


**UNITED  
NATIONS**

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-03-68-T
		Date:	30 June 2006
		Original:	English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge Hans Henrik Brydenscholt  
Judge Albin Eser

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 30 June 2006

**PROSECUTOR**

v.

**NASER ORIĆ**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Jan Wubben  
Ms. Patricia Viseur Sellers  
Mr. Gramsci Di Fazio  
Ms. JoAnne Richardson  
Mr. José Doria

**Counsel for the Accused:**

Ms. Vasvija Vidović  
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# I. INTRODUCTION

## A. The Accused

1. The accused in this case, Naser Orić (“Accused”), was born on 3 March 1967 in Potočari, Srebrenica municipality, Bosnia and Herzegovina (“BiH”). During mandatory military service in the Yugoslav People’s Army (“JNA”) from 1985 to 1986, he was attached to a special unit for atomic and chemical defence. Thereafter, starting in 1988, the Accused underwent training as a policeman, and eventually, in 1990, he joined a police unit for special actions of the Ministry of Interior of the Republic of Serbia in Belgrade. In this capacity, the Accused was deployed to Kosovo in 1990. In August 1991, the Accused returned to BiH, where he served as a police officer in the Ilidža suburb near Sarajevo. In late 1991, the Accused was transferred to the Srebrenica police station. On 8 April 1992, he was appointed chief of the police sub-station in Potočari.<sup>1</sup>

2. The Indictment<sup>2</sup> alleges that on 17 April 1992, the Territorial Defence (“TO”) of Potočari was established of which the Accused became commander, and that on 20 May 1992, the Srebrenica Municipal TO Staff was formed and the Accused was appointed its commander. It is alleged that the Accused thereafter commanded all units subordinated to the Headquarters of the Srebrenica TO, renamed the Headquarters of the Srebrenica Armed Forces on 3 September 1992.<sup>3</sup> The Prosecution and the Defence (“Parties”) agree that the Accused was also a member of the Srebrenica War Presidency upon its creation on 1 July 1992.<sup>4</sup> The Indictment alleges that the breadth of the Accused’s command was extended in early November 1992, when he was appointed commander of the Joint Armed Forces of the Sub-Region of Srebrenica, encompassing the area of the municipalities of Srebrenica, Bratunac, Vlasenica and Zvornik.<sup>5</sup>

3. The Indictment alleges that on 1 January 1994, all units under the command of the Accused were named the 8<sup>th</sup> Operative Group Srebrenica Headquarters of the Army of Bosnia and Herzegovina (“ABiH”).<sup>6</sup> In early 1995, the 8<sup>th</sup> Operative Group was renamed the ABiH 2<sup>nd</sup> Corps 28<sup>th</sup> Division, and the Accused remained its commander until he left the ABiH in August 1995.<sup>7</sup>

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<sup>1</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Third Amended Indictment, 30 June 2005 (“Indictment”), paras 1-3. These facts were agreed to by the Prosecution and the Defence, *see ex. P562*, “Agreed Facts”, A.1-10.

<sup>2</sup> *See fn. 1 supra*.

<sup>3</sup> Indictment, paras 4, 5.

<sup>4</sup> Indictment, para. 6; *ex. P562*, “Agreed Facts”, A.19.

<sup>5</sup> Indictment, para. 7. The Defence agrees that “Naser Orić was appointed Commander of the Joint Armed Forces of the Sub-Region Srebrenica in early November 1992” (*ex. P562*, “Agreed Facts”, A.21), but not that his command encompassed the area of the municipalities of Srebrenica, Bratunac, Vlasenica and Zvornik.

<sup>6</sup> Indictment, para. 8.

<sup>7</sup> Indictment, para. 10; *ex. P562*, “Agreed Facts”, A.24, 28.

4. On 12 July 1994, the Accused was promoted to the rank of Brigadier. He also received two decorations from the chief of staff of the ABiH Supreme Command, Sefer Halilović: on 15 April 1993, he was issued a certificate of merit, and at a date prior to 1 March 1994, he was decorated with the 'Golden Lily', the highest military award issued by the ABiH.<sup>8</sup>

## **B. Summary of the Charges**

### **1. Charges of Murder and Cruel Treatment**

5. The Prosecution alleges that between 24 September 1992 and 20 March 1993, members of the military police under the command and control of the Accused detained several Serb individuals at the Srebrenica police station ("Srebrenica Police Station") and at a building behind the Srebrenica municipal building ("Building").<sup>9</sup> These detainees were, according to the Prosecution, confined in overcrowded and unsanitary conditions and subjected to serious abuse and injury by the guards and/or by others with the support of the guards. The serious abuse is said to have included beating with sticks, poles and metal bars, as well as kicking with boots and forcing teeth extractions using rusty pliers, all causing the victims severe pain and injuries. In some instances, detainees were allegedly beaten to death.<sup>10</sup>

6. The alleged victims of cruel treatment at the Srebrenica police station between 24 September 1992 and 16 October 1992 were Nedeljko Radić, Slavoljub Žikić, Zoran Branković, Nevenko Bujanj and Veselin Šarac. In addition, the Prosecution alleges that Ilija Ivanović, Ratko Nikolić, Rado Pejić, Stanko Mitrović and Mile Trifunović were subjected to cruel treatment between 15 December 1992 and 20 March 1993, both at the Srebrenica police station and at the Building.<sup>11</sup> The Prosecution further contends that on or about 25 September 1992, Dragutin Kukić was beaten to death at the Srebrenica police station, and that between 6 February and 20 March 1993, Jakov Đokić, Dragan Ilić, Milisav Milovanović, Kostadin Popović and Branko Sekulić were killed at the Building.<sup>12</sup>

7. The Prosecution alleges that from about September 1992 to August 1995, the Accused knew or had reason to know either that his subordinates were about to plan, prepare or execute the killing

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<sup>8</sup> Indictment, paras 9, 11; ex. P562, "Agreed Facts", A.25-27.

<sup>9</sup> Indictment, para. 22.

<sup>10</sup> Indictment, para. 23.

<sup>11</sup> Indictment, para. 24. In its Judgement of Acquittal rendered orally pursuant to Rule 98*bis* of the Rules of Procedure and Evidence ("Rules") on 8 June 1992 ("Rule 98*bis* Decision"), the Trial Chamber found that the Prosecution had not adduced evidence capable of supporting a conviction for the cruel treatment of Miloje Obradović: T. 9003.

and/or cruel treatment of the above-named Serb detainees, or that they had done so, and that he failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>13</sup> The Accused is thus charged under COUNT 1 with individual criminal responsibility under Article 7(3) of the Statute of the Tribunal (“Statute”) for **murder** as a violation of the laws or customs of war pursuant to Article 3 of the Statute. Under COUNT 2, the Accused is charged with individual criminal responsibility under Article 7(3) of the Statute for **cruel treatment** as a violation of the laws or customs of war pursuant to Article 3 of the Statute.

## 2. Charges of Wanton Destruction

8. The Prosecution alleges that from May 1992 to February 1993, Bosnian Muslim armed units engaged in military operations against the Army of the Serbian Republic of Bosnia and Herzegovina (“VRS”) in eastern BiH.<sup>14</sup> It is alleged that in the course of such operations, between 10 June 1992 and 8 January 1993, Bosnian Muslim armed units under the command and control of the Accused burned and destroyed buildings, dwellings and other property in villages inhabited predominantly by Bosnian Serbs.<sup>15</sup> More specifically, it is submitted that destruction occurred in the course of the following attacks: Ratkovići, including the surrounding hamlets of Brađevina, Dučići and Gornji Ratkovići (21 and 27 June 1992); Ježestica (8 August 1992)<sup>16</sup>; Fakovići, including the hamlet of Divovići (5 October 1992)<sup>17</sup>; Bjelovac and the adjoining hamlet of Sikirić (14 to 19 December 1992); and Kravica, including the nearby villages of Šiljkovići and Ježestica (7 and 8 January 1993).<sup>18</sup>

9. The Prosecution alleges that from about June 1992 to August 1995, the Accused knew or had reason to know either that his subordinates were about to commit acts of wanton destruction in the above-named villages and hamlets, or that they had done so, and that he failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>19</sup> The Accused is

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<sup>12</sup> Indictment, para. 25. In its Rule 98*bis* Decision, the Trial Chamber found that the Prosecution had not adduced evidence capable of supporting a conviction for the murder of Bogdan Živanović: T. 8993.

<sup>13</sup> Indictment, para. 26.

<sup>14</sup> When the Serbian Republic of BiH was renamed ‘Republika Srpska’ on 12 August 1992, the domination of its armed forces also changed from ‘Army of the Serbian Republic of BiH’ to ‘Army of the Republika Srpska’ (VRS). For ease of reference, the Trial Chamber will use the term ‘VRS’ throughout this Judgement, even when it refers to events prior to 12 August 1992.

