel, T 7954-7957.

witness marked on that occasion is one of Johan Tarčulovski. M052 has also heard that a group, who were to participate with Johan Tarčulovski in the operation on 12 August 2001, stayed at the children's holiday resort for the night.<sup>2019</sup>

546. The evidence in this case is noteworthy for the sparsity of evidence from or about the identities of the police who entered Ljuboten on the morning of 12 August 2001. Indeed, despite the enquiries commissioned by Ljube Boškoski, and the responsibility of the criminal police of OVR Čair, the judiciary and the public prosecutor to investigate the deaths and other events, the evidence would indicate that, with a very few exceptions, the identity of the persons who entered the village is not known. The police records which have been provided in evidence do not identify them. The residents who suffered at their hands and gave evidence were prevented from seeing them for much of the time as they were required to cover their heads. What residents mostly described were armed uniformed police whose faces were masked. There were residents who thought they could identify a few of the police as local men of Macedonian ethnicity, but for this purpose those residents could only rely on the sound of voices they heard, which is not a sufficiently reliable identification. A few police records of issues of arms and other equipment provide a means by which some of the men could be identified, but otherwise the identity of the police is not discoverable from the evidence.

547. The use of face-masks, which the Chamber accepts was the case for many of the police, indicates a deliberate attempt to avoid identification. The failure of other police to determine the identity of those who entered Ljuboten on 12 August evidences a serious and scandalous attempt to protect the men involved and represents a grave failure to carry out their responsibilities at the level of OVR Čair, one which would appear to have been countenanced by more senior police as it has gone uncorrected for so long. It is in this context that the Chamber must view the limited evidence concerning Johan Tarčulovski on 12 August 2001.

548. In addition to the significance of his presence and role at the planning meeting at the command post of the 3rd Guardist Battalion on 10 August 2001, the evidence establishes, in the finding of the Chamber, that Johan Tarčulovski maintained telephone contact with army personnel who had a key active role in supporting the police operation on 12 August 2001. This finding is made despite denials by those army officers in their evidence of further contact with Johan Tarčulovski. Lieutenant Jurišić initially stated that he did not exchange telephone numbers with any of the police officers whom he had seen at the children's holiday resort that weekend.<sup>2020</sup> He then corrected himself and stated that he did exchange numbers with the leader of the group of

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<sup>2019</sup> M052, T 8275.

police officers when he arrived.<sup>2021</sup> The number of the telephone used by Lieutenant Jurišić at the time appears on the list of outgoing telephone calls from the telephone used at the time by Johan Tarčulovski.<sup>2022</sup> Such calls are recorded at 1030 hours on 11 August 2001 and 0347 hours on 12 August 2001.<sup>2023</sup> While Lieutenant Jurišić suggested he had no recollection of these telephone calls,<sup>2024</sup> the Chamber finds that there were these two telephone conversations with Johan Tarčulovski, the second at a time at which preparations for the activities of 12 August can be expected to be commencing. The Chamber also attaches significance to Lieutenant Jurišić's understanding of the role of Johan Tarčulovski, with whom, the Chamber finds, he exchanged telephone numbers, as the "leader of the group of police officers".<sup>2025</sup>

549. Similarly, Captain Grozdanovski denied having exchanged telephone numbers with Johan Tarčulovski.<sup>2026</sup> He did not recall having received a phone call from Johan Tarčulovski on 11 August 2001.<sup>2027</sup> Yet, his number appears on the list of outgoing calls from the telephone of Johan Tarčulovski. Captain Grozdanovski denied having received such a phone call.<sup>2028</sup> The list of incoming calls for the telephone of Johan Tarčulovski further reveals that Captain Grozdanovski made a phone call to Johan Tarčulovski at 0356 hours on 12 August 2001. Captain Grozdanovski also denied having made this phone call, arguing that someone else might have used his telephone.<sup>2029</sup> The Chamber is satisfied of the falsity of Captain Grozdanovski's denial of these telephone contacts with Johan Tarčulovski. As observed in respect of the call to Lieutenant Jurišić at 0347 hours on 12 August, the call at 0356 hours is at a time when preparations for the activities of 12 August 2001 can be expected to be commencing. These false denials appear to be a further attempt by Captain Grozdanovski to distance himself from Johan Tarčulovski and the activities of the police in Ljuboten on 12 August. These lies are one of the matters also weighed by the Chamber in rejecting other evidence of Captain Grozdanovski relating to the events of 12 August.

550. The Chamber is satisfied that both Lieutenant Jurišić and Captain Grozdanovski knew Johan Tarčulovski at the time of the events in Ljuboten and had exchanged telephone numbers with him. As they were all in the area of Ljuboten at the time and involved in the events, it is evident from the circumstances, in the finding of the Chamber, that the telephone calls between these men were

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<sup>2020</sup> Marijo Jurišić, T 3307-3308.

<sup>2021</sup> Marijo Jurišić, T 3308.

<sup>2022</sup> The telephone was apparently registered under the name of a certain Mr Todorovski; Thomas Kuehnel, T 7978-7979. However, there is evidence, which the Chamber accepts, suggesting that the telephone was used by Johan Tarčulovski at the time; M052, T 8322; Exhibit P231, p 4.

<sup>2023</sup> Marijo Jurišić, T 3311-3313; Exhibit P369.

<sup>2024</sup> Marijo Jurišić, T 3312-3313.

<sup>2025</sup> Marijo Jurišić, T 3308.

<sup>2026</sup> Nikolče Grozdanovski, T 10482.

<sup>2027</sup> Nikolče Grozdanovski, T 10486-10487.

<sup>2028</sup> Nikolče Grozdanovski, T 10489-10490; 10514; Exhibit P369.

<sup>2029</sup> Nikolče Grozdanovski, T 10490-10492; Exhibit P369.

made in connection with the preparation for the operation in the village. *Inter alia*, they indicate the planning and coordination of Johan Tarčulovski. The Chamber has no direct evidence of the means of communication, other than telephone, which may have been available between Johan Tarčulovski and these two army officers who were located overlooking Ljuboten during the police operation. Radio is an obvious possibility. Johan Tarčulovski had been issued with radios at OVR Čair.<sup>2030</sup> Whatever the means used there appears to have been communication. As, in the Chamber's finding recorded elsewhere in this Judgement, the operation commenced with a limited shelling by the army of an ethnic Albanian area of the village, in the vicinity of the point of entry of the police to the village,<sup>2031</sup> there was an obvious need for communication at least to ensure that shelling ceased before the police entered Ljuboten. In this respect the Chamber also records that it does not accept the honesty of evidence that the army interrupted its firing because the (unexpected) presence of a party of police moving in the village was observed from the army positions.

551. The Chamber also accepts that before the police entered the village and before the army shelled with its mortars (rejecting in this regard as dishonest that part of the evidence of M037 who from obvious self interest suggested this occurred much later in the morning and involved a longer wait), Johan Tarčulovski requested that a police Hermelin APC from Mirkovci wait at the Stranište checkpoint until mortar fire support was provided.<sup>2032</sup> This offers apparent confirmation that Johan Tarčulovski was then informed that shelling by the army mortars was about to commence. The very presence of the Hermelin APC further evidences the involvement of Johan Tarčulovski in the planning of the operation as this was provided at his request by the Head of OVR Čair. The Chamber is not able to rely on evidence, however, that Ljube Boškoski also personally approved the use of the Hermelin APC,<sup>2033</sup> as this also appears to be an attempt to ensure that the witness who gave this evidence had no responsibility for the use of the Hermelin APC in the operation. In the Chamber's finding the use of the Hermelin APC in the operation on 12 August occurred at the specific request of Johan Tarčulovski and was approved, at least, at the level of the Head of OVR Čair.

552. The evidence is not specific as to the movements of the police through Ljuboten on 12 August, although the general tenor of the evidence is consistent with the police moving as one group along the main road through the village and being involved in particular events, starting with the shooting at the Jusufi home, and concluding with the engagement just beyond the far end of the village at the Jashari family homes.

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<sup>2030</sup> See *supra*, para 113.

<sup>2031</sup> See *supra*, paras 39; 42.

<sup>2032</sup> See *supra*, para 41.

<sup>2033</sup> M052, T 8288-8289.

553. In this context the events at the home of Adem Ametovski occurred. There is specific evidence, which the Chamber accepts,<sup>2034</sup> that Johan Tarčulovski was with the group of people in camouflage uniforms, *i.e.* in the Chamber's finding, the police, who there held ten residents who had been sheltering in the cellar of the house of Adem Ametovski and then seriously mistreated them in the front yard of that house. Atulla Qaili was seriously mistreated there, and, in the Chamber's finding, two of the residents, Sulejman Bajrami and Muharem Ramadani were shot and killed on the road by that house by one or more of the police in the group.<sup>2035</sup> A third resident was shot in the hand.

554. Beyond that location, at the location of the Jashari family homes, near which three men were shot and killed having been fired on by the police group as well as the army, in the Chamber's finding, Johan Tarčulovski was present and directed that there was no need for the police to conduct an inspection in respect of the deaths of the three men because there was a state of war.<sup>2036</sup> There is also evidence that the weapons and ammunition said to have been found by members of the police party near the bodies of the three dead men were brought to Johan Tarčulovski who had them transported back in the Hermelin APC. The weapons and ammunition were transported in the Hermelin to Braca's house where they were shown to Ljube Boškosi.<sup>2037</sup>

555. The evidence discussed so far is sufficient to persuade the Chamber that Johan Tarčulovski was the person in charge of the police operation to enter the village of Ljuboten on 12 August and in that capacity he was responsible for the preparations for the operation. The Chamber is also persuaded by it that he led the police as they moved through the village on 12 August.

556. There is, however, further and significant evidence of accounts given by Johan Tarčulovski in 2003 to a Commission for Inquiry into the operation in Ljuboten. These have been admitted as evidence relating to Johan Tarčulovski, but not as evidence against Ljube Boškosi. In an Official Note dated 3 March 2003<sup>2038</sup> Johan Tarčulovski briefly set out that with police reservists who had volunteered:

... we entered the village with only 20 men, with the aim of going into houses in which he [Džavid Asani] could have been put up, but we had to wait until daylight because we came under fire from the other side. We then attacked the locations from which we had come under fire. The operation lasted until 1500 hrs because we only entered those houses which, according to information we had, were occupied by Džavid and the terrorists and two or three houses from which we had come under fire. The people we found in the village, the women and children and the elderly, were

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<sup>2034</sup> M037, T 786; *see supra*, footnote 200.

<sup>2035</sup> *See supra*, paras 55; 57.

<sup>2036</sup> *See supra*, para 69.

<sup>2037</sup> *See supra*, paras 69; 428.

<sup>2038</sup> Exhibit P379.01.

searched and released. Fifteen people who were hiding in the cellar of one of the three houses were detained.<sup>2039</sup>

557. At a meeting of the Commission for Inquiry on 12 November 2003 Johan Tarčulovski gave more information about the Ljuboten operation. On this occasion he attended with his attorney. The Commission had no powers of compulsion. There are minutes of what was said.<sup>2040</sup> They are not a verbatim record but they appear to provide a reliable account of what he said about significant issues. They were signed by Johan Tarčulovski. Relevantly, the minutes say:

...Tarčulovski replied that he had been in Ljuboten with a large group of men, more than a hundred, and that he had known all of them. As to the activities they carried out, he refused to provide an answer. Regarding the weapons, Tarčulovski answered that during their activities in Ljuboten village, they carried automatic rifles only. ...

Tarčulovski explained that the action in Ljuboten village commenced between 0300 and 0400 hours and ended about noon. During the action, they did not have contact with anybody, there were no members of the regular force or senior police officers in the village. The Minister of the Interior at the time came to the entrance of the village, but Tarčulovski did not see him personally. In the course of the action in Ljuboten, they entered two houses from which fire was coming and took into custody 10 persons who were later taken over by the regular police, which was at the entrance of the village. Tarčulovski said that activities had been taken only against buildings where, according to their information, persons from the wanted lists had been staying, and to the question of who provided this information, he replied that he himself had received it through personal contacts.<sup>2041</sup>

On this occasion he also expressly stated “he had gone to Ljuboten of his own accord and will, that is to say nobody ordered him to go to Ljuboten.”<sup>2042</sup> Although expressly asked who was with him in Ljuboten, Johan Tarčulovski replied that he “had decided to withhold their names”.<sup>2043</sup> On both occasions he indicated that the men with him were volunteer reservists who had been issued with weapons at PSOLO police station. On the second occasion he indicated that the Minister of Interior ordered him to select these men for guarding vital state buildings.<sup>2044</sup>

558. There are differences between these two accounts, and significant differences between the evidence disclosed and the accounts Johan Tarčulovski gave to the Commission. Entirely omitted is the fact that men were murdered and cruelly mistreated and that many houses were deliberately set on fire. These events contradict the purpose of the operation stated by Johan Tarčulovski of searching identified houses for terrorists. It is also shown by the evidence that the police in the village were more extensively armed than merely with Kalashnikovs and that a Hermelin APC supported them and carried incendiary materials used to set houses on fire. Further, while Johan Tarčulovski accepts that he had personally selected the police reserve volunteers and was with them

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<sup>2039</sup> Exhibit P379.01.

<sup>2040</sup> Exhibit P379.02.

<sup>2041</sup> Exhibit P379.02.

<sup>2042</sup> Exhibit P379.02.

<sup>2043</sup> Exhibit P379.02.

<sup>2044</sup> Exhibit P379.02.



in the village throughout the operation,<sup>2045</sup> he does not expressly accept that he led the operation. For reasons set out a little earlier, the Chamber is satisfied that Johan Tarčulovski did lead the operation, which included bringing the detained men to Braca's house.

559. Johan Tarčulovski also suggests that the men were armed and equipped at PSOLO police station. Yet the evidence discloses that this is only correct for some men who had been equipped in July 2001. He omits to disclose that many more were armed and equipped at OVR Čair on 10 and 11 August. In view of the many matters set out in the evidence which has just been discussed, the Chamber observes that the suggestion of Johan Tarčulovski that he went to Ljuboten "of his own accord" and not on orders from anyone is entirely unbelievable. The facts entirely contradict that what occurred was a spontaneous happening in which Johan Tarčulovski and more than 100 reserve police just came together, found arms, munitions, equipment, transport and accommodation, gathered intelligence through personal contacts, secured army and police co-operation and support, and enjoyed such success that even the Minister came to see what was happening. It is to be noted that the Defence led evidence and submitted that the President was personally involved in supporting the operation.

560. The Chamber is entirely satisfied and finds that Johan Tarčulovski was the person in charge of an operation by the police to enter the village of Ljuboten on 12 August 2001 and was responsible for the preparations for the operation. Further, in the Chamber's finding, he personally led the police as they moved through the village on 12 August.

## 2. Responsibility of Johan Tarčulovski

561. The Indictment charges the Accused Johan Tarčulovski with individual criminal liability under Article 7(1) of the Statute for ordering, planning, instigating, or aiding and abetting the crimes referred to in Article 3 of the Statute and described in the Indictment, and with committing them by participation in a joint criminal enterprise.<sup>2046</sup>

### (a) Ordering, planning, instigating and aiding and abetting

562. The preparations for the police operation appear to have commenced in the evening of the very day when terrorists, believed to be NLA, killed and wounded many soldiers using a land mine at a location close to Ljuboten. Initially the police operation was to be on the following morning

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<sup>2045</sup> The repeated reference to "we" in Exhibit P379.01.

<sup>2046</sup> Indictment, para 3.

but it was postponed for a day.<sup>2047</sup> Some of the soldiers killed were from Ljubanci, the ethnic Macedonian village adjoining Ljuboten. Persons, believed to be NLA members, who had participated in the land mine attack, were observed withdrawing towards Ljuboten, and on other reports entering it, after the attack. This land mine incident in Ljubotenski Bačila followed only two days after another NLA attack on the Skopje Tetovo road near the village of Grupčin (Karpalak area), in which 10 soldiers were killed.<sup>2048</sup> As has been noted elsewhere in this Judgement, there was intense anger and unrest among the people of Macedonian ethnicity in the areas, respectively, of these attacks.<sup>2049</sup> The evidence discloses action by angry citizens following each attack which revealed a desire to act violently against ethnic Albanian persons living in the respective areas. In the Ljuboten area, following the land mine attack, large numbers of ethnic Macedonians who had armed themselves in a variety of ways set off to confront ethnic Albanian residents trying to leave Ljuboten, and a special unit of police was deployed to keep the two groups apart.<sup>2050</sup>

563. The assembly of police reserves late on 10 August and 11 August, including the use of men from the Kometa security agency, and arrangements for the arming and equipping and accommodation of some of them, and the meeting convened late on 10 August of senior army personnel and police in the area, with Johan Tarčulovski, all suggest haste in the organisation of the operation. Johan Tarčulovski, who led the police operation, was from Ljubanci. A person close to him had been killed in the land mine explosion on 10 August.<sup>2051</sup> Whether or not there was a direct involvement of the President, these matters indicate, in the finding of the Chamber, that the Ljuboten operation was a direct reaction and response to the land mine attack on 10 August.

564. The evidence as discussed in more detail earlier in this Judgement, establishes in the finding of the Chamber, that Johan Tarčulovski personally led the police operation on 12 August, and was with the group of police as they moved through the village from the Ljubanci side, essentially along the main road to the outskirts of the village on its far side, from where the road continues to Raštak. The police then returned to leave the village towards Ljubanci. The police did not go along all roads in the village or visit all houses or all houses occupied by persons of Albanian ethnicity. There was no pattern of searching houses. Their progress was essentially along the main road and their activities were in houses on that road, including a short diversion where it forks, and houses close to that road.

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<sup>2047</sup> See *supra*, paras 109; 113.

<sup>2048</sup> See *supra*, para 229.

<sup>2049</sup> See *supra*, paras 105; 123; 229.

<sup>2050</sup> See *supra*, para 82.

<sup>2051</sup> See *supra*, para 539.

565. In these particular circumstances, what was done by the group of police in the village, in the presence of the leader of the group, Johan Tarčulovski, as the Chamber finds was the case, provides a significant and reliable guide to what was intended as the object of the operation, by Johan Tarčulovski.

566. In the Chamber's finding the police group was large in number, as found elsewhere at least 60-70 and perhaps over 100 men, all well armed, equipped with a range of weapons, including grenades and rocket explosives. What the police did in the village reveals that they took with them considerable quantities of gasoline or incendiary materials, which, the circumstances indicate, were transported in a Hermelin APC accompanying the group, both because of weight and safety in the event of armed resistance.

567. The first act of the group in the village was to blow open the gate to the home of an ethnic Albanian family (the Jusufis), fire very many shots from a number of police at the house and through the open front door, shooting fatally an unarmed man in casual civilian clothing as he tried to close the door. The evidence establishes no known NLA affiliation of the dead man who obviously presented no threat to the police when he was shot and was taking no part in hostilities. There is no evidence that the house was used for hostilities against the police or army that day. The police did not seek to enter the house to search or to interview the other persons inside. Instead, as the Chamber finds, a car and construction material in the front yard were then deliberately set on fire with the aid of incendiary material the police had with them. Then the police moved on.

568. The next action of the police was to deliberately set fire to the house of another ethnic Albanian, again with the aid of incendiary material the police had with them. There was no entry of the house to search. Again, there is no evidence of this house having been used for hostilities against the police or army that day, or that the owner was affiliated with the NLA.

569. This conduct of setting fire to houses in similar circumstances to those just described was repeated many times as the police moved through the village. Often there was also extensive firing with weapons at the houses.

570. As has been described elsewhere in this Judgement, at the house of Adem Ametovski a group of 10 men, who had taken shelter in the basement, and who were unarmed, dressed in civilian clothes, and who offered no resistance, were taken in custody. Three men from an adjoining house, who were in the basement of that house with women and children, were made to join the 10 men. Valuables and identification papers were taken from the men, and valuables from the women. The identification papers appear to have been taken for the purpose of determining whether the men were Macedonian residents and of Albanian ethnicity. The men were then subjected to substantial

violence. In addition, two of them were shot dead and a third was shot and wounded by the police in the circumstances described elsewhere. The others of these detained men were taken under armed guard by some of the police to the police checkpoint at Braca's house, where they were further violently mistreated by the police. The evidence does not show that any of these men had any NLA affiliation. In some cases another person of the same family was, or may have been, a member of the NLA. Further, and in any event, these men were in police custody, unarmed and obviously presented no threat to the armed police who heavily outnumbered them. They were not taking any active part in hostilities. Had they been affiliated with the NLA, which is not the finding of the Chamber, obviously they would have been *hors de combat* at the time they were mistreated and, in three cases, shot.

571. As mentioned earlier, there is some evidence which suggests that the object of the operation was law enforcement to locate and arrest or in some other way deal with NLA members, also described as "terrorists", in the village. In some respects, but only in some respects, the conduct of the police in relation to the detained men who were not shot can be seen as consistent with such a purpose. In most other respects, however, the actions of the police in the village which have been summarised disclose something which is quite different. Other factors which demonstrate that the operation was not solely or substantially one of law enforcement or directed against the NLA or terrorists, include the composition of the police unit which conducted the operation; this was not composed of regular police experienced in criminal or terrorist investigation, but reservists from a security agency and apparently other volunteers; the operation was led by Johan Tarčulovski, who had no experience in criminal or terrorist investigation and whose normal position and duties would not rank him as a leader of such a group; the acts of shooting men who did not pose a significant threat to the police; the deliberate setting fire to houses and property with no apparent need or justification; the deliberate firing of rifles at houses; the very considerable and repeated violence to persons detained; the taking of valuables from detained men, and also from women in respect of whom no other action was taken; the fact that the police did not proceed along all roads in the village and enter and search all houses, or all houses occupied by ethnic Albanians. Instead the operation was essentially confined to houses which could be readily reached from the main road.

572. In the Chamber's finding what is disclosed is that an object, apparently the predominant object, was to indiscriminately attack ethnic Albanians and the property of ethnic Albanians. The evidence does not support the conclusion that the persons attacked and the persons whose property was destroyed were singled out for attack because they had an NLA affiliation. To the contrary, the totality of the circumstances disclosed by the evidence persuades the Chamber and it finds, that the predominant objective of this police operation was to retaliate against persons of Albanian ethnicity in the village for the actions of the NLA, which the village was thought to have harboured or

supported, in killing ethnic Macedonian soldiers, most especially in respect of the land mine attack at Ljubotenski Bačila on 10 August 2001. By acting as they did the operation was not only a means of retaliation, but it would also serve as a warning to persons of Albanian ethnicity of the consequences of support in the village for the NLA. This does not exclude that in some cases Johan Tarčulovski may have been told of some possible NLA affiliation of a member of a household, which encouraged actions against that person or the home of that person or of his family. But this is not able to be demonstrated from the evidence as Johan Tarčulovski has not disclosed what he may have been told or by whom. What is established by the evidence, in the Chamber's finding, for the reasons given, is that this was not the only or dominant reason for what occurred, and, further, even if this was a factor influencing some of the actions of the police, it offered no justification or excuse in law for the actions of the police except in three cases specifically identified in the Chamber's consideration of the charges of murder.

573. This pattern of conduct in the village by the police, discloses, in the finding of the Chamber, a deliberate but indiscriminate attack against residents of Ljuboten of Albanian ethnicity, involving acts of murder and cruel treatment, as well as the indiscriminate and wanton destruction of houses and other property of ethnic Albanian residents of Ljuboten. The repetition of each of the offences of murder, cruel treatment and wanton destruction displaces, in the Chamber's finding, all possibility that the conduct constituting these offences occurred by mistake or confusion or accidentally.

574. The evidence does not reveal any formal appointment or source of authority that entitled Johan Tarčulovski *de jure* to lead or direct the police who entered Ljuboten with him on 12 August. The evidence demonstrates, however, as the Chamber has found, that he led and directed the operation at all stages on 10, 11 and 12 August. He exercised effective leadership and control of the police in the village that day. The actions of the police in the village were at his direction. The evidence indicates, however, that the leadership role of Johan Tarčulovski and his *de facto* authority did not continue beyond the conclusion of the police operation in Ljuboten, which included the cruel treatment of detainees at Braca's house. It was limited to that operation and the police who entered the village. As a consequence, the police at Buzalak checkpoint, and at the Mirkovci, Čair/Butel, Kisela Voda, Bit Pazar and Karpoš police stations, as well as the special police or security personnel at Skopje Court II and Skopje City Hospital were not under his authority or direction. This is accepted by the Indictment which, by paragraph 42, does not allege that he is criminally responsible for any of the offences alleged in respect of these locations.

575. The Chamber notes that while Atulla Qaili suffered cruel treatment in the village on 12 August at the hands of police led by Johan Tarčulovski, for reasons which are set out earlier, it is

not established that the police responsible for this cruel treatment then intended his death, nor did they act realising that his death was a probable consequence of their actions. It was different police, not under the authority or direction of Johan Tarčulovski, who further mistreated Atulla Qaili later at Mirkovci police station and whose conduct constitutes his murder, as set out earlier in this Judgement. It has not been established that Johan Tarčulovski is criminally responsible for their actions in murdering Atulla Qaili.