<sup>15</sup> Indictment, paras 27-29.

<sup>16</sup> In its Rule 98*bis* Decision, the Trial Chamber found that the Prosecution had not adduced evidence capable of supporting a conviction for the wanton destruction not justified by military necessity of the hamlet of Božići on 8 August 1992: T. 9012.

<sup>17</sup> In its Rule 98*bis* Decision, the Trial Chamber found that the Prosecution had not adduced evidence capable of supporting a conviction for the wanton destruction not justified by military necessity of the hamlet of Radijevići on 5 October 1992: T. 9012.

<sup>18</sup> Indictment, paras 30-34.

<sup>19</sup> Indictment, para. 36.

thus charged under COUNT 3 with individual criminal responsibility under Article 7(3) of the Statute for **wanton destruction of cities, towns or villages, not justified by military necessity** as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute in relation to all of the aforementioned attacks.

10. In addition, the Prosecution alleges that the Accused implemented a strategy of wanton destruction and that he personally took part in the attacks on Fakovići including the hamlet of Divovići (5 October 1992), Bjelovac and the adjoining hamlet Sikirić (14 to 19 December 1992) and Kravica, including the nearby villages of Šiljkovići and Ježestica (7 and 8 January 1993), where he allegedly failed to issue any, or sufficient, orders to prevent wanton destruction, thereby instigating the commission of the crimes and aiding and abetting the perpetrators thereof.<sup>20</sup> Under COUNT 5, the Accused is thus charged with individual criminal responsibility under Article 7(1) of the Statute for **wanton destruction of cities, towns or villages, not justified by military necessity** as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute in relation to the attacks on Fakovići including the hamlet Divovići (5 October 1992), Bjelovac and the adjoining hamlet of Sikirić (14 to 19 December 1992) and Kravica, including the nearby villages of Šiljkovići and Ježestica (7 and 8 January 1993).<sup>21</sup>

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<sup>20</sup> Indictment, para. 37.

<sup>21</sup> In its Rule 98bis Decision, the Trial Chamber found that the Prosecution had not adduced evidence capable of supporting a conviction for COUNT 4 and COUNT 6, which charged the Accused with individual criminal responsibility under Article 7(3) of the Statute (COUNT 4) and Article 7(1) of the Statute (COUNT 6) for **plunder of public or private property** as a violation of the laws or customs of war pursuant to Article 3(e) of the Statute in relation to the above-named villages and hamlets: T. 9032. *See also* para. 820 *infra*.

## II. GENERAL CONSIDERATIONS REGARDING EVALUATION OF THE EVIDENCE

### A. General Matters Regarding the Admission of Evidence

11. During the course of the proceedings, ‘evidence’ has been taken to mean the information which was put before the Trial Chamber in order to establish the facts at issue. Evidence was admitted in the following form: oral evidence, documentary evidence and facts agreed upon by the Parties. In its final exercise of evaluating the entire evidence before it, the Trial Chamber has divided it into: a) direct and indirect evidence; b) original and hearsay evidence; c) primary and secondary evidence; and d) circumstantial evidence. Hearsay and circumstantial evidence have been considered as indirect evidence.

12. The Trial Chamber has assessed the evidence in accordance with the Statute and the Rules of Procedure and Evidence (“Rules”) of the Tribunal. Where no guidance is given by these sources, pursuant to Rule 89(B) of the Rules, it has evaluated the evidence in such a way as will best favour a fair determination of the case and which is consistent with the spirit of the Statute and the general principles of law, including the principle of *in dubio pro reo*.<sup>22</sup> At the very outset of trial, for reasons of trial efficiency and fairness, the Trial Chamber rendered an “Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings” (“Evidentiary Guidelines”), providing the Parties with the rules that would govern the admission or exclusion of evidence, particularly in relation to documentary evidence.<sup>23</sup>

13. The rules on admissibility of evidence that have been applied do not purport to conform to any particular domestic system or tradition, but rather are inspired by the need for a fair determination of the matter at issue. Rule 89(A) of the Rules makes it clear that a Trial Chamber shall not be bound by national rules of evidence.<sup>24</sup>

14. The Rules do not contain a detailed set of technical rules on the admissibility or the exclusion of evidence. As the Trial Chamber already stated in its Evidentiary Guidelines, it is clear that the approach adopted in the Rules is one that favours the admissibility of evidence, provided it

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<sup>22</sup> According to the principle of *in dubio pro reo*, any doubt as to the evidence must be resolved in favour of the accused.

<sup>23</sup> ‘Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings’, 21 October 2004 (“Evidentiary Guidelines”).

<sup>24</sup> *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 January 1999 (“*Aleksovski* Appeal Decision on Admissibility”), para. 19.

is relevant and has probative value.<sup>25</sup> Throughout the proceedings, both during the Prosecution and the Defence cases-in-chief, the admission of evidence was guided by the consistent practice of other Trial Chambers: first admitting all evidence, unless it appears manifestly inappropriate to do so, and second, at a later stage, assessing its relative weight in the context of the entire trial record.<sup>26</sup>

15. Article 21(3) of the Statute bestows a presumption of innocence on the Accused. The burden of establishing the guilt of the Accused lies firmly on the Prosecution. Rule 87(A) of the Rules provides that, in so doing, the Prosecution must prove beyond reasonable doubt each element of a crime with which the Accused is charged. The approach taken by the Trial Chamber has been to determine whether the ultimate weight of the admitted evidence is sufficient to establish beyond reasonable doubt the elements of the crimes charged in the Indictment, and ultimately, the guilt of the Accused. In making this determination, the Trial Chamber has carefully considered whether there is any other reasonable interpretation of the admitted evidence other than the guilt of the Accused. If so, he must be acquitted.<sup>27</sup>

16. Article 21(4)(g) of the Statute provides that accused shall not be compelled to testify against themselves or to confess guilt. In this case, the Accused has made use of his right to remain silent. The Trial Chamber has drawn no unfavourable inference therefrom and acknowledges that silence may not be used as evidence to prove guilt and may not be interpreted as an admission.<sup>28</sup>

17. The Trial Chamber has carefully evaluated the evidence relevant to the identification of the Accused in order to establish its reliability.<sup>29</sup> Particular caution has been exercised in light of several factors, namely, that at least 12 years have elapsed between the incidents charged in the Indictment and the proceedings in this case, that a number of victim-witnesses had never seen the Accused and first came to see an image of him in the media after the incidents alleged in the

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<sup>25</sup> Evidentiary Guidelines, para. 10, citing *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Land'o (aka "Zenga")*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998 ("*Čelebići* Decision on Admissibility of Evidence"), para. 16.

<sup>26</sup> Evidentiary Guidelines, para. 10, citing *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 13.

<sup>27</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Land'o (aka "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 458.

<sup>28</sup> The statement made by the Accused on 10 April 2006, after the Closing Arguments, does not fall within the purview of Rule 84*bis* of the Rules, T. 16624-16625.

<sup>29</sup> *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement"), para. 16, referring to *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), paras 34-40; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T&IT-96-23/1-T, 22 February 2001 ("*Kunarac* Trial Judgement"), paras 561-562.

Indictment,<sup>30</sup> that it is likely that other men were using the Accused's name and imitating his appearance at the time,<sup>31</sup> and that it is possible that at least one man resembled the Accused.<sup>32</sup>

18. In its evaluation of *viva voce* evidence, the demeanour, conduct and character of witnesses have been considered. With regard to all witnesses, the Trial Chamber has also assessed the probability and the consistency of their evidence as well as the circumstances of the case and corroboration from other evidence. In some cases, only one witness has given evidence regarding a particular incident. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.<sup>33</sup> When such situation occurred, the Trial Chamber examined the evidence of the Prosecution witness with great care before accepting it as a sufficient basis for finding guilt. Further, minor discrepancies between the evidence of different witnesses, or between the evidence of a particular witness in court and his or her prior statements when these were made use of during trial, have not been regarded in general as discrediting their evidence, where that witness has nevertheless recounted the essence of the alleged event in acceptable detail.<sup>34</sup>

19. As regards hearsay evidence, it is well settled in the practice and jurisprudence of the Tribunal that such evidence is admissible. The Appeals Chamber held that

Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.<sup>35</sup>

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<sup>30</sup> Nedeljko Radić, T. 3603, 3639-3642; Ilija Ivanović, T. 4054-4057.

<sup>31</sup> Ibrahim Bećirović, T. 7700; Sead Bekrić, T. 9566.

<sup>32</sup> Mira Stojanović, T. 3853, 3904-3906; Bećir Bogilović, T. 6497-6498; Mensud Omerović, T. 8517; Sead Bekrić, T. 9566.

<sup>33</sup> *Čelebići* Appeal Judgement, para. 506; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 62.

<sup>34</sup> *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 69; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 26.

<sup>35</sup> *Aleksovski* Appeal Decision on Admissibility, para. 15 (footnotes omitted).

20. Both Parties have made use of the possibility to tender written statements into evidence pursuant to Rule 92*bis* of the Rules.<sup>36</sup> Before admitting this evidence, the Trial Chamber assessed whether each of these statements went to the acts and conduct of the Accused, was relevant to the present case, had probative value under Rule 89(C) of the Rules and was cumulative in nature. The declarations of two further witnesses were admitted into evidence pursuant to Rule 89(F) of the Rules.<sup>37</sup>

21. Circumstantial evidence is defined by the Trial Chamber as the evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonable inferred.<sup>38</sup> The nature of the crimes within the jurisdiction of the Tribunal is such that it is very often difficult, or even impossible, to establish the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents which may be problematic to procure or even unavailable. Hence, circumstantial evidence may become a critical tool for either party. While individual items of circumstantial evidence may, by themselves, be insufficient to establish a fact, their cumulative effect may have a decisive role. In its Evidentiary Guidelines, the Trial Chamber endorsed the principle that “it is no derogation of evidence to say that it is circumstantial.”<sup>39</sup> Circumstantial evidence, therefore, was not considered to be of less probative value than direct evidence.

22. The Trial Chamber and the Parties conducted an on-site visit to various locations in the Srebrenica, Vlasenica and Bratunac municipalities in BiH between 20 and 24 June 2005. The purpose of this visit was to assist the Trial Chamber in assessing the evidence admitted throughout the case. The Trial Chamber did not take or admit any evidence during the site visit.

## **B. Authenticity of Exhibits**

23. The Trial Chamber will reject evidence if it is not satisfied of its relevance and probative value. The burden of proof with respect to relevance and probative value lies on the party seeking

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<sup>36</sup> ‘Decision on Prosecution’s Motion for the Admission of Written Statements of Witnesses Veseljko Bogičević, Novka Bo`ić and Miladin Bogdanović Pursuant to Rule 92*bis*(C)’, 2 November 2004. On 1 February 2006, the Trial Chamber orally granted the ‘Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92*bis*’, 31 January 2006, admitting the written statement of Philipp von Recklinghausen under Rule 92*bis* of the Rules: T. 15826-15827.

<sup>37</sup> On 7 October 2004, T. 298-299, the Trial Chamber granted orally the “Prosecution Motion to Admit the Written Statements of Witnesses Barney Kelly and Stephen Tedder Pursuant to Rule 89(F)” filed on 6 October 2004, with the caveat that the Trial Chamber can, at any time, require the presence in court of the two persons referred to in the Prosecution’s motion. The declarations of former Prosecution investigators, Steven Tedder and Barney Kelly, were thus admitted into evidence on 11 October 2004 respectively as ex. P380 and ex. P382.

<sup>38</sup> Evidentiary Guidelines, p. 7, referring to Richard May and Steven Powles, *Criminal Evidence*, 5<sup>th</sup> Edition (London: Sweet & Maxwell Ltd., 2004).

<sup>39</sup> Evidentiary Guidelines, p. 7, referring to *Taylor, Weaver and Donovan* (1928) 21 Cr. App. R. 20, 21, *per* Lord Hewart C.J.



to introduce a particular piece of evidence. With respect to documentary hearsay evidence, the Prosecution must prove its relevance and probative value beyond reasonable doubt, whereas the Defence is only required to prove the relevance and probative value of such evidence on a balance of probabilities.<sup>40</sup>

### 1. Prosecution Objections to the Admission of Documents Tendered by the Defence

24. The Prosecution has objected to the admission of Defence exhibits ex. D35,<sup>41</sup> ex. D127,<sup>42</sup> ex. D725<sup>43</sup> and ex. D822<sup>44</sup>, but has not substantiated any of its objections. The authenticity and the probative value of these documents are sufficiently proven by the Defence, and they are therefore admitted.

### 2. Defence Objections to the Admission of Documents Tendered by the Prosecution

25. In the course of the proceedings, a vast number of documents tendered by the Prosecution were contested by the Defence, both orally and by way of written motions. The Trial Chamber provisionally admitted the large majority of these documents with the caveat that in its final deliberations, it would consider the respective submissions of the Parties, the reliability of these documents and ultimately their probative value in the overall context of the evidence before deciding on their ultimate admissibility and what weight to attribute to them, if at all. Each document objected to by the Defence has been examined applying criteria which reflect the reason at the basis of each objection.

#### (a) Objections Based on Lack or Insufficient Chain of Custody

26. The Defence submits that the authenticity of 186 Prosecution exhibits<sup>45</sup> is called into question by the fact that practically no evidence has been led on the ‘chain of custody’ of these documents. According to the Defence,

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<sup>40</sup> *Brđanin* Trial Judgement, para. 29.

<sup>41</sup> Hearing of 26 October 2004, T. 1266-1270, during which the Prosecution objected to the relevance of ex. D35.

<sup>42</sup> Hearing of 14 December 2004, T. 3123-3124, during which the Prosecution objected to ex. D127 on the grounds that the date of origin could not be established.

<sup>43</sup> Hearing of 31 August 2005, T. 10087-10089, during which the Prosecution objected to ex. D725 on the ground that the precise date on which these photos were taken had not been established.

<sup>44</sup> Hearing of 12 October 2005, T. 12235, during which the Prosecution first stated that it objected to ex. D822 but did not pursue the matter when the Trial Chamber pointed out that the matter ought not to be raised in the presence of the witness.

<sup>45</sup> ‘Defence Filing Regarding Authenticity’, 10 March 2006 (“Authenticity Filing”), paras 12-15, in which the Defence submits that when, in addition to Prosecution investigator, Racine Manas, the Prosecution called Radovan Radojičić to give evidence on the chain of custody of these documents, the latter admitted that he had first become aware of these documents in November 2004 and that no written record of the “chain of custody” exists for the prior nine years since

Faž complete “*chain of custody*” exists, therefore, when the Prosecution has adduced evidence as to who created and/or signed a document and evidence as to all the subsequent hands through which it passed until it became a Prosecution exhibit. In this case, however, when the Prosecution has purported to adduce evidence of “*chain of custody*”, it is usually nothing more than a recording of the source from which the Prosecution received the document.<sup>46</sup>

27. During closing arguments, the Defence conceded that it was not proposing any ‘iron-clad rule’ that documents which have no complete chain of custody are *per se* inadmissible or of no probative value.<sup>47</sup> The Trial Chamber does not consider that proof of chain of custody is a *sine qua non* requirement for admissibility. Therefore, gaps in the chain of custody are not fatal, provided that the evidence as a whole demonstrates beyond reasonable doubt that the piece of evidence concerned is what it purports to be. The Trial Chamber is convinced that applying rigid rules of evidence on chain of custody to cases involving an armed conflict would not be in the interests of justice, and potentially, could even lead to the impossibility of bringing evidence at all in some cases. The nature of armed conflicts is such that it is often impossible to investigate an offence committed during an armed conflict to the extent of ordinary crimes committed in peacetime. In addition to the difficulty in retrieving evidence, maintaining a proper chain of custody and safeguarding it during an armed conflict, witnesses are often unidentified or cannot be found, and physical evidence is sometimes destroyed or damaged while the crime scene may not be accessible.

28. In particular, the Defence has objected to the admission into evidence of a document purporting to be a ‘Military Log’ of the ‘Srebrenica military police’, a photocopy of which was tendered as ex. P458 and its purported original as ex. P561. The Defence denounces the obscure origin and chain of custody of this document.<sup>48</sup> Moreover, it submits that this purported ‘Military Log’ contains inconsistencies and that a number of its pages have been ripped out.<sup>49</sup> The Trial Chamber granted two Prosecution requests to withdraw ex. P561 from the records of the Registry for forensic examination purposes. The Prosecution first moved to have the document examined by its purported author and second to have it forensically examined by the Netherlands Forensic Institute.<sup>50</sup> The exhibit was subsequently returned to the Registry. No evidence was led on either

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the documents were allegedly seized in Srebrenica in July 1995, and during which there had been at least six separate handovers of the documents.

<sup>46</sup> Authenticity Filing, paras 8-9.

<sup>47</sup> Defence Closing Argument, T. 16412.

<sup>48</sup> Hearing of 9 December 2004, T. 2805-2808, 2881, during which a Prosecution witness, Nikola Popović, claimed that his uncle, Radovan Popović, had received the ‘Military Log’ from a neighbour of his, a café-owner in Milići. The latter had allegedly received the ‘Military Log’ from workers who found it in a meadow near the bauxite mine.