576. The circumstances that have been discussed and, in particular, the presence of Johan Tarčulovski as the leader of the police when the acts of murder, cruel treatment and wanton destruction were committed during the operation demonstrates, in the Chamber's finding, that acts of murder, cruel treatment and wanton destruction were intended by Johan Tarčulovski at the times relevant respectively to ordering, planning and instigating, or, alternatively, that the commission of crimes of this nature were foreseen, at these times, to be a substantial likelihood of the execution of the operation.

577. The elements necessary to constitute ordering, planning and instigating, for the purposes of Article 7(1) of the Statute have been set out earlier in this Judgement.<sup>2052</sup> Having regard to the matters discussed above, the Chamber finds that it has been established that the Accused Johan Tarčulovski is criminally responsible for ordering, planning and instigating some of the offences charged against him in the Indictment. These offences are:

- the murder of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani;
- the wanton destruction of the houses or other property of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevshet Jusufovski, Abdullah Luftiu, Harun Rexhepi (Redžepi), Ismet Rexhepi (Rexhepovski), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari;
- the cruel treatment at Adem Ametovski's house of M012, Hamdi Ahmedovski, Adem Ametovski, Aziz Bajrami, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, Muharem Ramadani, Osman Ramadani, and Sulejman Bajrami and at Braca's house of M012, Hamdi Ahmedovski, Adem Ametovski, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, and Osman Ramadani.

The Accused will be convicted of these offences pursuant to Article 7(1) of the Statute.

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<sup>2052</sup> In addition to those elements which were discussed in this section, the Chamber is also satisfied that the actions taken by Johan Tarčulovski at both the preparatory and execution phases of the operation to enter the village of Ljuboten contributed substantially to the commission of the crimes with which he is charged and which have been proved.

578. In view of his direct role in ordering the commission of these offences it is not the case that he merely aided and abetted their commission. His alleged criminal liability for aiding and abetting the commission of the offences charged against him in the Indictment becomes irrelevant.

579. Earlier in this Judgement the Chamber has set out its reasons for concluding that the Prosecution has not proven that Xhelal Bajrami, Bajram Jashari and Kadri Jashari were murdered as alleged.<sup>2053</sup>

(b) Joint criminal enterprise

580. The Indictment alleges that a joint criminal enterprise involving Johan Tarčulovski existed from 10 to 12 August 2001, the object of which was to “direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, which was not justified by military necessity, a crime under Article 3 of the Statute”. It is alleged that the crimes occurring in Ljuboten and charged in Counts 1 to 3 of the Indictment were within the object of the JCE, or alternatively, were the natural and foreseeable consequences of the execution of the object of the JCE.<sup>2054</sup> The Indictment further alleges that other members of the JCE, working in concert with Johan Tarčulovski were FYROM regular and reserve police under his command within the Ministry of Interior.<sup>2055</sup> In support of the allegation that a common plan to commit these crimes existed the Prosecution seeks to rely on evidence regarding a meeting on 10 August in which Johan Tarčulovski and others participated and on the pattern of crimes committed in Ljuboten, which, it submits, is indicative of the existence of such common plan, design or purpose.<sup>2056</sup>

581. The Chamber has established that in the morning hours of 12 August 2001, a police unit of at least 60 to 70 men, comprising reserve police forces, including, employees of the private security agency “Kometa”, led by Johan Tarčulovski entered Ljuboten and committed the crimes described above. It is the Prosecution’s case that Johan Tarčulovski, Petre Stojanovski, Ljupčo Bliznakovski, Zoran Jovanovski a.k.a. Bučuk the head of the Kometa agency, as well as the Janevski brothers, and other employees of the Kometa company who entered the village of Ljuboten in the group led by Johan Tarčulovski, were members of the joint criminal enterprise.<sup>2057</sup> A witness suggested that Zoran Jovanovski a.k.a. Bučuk might have been among the participants in the meeting in Ljubanci on 10 August 2001,<sup>2058</sup> but given his lack of certainty and the absence of other confirming evidence, the Chamber is unable to conclude that he was present. There is no evidence of attendance of other

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<sup>2053</sup> See *supra*, para 345.

<sup>2054</sup> Indictment, paras 4, 8.

<sup>2055</sup> Indictment, para 5.

<sup>2056</sup> See Prosecution Final Brief, paras 221-228.

<sup>2057</sup> Prosecution Pre-Trial Brief, para 61.

<sup>2058</sup> M052, T 8264-8265.

members of the “Kometa” agency. There is no evidence that decisions regarding the operation to enter the village of Ljuboten were made with the involvement of men from “Kometa”. The sparse evidence regarding their participation in the events of 10-12 August, including that of Bučuk, is consistent with their participation being in the implementation of decisions taken by others, and upon specific orders rather than of their own accord or pursuant to a common purpose they shared with others. As discussed a little earlier, Johan Tarčulovski was the leader of the operation. The men from “Kometa” acted upon his orders. In the Chamber’s finding, their actions taken in the preparation for the operation, their movement through Ljuboten and acts committed by them in the village, were at the direction of Johan Tarčulovski.

582. The evidence to support allegations that Petre Stojanovski and Ljupčo Bliznakovski were members of the JCE is sparse indeed and unreliable.<sup>2059</sup> Stojanovski’s and Bliznakovski’s positions in the MoI as the deputies of the Head of SVR Skopje placed them senior to the Head of OVR Čair. Each could issue orders to the Head of OVR Čair. Their distinct functions, however, with responsibilities for operative affairs and the criminal police in the case of Stojanovski, and for public law and order in the case of Bliznakovski, do not obviously suggest why these two officers, together, would have an interest or involvement in the operation in Ljuboten. There is no direct evidence that either man was associated with Johan Tarčulovski or any of the other identified members of the alleged JCE, or that they had joined together with each other or any of the other identified members in forming a common intention or plan. There is no evidence they received any order from any person more senior to them, or that they gave any order to persons less senior, which could indicate a participation in the alleged JCE. It has been established that the Head of OVR Čair, Ljube Krstevski discussed with Petre Stojanovski whether he should attend the meeting at the army premises at the school in Ljubanci on the evening of 10 August, and Stojanovski ordered or approved Krstevski’s attendance.<sup>2060</sup> The evidence indicates, however, that what little was known about the reason for this meeting, suggested it had been called by the army and could provide a sufficient explanation for him to take the view that OVR Čair, which had responsibility in the area, should attend in any event, without this revealing any knowledge of, or involvement in, the unlawful purpose that was eventually pursued.<sup>2061</sup> The Chamber did form the view that the demeanour of Stojanovski as he gave evidence was unsatisfactory but that does not overcome the deficiencies in the evidence. The evidence concerning Ljupčo Bliznakovski was even less satisfactory. Much of these aspects which could offer some support for his participation in the JCE were apparently unreliable.<sup>2062</sup> It is said that information of the meeting on the evening of 10

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<sup>2059</sup> See *supra*, para 108.

<sup>2060</sup> See *supra*, para 108.

<sup>2061</sup> M052, T 8262-8263; 8459; Petre Stojanovski, T 9152.

<sup>2062</sup> See *supra*, paras 121-122.



August was given by Bliznakovski to Krstevski. Even if this evidence were reliable its tenor could also suggest that it was thought that the army called the meeting. In the Chamber's finding the evidence presented falls well short of establishing that either Petre Stojanovski or Ljupčo Bliznakovski were members of the JCE.

583. The Chamber has found that on the evening of 10 August 2001, Johan Tarčulovski participated in a meeting held at the command post of the 3<sup>rd</sup> Guardist Battalion in Ljubanci. The meeting was attended by key representatives in the area of the army and the police, including the commander of the 3<sup>rd</sup> Battalion of the 1<sup>st</sup> Guardist Brigade Major Despodov and the senior police officer, the Head of OVR Čair Ljube Krstevski. Other less senior police attending were the commander of Mirkovci police station, Slavko Ivanovski and the head of the sector of analysis at OVR Čair Borce Pesevski.<sup>2063</sup> At the meeting, Johan Tarčulovski discussed with other participants an operation to enter the village of Ljuboten.<sup>2064</sup>

584. None of the individuals, who, the evidence establishes, attended the meeting with Johan Tarčulovski on 10 August in Ljubanci is specifically alleged to have been a member of the JCE charged in the Indictment. While the allegation is not confined to those specifically identified, the Prosecution made it explicitly clear that members of the Macedonian army were not included in the JCE alleged in the Indictment.<sup>2065</sup> It was not the Prosecution's case that the Head of OVR Čair was a participant in the JCE. Indeed the Prosecution submitted he did not want to attend the meeting. The evidence does not identify any particular role of other police attending.

585. In the Chamber's finding, it has not been proved that Johan Tarčulovski acted in concert with members of the JCE alleged in the Indictment to commit the crimes charged. Rather, in the Chamber's finding, the evidence establishes that he planned, instigated and ordered the crimes that were committed in Ljuboten on 12 August 2001 and his responsibility should be engaged on that basis. While the circumstances indicate that in turn, Johan Tarčulovski, acted under orders, the evidence does not enable a finding to be made as to whose orders or the terms of the orders. The allegations of Johan Tarčulovski's participation in a joint criminal enterprise are, therefore, dismissed.

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<sup>2063</sup> See *supra*, para 108.

<sup>2064</sup> See *supra*, para 111.

<sup>2065</sup> *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief," 26 May 2006, para 64.

## VIII. SENTENCING

586. The Prosecution submits that a single sentence of 15 years imprisonment would be appropriate for the Accused Johan Tarčulovski, if found guilty.<sup>2066</sup>

587. Sentencing is governed by Article 24 of the Statute and Rule 101 of the Rules.<sup>2067</sup> In accordance with Rule 101(A), a convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life. The Chamber shall, in accordance with Article 24(2) of the Statute and Rule 101(B) of the Rules, take into account such factors as the gravity of the offence and the individual circumstances of the convicted person, and any aggravating and mitigating circumstances. The Chamber is also to take into account the general practice of prison sentences in the former Yugoslavia,<sup>2068</sup> although the Chamber is not bound by this practice.<sup>2069</sup> The decision as to the length of sentence is a discretionary one, turning on the circumstances of the case.<sup>2070</sup> In the exercise of its discretion, the Chamber is guided by the relevant provisions of the Statute and the Rules. The Chamber also takes note of the primary objectives of sentencing as defined by the Appeals Chamber, namely deterrence and retribution.<sup>2071</sup> Further, a sentence must not be

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<sup>2066</sup> Prosecution Final Brief, para 505; Closing Arguments, T 11058-11059.

<sup>2067</sup> Article 24 of the Statute provides: “1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”

Rule 101 of the Rules provides: “(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life. (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

<sup>2068</sup> Article 24(1) of the Statute; Rule 101(B)(iii) of the Rules.

<sup>2069</sup> *Krstić* Appeals Judgement, para 260; *Kunarac* Appeals Judgement, para 377; *Blaškić* Appeals Judgement, para 681-682, referring to the *Kunarac* Trial Judgement, para 829: “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 provisions 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.”

<sup>2070</sup> *Krstić* Appeals Judgement, para 248; *Semanza* Appeals Judgement, para 394; *Brdanin* Appeals Judgement, para 500.

<sup>2071</sup> *Tadić* Sentencing Appeals Judgement, para 48; *Deronjić* Appeals Judgement, paras 136-137, referring to *Čelebići* Appeals Judgement, paras 800-801; 806; *Kordić* Appeals Judgement, paras 1073-1075; 1075-1076; *Blaškić* Appeals Judgement, para 678; *Aleksovski* Appeals Judgement, para 185; *Dragan Nikolić* Appeals Judgement, para 46; *Stakić* Appeals Judgement, para 402.

capricious or excessive, *i.e.* it should not be out of reasonable proportion with a line of sentencing passed in similar circumstances for the same offences.<sup>2072</sup>

#### A. The gravity of the offence

588. The gravity of the offence is a factor of primary importance in the determination of the sentence.<sup>2073</sup> In assessing the gravity of the offence the Chamber may consider the nature of the crimes, the scale and brutality of the crime, the role of the accused and the overall impact of the crimes upon the victims and their families.<sup>2074</sup> Factors that a Trial Chamber takes into account as aspects of the gravity of the crime should not be additionally taken into account separately as aggravating or mitigating circumstances, and *vice versa*.<sup>2075</sup> A sentence must reflect the inherent gravity or the totality of the criminal conduct of an accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.<sup>2076</sup> It is an established principle in the jurisprudence of the Tribunal that war crimes are not inherently less serious than crimes against humanity.<sup>2077</sup>

589. The Chamber has found Johan Tarčulovski guilty of Murder (Count 1), Wanton Destruction (Count 2), and Cruel Treatment (Count 3). These offences all occurred on 12 August 2001 in the village of Ljuboten in the Former Yugoslav Republic of Macedonia. The victims were all residents of the village and were of Albanian ethnicity.