<sup>49</sup> Hearing of 27 January 2005, T. 4259; Gamini Wijeyesinghe, T. 8810-8811.

<sup>50</sup> ‘Decision on Prosecution’s Motion for Leave to Remove Exhibit P561 for Purpose of Investigation’, 15 June 2005; ‘Oral Decision Granting Confidential Prosecution’s Motion for Leave to Remove Prosecution’s Exhibit 561 for Purpose of Forensic Examination’, 15 December 2005.

authorship or forensic examination.<sup>51</sup> While undoubtedly the chain of custody of ex. P561 is largely incomplete and the Prosecution has not been able to prove authorship, this in itself is not fatal and needs to be weighed against the probative value of its contents. Despite possible errors and minor inconsistencies,<sup>52</sup> as a whole, the details contained in ex. P561 generally fit in the jigsaw of the evidence relating to activities of the Srebrenica military police. Yet, throughout the deliberative process, the Trial Chamber has used the document with caution and only in as far as it corroborates, or is corroborated by, other acceptable evidence, and never as the sole basis for a finding of guilt.

(b) Objections to Exhibits Which Have not Been Presented to any Witness

29. The Defence submits that an exhibit which has not been presented to any witness has no probative value.<sup>53</sup> During closing arguments, the Defence conceded that it was not proposing that documents not shown to witnesses be *per se* inadmissible or of no probative value.<sup>54</sup> This is precisely the position taken by the Trial Chamber. There are 198 out of a total of 625 Prosecution exhibits and 317 out of a total of 1024 Defence exhibits that have not been put to any witness. The difference between the Parties is that while the Defence has barely referred to any of these unused exhibits in its Final Brief and closing arguments, the Prosecution has made ample use of them on both occasions. The Trial Chamber's position is that an exhibit that has been put to a witness and commented upon cannot be treated the same as one which has not been presented to any witness or on which there is no evidence. Consequently, it dealt with these unused exhibits on a case by case basis considering each time if the Prosecution had met its obligation to prove both their reliability and probative value. The great majority of these documents are not used in this Judgement, but when they are used, it is because the Trial Chamber is convinced of their relevance and probative value.

(c) Objections Based on the Nature of the Document

i. Computer Files

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<sup>51</sup> Hearing of 17 January 2006, T. 15165, during which the Prosecution declared that, for technical reasons, the forensic examination of ex. P561 by the Netherlands Forensic Institute could not be conducted.

<sup>52</sup> Defence Final Brief, para. 640.

<sup>53</sup> Authenticity Filing, para. 16.

<sup>54</sup> Defence Closing Argument, T. 16412.

30. The Defence objects to all Prosecution exhibits which are computer files, unless they have been authenticated by a witness, since computer files can easily be manipulated.<sup>55</sup>

31. Undoubtedly, the Defence submission is of relevance, however, the mere fact that a document is a computer file and that the Prosecution has not brought forward any witness to authenticate it, does not necessarily lead to the conclusion that its authenticity has not sufficiently been proven, much less that it is not relevant or that it has no probative value. In the present case, most of these exhibits have been shown to witnesses and generally, even taking into consideration the alleged inaccuracies, the Trial Chamber is satisfied that their authenticity is sufficiently proven and weight has been given to them when appropriate.

ii. 'Combat Action Information Sheets' from the ABiH 2<sup>nd</sup> Corps

32. The Defence challenges the authenticity of ex. P87, ex. P88 and ex. P89, which are alleged 'Combat Action Information Sheets' authored by the ABiH 2<sup>nd</sup> Corps.<sup>56</sup> The Defence submits that a similar document from the same collection has been shown to its purported author who denies any involvement with it.<sup>57</sup> On this basis, the Defence considers the whole collection suspicious.

33. Given the nature of these documents and the circumstances surrounding their creation as explained at trial,<sup>58</sup> the Trial Chamber cannot attribute any validity to the submission of the Defence. However, while the authenticity of ex. P87, ex. P88 and ex. P89 cannot be doubted, in view of the testimony of Sead Delić, Azir Malagić and Ejub Dedić, the Trial Chamber has, throughout its deliberative process, used these documents with caution and only in as far as they corroborate, or are corroborated by, other acceptable evidence, and never as a sole basis for a finding of guilt.<sup>59</sup>

(d) Objections Based on the Source of the Document

i. Documents Provided by the Republika Srpska Liaison Office

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<sup>55</sup> Authenticity Filing, paras 64-65: the exhibits concerned are ex. P93 to ex. P95, ex. P297, ex. P582, ex. P583, ex. P592, ex. P600 to ex. P604.

<sup>56</sup> Authenticity Filing, paras 55-58.

<sup>57</sup> This document bearing ERN 0262-1257-0262-1260 featured in the Prosecution's pre-trial list of exhibits as having been purportedly signed by Ramo Hodžić. Yet, in ex. D157, "Statement of Ramo Hodžić" of 3 June 2004, para. 18, Ramo Hodžić denied any involvement with this document.

<sup>58</sup> Sead Delić, T. 8634-8649.

<sup>59</sup> Sead Delić, T. 8726-8746, giving evidence on all three documents; Azir Malagić, T. 11404-11412, giving evidence on ex. P89; Ejub Dedić, T. 12271-12281, giving evidence on ex. P88.

34. The Defence objects to 28 Prosecution exhibits originating from the Republika Srpska Liaison Office (“RS Liaison Office”).<sup>60</sup> The Defence submits that the RS Liaison Office is a highly suspicious and unreliable source,<sup>61</sup> particularly in light of the evidence on ex. P17,<sup>62</sup> which according to the Defence is highly questionable. In these circumstances, the Defence considers that the RS Liaison Office must *prima facie* be regarded as a tainted source, and consequently, the Defence objects to the authenticity of any document from this source, absent convincing proof of authenticity and/or reliability of the exhibit in question.

35. The Trial Chamber has examined these documents, seven of which were not put to any witness. Some of these documents have been examined by the three handwriting experts, some by Dr. Fagel and Dr. Keržan only, and others by Dr. Fagel only. On the basis of their findings, but also in light of the totality of evidence, the Trial Chamber is satisfied that the Prosecution has reached the required standard of proof of authenticity for this category of exhibits. Because of remaining concerns as to the alleged signature of Džanan Džananović, ex. P17 is the only document to present some doubt. The Trial Chamber concludes that although there is no conclusive evidence that this signature is indeed forged, the existing doubt must go to the benefit of the Accused. The nature of the exhibit, however, is such that it does not necessarily follow that the signatures of several other persons contained in it are also to be considered doubtful.<sup>63</sup> Yet, throughout its deliberative process, the Trial Chamber decided to use ex. P17, as well as ex. P14, ex. P15, ex. P16, ex. P18 and ex. P19 with some caution and only in as far as they corroborate, or are corroborated by, other acceptable evidence, and never as a sole basis for a finding of guilt.<sup>64</sup>

ii. Documents Provided by Republika Srpska Bureau for Co-operation

With the Tribunal

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<sup>60</sup> The exhibits concerned are ex. P4 to ex. P22, ex. P106, ex. P117, ex. P155, ex. P158 to ex. P160 and ex. P332 to P334.

<sup>61</sup> Authenticity Filing, paras 23-26, submitting that the past conduct of the Republika Srpska (“RS”) has demonstrated that it cannot be trusted to provide authentic documents to the Prosecution.

<sup>62</sup> Hearing of 10 January 2005, T. 3417-3422, during which the Defence submitted that while ex. P17 purports to bear D’anan D’ananović’s signature, when it was shown to him during an interview with the Prosecution, he denied that the document in fact bears his signature. *See* ex. D139, “Statement of D’anan D’ananović” of 13 December 2003. The Prosecution sent ex. P17 to its forensic document examiner, W.F.P. Fagel, of the Netherlands Forensic Institute. W.F.P. Fagel examined the document and the signature against authentic specimen signatures provided by D’anan Džananović and he concluded that the questioned signature was “probably not written by Mr. Džananović.” *See* ex. D140, “Expert Report” of 17 May 2004.

<sup>63</sup> Ex. P17, which also contains the signatures of Amir Habibović, Safet Muhić, Esad Salihović, Sabahudin Osmanović, Rifet Ibrić, Esed Kand’etović and Hurem Hasanović.

<sup>64</sup> The same applies to ex. P332 and ex. P333. The subject matter of these documents is such that there can be several possible explanations for the non-authenticity of the signature.