590. A force of at least 60-70 well armed reserve police, led by Johan Tarčulovski, entered the village that morning, supported by opening mortar fire from army positions. While in the village the police shot and killed three men (Count 1), deliberately destroyed or damaged by fire the houses of 12 residents, in some cases also causing damage by gunfire and grenades, (Count 2), and very cruelly beat, injured or threatened with knives and guns and by kicking, over a protracted period and in some cases at two locations, 13 men who had taken shelter in the basements of two houses (Count 3).

591. Two of the men who were subjected to cruel treatment were later shot and killed and their murders are also the subject of Count 1. Another of the 13 men was also shot, but was not killed,

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<sup>2072</sup> *Momir Nikolić* Appeals Judgement para 39, referring to *Jelisić* Appeals Judgement, para 96; *see also Babić* Appeals Judgement, para 33.

<sup>2073</sup> *Momir Nikolić* Appeals Judgement, para 11; *Aleksovski* Appeals Judgement, para 182; *Čelebići* Appeals Judgement, para 731; *Kupreškić* Appeals Judgement, para 442; *Jelisić* Appeals Judgement, para 101; *Blaškić* Appeals Judgement, para 683.

<sup>2074</sup> *See Rajić* Sentencing Judgement, paras 83-95.

<sup>2075</sup> *Deronjić* Sentencing Appeals Judgement, para 106; *Momir Nikolić* Appeals Judgement, para 58; *Limaj* Appeals Judgement, para 143.

<sup>2076</sup> *Furundžija* Appeals Judgement, para 249; *Blaškić* Appeals Judgement, para 683.

<sup>2077</sup> *Tadić* Sentencing Appeals Judgement, para 69; *Furundžija* Appeals Judgement, para 247; *Rajić* Sentencing Judgement, para 83.

and another had a cross carved on his back with a knife. In some cases the beatings and injuries inflicted were so severe that the victims lost consciousness.

592. The men who were shot and killed and who were cruelly treated in the village that day were all unarmed and offered no physical threat or resistance to the police. In most cases the police were masked.

593. For the victims who died, the consequences of the conduct of the police were absolute. Close family members must carry the burden of the loss of their loved ones. For the victims who survived, it is apparent that the physical and mental suffering has often been considerable and prolonged. Obviously 12 families suffered the financial and personal loss of their homes and possessions.

594. While Johan Tarčulovski was the leader of the police in Ljuboten on 12 August 2001, and of the police operation that day, the Chamber notes again its finding that in these things Johan Tarčulovski was carrying out the orders of a person or persons unknown, who were more senior to him in the Ministry of the Interior or perhaps, as his Defence suggests, of the President of FYROM who has since died. Johan Tarčulovski is not to be sentenced, therefore, as the person who originated the police operation in Ljuboten. He was a relatively junior person in the Ministry of the Interior, carrying out orders. It is also to be noted that he was not the actual perpetrator of any of the offences. The role of Johan Tarčulovski was to plan the offences, incite the reserve police he had assembled to carry out the offences, and to order them to do so. His role in ordering the commission of the offences fully and adequately reflects the real gravity of his conduct. No additional punishment is warranted in the circumstances of this case for his planning and incitement. It is also relevant to his sentence that it has not been established that he participated in a Joint Criminal Enterprise to commit the offences, as was alleged against him in the Indictment.

**B. Individual circumstances of the Accused: aggravating and mitigating circumstances**

595. The Statute and the Rules do not endeavour to exhaustively define factors which may appropriately constitute aggravating and mitigating circumstances with a view of determining a sentence. Rule 101(B) only refers to substantial cooperation with the Prosecutor as a mitigating circumstance. The jurisprudence of the Tribunal has identified further factors which a Chamber might take into account.<sup>2078</sup> These are not exhaustive. Necessarily, what constitutes aggravating

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<sup>2078</sup> *Blaškić Appeals Judgement*, paras 686 and 696.

and mitigating circumstances, and the weight each should be accorded, must be determined in light of the particular circumstances of each case.<sup>2079</sup>

596. Aggravating circumstances must be directly related to the commission of the offence,<sup>2080</sup> and must be established beyond reasonable doubt.<sup>2081</sup> The exercise by an accused of his right to remain silent may not constitute an aggravating circumstance.<sup>2082</sup>

597. Mitigating circumstances may be taken into account regardless of whether they are directly related to the alleged offence,<sup>2083</sup> and are to be determined on a balance of probabilities.<sup>2084</sup> Factors, such as the family situation of an accused, his efforts to be reintegrated into society and the absence of prior criminal record have been taken into consideration in mitigation.<sup>2085</sup>

598. In the present case, the Prosecution submits that relevant aggravating factors include Tarčulovski's "leadership position as the leader of the police unit that committed the crimes in Ljuboten on 12 August";<sup>2086</sup> his direct participation and presence; a sadistic or cruel motivation for the crimes and vulnerability of the victims,<sup>2087</sup> as well as a lack of awareness or remorse.<sup>2088</sup>

599. The Tarčulovski Defence has advanced in mitigation the Accused's good character, personal circumstances, conduct during the trial and in the Tribunal's Detention Unit and co-operation by his Counsel.<sup>2089</sup>

600. Johan Tarčulovski was born in Skopje in 1974. He is married with a family. In 2001 he was employed as a police officer in the Ministry of the Interior. He had been selected to serve in the unit providing security for the President and his family. He was regarded as a capable and successful officer. Nothing adverse to the Accused is known about his past or his personal circumstances. A number of persons have testified to his good character. He has been described as honest, efficient, hardworking and trustworthy.<sup>2090</sup> He surrendered voluntarily to the Tribunal and has conducted himself properly in detention here and during this trial. These matters warrant some mitigation of his punishment.

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<sup>2079</sup> *Čelebići Appeals Judgement*, paras 777; 780; *Blaškić Appeals Judgement*, para 685; *Stakić Appeals Judgement*, para 405..

<sup>2080</sup> *Kunarac Trial Judgement*, para 850; *Stakić Trial Judgement*, para 911.

<sup>2081</sup> *Čelebići Appeals Judgement*, para 763; *Blaškić Appeals Judgement*, para 686.

<sup>2082</sup> *Čelebići Appeals Judgement*, para 783; *Blaškić Appeals Judgement*, para 687.

<sup>2083</sup> *Stakić Trial Judgement*, para 920.

<sup>2084</sup> *Blaškić Appeals Judgement*, para 697.

<sup>2085</sup> *Rajić Sentencing Judgement*, para 160.

<sup>2086</sup> Prosecution's Final Brief, para 505.

<sup>2087</sup> Prosecution's Final Brief, para 505; Prosecution Closing Submission T 11058-11059.

<sup>2088</sup> Prosecution Closing Submission T 11059.

<sup>2089</sup> Tarčulovski Defence Final Brief, paras 375-379.

<sup>2090</sup> Vilma Trajkovska, Exhibit 1D114; Jarčev Tadeuš, Exhibit 1D116.

601. In a statement at the end of trial Johan Tarčulovski indicated that he saw his actions to be directed to the Defence of his country against terrorists and in defence of the constitutional order. It will be apparent that the Chamber takes a different view of the events on that day, and observes that there was no indication of a genuine remorse for what occurred. The Chamber acknowledges, however, that like so many people, the Accused found himself torn between different views of right and wrong in the turmoil of an armed conflict between opposing interests within the country, and notes that immediately before the crimes were committed in Ljuboten, Johan Tarčulovski had suffered a close loss in the Ljubotenski Bačila land mine incident.

### **C. The general practice in the courts of the FYROM and this Tribunal**

602. In the determination of the appropriate sentence, the Chamber will also take into account the general practice regarding prison sentences in the courts of the FYROM.<sup>2091</sup> The factors to be taken into consideration for the purpose of sentencing in the FYROM are set out in Article 39(1) and 39(2) of the FYROM Criminal Code which was in force at the time of the commission of the crimes alleged in the Indictment.<sup>2092</sup>

603. Article 404 of the FYROM Criminal Code of 1996, which deals with acts in violation of the rules of international law, “during a war, armed conflict or occupation”, prohibits ordering or committing “murder”, “inhuman acts” and “inflicting grave suffering or injury to the body integrity or the health” and “illegal and self-willed destruction or usurpation of a larger extent of properties which is not justified by the military needs” and prescribes a sentence of at least 10 years or life imprisonment.<sup>2093</sup> Article 35(1) of this Code in its redaction in force in 2001 provided that

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<sup>2091</sup> Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules. Article 24 and Rule 101 B refer to actual practice of the courts of the former Yugoslavia. It is, however, settled in the jurisprudence of the Tribunal that the sources to be consulted pursuant to these provisions are not limited to actual case law from the former Yugoslavia, but also include statutory provisions, *Dragan Nikolić* Sentencing Judgement, para 148; *See also Čelebići Appeals Judgement*, para 715; *Jokić Appeals Judgement*, paras 36-38; *Stakić Trial Judgement*, para 888-890.

<sup>2092</sup> Exhibit P81. The FYROM Criminal Code was adopted on 23 July 1996 (Official Gazette No 37/1996) and took effect on 1 November 1996. A subsequent law, the “Law on amending the Criminal Code” (Official Gazette, No 19/2004), was passed amending some provisions of the Criminal Code.

Article 39(1) of the FYROM Criminal Code states: “The court shall mete out a punishment to the offender within the limits prescribed by law for that crime, having in mind the criminal responsibility of the offender, the weight of the crime and the aims of the punishment.”

Article 39(2) of the FRYOM Criminal Code states: “Hereby, the court shall have in mind all the circumstances that have influence upon decreasing or increasing the punishment (extenuating or aggravating circumstances), and especially: the level of criminal responsibility, the motives for the perpetrated crime, the extent of endangerment or damage to the protected goods, the circumstances under which the crime was committed, the contribution of the victim in the perpetration of the crime, the previous life of the offender, his personal circumstances and his behaviour after the perpetrated crime, as well as other circumstances that concern the personality of the offender.”

<sup>2093</sup> Exhibit P81. Article 404 of the FYROM Criminal Code provides: “A person who, by violating the rules of international law, during a war, armed conflict or occupation, orders an attack against a civilian population; [...], to commit against the civil population murder, [...], inhuman acts, [...], inflicting grave suffering or injury to the body integrity or the health; [...], illegal and self-willed destruction or usurpation of a larger extent of properties which is not justified by the military needs, [...]; or the person who commits some of the above mentioned crimes – shall be punished with imprisonment of at least ten years, or with life imprisonment”.

imprisonment, other than life imprisonment,<sup>2094</sup> may not be longer than 15 years.<sup>2095</sup> It is noted that this provision was amended in 2004 to allow a sentence of up to 20 years imprisonment for crimes for which life imprisonment is prescribed. Article 44 of this Code also made specific provisions for sentencing a concurrence of crimes.<sup>2096</sup> It would appear, however, that on the basis of the principle of *lex mitior*, enshrined in Macedonian law in Article 3(2) of the FYROM Criminal Code,<sup>2097</sup> the maximum sentenced that could be imposed by Macedonian courts for crimes committed in 2001 of the nature of those charged in the present Indictment is 15 years imprisonment, or life imprisonment.

#### **D. Credit for time served in custody**

604. Pursuant to Rule 101(C) of the Rules, the Accused is entitled to credit for the time spent in detention pending and during trial. The Accused Johan Tarčulovski has been in custody in relation to this Indictment since 16 March 2005.

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<sup>2094</sup> Exhibit P81. Article 35(2) of the FYROM Criminal Code provided: “If a punishment of 15 years of imprisonment is prescribed for a premeditated crime, a punishment of life imprisonment may be prescribed for severe forms of this crime”.

<sup>2095</sup> Exhibit P81. Article 35(1) of the FYROM Criminal Code, as amended in 2004, states: “Imprisonment may not be [...] longer than 15 years. For the crimes for which the law prescribes a life imprisonment sentence, a sentence of imprisonment of up to 20 years may be applied.”