36. The Defence objects to 12 Prosecution exhibits originating from the Republika Srpska Bureau for Cooperation with the Tribunal (“RS Bureau”).<sup>65</sup> The Defence submits that the RS Bureau is an unreliable source as it prepared the 2002 report into the 1995 events in Srebrenica (“2002 Srebrenica Report”) which was condemned by the international community as “scandalous and shameful”.<sup>66</sup>

37. The Defence further submits that the RS Bureau has shown a commitment to justify crimes committed by Bosnian Serbs by blaming Bosnian Muslims for having provoked them.<sup>67</sup> According to the Defence, in other cases, the Prosecution being aware of this, has taken the position that the RS Bureau can no longer be considered a serious source for any purposes.<sup>68</sup>

38. There is no doubt that these submissions are relevant and important. However they are not such as would necessarily lead to the conclusion suggested by the Defence, that therefore, all documents originating from the said source are automatically tainted for the purpose of authenticity. The Trial Chamber has examined the 12 documents originating from this source on their own merit but also in the light of other evidence received and concludes that the Prosecution has sufficiently proven their authenticity.

### iii. Documents From the Sokolac Collection

39. The Defence objects to 47 Prosecution exhibits originating from the so-called Sokolac Collection.<sup>69</sup> This collection consists of a series of documents confiscated from the headquarters of

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<sup>65</sup> The exhibits concerned are ex. P84, ex. P97, ex. P102, ex. P103, ex. P155, ex. P158 to ex. P160, ex. P390, ex. P391, ex. P426, ex. P430. Out of these, ex. P102, ex. P103, ex. P159, ex. P390, ex. P391, ex. P426 and ex. P430 were not put to any witness.

<sup>66</sup> Ex. D141, “OHR Media Round-Up” of September 2002, p. 4.

<sup>67</sup> More specifically, the Defence submits its grave concern that the Rules of the Road case against the Accused was handed over to the Prosecution by a member of the RS Bureau, Dejan Miletić: *see* ex. D143, “Notification of Receipt of the Rules of the Road Case” of 4 March 2004; ex. D144, “Interview with Dejan Miletić” of 10 March 2004. The Defence also makes reference to ex. D959, “Excerpt of the UN Secretary General’s Report on Srebrenica”, in support of the submission that “[t]he Serbs repeatedly exaggerated the extent of the ‘raids’ out of Srebrenica as a pretext for the prosecution of a central war aim: to create a geographically contiguous and ethnically pure territory along the Drina [...]”. *See also* ex. D145, “Removal of Dejan Miletić from Office by the High Representative” of 20 April 2004, for having obstructed the investigations into the 1995 events in Srebrenica.

<sup>68</sup> Ex. D142, “Prosecution Response to Blagojević’s Application for Provisional Release” of 12 November 2002, paras 13-16, in which the Prosecution declared that “[t]he government of the *Republika Srpska* is obviously neither willing nor able to learn. Rather, it sets out to perpetuate myths and lies, in sharp contrast with the very reasons why this Tribunal was established. It is remarkable and unfortunate, that this Report carries the name of the very office that is supposed to facilitate the work of the ICTY”. The Prosecution further stated that “[t]he fact that the RS is still capable of publishing such gross propaganda seven years after the end of the war in Bosnia lends further support to the Prosecution’s contention that the government of the RS is not serious in joining the international community and cannot be relied upon in any serious matter [...]”.

<sup>69</sup> The exhibits concerned are ex. P44 to ex. P80, ex. P101, ex. P108, ex. P145, ex. P152, ex. P157, ex. P161, ex. P468 to P470 and ex. P485. Out of these, the following exhibits were not put to witnesses: ex. P51, ex. P52, ex. P54 to ex.

the 5<sup>th</sup> Corps of the VRS, which for the Defence is an extremely unreliable source.<sup>70</sup> In support of its submission, the Defence makes particular reference to the documents repudiated by Avdo Hasanović<sup>71</sup> and Ilijaz Pilav.<sup>72</sup>

40. The Trial Chamber has already expressed its serious doubts about ex. P65 and ex. P68<sup>73</sup> when it disallowed their use in its decision of 17 March 2005, pending further information by the Prosecution on their authenticity.<sup>74</sup> This does not however lead to the conclusion that the authenticity of all other exhibits from the Sokolac Collection is also tainted. Ex. P46, ex. P48, ex. P49, ex. P51, ex. P62, ex. P66, ex. P69, ex. P101 and ex. P108 were examined by Defence handwriting expert Professor Esad Bilić (“Prof. Bilić”) who found that these documents “most probably were not signed in hand” by their purported author.<sup>75</sup> In the absence of other expert opinion, the Trial Chamber decided to treat these exhibits with caution unless they corroborate, or are corroborated by, other reliable evidence demonstrating their authenticity or the reliability of their content. Ex. P73, ex. P74 and ex. P75 were examined by all three handwriting experts. Dr. W.F.P. Fagel (“Dr. Fagel”) found that it was “highly probable” that the author of the reference signatures and of the examined signature was the same person.<sup>76</sup> Similarly, Dr. Dorijan Keržan (“Dr. Keržan”) found that his conclusions “strongly support the assumption that the questioned and reference signatures were written by the same individual.”<sup>77</sup> On the contrary, Prof. Bilić concluded that these documents were not signed by the author of the reference signatures.<sup>78</sup> The Trial Chamber, having had the opportunity to hear the three experts on their respective expert opinions, is satisfied that the Prosecution has sufficiently proven the authenticity of ex. P73, ex. P74 and ex.

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P59, ex. P63, ex. P64, ex. P65, ex. P67, ex. P70, ex. P71, ex. P77, ex. P78, ex. P101, ex. P108, ex. P145, ex. P152 and ex. P161.

<sup>70</sup> In addition, the Defence submits that the chain of custody between the 5<sup>th</sup> Corps of the VRS and the authorities of the ABiH is unclear: see ‘Confidential Motion Regarding Authenticity of Documents and Non-Compliance With Rule 68’, 17 December 2004; ‘Confidential Reply to Prosecution Response to Motion Regarding Authenticity of Documents and Non-Compliance with Rule 68’, 25 January 2005.

<sup>71</sup> The Defence refers in this regard to ex. D148, “Statement of Dr. Avdo Hasanović” of 6 and 7 March 2004, paras 67-68, in which Avdo Hasanović denied that the purported signature on ex. P65, “Record of On-Site Investigation” of death of Jakov Ćokić, 9 March 1993 and on ex. P68, “Record of On-Site Investigation” of death of Dragan Ilić, 10 March 1993, were his.

<sup>72</sup> The Defence refers in this regard to ex. D153, “Statement of Ilijaz Pilav” of 19 October 2002, paras 57-63, in which Ilijaz Pilav denounces ex. P46, “Interrogation Notes” of Kostadin Popović of 30 January 1993, and ex. P61, “Interrogation Notes” of Bogdan @ivanović” of 21 January 1993. According to the Defence, the authenticity of the entire Sokolac Collection is consequently tainted.

<sup>73</sup> The Trial Chamber notes with regret that the Prosecution, notwithstanding the 17 March 2005 Decision, makes use of ex. P68 in its Final Brief, which submission has not been given any importance for the purpose of this Judgement.

<sup>74</sup> ‘Confidential Decision on Defence Motion Regarding Authenticity of Documents and Non-Compliance With Rule 68’, 17 March 2005, p. 6.

<sup>75</sup> Ex. D1012, “Expert Report” of Esad Bilić of 2 December 2005, p. 36; Esad Bilić, T. 15559-15572, 15581-15589, 15597-15604, 15611-15616, 15621-15623, 15758-15762.

<sup>76</sup> Ex. P264, “Expert Report” of 25 February 2004, p. 6.

<sup>77</sup> Ex. C7, “Expert Report” of Dorijan Keržan of 20 February 2006, pp. 13-15.

<sup>78</sup> Ex. D1012, “Expert Report” of Esad Bilić of 2 December 2005, p. 36.

P75. Ex. P72 was examined by Dr. Fagel only, who found that it was “highly probable” that the author of the reference signatures and of the examined signature was the same person.<sup>79</sup> The Trial Chamber has no reason to doubt the authenticity of this document. The Trial Chamber finds that the required standard of proof has been reached by the Prosecution with regard to the other documents from the Sokolac Collection.