<sup>2096</sup> Exhibit P81. Article 44(1) of the FYROM Criminal Code stipulates: “If the offender committed several crimes with one action or with several actions, for which he is tried simultaneously, the court shall previously determine the punishments for each one of these crimes, and then shall pronounce a single punishment for all of these crimes.” Article 44(2)(i) of the FYROM Criminal Code provides: “if it determines a punishment of life imprisonment for some crime in concurrence, it shall pronounce only this punishment”, whilst Article 44(2)(ii) provides: “if it has determined a punishment of imprisonment for crimes in concurrence, the single punishment must be larger than each individual punishment but it may not reach the sum of the determined punishments, nor may it exceed 15 years of imprisonment.”

<sup>2097</sup> Exhibit P81. Article 3(2) provides: “If the law has changed once or several times after the crime was committed, that law shall be applied which is more lenient towards the offender.”

## IX. DISPOSITION

605. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:

606. The Chamber finds the Accused Ljube Boškoski **NOT GUILTY** on all counts in the Indictment. Pursuant to Rule 99(A) of the Rules, the Chamber orders that Ljube Boškoski be released from the United Nations Detention Unit immediately on the completion of the necessary modalities.

607. The Chamber finds the Accused Johan Tarčulovski **GUILTY**, pursuant to Article 7(1) of the Statute, of the following counts:

Count 1: Murder, a violation of the laws or customs of war, under Article 3 of the Statute, for having ordered, planned and instigated the murder of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani;

Count 2: Wanton destruction, a violation of the laws or customs of war, under Article 3 of the Statute, for having ordered, planned and instigated the wanton destruction of the houses or other property of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevxhet Jusufovski, Abdullah Luftiu, Harun Rexhepi (Redžepi), Ismet Rexhepovski (Rexhepi, Redžepi), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari;

Count 3: Cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute, for having ordered, planned and instigated the cruel treatment at Adem Ametovski's house of M012, Hamdi Ametovski, Adem Ametovski, Aziz Bajrami, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, Muharem Ramadani, Osman Ramadani, and Sulejman Bajrami; and the cruel treatment at Braca's house of M012, Hamdi Ametovski, Adem Ametovski, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, and Osman Ramadani;

608. The Chamber hereby sentences Johan Tarčulovski to a single sentence of twelve years imprisonment. Johan Tarčulovski has been in custody since 16 March 2005. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention so far. Pursuant to Rule 103(C) of the Rules, Johan Tarčulovski shall remain in custody of the Tribunal pending the finalisation of arrangements for his transfer to a State where he shall serve his sentence.



Done in English and French, the English text being authoritative.

Dated this tenth day of July 2008  
At The Hague  
The Netherlands

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Judge Kevin Parker  
Presiding

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Judge Christine Van Den Wyngaert

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Judge Krister Thelin

**[Seal of the Tribunal]**

## X. ANNEX I: GLOSSARY OF TERMS

|                                      |                                                                                                                                                                                |
|--------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Additional Protocol I                | Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977      |
| Additional Protocol II               | Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977 |
| <i>Akayesu</i> Trial Judgement       | <i>Prosecutor v. Jean-Paul Akayesu</i> , Case No. ICTR-96-4-T, Judgement, 2 September 1998                                                                                     |
| <i>Aleksovski</i> Appeals Judgement  | <i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, Judgement, 24 March 2000                                                                                       |
| <i>Aleksovski</i> Trial Judgement    | <i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-T, Judgement, 25 June 1999                                                                                        |
| APC                                  | Armoured Personnel Carrier                                                                                                                                                     |
| ARM                                  | “Army of the Republic of Macedonia”                                                                                                                                            |
| <i>Babić</i> Appeals Judgement       | <i>Prosecutor v. Milan Babić</i> , Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005                                                                           |
| <i>Bagilishema</i> Appeals Judgement | <i>Prosecutor v. Ignace Bagilishema</i> , Case No. ICTR-95-1A-A, Judgement, 3 July 2002                                                                                        |
| BBC                                  | British Broadcasting Corporation                                                                                                                                               |
| BCS                                  | Bosnian Croatian Serbian language                                                                                                                                              |
| <i>Blagojević</i> Appeals Judgement  | <i>Prosecutor v. Vidoje Blagojević &amp; Dragan Jokić</i> , Case No. IT-02-60-A, Judgement, 9 May 2007                                                                         |
| <i>Blagojević</i> Trial Judgement    | <i>Prosecutor v. Vidoje Blagojević &amp; Dragan Jokić</i> , Case No. IT-02-60-T, Judgement, 17 January 2005                                                                    |
| <i>Blaškić</i> Appeals Judgement     | <i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, Judgement, 29 July 2004                                                                                            |
| <i>Blaškić</i> Trial Judgement       | <i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, Judgement, 3 March 2000                                                                                            |
| Boškoski Defence                     | Counsel for the Accused Ljube Boškoski                                                                                                                                         |
| Boškoski Defence Pre-Trial Brief     | <i>Prosecutor v. Ljube Boškoski and Johan Tarčulovski</i> , Case No. IT-04-82-PT, Boškoski Defence Pre-Trial Brief, 2 October 2006                                             |

|                                            |                                                                                                                                                              |
|--------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Boškoski Defence Final Brief               | <i>Prosecutor v. Ljube Boškoski and Johan Tarčulovski</i> , Case No. IT-04-82-T, Boškoski Defence Final Trial Brief with Confidential Annex A, 24 April 2008 |
| <i>Brdanin</i> Appeals Judgement           | <i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-A, Judgement, 3 April 2007                                                                         |
| <i>Brdanin</i> Trial Judgement             | <i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-T, Judgement, 1 September 2004                                                                     |
| <i>Bralo</i> , Appeal Sentencing Judgement | <i>Prosecutor v. Miroslav Bralo</i> , Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007                                                      |
| <i>Čelebići</i> Appeals Judgement          | <i>Prosecutor v. Zejnil Delalić et al</i> , Case No. IT-96-21-A, Judgement, 20 February 2001                                                                 |
| <i>Čelebići</i> Trial Judgement            | <i>Prosecutor v. Zejnil Delalić et al</i> , Case No. IT-96-21-T, Judgement, 16 November 1998                                                                 |
| Chamber                                    | Section II of Trial Chamber II of the Tribunal                                                                                                               |
| Common Article 3                           | Article 3 of Geneva Conventions I to IV                                                                                                                      |
| Defence                                    | Counsel for the Accused Ljube Boškoski and Johan Tarčulovski                                                                                                 |
| DPA                                        | Democratic Prosperity for Albanians                                                                                                                          |
| <i>Deronjić</i> Appeals Judgement          | <i>Prosecutor v. Miroslav Deronjić</i> , Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005                                                   |
| <i>Dragomir</i> Trial Judgement            | <i>Prosecutor v. Milosevic Dragomir</i> , Case No. IT-98-29/1, 12 December 2007                                                                              |
| DA                                         | Democratic Alternative                                                                                                                                       |
| DTG                                        | Divergent Terrorist Groups                                                                                                                                   |
| EAAG                                       | Ethnic Albanian Armed Groups                                                                                                                                 |
| ECHR                                       | European Convention for the Protection of Human Rights and Fundamental Freedoms                                                                              |
| ECtHR                                      | European Court of Human Rights                                                                                                                               |
| ESZ                                        | A Special Tasks Unit of the Ministry of Interior, also known as the “Tigers”                                                                                 |
| EU                                         | European Union                                                                                                                                               |
| EUMM                                       | European Union Monitoring Mission                                                                                                                            |

|                                                   |                                                                                                                                                                                                                     |
|---------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| FYROM                                             | Former Yugoslav Republic of Macedonia                                                                                                                                                                               |
| FRY                                               | Federal Republic of Yugoslavia                                                                                                                                                                                      |
| <i>Furundžija</i> Appeals Judgement               | <i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-A, Judgement, 21 July 2000                                                                                                                               |
| <i>Furundžija</i> Trial Judgement                 | <i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, Judgement, 10 December 1998                                                                                                                           |
| <i>Galić</i> Appeals Judgement                    | <i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, Judgement, 30 November 2006                                                                                                                             |
| <i>Galić</i> Trial Judgement                      | <i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003                                                                                                                  |
| Geneva Convention I                               | Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949                                                                                    |
| Geneva Convention II                              | Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949                                                                        |
| Geneva Convention III                             | Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949                                                                                                                               |
| Geneva Convention IV                              | Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949                                                                                                                 |
| Geneva Conventions                                | Geneva Conventions I to IV of 12 August 1949                                                                                                                                                                        |
| <i>Hadžihasanović</i> Appeals Judgement           | <i>Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Case No. IT-01-47-A, Judgement, 22 April 2008                                                                                                           |
| <i>Hadžihasanović</i> Rule 98bis Appeals Decision | <i>Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Case No. IT-01-47-AR73.3, “Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal”, 11 March 2005 |
| <i>Hadžihasanović</i> Trial Judgement             | <i>Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Case No. IT-01-47-T, Judgement, 15 March 2006                                                                                                           |
| <i>Halilović</i> Appeals Judgement                | <i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-A, Judgement, 16 October 2007                                                                                                                              |
| <i>Halilović</i> Trial Judgement                  | <i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-T, Judgement, 16 November 2005                                                                                                                             |
| <i>Haradinaj</i> Trial Judgement                  | <i>Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj</i> , Case No. IT-04-84, Judgement, 3 April 2008                                                                                                   |
| HRW                                               | Human Rights Watch                                                                                                                                                                                                  |

|                                         |                                                                                                                                                                                                                                                                                                                                                                    |
|-----------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ICC                                     | International Criminal Court                                                                                                                                                                                                                                                                                                                                       |
| ICG                                     | International Crisis Group                                                                                                                                                                                                                                                                                                                                         |
| ICRC                                    | International Committee of the Red Cross                                                                                                                                                                                                                                                                                                                           |
| ICRC Commentary                         | Commentary on the Additional Protocols of Protocols 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987                                                                                                                                                                                                |
| ICRC Commentary on Geneva Convention IV | J. Pictet, ed., <i>The Geneva Conventions of 12 August 1949: Commentary, Part: IV Geneva Convention relative to the protection of civilian persons in time of war</i> (Geneva, International Committee of the Red Cross 1958)                                                                                                                                      |
| 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                                                                                                                                                                          |
| IMG                                     | International Management Group                                                                                                                                                                                                                                                                                                                                     |
| Indictment                              | <i>Prosecutor v. Boškoski and Tarčulovski</i> , Case No. IT-04-82-PT, Second Amended Indictment, 4 April 2006                                                                                                                                                                                                                                                      |
| JCE                                     | Joint Criminal Enterprise                                                                                                                                                                                                                                                                                                                                          |
| <i>Jelisić</i> Appeals Judgement        | <i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-A, Judgement, 5 July 2001                                                                                                                                                                                                                                                                                   |
| <i>Jelisić</i> Trial Judgement          | <i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-T, Judgement, 14 December 1999                                                                                                                                                                                                                                                                              |
| <i>Jokić</i> Appeals Judgement          | <i>Prosecutor v. Miodrag Jokić</i> , Case No. IT-01-41/1-A, Judgement on Sentencing Appeals, 30 August 2005                                                                                                                                                                                                                                                        |
| <i>Kamuhanda</i> Appeals Judgement      | <i>Prosecutor v. Jean de Dieu Kamuhanda</i> , Case No. ICTR-99-54A-A, Judgement, 19 September 2005                                                                                                                                                                                                                                                                 |
| <i>Kayishema</i> Trial Judgment         | <i>Clément Kayishema and Obed Ruzindana v. The Prosecutor</i> , Case No. ICTR-95-1-T, Judgement, 21 May 1999                                                                                                                                                                                                                                                       |

|                                    |                                                                                                                |
|------------------------------------|----------------------------------------------------------------------------------------------------------------|
| KFOR                               | The Kosovo Force. A NATO-led international force in Kosovo, which has been under UN administration since 1999. |
| KLA                                | Kosovo Liberation Army                                                                                         |
| KPC                                | Kosovo Protection Corps                                                                                        |
| <i>Kordić Appeals Judgement</i>    | <i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-A, Judgement, 17 December 2004      |
| <i>Kordić Trial Judgement</i>      | <i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-T, Judgement, 26 February 2001      |
| <i>Krnojelac Appeals Judgement</i> | <i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, Judgement, 17 September 2003                     |
| <i>Krnojelac Trial Judgement</i>   | <i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, Judgement, 15 March 2002                         |
| <i>Krstić Appeals Judgement</i>    | <i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-A, Judgement, 19 April 2004                           |
| <i>Krstić Trial Judgement</i>      | <i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-T, Judgement, 2 August 2001                           |
| <i>Kunarac Appeals Judgement</i>   | <i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23&23/1-A, Judgement, 12 June 2002              |
| <i>Kunarac Trial Judgement</i>     | <i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23/1-T, Judgement, 22 February 2001             |
| <i>Kupreškić Appeals Judgement</i> | <i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-A, Judgement, 23 October 2001                  |
| <i>Kupreškić Trial Judgement</i>   | <i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-T, Judgement, 14 January 2000                  |
| <i>Kvočka Appeals Judgement</i>    | <i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No. IT-98-30/1-A, Judgement, 28 February 2005               |
| <i>Kvočka Trial Judgement</i>      | <i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No. IT-98-30-T, Judgement, 2 November 2001                  |
| LP                                 | Liberal Party                                                                                                  |
| LDP                                | The Liberal Democratic Party                                                                                   |
| Lions                              | A rapid intervention police battalion of FYROM Ministry of Interior.                                           |
| <i>Limaj Appeals Judgement</i>     | <i>Prosecutor v. Fatmir Limaj et al.</i> , Case No. IT-03-66-A, Judgement, 27 September 2007                   |

|                                            |                                                                                                                                     |
|--------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| <i>Limaj</i> Trial Judgement               | <i>Prosecutor v. Fatmir Limaj et al.</i> , Case No. IT-03-66-T, Judgement, 30 November 2005                                         |
| <i>Martić</i> Trial Judgement              | <i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-T, Judgement, 12 June 2007                                                    |
| <i>Mrkšić</i> Trial Judgement              | <i>Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin</i> , Case No. IT-95-13/1, Judgement, 27 September 2007       |
| MRTV                                       | Macedonian Radio and Television                                                                                                     |
| <i>Milošević</i> Rule 98bis Decision       | <i>Prosecutor v. Slobodan Milošević</i> , Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004          |
| MoI                                        | Ministry of Interior                                                                                                                |
| <i>Mucić</i> Appeal Sentencing Judgement   | <i>Prosecutor v. Zdravko Mucić Hazim Delić and Esad Landžo</i> , Case No. 1T-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003 |
| <i>Naletilić</i> Appeals Judgement         | <i>Prosecutor v. Mladen Naletilić and Vinko Martinović</i> , Case No. 98-34-A, Judgement, 3 May 2006                                |
| <i>Naletilić</i> Trial Judgement           | <i>Prosecutor v. Mladen Naletilić and Vinko Martinović</i> , Case No. 98-34-T, Judgement, 31 March 2003                             |
| NATO                                       | North Atlantic Treaty Organization                                                                                                  |
| NFI                                        | Netherlands Forensic Institute                                                                                                      |
| <i>Dragan Nikolić</i> Sentencing Judgement | <i>Prosecutor v. Dragan Nikolić</i> , Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003                                    |
| <i>Dragan Nikolić</i> Appeals Judgement    | <i>Prosecutor v. Dragan Nikolić</i> , Case No. IT-94-2-S, Judgement on Sentencing Appeal, 4 February 2005                           |
| <i>Momir Nikolić</i> Appeals Judgement     | <i>Prosecutor v. Momir Nikolić</i> , Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006                            |
| NLA                                        | National Liberation Army                                                                                                            |
| <i>Orić</i> Appeals Judgement              | <i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-A, Judgement, Judgement, 3 July 2008                                            |
| <i>Orić</i> Trial Judgement                | <i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, Judgement, Judgement, 30 June 2006                                           |
| OSCE                                       | Organization for Security and Cooperation in Europe                                                                                 |
| OTP                                        | Office of the Prosecutor of the ICTY                                                                                                |

|                                   |                                                                                                                                                             |
|-----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| OVR                               | Oddelenie za Vnatrešni Raboti, Department for Internal Affairs                                                                                              |
| PDP                               | Party for Democratic Prosperity                                                                                                                             |
| Prosecution                       | Office of the Prosecutor of the ICTY                                                                                                                        |
| Prosecution Final Brief           | <i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , , Case No. IT-04-82-T, Confidential Prosecution's Final Brief 24 April 2008                         |
| Prosecution Pre-Trial Brief       | <i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> Case No. IT-04-82-PT, Confidential, Prosecution's Submission of Amended Pre-Trial Brief, 4 April 2006 |
| PSB                               | Public Security Bureau                                                                                                                                      |
| PSOLO                             | Police Station in Skopje                                                                                                                                    |
| <i>Rajić</i> Sentencing Judgement | <i>Prosecutor v. Ivica Rajić, a.k.a. Viktor Andrić</i> , Case No. IT-95-12-S, Sentencing Judgement, 8 May 2006                                              |
| RPG                               | Rocket-propelled grenade, a shoulder-launched anti-tank weapon                                                                                              |
| Rules                             | Rules of Procedure and Evidence of the Tribunal                                                                                                             |
| Rule Book on Organisation         | Rule Book on the Organisation and Work of the Ministry of Internal Affairs                                                                                  |
| <i>Rutaganda</i> Trial Judgement  | <i>Prosecutor v. Georges Anderson Nderubumwe Rutaganda</i> , Case No. ICTR-96-3-T, Judgement, 6 December 1999                                               |
| SDSM                              | Social Democratic Alliance of Macedonia                                                                                                                     |
| <i>Semanza</i> Appeals Judgement  | <i>Prosecutor v. Laurent Semanza</i> , Case No. ICTR-97-20-A, Judgement, 20 May 2005                                                                        |
| Statute                           | Statute of the International Criminal Tribunal for the former Yugoslavia established by Security Council Resolution 827                                     |
| <i>Stakić</i> Appeals Judgement   | <i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-A, Judgement, 22 March 2006                                                                         |
| <i>Stakić</i> Trial Judgement     | <i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-T, Judgement, 31 July 2003                                                                          |
| <i>Strugar</i> Trial Judgement    | <i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, Judgement, 31 January 2005                                                                        |
| SVR                               | Sektor za Vnatrešni Raboti, Sector for Internal Affairs                                                                                                     |



|                                          |                                                                                                                                                                                                                                                                                       |
|------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| T                                        | Transcript of hearings in the present case. All transcript pages referred to in this Judgement are taken from the uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public |
| <i>Tadić</i> Appeals Judgement           | <i>Prosecutor v. Duško Tadić aka “Dule”</i> , Case No. IT-94-1-A, Judgement, 15 July 1999                                                                                                                                                                                             |
| <i>Tadić</i> Jurisdiction Decision       | <i>Prosecutor v. Duško Tadić aka “Dule”</i> , Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995                                                                                                                          |
| <i>Tadić</i> Sentencing Appeal Judgement | <i>Prosecutor v. Duško Tadić aka “Dule”</i> , Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000                                                                                                                                                   |
| <i>Tadić</i> Trial Judgement             | <i>Prosecutor v. Duško Tadić aka “Dule”</i> , Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997                                                                                                                                                                                   |
| Tarčulovski Defence                      | Counsel for the Accused Johan Tarčulovski                                                                                                                                                                                                                                             |
| Tarčulovski Defence Pre-Trial Brief      | <i>Prosecutor v. Ljube Boškoski and Johan Tarčulovski</i> , Case No. IT-04-82-PT, Johan Tarčulovski Pre-Trial Brief, 2 October 2006                                                                                                                                                   |
| Tarčulovski Defence Final Brief          | <i>Prosecutor v. Ljube Boškoski and Johan Tarčulovski</i> , Case No. IT-04-82-T, Tarčulovski Defence Pre-Trial Brief, 24 April 2008                                                                                                                                                   |
| Tribunal                                 | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991                                                                                             |
| UÇK                                      | Ushtria Çlirimtare e Kosovës, or the Kosovo Liberation Army (KLA)                                                                                                                                                                                                                     |
| UBK                                      | Security and Counterintelligence Division of the Ministry of Interior ( <i>in Macedonian</i> )                                                                                                                                                                                        |
| UN                                       | United Nations                                                                                                                                                                                                                                                                        |
| <i>Vasiljević</i> Appeals Judgement      | <i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-A, Judgement, 25 February 2004                                                                                                                                                                                              |
| <i>Vasiljević</i> Trial Judgement        | <i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-T, Judgement, 29 November 2002                                                                                                                                                                                              |
| VMRO-DPMNE                               | Internal Macedonian Revolutionary Organisation – Democratic Party for Macedonian Unity                                                                                                                                                                                                |
| “Zolja”                                  | Hand-held infantry missile                                                                                                                                                                                                                                                            |

## XI. ANNEX II: PROCEDURAL HISTORY

### A. Pre-Trial Proceedings

#### 1. Confirmation of the initial indictment, arrest and initial appearance

609. The original indictment<sup>2098</sup> against the Accused Ljube Boškoski and Johan Tarčulovski was confirmed on 9 March 2005;<sup>2099</sup> confidential arrest warrants were issued for both the Accused on this day.<sup>2100</sup> At the time of his transfer to the United Nations Detention Unit (“UNDU”) in the Hague on 24 March 2005, Ljube Boškoski was in custody in Croatia, where he was awaiting trial on unconnected charges.<sup>2101</sup> Johan Tarčulovski was arrested on 14 March 2005, and transferred to UNDU on 16 March 2005.<sup>2102</sup> At his initial appearance on 1 April 2005, Ljube Boškoski pleaded not guilty to all charges against him. Johan Tarčulovski chose to postpone his decision to enter a plea in accordance with the Rules at his initial appearance on 21 March 2005, subsequently entering a plea of not guilty to all charges against him on 18 April 2005.

#### 2. Challenges to the jurisdiction of the Tribunal

610. Challenges to the territorial, temporal and subject-matter jurisdiction of the Tribunal were submitted by Ljube Boškoski on 23 May 2005, and by Johan Tarčulovski on 31 March 2005, 24 May 2005 and 27 May 2005.<sup>2103</sup> Both defences submitted in essence that: (i) the temporal jurisdiction of the Tribunal ceased in 1999 as a result of peace agreements ending the war in Bosnia and Herzegovina and Croatia in 1995, and in Kosovo in 1999;<sup>2104</sup> (ii) the Tribunal lacked territorial jurisdiction because the FYROM at the time the Tribunal was established in 1993 was not

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<sup>2098</sup> The original indictment is dated 22 December 2004.

<sup>2099</sup> Before the Reviewing Judge, Judge Patrick Robinson, “Decision of Review of the Indictment”, 9 March 2005.

<sup>2100</sup> *Prosecutor v. Ljube Boškoski, Ex Parte* and Under Seal, Case No. IT-04-82-I, “Warrant of Arrest Order for Surrender”, 9 March 2005, issued to the Republic of Macedonia, to the Republic of Croatia and to any Member state of the United Nations; *The Prosecutor v. Johan Tarčulovski, Ex Parte* and Under Seal, Case No. IT-04-82-I, “Warrant of Arrest Order for Surrender, to the Republic of Macedonia and to any Member state of the United Nations” 9 March 2005.

<sup>2101</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR65.2, “Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release”, 28 September 2005, para 3.

<sup>2102</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, “Decision on Johan Tarčulovski’s Motion for Provisional Release”, 18 July 2005, para 4.

<sup>2103</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, “Defence Motion of Ljube Boškoski Challenging the Jurisdiction of the Tribunal”, 23 May 2005 (“Boškoski Jurisdiction Motion May 2005”); *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, “Preliminary Motion against the Indictment of the Prosecutor of the Tribunal No IT-04-82-I dated 22 December 2004”, filed by the Defence for the Accused Johan Tarčulovski on 31 March 2005 (“Tarčulovski Preliminary Motion March 2005”); “Addendum to the Preliminary Motion”, filed by the Defence for the Accused Johan Tarčulovski 24 May 2005 (“Addendum to Preliminary Motion May 2005”); “Motion filed by the Defence of Johan Tarčulovski Challenging: the Territorial, Temporal & Subject Matter Jurisdiction of the Tribunal”, 27 May 2005 (“Tarčulovski Jurisdiction Motion May 2005”).