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<sup>79</sup> Ex. P264, “Expert Report” of W.F.P Fagel and Jan De Koeijer of 25 February 2004, p. 6.



iv. Documents From the Impeached Banja Luka Source

41. There are three categories of documents from Banja Luka that are being impeached by the Defence.<sup>80</sup> The first group of Prosecution exhibits in this category originates from the Military Defence Building, Banja Luka, and were handed over to the Tribunal by Rajko Šarenac on 13 July 2001.<sup>81</sup> The second group originates from Milivoje Ivanišević who handed them to a Prosecution investigator in the Golden Card Hotel, Banja Luka.<sup>82</sup> The third group originates from different sections of the Ministry of the Interior (“MUP”) in Banja Luka.<sup>83</sup>

42. Ex. P3 and ex. P37 were examined by all three handwriting experts.<sup>84</sup> In both cases, after hearing the experts on their respective findings, the Trial Chamber decided to treat them with caution and only in as far as they corroborate, or are corroborated by, other reliable evidence demonstrating their authenticity or the reliability of their contents. Ex. P2, ex. P36 and ex. P39 were examined by Dr. Fagel.<sup>85</sup> The Trial Chamber finds that the authenticity of these three documents has been sufficiently proven. As regards the remaining exhibits from these three Banja Luka sources, the Trial Chamber is satisfied that the Prosecution has adduced sufficient evidence to prove that they are authentic.

v. Documents Provided by the ‘Law Projects Centre’ in Belgrade

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<sup>80</sup> The following exhibits from these sources have not been put to any witness: ex. P34, ex. P35, ex. P38, ex. P39, ex. P104, ex. P119, ex. P124, ex. P128, ex. P156, ex. P295, ex. P305, ex. P306, ex. P312, ex. P436, ex. P438 and ex. P445.

<sup>81</sup> The exhibits concerned are ex. P34 to ex. P42, ex. P104, ex. P119, ex. P124, ex. P128, ex. P156, ex. P162, ex. P255, and ex. P295. The Defence challenges ex. P41 and ex. P42 by reference to a document obtained on the same day from the Military Defence Building in Banja Luka, and thus purportedly from the same collection, and which content was denied by their purported recipient; *see* ex. D151, “Statement of Kasim Suljić” of 3 November 2002, p. 9. The Defence argues that because this document is from the same collection as ex. P41 and ex. P42, the authenticity of the two latter documents is also tainted.

<sup>82</sup> The exhibits concerned are ex. P2 and ex. P3.

<sup>83</sup> The exhibits concerned are ex. P254 (MUP Building, Banja Luka, 12 January 2000), ex. P293 (RS MUP, Banja Luka, 2 June 1999 from CBS Sarajevo), ex. P305 (Special Police Headquarters, Banja Luka, 21 June 2002 from Srebrenica Police Station), ex. P306 (Special Police Headquarters, Banja Luka, 21 June 2002 from Srebrenica Police Station), ex. P307 (Special Police Headquarters, Banja Luka, 21 June 2002 from Srebrenica Police Station), ex. P308 (Special Police Headquarters, Banja Luka, 21 June 2002 from Srebrenica Police Station), ex. P312 (Special Police Headquarters, Banja Luka, 21 June 2002 from Srebrenica Police Station), ex. P436 (MUP Headquarters, Banja Luka, 29 July 1998), ex. P438 (MUP Headquarters, Banja Luka, 29 July 1998) and ex. P445 (Special Police Brigade Barracks, Banja Luka, 5 June 2002).

<sup>84</sup> *See* ex. P264, “Expert Report” of W.F.P. Fagel and Jan De Koeijer of 25 February 2004, pp. 5-6; ex. D1012, “Expert Report” of Esad Bilić of 2 December 2005, pp. 17-19, 36; ex. C7, “Expert Report” of Dorijan Ker’an of 20 February 2006, pp. 9, 12-13.

<sup>85</sup> *See* ex. P264, “Expert Report” of W.F.P. Fagel and Jan De Koeijer of 25 February 2004, pp. 5-6.

43. The documents challenged by the Defence under this category are ex. P428 and ex. P441 as well as ex. P117.<sup>86</sup> The Defence submits that this source is unreliable as it co-authored the 2002 Srebrenica Report and that it transferred a suspiciously high number of documents to the Prosecution which were purportedly seized after the fall of Srebrenica.<sup>87</sup>

44. There is no evidence that would support the Defence submission.<sup>88</sup> Rather, ex. P428, a video footage, had parts of it confirmed by witness Miloš Okanović,<sup>89</sup> while ex. P441 is a video recording showing the Accused, the authenticity of which has never really arisen. The Trial Chamber is also satisfied that the Prosecution has sufficiently established the authenticity of ex. P117.

#### vi. Documents From the Republika Srpska OBS Source

45. The Defence further challenges Prosecution exhibits originating from the Republika Srpska Intelligence Service (“OBS”).<sup>90</sup> In challenging the authenticity of these exhibits, the Defence submits that the organs of Republika Srpska are pursuing “a campaign of misinformation about the scale of crimes committed by Bosnian Muslims and, in particular, the Accused”. Against this backdrop, the Defence alleges that the OBS is exerting pressure on individuals and systematically providing falsified documents.<sup>91</sup>

46. The Trial Chamber reiterates its decision of 17 January 2006, which denied the respective Defence motion on the ground that

considering that the contents of the documents provided by the Defence in the Annexes to the Motion allow for more than one reasonable inference to be drawn as to whether undue pressure was exerted on Hakiya Meholjić by the OBS, and whether that agency produced false documents in order to spread misinformation regarding the Accused [...].<sup>92</sup>

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<sup>86</sup> See Authenticity Filing, pp. 12-13; ‘Rejoinder to Prosecution Reply Regarding Prosecution Declaration of 11 November 2005 Stating Searches and Results of Searches’, 2 December 2005, paras 36-37. Ex. P117 is also considered under the category of documents provided by the RS Liaison Office. It is mentioned in relation to the Belgrade Law Projects Centre in Annex 1 to the ‘Defence Response to the Prosecution Declaration Stating Searches, Location of Searches, and Results of Searches as Ordered by the Trial Chamber on the 27<sup>th</sup> of October 2005’, 17 November 2005, p. 11.

<sup>87</sup> Radovan Radojičić, T. 8394-8395; Sidik Ademović, T. 13124; see also ex. D287, “Transfer of Documents From the Law Projects Centre to the Prosecution”.

<sup>88</sup> The Trial Chamber does not make this statement because the Defence has any onus of proving the unreliability of this source, which it does not.

<sup>89</sup> Miloš Okanović, T. 7991-8000.

<sup>90</sup> The exhibits concerned are ex. P163 to ex. P197, ex. P199, ex. P201 to ex. P219, ex. P221 to ex. P227, ex. P256 to ex. P260, ex. P263, ex. P392 and ex. P393. Out of these 70 exhibits, 56 were not used with any witness.

<sup>91</sup> ‘Confidential Defence Motion Regarding Documents from the Republika Srpska OBS Source’, 1 December 2005 (“Defence Motion on OBS Source”).

<sup>92</sup> ‘Confidential Decision on Defence Motion Regarding Documents from the Republika Srpska OBS Source’, 17 January 2006, p. 3.

47. Some of the exhibits from this source, such as ex. P176, ex. P177, ex. P179, ex. P210, ex. P213, ex. P219 and ex. P263 were examined by one, or more, of the three handwriting experts. The findings by these experts are such that the Trial Chamber decided to make use of these particular exhibits with caution and only in as far as they corroborate, or are corroborated by, other reliable evidence, and never as a sole basis for a finding of guilt. As regards the other exhibits in this category, although some witnesses have expressed doubts as to the contents of some of them,<sup>93</sup> the Trial Chamber is satisfied that the Prosecution has reached the required standard of proof of authenticity.

vii. Documents Provided by the Dutch Institute of War Documentation and the Dutch Evangelical Church

48. In this category of Prosecution exhibits, the Defence contests ex. P425, which is also marked as ex. P432, and ex. P164.<sup>94</sup> Ex. P425/P432 is a video-documentary entitled “The Uncrowned King of Srebrenica” produced by the Dutch Evangelical Church, which according to the Defence “has taken an interest in this case and provided documents to be used as exhibits in the prosecution of the Accused”.<sup>95</sup> Only small parts from ex. P425/P432 were admitted, when used with witnesses Slavoljub Rankić and Enver Hogić.<sup>96</sup>

49. The Trial Chamber considers that these submissions have no bearing on the authenticity of the exhibit as such, especially since one of the parts admitted in evidence shows the Accused himself being interviewed. In addition, however, the Defence allegation is without any basis. Consequently, the Trial Chamber has no difficulty in concluding that the authenticity of ex. P425/P432 has been sufficiently proven by the Prosecution.

50. Ex. P164 originates from the Dutch Institute for War Documentation (NIOD). The Defence contends that an impartial reading of the document reveals exactly the opposite of what is contained in the annotation in the Dutch language appearing at the bottom of the document.<sup>97</sup> According to the Defence, the NIOD has thus shown itself to be a biased source as it has provided documents in a

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<sup>93</sup> Defence Motion on OBS Source; *see also* Safet Golić, T. 11893-11895, with regard to ex. P203 and ex. P204; Ibrahim Bećirović, T. 7719-7721, with regard to ex. P208.