<sup>2104</sup> Boškoski Jurisdiction Motion May 2005, para 24; Tarčulovski Preliminary Motion March 2005, p 7 para 3; Addendum to Preliminary Motion May 2005, p 1; Tarčulovski Jurisdiction Motion May 2005, para 5.

connected to Yugoslavia;<sup>2105</sup> and (iii) the Tribunal lacks subject matter jurisdiction on the basis, as argued, there was no armed conflict, and the charged crimes do not meet the required elements for applicability of Article 3 of the Statute.<sup>2106</sup>

611. On 1 June 2005, the Pre-Trial Chamber issued decisions on Johan Tarčulovski's first two motions,<sup>2107</sup> finding that the Tribunal had territorial jurisdiction over the charged crimes in the Indictment because its jurisprudence had consistently recognized that the territory of the former SFRY included the FYROM,<sup>2108</sup> that the Tribunal has temporal jurisdiction over crimes committed on the territory of the former Yugoslavia since 1991 and the Statute does not contain a date on which this jurisdiction ends,<sup>2109</sup> and that the issue of whether an armed conflict existed did not pertain to the arguments of jurisdiction, but rather requires a factual determination that could only be made by a Trial Chamber after having duly examined all the evidence tendered during trial.<sup>2110</sup> By a decision of 14 June 2005, the Chamber held that these findings applied equally to the arguments made in Ljube Boškosi's motion challenging jurisdiction of 23 May 2005.<sup>2111</sup> On 15 June 2005, Johan Tarčulovski filed an interlocutory appeal against the Pre-Trial Chamber's decision of 1 June 2005,<sup>2112</sup> which was dismissed by the Appeals Chamber on 22 July 2005 on the grounds that firstly, the Tribunal's temporal jurisdiction was open-ended and did extend to allegations of serious violations of international humanitarian law occurring after 2001,<sup>2113</sup> and secondly, it agreed with the Pre-Trial Chamber's holding that the characterisation of the conflict in FYROM was a factual determination to be addressed at trial and not during pre-trial proceedings.<sup>2114</sup>

612. On 21 June 2006 the then Assigned *pro bono* Counsel for Ljube Boškosi filed a motion containing challenges to the jurisdiction of the Tribunal as well as a challenge to the Second Amended Indictment.<sup>2115</sup> The Motion contained three arguments: (i) that there is no legal basis for

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<sup>2105</sup> Boškosi Jurisdiction Motion May 2005, paras 22-23; Tarčulovski Preliminary Motion March 2005, p 7 para 3-4, p 8, para 1; Addendum to Preliminary Motion May 2005, pp 1-2; Tarčulovski Jurisdiction Motion May 2005, para 5.

<sup>2106</sup> Boškosi Jurisdiction Motion May 2005, paras 25-35; Tarčulovski Jurisdiction Motion May 2005, paras 6-19.

<sup>2107</sup> *The Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Johan Tarčulovski's Motion Challenging Jurisdiction", 1 June 2005 ("Tarčulovski Jurisdiction Decision June 2005"), and "Decision on Johan Tarčulovski's Second Motion Challenging Jurisdiction", 1 June 2005 ("Tarčulovski Second Jurisdiction Decision June 2005").

<sup>2108</sup> Tarčulovski Jurisdiction Decision June 2005, para 9.

<sup>2109</sup> *Ibid.*, para 10.

<sup>2110</sup> *Ibid.*, para 11.

<sup>2111</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Ljube Boškosi's Motion Challenging Jurisdiction", 14 June 2005, p 3 ("Boškosi Jurisdiction Decision June 2005").

<sup>2112</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case IT-04-82-AR 72.1, "Interlocutory Appeal Against the Decision on Johan Tarčulovski's Motion Challenging Jurisdiction", 15 June 2005.

<sup>2113</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case IT-04-82-AR 72.1, "Decision on Interlocutory Appeal on Jurisdiction", 22 July 2005, para 10.

<sup>2114</sup> *Ibid.*, para 13.

<sup>2115</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case IT-04-82-PT, "Assigned *Pro bono* Counsel Motion Challenging Jurisdiction", 21 June 2006, paras 3-4 ("Assigned *pro bono* Jurisdiction Motion June 2006").

responsibility under Article 7(3) of the Statute for acts committed by third parties which subordinates are alleged to have aided and abetted;<sup>2116</sup> (ii) that the necessary *mens rea* with regard to armed conflict had not been pleaded, and, the indictment therefore does not satisfy the jurisdictional requirement of Article 3;<sup>2117</sup> and (iii) that the responsibility as pleaded in the Second Amended Indictment amounts to an abuse of process because this amendment was sought as a result of the Prosecution's awareness of the lack of legal foundation of its case.<sup>2118</sup> In a decision of 8 September 2006, the Pre-Trial Chamber dismissed these arguments<sup>2119</sup> on the grounds that the first argument was already rejected in a previous decision of the Chamber,<sup>2120</sup> that there is no basis under the jurisprudence of the Tribunal for asserting that the *mens rea* in relation to the existence and international character of an armed conflict is a jurisdictional prerequisite,<sup>2121</sup> and that the serious charge of abuse of process cannot be substantiated.<sup>2122</sup> Ljube Boškoski filed an appeal against this decision on 22 September 2006,<sup>2123</sup> which was dismissed on 9 January 2007, on the basis, *inter alia*, that the issues in question relating to Article 7(3) of the Statute had been previously litigated, as the Pre-Trial Chamber dismissed the same issues in its decision of 26 May 2006 confirming the Second Amended Indictment, and that Boškoski's Article 3 and abuse of process challenges to the Tribunal's jurisdiction are not properly presented as issues of jurisdiction within the narrow purview of Rule 72(D) of the Rules.<sup>2124</sup>

### 3. Indictment history

613. The history of the Indictment in this case is intertwined with the challenges of jurisdiction brought by the parties, especially those of Ljube Boškoski regarding his responsibility under Article 7(3) of the Statute. On 25 May 2005, Ljube Boškoski filed a motion challenging the form of the original indictment, submitting, *inter alia*, that there were a number of defects in relation to the pleading of Article 7(3) of the Statute.<sup>2125</sup> In a decision of 22 August 2005, the Pre-Trial Chamber,

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<sup>2116</sup> *Ibid.*, paras 5-23.

<sup>2117</sup> *Ibid.*, paras 24-27, see para 26 especially.

<sup>2118</sup> *Ibid.*, paras 28 -33, see para 30 especially.

<sup>2119</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Assigned *pro bono* Counsel Motion Challenging Jurisdiction", 8 September 2006 ("Assigned *pro bono* Jurisdiction Decision September 2006").

<sup>2120</sup> *Ibid.*, para 13, see also para 15-16; see also "Decision on Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief," 26 May 2006.

<sup>2121</sup> Assigned *pro bono* Jurisdiction Decision September 2006, para 19.

<sup>2122</sup> *Ibid.*, para 21.

<sup>2123</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Boškoski Defence Appeal on Jurisdiction", 22 September 2006.

<sup>2124</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR72.2, "Decision on Ljube Boškoski's Appeal on Jurisdiction," 9 January 2007, paras 4- 5.

<sup>2125</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Defence Motion of Ljube Boskoski Challenging the Form of the Indictment," 25 May 2005, see paras 27-47.

dismissing all other arguments raised in the motion,<sup>2126</sup> ordered the Prosecution to amend the original indictment providing clarification of whether Ljube Boškosi is charged with superior responsibility for the acts of regular and reserve police only or whether he is also charged for the acts of others, *inter alia*, some civilians, special police, prison guard and hospital personnel, as detailed in the original indictment.<sup>2127</sup> The Prosecution submitted a revised indictment on 5 September 2005 in conformity with the Pre-Trial Chamber's order, and in addition sought to introduce further amendments to render the indictment "legally and factually more accurate and precise".<sup>2128</sup> The Boškosi Defence, by motion of 29 September 2005, argued, *inter alia*, that the source and grounds for the allegations of the Accused's authority and his effective control over the special police, prison guards, hospital personnel and civilians had not been pleaded with sufficient detail in the proposed amended indictment, and that that the specification of the timeframe during which there was an armed conflict obliged the Prosecution to provide evidence, or reasonable grounds for the belief, that such an armed conflict existed.<sup>2129</sup> The Tarčulovski Defence also filed a motion alleging a number of defects with regards to the pleading of the JCE, arguing that the Prosecution did not provide the identity or the participants of the JCE, that it failed to clarify whether Johan Tarčulovski is charged as a co-perpetrator or for aiding and abetting the JCE, and that the timeframe of participation of Johan Tarčulovski in the JCE was not clearly plead.<sup>2130</sup>

614. On 1 November 2005, the Pre-Trial Chamber rendered a decision on the objections raised by both Defences in their respective motions.<sup>2131</sup> The Pre-Trial Chamber found, *inter alia*, that the newly proposed pleading of Ljube Boškosi's authority over "special police" and the police force included sufficient material facts, yet that the pleading with regards to "acts committed by prison guards, hospital personnel and civilians" remained general and ambiguous, ordering the Prosecution to submit clarifications in its Pre-Trial Brief to be filed on 7 November 2005 in order to cure this defect.<sup>2132</sup> Further, the Chamber granted the proposed amendment concerning the specified time frame of the armed conflict.<sup>2133</sup> The Pre-Trial Chamber rejected the objections raised by Johan Tarčulovski to the Prosecution's proposed amendments, as they all concerned allegations which

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<sup>2126</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Ljube Boškosi Motion Challenging the Form of the Indictment", 22 August 2005.

<sup>2127</sup> *Ibid.*, para 19 and p 12, Disposition.

<sup>2128</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution Motion for Leave to Amend the Original Indictment with Attachments Annex A and B", 5 September 2005, para 2.

<sup>2129</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Defence's Response to Prosecution's Motion for Leave to Amend the Original Indictment with Attachments Annex A and B", 29 September 2005, paras 10-13, 14-17, 25-26.

<sup>2130</sup> *Ibid.*, paras 6-11.

<sup>2131</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment", 1 November 2005.

<sup>2132</sup> *Ibid.*, paras 37-42.

<sup>2133</sup> *Ibid.*, paras 10-13.

already existed in the original indictment, which Tarčulovski had not challenged. The Pre-Trial Chamber ordered *propriu motu*, however, that the Prosecution should include in their Pre-Trial Brief a detailed description of who, if possible by name, it considers to have participated in the JCE together with Johan Tarčulovski, adding that it was also expecting an extensive description relating to the other forms of liability that the Accused was charged with.<sup>2134</sup> The Prosecution filed an amended indictment on 2 November 2005,<sup>2135</sup> and its Pre-Trial Brief on 7 November 2005.<sup>2136</sup>

615. Pursuant to a range of instructions issued by the Pre-Trial Judge during a Rule 65ter conference on 23 March 2006,<sup>2137</sup> concerning, *inter alia*, issues that remained unclear relating to Ljube Boškosi's charge of Article 7(3),<sup>2138</sup> as well as a number of issues relating to the alleged JCE and Johan Tarčulovski's participation in it,<sup>2139</sup> the Prosecution on 4 April 2006 submitted both a motion to amend the indictment<sup>2140</sup> as well as an Amended Pre-Trial Brief.<sup>2141</sup> By its proposed Second Amended Indictment, the Prosecution sought to clarify and reduce the scope of allegations against the Accused.<sup>2142</sup> On 11 April 2006, the Boškosi Defence filed the a Response<sup>2143</sup> submitting, *inter alia*, that the proposed amendment concerning Ljube Boškosi's superior responsibility goes outside of the scope of Article 7(3) of the Statute.<sup>2144</sup> In a decision of 26 May 2006, the Pre-Trial Chamber discussed in detail the nature and scope of Ljube Boškosi's alleged criminal responsibility as charged,<sup>2145</sup> and the scope of Johan Tarčulovski's alleged criminal responsibility,<sup>2146</sup> and granted the Prosecution's request to amend the Amended Indictment and the Pre-Trial Brief.<sup>2147</sup> The Prosecution filed the Second Amended Indictment on 4 April 2006; the

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<sup>2134</sup> *Ibid.*, paras 45-47.

<sup>2135</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Notice of Compliance with the Trial Chamber's 'Decision on Prosecution's Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment' with Annex A", 2 November 2005, and "Amended Indictment", 2 November 2005.

<sup>2136</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Pre-Trial Brief", 7 November 2005.

<sup>2137</sup> Rule 65ter conference 23 March 2006.

<sup>2138</sup> Rule 65ter conference 23 March 2006.

<sup>2139</sup> Rule 65ter conference 23 March 2006.

<sup>2140</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Motion to Amend the Indictment and Submissions of Proposed Second Amended Indictment", 4 April 2006 ("Motion to Amend Indictment and Proposed Second Amended Indictment April 2006").

<sup>2141</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Submission of Amended Pre-Trial Brief", 4 April 2006.

<sup>2142</sup> Motion to Amend Indictment and Proposed Second Amended Indictment April 2006, para 1.

<sup>2143</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Defence's Response to Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment", 11 April 2006.

<sup>2144</sup> *Ibid.*, paras 5-15.

<sup>2145</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief", 26 May 2006", paras 15-48.

<sup>2146</sup> *Ibid.*, paras 49-51.

<sup>2147</sup> *Ibid.*, para 71.