<sup>94</sup> Ex. P263 is identical to ex. P164 save the handwriting in the Dutch language.

<sup>95</sup> Authenticity Filing, para 62. The Defence set out its objections to this exhibit at the hearing of 1 December 2004, T. 2325-2327.

<sup>96</sup> Slavoljub Rankić, T. 2328-2330; Enver Hogić, T. 8138.

<sup>97</sup> Ex. P164, “Order signed by Naser Orić” of 11 December 1992, which contains the following annotation in Dutch: “The leader of the enclave announces a mobilisation to prepare an attack on the Serbian settlements.” According to the Defence, supported by the testimony of Nedret Mujkanović, T. 5352-5357, the document is concerned rather with repelling an impending Serb attack.

way which suggests a lack of impartiality. However, the Trial Chamber sees no issue of authenticity involved with ex. P164 and considers the allegation of bias on the part of NIOD without foundation.

(e) Objections Based on Intrinsic Factors

i. Exhibit P84

51. During the course of trial, the Defence repeatedly pointed out translation errors in ex. P84, also referred to as the “War Diary”.<sup>98</sup> On 23 January 2006, the Defence filed a motion requesting that the Prosecution be ordered to provide an accurate English translation of ex. P84 which would take into account the observations and errors noted by the Defence, save which ex. P84 should be expunged from the trial record.<sup>99</sup> On 30 January 2006, the Conference and Language Service Section of the Tribunal (“CLSS”), having reviewed the document in its original language, the contested translation, as well as the issues raised by the Defence in the aforementioned motion, provided a revised translation of ex. P84.<sup>100</sup> On 9 February 2006, the Trial Chamber issued a decision denying the Defence motion but noting the remaining divergences with regards to the accuracy of a few parts of the revised translation of ex. P84.<sup>101</sup> The Trial Chamber remained mindful of these divergences at all times during the deliberative process. Otherwise, the Trial Chamber does not doubt the authenticity of this document, its relevance or its probative value.

ii. Exhibits P328 and P329

52. During the trial proceedings of 11 January 2005, the Prosecution tendered into evidence the video-recordings and transcripts of what appears to be a suspect interview with the Accused (“Interview”).<sup>102</sup> This Interview was conducted from 2 to 6 April 2001 and from 14 to 24 May 2001 at the United Nations (“UN”) Field Office in Sarajevo.<sup>103</sup> The record of the Interview consists of a total of 52 CDs and more than a thousand pages of transcript in the English and in the Bosnian language.

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<sup>98</sup> See for instance, hearing of 14 February 2005, T. 5053-5054.

<sup>99</sup> ‘Motion for a Revised Translation of Prosecution Exhibit P84’, 23 January 2006.

<sup>100</sup> ‘Confidential Response to the Defence Motion for a Revised Translation of Prosecution Exhibit P84’, 31 January 2006, with revised translation by CLSS appended at Annex H.

<sup>101</sup> ‘Confidential Decision on Defence Motion for a Revised Translation of Prosecution Exhibit P84’, 9 February 2006, noting the pending issues stated by the Defence in its ‘Confidential Reply to Prosecution Response to Motion for a Revised Translation of Prosecution Exhibit P-84’, 3 February 2006.

<sup>102</sup> Racine Manas, T. 3460-3475. The Trial Chamber considers that the Interview is a reflection of what the Accused is reputed to have stated. However, for the sake of brevity, the Trial Chamber will not restate this fact each time it refers to the Interview throughout this Judgement where the Accused is reported to have made a statement.

<sup>103</sup> Ex. P328; ex. P329. On 1 March 2006, technically defective parts of ex. P328 and ex. P329 were exchanged with ex. P624 and ex. P625 respectively. Nonetheless, throughout this Judgement, the Trial Chamber will refer solely to ex. P328 and ex. P329.

53. Throughout trial, the Defence raised concerns with regard to the translation and the transcription of the Interview.<sup>104</sup> However, it was only on 23 January 2006 that the Defence filed a motion contending that the Interview was a generally unreliable and misleading piece of evidence,<sup>105</sup> and requested that the Trial Chamber exclude the entire record of the Interview from evidence pursuant to Rules 89(D) and 95 of the Rules. The Defence submitted that the Interview was defective in six areas, each of which allegedly rendered it unreliable. These were flawed interpretation, incomplete or erroneous transcription, incompetent representation, consultation of other sources by the Accused, aggressive questioning by Prosecution investigators and abuse of process on part of the Prosecution.<sup>106</sup>

54. On 7 February 2006, the Trial Chamber denied the Defence motion, pointing out the following.<sup>107</sup> First, it emphasised “that the Interview is not equivalent to testimony given by an accused at trial. The Interview is the record of what appears to be a suspect interview with the now Accused, and as with all other exhibits adduced by the Prosecution in these proceedings, it is the Prosecution that must discharge its burden of proof regarding all factors affecting reliability.” The Trial Chamber did not depart from the decision of the Appeals Chamber in the *Halilović* case which held that

With respect to the Appellant’s first argument, that the Rules do not permit a record of an interview with the accused to be tendered into evidence unless the accused has chosen to testify or has consented to the tender, the Appeals Chamber does not agree that the Rules impose such a categorical restriction. ... The Trial Chamber therefore had the discretion to admit the record, at least so long as doing so did not violate any of the specific restrictions outlined in the remainder of the Rules, nor the general principle of Rule 89(B) ...<sup>108</sup>

55. With regard to the Defence specific challenges, while the Trial Chamber could not agree that the alleged defective interpretation and transcription rendered the Interview unreliable, it gave due consideration to the parts of the Interview where it is submitted that the Accused received incorrect translation or where the transcript appeared to be incorrect or defective, and, for these parts, relied on the revised translation and transcription submitted by the Defence. It held that all

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<sup>104</sup> See for instance, Rule 65ter Conference of 28 July 2003, T. 33, 35-36; hearing of 12 May 2005, T. 8129.

<sup>105</sup> ‘Motion to Exclude the Alleged Record of Interview With the Accused Pursuant to Rules 89(D) and 95’, 23 January 2006.

<sup>106</sup> *Ibid.*

<sup>107</sup> ‘Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95’, 7 February 2006.

<sup>108</sup> *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the bar Table, 19 August 2005, pp. 5-6, referring to *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras 30-36; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka* Appeal Judgement”), paras 122-126.

provisions governing the questioning of suspects had been respected,<sup>109</sup> and more particularly, that the Accused was advised that he was a suspect, that anything he would be saying could be used as evidence in a possible trial and that he was entitled to remain silent. The Trial Chamber further found that there was no basis for the Defence allegation that the Accused was incompetently represented during the Interview. Finally, it paid particular attention to those instances indicated by the Accused where, with regard to particular answers, he claims to have consulted outside sources. The Trial Chamber notes that the transcription of the Interview only became available to the Accused when ex. P328/ex. P329 was disclosed to the Defence, during the course of these proceedings.

56. The Trial Chamber thus concluded that the Interview has probative value, although at no time could it be considered as the testimony of the Accused at trial, and as such has treated the Interview as any other evidence entered into the record by the Prosecution. Because it is accepted that the Accused, at the time of the Interview, could not always have a completely accurate recollection of the described events, the Trial Chamber has examined whether the various relevant parts of the Interview corroborate, or are corroborated by, other evidence that the Trial Chamber has found acceptable. The Trial Chamber gave due consideration to the aforementioned submissions of the Defence at all times during the deliberative process where they became relevant. Finally, the Trial Chamber has also taken into account that the Accused was informed that he was being interviewed as a suspect and that he was cautioned as to his right to remain silent.

iii. Exhibits P598 and P598.1

57. On 28 November 2005, the Prosecution tendered into evidence a handwritten document purporting to be a 'military diary' and marked as ex. P598.<sup>110</sup> Throughout the proceedings, the Defence repeatedly raised strong objections to the admission of this document into the trial record, for reasons such as violation of Rule 90(H)(ii) of the Rules,<sup>111</sup> lack of a proper chain of custody and general inconsistencies in the document.<sup>112</sup> On 18 January 2006, the Prosecution sought to tender a purportedly complete version of ex. P598 which, according to the Defence, contained additional

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<sup>109</sup> Article 18(3) of the Statute; Rules 42, 43 of the Rules.

<sup>110</sup> Hearing of 28 November 2005, T. 14137, 14146.

<sup>111</sup> Rules 90(H)(ii) of the Rules provides that "ign the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party for whom that counsel appears which is in contradiction of the evidence given by the witness."