Accused were granted 14 days from the date of the filing of the translation of the decision of 26 May 2006 to file their challenges to the Second Amended Indictment.<sup>2148</sup>

616. On 21 June 2006, the assigned *pro bono* counsel for Ljube Boškoski filed a motion arguing that paragraph 11 of the Second Amended Indictment, concerning the Accused's superior responsibility under Article 7(3) for acts of his subordinates, does not contain the necessary material facts.<sup>2149</sup> This motion included an annex with a set of questions by the Accused Ljube Boškoski concerning the Second Amended Indictment.<sup>2150</sup> The Prosecution responded that neither the questions put forth by the Accused or the submissions of the assigned *pro bono* counsel raise any material defects in the form of the Second Amended Indictment.<sup>2151</sup> By a decision on 27 September 2006 the Pre-Trial Chamber rejected all arguments raised in relation to paragraph 11 concerning Article 7(3) in the Second Amended Indictment, denying the Defence motion.<sup>2152</sup> The Second Amended Indictment of 4 April 2006 became the operative indictment.

617. Finally, on 28 September 2007, the Prosecution filed a motion seeking leave to amend the Second Amended Indictment by replacing references to a Macedonian police checkpoint at Buzalak or "Buzalak / Kodra e Zaimit" with references to "a police checkpoint set up in an area between the two locations known as Buzalak and Kodra e Zaimit".<sup>2153</sup> The Defence filed a joint response submitting that the amendments to the Indictment proposed by the Prosecution constitute a new charge, as this constituted a new location at which crimes were alleged to be committed.<sup>2154</sup> In a decision of 14 November 2007, the Pre-Trial Chamber found that it was not persuaded that there was a need to amend the Indictment, as the specific name of the police checkpoint is not a legal element of, and not factually material to, the offences alleged to have occurred there.<sup>2155</sup> The Second Amended Indictment thus remained the operative Indictment throughout the remainder of the Trial.

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<sup>2148</sup> *Ibid.*, p 21, Disposition. A translation of the Decision of 26 May 2006 was filed on 7 June 2006.

<sup>2149</sup> Assigned *pro bono* Jurisdiction Motion June 2006, paras 15-18.

<sup>2150</sup> *Ibid.*, Annex.

<sup>2151</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Response to 'Assigned *pro bono* Counsel Motion Challenging the Form of the Second Amended Indictment' with Annex A", 4 July 2006, para 15.

<sup>2152</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Motion Challenging the Form of the Second Amended Indictment and on Motion for Leave to Reply", 27 September 2006, paras 28 and 29, and p 10, Disposition.

<sup>2153</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, "Prosecution Motion for Leave to Amend the Second Amended Indictment with Annexes A and B", 28 September 2007, para 1.

<sup>2154</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, "Joint Defence Response to Prosecution Motion for Leave to Amend Second Amended Indictment", 17 October 2007, paras 4(iii), 8-10.

<sup>2155</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, "Decision on Motion to Amend the Indictment", 14 November 2007, *see, inter alia*, para 7.

#### 4. Applications for provisional release

618. On 25 May 2005 Ljube Boškosi filed a motion requesting his provisional release to FYROM or alternatively, to the Republic of Croatia.<sup>2156</sup> The Prosecution responded opposing the motion.<sup>2157</sup> An oral hearing was held on 4 July 2005 before the Pre-Trial Chamber, at which time both parties and the Minister of Justice of FYROM had the opportunity to be heard on the matter.<sup>2158</sup> By a decision of 18 July 2005, the Pre-Trial Chamber rejected the Accused's application for provisional release on the grounds, *inter alia*, that the potential for a lengthy prison sentence resulting from either the case before the Tribunal or the alleged involvement of the Accused in the murder of seven individuals from the FYROM, may constitute an incentive for the Accused to flee.<sup>2159</sup> Further, the Pre-Trial Chamber was not persuaded that the release of the Accused would not pose a danger to victims, witnesses or other persons.<sup>2160</sup> The Pre-Trial Chamber also rejected the Accused's application for provisional release to Croatia, as the Croatian government did not attend the oral hearing on 4 July and was not heard on the matter, and as it had failed to issue government guarantees on behalf of the Accused.<sup>2161</sup> Ljube Boškosi's appeal against this decision was dismissed by the Appeals Chamber on 28 September 2008.<sup>2162</sup>

619. A request for provisional release was filed by Johan Tarčulovski on 20 May 2005.<sup>2163</sup> The Prosecution opposed the motion.<sup>2164</sup> On 18 July 2005, the Pre-Trial Chamber denied Johan Tarčulovski's request for provisional release, as it had serious concerns of whether he would appear for trial and would not pose a danger to any victim, witness or other person.<sup>2165</sup> Johan Tarčulovski's appeal against this decision was dismissed on 4 October 2005.<sup>2166</sup> The Accused filed, confidentially, a second motion for provisional release on 1 December 2006, arguing that there had been a material change in the circumstances relevant to his application.<sup>2167</sup> The Pre-Trial Chamber

<sup>2156</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Defence Motion of Ljube Boškosi for Provisional Release", 25 May 2005.

<sup>2157</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Response to Ljube Boškosi's Application for Provisional Release," 7 June 2005, paras 16-23.

<sup>2158</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Defence Motion of Ljube Boškosi for Provisional Release", 18 July 2005, para 1.

<sup>2159</sup> *Ibid.*, para 32.

<sup>2160</sup> *Ibid.*, para 43.

<sup>2161</sup> *Ibid.*, paras 47, 49.

<sup>2162</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-AR65.2, "Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release", 28 September 2005, para 24.

<sup>2163</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Motion filed by the Defence of Johan Tarčulovski Requestion Provisional Release of Accused Tarčulvoski", 20 May 2005.

<sup>2164</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Prosecution's Response to Johan Tarčulovski's Application for Provisional Release", 2 June 2005, paras 5-12.

<sup>2165</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision on Johan Tarčulovski's Motion for Provisional Release", 18 July 2005, paras 20, 30 and 33.

<sup>2166</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-AR-65.1, "Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release", 4 October 2005.

<sup>2167</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Johan Tarčulovski Second Motion for Provisional Release", filed confidentially on 1 December 2006.



denied this motion on 17 January 2007, finding that the Accused had failed to demonstrate that there had in fact been a material change in circumstances since the Pre-Trial Chamber's Decision denying his first request for provisional release.<sup>2168</sup> Two subsequent motions for provisional release were denied by the Trial Chamber on 19 July 2007 and 10 December 2007, respectively.<sup>2169</sup>

## 5. Commencement of trial

620. The Prosecution first filed its Pre-Trial Brief on 7 November 2005, accompanied by a list of witnesses and exhibits pursuant to Rule 65ter(E) of the Rules. A revised Pre-Trial Brief was filed on 4 April 2006.<sup>2170</sup> The Defence of the Accused filed their respective Pre-Trial Briefs on 2 October 2006.<sup>2171</sup>

621. On 2 April 2007, by Order of Judge Carmel Agius, the then Presiding Judge of Trial Chamber II, the case was assigned to a bench of Trial Chamber II consisting of Judge Kevin Parker (Presiding), Judge Christine Van Den Wyngaert and Judge Krister Thelin.<sup>2172</sup> The pre-trial conference took place on 12 April 2007 and the trial commenced on 16 April 2007.

## B. Trial Proceedings

### 1. Overview

622. The Prosecution case opened on 16 April 2007 and ended on 6 December 2007. The Boškosi Defence opened its case on 30 January 2008 and completed it on 4 March 2008. The Tarčulovski Defence case started on 4 March and was completed on 18 March 2008. Closing arguments were heard from 6 to 8 May 2008. The Chamber received the evidence of 56 Prosecution witnesses; the evidence of six of these witnesses was provided entirely in the form of Rule 92bis statements. 17 further Prosecution witnesses gave evidence pursuant to Rule 92bis but were required to appear before the Chamber for cross-examination. The evidence of seven Prosecution witnesses was presented under Rule 92ter. The Boškosi Defence called a total of 13 witnesses, the evidence of seven of whom was received in the form of written statements pursuant

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<sup>2168</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Decision concerning Renewed Motion for Provisional Release of Johan Tarčulovski", 17 January 2007, paras 17, 22 and p 12, Disposition.

<sup>2169</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Confidential "Decision on Johan Tarčulovski's Motion for Provisional Release on Humanitarian Grounds", 19 July 2007; see also *The Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, "Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release", 27 July 2007; "Decision on Tarčulovski Fourth Motion for Provisional Release with Annexes A through B", 10 December 2007.

<sup>2170</sup> Amended Pre-Trial Brief Submission on April 2006.

<sup>2171</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Boškosi Defence Pre-Trial Brief", 2 October 2006 and "Johan Tarčulovski Pre-Trial Brief", 2 October 2006.

<sup>2172</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, "Order Regarding Composition of Trial Chamber", 2 April 2007.

to Rule 92bis. Three of these seven Rule 92bis witnesses were required to appear for cross-examination. The Tarčulovski Defence called seven witnesses, four of whom under Rule 92bis. One of the Rule 92bis witnesses was required to appear for cross-examination.

## 2. Matters relating to witnesses

623. The Chamber granted trial related protective measures to 13 Prosecution witnesses and one Defence witness; these witnesses gave their evidence with protective measures. The Chamber issued subpoenas with respect to six witnesses.

## 3. Decision on admissibility of evidence

624. On 18 September 2007 the Prosecution moved orally for the admission into evidence of several documents including statements made by Johan Tarčulovski and a number of other persons before a commission set up in March 2003 by then Minister of Interior Hari Kostov to inquire into the Ljuboten events.<sup>2173</sup> On 7 December 2007, the Chamber issued its decision on this motion and admitted into evidence, *inter alia*, an interview with Johan Tarčulovski,<sup>2174</sup> a document recording the evidence in this interview,<sup>2175</sup> and an “Official Note” by Johan Tarčulovski provided to this commission.<sup>2176</sup> Johan Tarčulovski’s interview and the information recording the contents of this interview were not admitted into evidence against Ljube Boškosi.<sup>2177</sup>

625. Throughout the trial, the Chamber granted fully or in part, a number of motions seeking admission of documents from the Bar Table,<sup>2178</sup> allowing the admission into evidence of documentary evidence, *inter alia*, regulations, court decisions, and other official documents.

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<sup>2173</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Court Hearing, 18 September 2007, T 5135; 5147-5151.

<sup>2174</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, “Decision on Prosecution’s Motion for Admission into Evidence of Documents MFI P251, P379 and P435”, 7 December 2007, “Minutes of 12 November”, an interview of Johan Tarčulovski with the Commission of 12 November 2003, para 3 and pp 24-25.

<sup>2175</sup> *Ibid.*, para 3, and pp 24-25, “Information of 25 November 2003”, summarizing the interview of Johan Tarčulovski with the Commission on 5 May 2003.

<sup>2176</sup> *Ibid.*, para 3 and pp 24-25, an “Official Note”, written by Johan Tarčulovski in connection with the meeting by the Commission that he attended on 5 May 2003.

<sup>2177</sup> *Ibid.*, p 25.

<sup>2178</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, “Decision on Prosecution Motion for Admission of Exhibits from the Bar Table with Confidential annexes A-E”, 14 May 2007; “Decision on Prosecution’s Submission on English Translation of Particular Exhibits that are the subject of the ‘Prosecution’s Motion for Admission of Exhibits from the Bar Table, with Confidential Annexes A and B’”, 19 July 2007; “Decision on Boškosi Defence Motion for Admission of Documents from the Bar Table, with Confidential Annexes A through B”, 21 November 2007; “Decision on Prosecution’s Second Motion for Admission of Exhibits from the Bar Table”, 5 December 2007; “Decision on Prosecution’s Third Motion for Admission of Exhibits from the Bar Table”, 5 December 2007; “Decision on Boškosi Defence Motion for Admission of Exhibits from the Bar Table – ‘Armed Conflict’ and Related Requirements under Article 3 of the Statute”, 27 February 2008; “Decision on Second Boškosi Defence Motion Regarding Admission of Exhibits from Bar Table Re ‘Armed Conflict’ and Related Elements”, 28 February 2008; “Decision on Boškosi Defence Second Defence Motion for

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Admission of Exhibits from the Bar Table”, 12 March 2008; “Decision on Tarčulovski Defence Motion for Admission of Exhibits form the Bar Table”, 12 March 2008; “Decision on Boškoski Defence Motion to Amend its Rule 65*ter* list and Admit Exhibits from the Bar Table”, 20 March 2008; “Decision on Tarčulovski’s Second Motion for Admission of Exhibits from the Bar Table with Annex A”, 7 April 2008; “Corrigendum to Decision on Tarčulovski’s Second Motion for Admission of Exhibits from the Bar Table with Annex A”, 15 April 2008.