<sup>112</sup> Hearing of 24 November 2005, T. 13948-13949; hearing of 28 November 2005, T. 14147. *See also* 'Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to put its Case to Witnesses Pursuant to Rule 90(H)(ii), 30 November 2005; in that respect, *see* 'Decision on *Partly Confidential Defence Motion Regarding the*

pages.<sup>113</sup> For clarity purposes, this document was later provisionally marked ex. P598.1.<sup>114</sup> The Defence vigorously contested the admissibility of this document in replacement of ex. P598, in so far as the two documents are different and that ex. P598.1 has not been shown to any witness.<sup>115</sup> In light of these considerations, the Trial Chamber reiterates its oral observations of 10 March 2006, where it gave a detailed review of both ex. P598 and ex. P598.1, outlining the differences between the two.<sup>116</sup>

58. The Trial Chamber is satisfied that although contested by the Defence, the authenticity of ex. P598 has been sufficiently proven by the Prosecution. Second, in examining whether ex. P598.1 should be admitted into evidence, either replacing ex. P598 or co-existing in the record beside it, the weight to be given to the discrepancies between the two documents is crucial. The two pages contained in ex. P598.1, which were not part of ex. P598,<sup>117</sup> provide information which is relevant to the case against the Accused but contain no new material that the Defence was not aware of, and which it could not have put to witnesses. Therefore, the fact that they were not put to any witness, including D005, is only of relative importance. The Trial Chamber has no doubt at all as to whether these two pages are truly part of the ‘military diary’. In such circumstances, it has a duty to ensure that a document, if considered authentic, is available in a form which is as complete and undivided as possible unless this prejudices the rights of the Accused. In light of this, ex. P598.1 is admitted, alongside ex. P598, and not in replacement of it. For the purpose of its deliberations, however, the Trial Chamber has not had the need to make use of the controversial pages in ex. P598.1.

(f) The Findings of Handwriting and Signature Experts

59. The Defence objected to a large number of documents tendered by the Prosecution in respect of signatures and authenticity in general. Two expert witnesses in handwriting and document examination, Dr. Fagel and Doctor J.A. De Koeijer (“Dr. De Koeijer”) were called by the Prosecution at the outset of its case-in-chief to report on their findings on the authenticity of a number of documents. In turn, the Defence called a handwriting expert, Prof. Bilić to examine the originals of some Prosecution exhibits as well as other documents in the custody of the Prosecution but not tendered in evidence. Thereafter, the Trial Chamber *proprio motu* appointed a third

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Consequences of a Party Failing to put its Case to Witnesses Pursuant to Rule 90(H)(ii)’, 17 January 2006, in which the Trial Chamber denied the Defence motion.

<sup>113</sup> Hearing of 18 January 2006, T. 15245-15249.

<sup>114</sup> Hearing of 6 April 2006, T. 16467.

<sup>115</sup> Hearing of 18 January 2006, T. 15250; hearing of 19 January 2006, T. 15344-15347; hearing of 1 March 2006, T. 16043-16044; hearing of 10 March 2006, T. 16090, 16092-16093, 16095-16097.

<sup>116</sup> Hearing of 10 March 2006, T. 16089-16099.

<sup>117</sup> These are pages bearing ERN 0299-5208 and ERN 0299-5228: *see* hearing of 18 January 2006, T. 15249, 15251; hearing of 19 January 2006, T. 15345-15346; hearing of 10 March 2006, T. 16089-16093, 16095-16099.



handwriting expert, Dr. Keržan in an attempt to obtain better insight into the conflicting opinions of the Prosecution and Defence experts and to have assistance in trying to determine the authenticity of some of the said documents.

60. The Defence objects to all exhibits found not to be authentic by Prof. Bilić. Conversely, the Prosecution submits that the report and testimony by Prof. Bilić should not be admitted into evidence, as the legal requirements of existence, transparency and disclosure of reference signatures (“alleged non-contentious signatures” of the Accused, Hamed Salihović and Hamdija Fejzić) have not been met.<sup>118</sup> The Prosecution also submits that given the testimony and reports of Dr. Fagel and Dr. De Koeijer, as well as that of Dr. Keržan, his report does not meet an acceptable standard of credibility and should therefore be ignored. The Trial Chamber will consider the respective submissions of the Parties in the same context.

61. The Prosecution submits that even if there is no general rule requiring disclosure of expert source materials,<sup>119</sup> disclosure of the underlying documents is necessary in relation to handwriting and signature analysis because of the nature of the expertise.<sup>120</sup> It is further submitted that the relevance and probative value of handwriting analysis can only be assessed in relation to the underlying materials. The Prosecution’s position is that the report submitted by Prof. Bilić without the underlying reference materials, should have been excluded from evidence pursuant to Rule 89(C) of the Rules as being irrelevant or lacking probative value.<sup>121</sup> In the alternative, the Trial Chamber should not place any weight on Prof. Bilić’s conclusions, since it is impossible to assess the accuracy of his findings. The Prosecution also refers to jurisprudence of this Tribunal affirming that “an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion.”<sup>122</sup>

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<sup>118</sup> ‘Prosecution’s Response to Defence Motion to File an Expert Statement Pursuant to Rule 94bis’, 17 January 2006.

<sup>119</sup> Prosecution Final Brief, para. 47, fn. 28, referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4. For a contrary position in national jurisdictions which require disclosure of underlying materials, the Prosecution refers to UK Crown Court Advance Notice of Expert Evidence Rules (SI 1987 No. 716), Rule 3(1)(b) and US Federal Rule of Civil Procedure 26.

<sup>120</sup> Prosecution Final Brief, para. 47, referring to 7 Wigmore on Evidence § 1999 (citing *Burr v. Harper*, N.P. 420, 421(1816)) which points out that expert handwriting evidence presents special concerns because its accuracy rests on two variables that do not necessarily affect other expert evidence: whether the specimens are genuine and whether the specimens are fair in the sense that they have not been “unfairly selected, calculated to serve the party producing them.”

<sup>121</sup> Only a limited group of documents, used in the report by the Defence expert as reference material, is accepted by the Parties as documents that include non-contentious signatures from the Accused: ex. D1012, “Expert Report” of Esad Bilić of 2 December 2005, pp. 3-5.

<sup>122</sup> Prosecution Final Brief, para. 47, fn. 28, referring to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution’s Motions for Admission of Expert Statements, 7 November 2003, para. 19; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the

62. The Trial Chamber notes first that although it is true that some of the conclusions reached by Prof. Bilić are based on source documents and alleged non-contentious signatures which have not been made available to the Trial Chamber and the Prosecution for verification, it is equally true that other conclusions are based on documents and signatures which are available. It is therefore not correct for the Prosecution to summarily request that the entire report submitted by Prof. Bilić be excluded.

63. Second, the decision of the Defence not to tender the alleged non-contentious signatures of Hamdija Fejzić and Hamed Salihović is not the only reason why reference signatures of these two persons are not available at trial. The Prosecution has the onus of proving the authenticity of all those documents purportedly signed by either Hamdija Fejzić or Hamed Salihović challenged by the Defence. For that purpose, especially since it was put on notice from even before the start of trial that objections to authenticity would be made, the Prosecution should have brought forward all the evidence necessary to prove the authenticity of those documents. If it has been possible for the Defence to procure reference signatures of Hamdija Fejzić and produce past signatures of Hamed Salihović, it is difficult to understand why the Prosecution was not in a position to do the same. In addition, the Prosecution made it clear that it would object to any recalling of Prof. Bilić and reintroducing of the alleged non-contentious signatures.<sup>123</sup>

64. Finally, the decision of the Defence not to tender the alleged non-contentious signatures of Hamdija Fejzić and Hamed Salihović used by Prof. Bilić is one to which it is entitled, especially since the burden of proving the authenticity of the challenged Prosecution exhibits rests with the Prosecution. The Defence never has, and never assumes, the onus of proving the non-authenticity of those exhibits. The Trial Chamber agrees with the Defence that, strictly speaking, the absence of the alleged non-contentious signatures of Hamdija Fejzić and Hamed Salihović documents does not impact on the credibility of Prof. Bilić as such, and that his conclusions remain open to assessment by the Trial Chamber as that of any witness. The fact the Trial Chamber has no alleged non-contentious signatures to rely upon in assessing Prof. Bilić's findings on the Hamdija Fejzić and Hamed Salihović contested documents, is only relevant in so far as it has the duty to decide if the Prosecution has fulfilled its burden of proving the authenticity of its own exhibits.

65. The Trial Chamber, therefore, dismisses the Prosecution request not to admit Prof. Bilić's report and evidence.

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Defence, 27 January 2003, p. 3; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2. The Prosecution further stated that "Rule 94bis of the

66. The Defence submits that Dr. Keržan, the Trial Chamber appointed expert, has considerably less experience than Prof. Bilić and had less non-contentious reference signatures. Further, the Defence maintains that Dr. Keržan's findings that certain documents were written by the Accused are unsustainable and that his expertise is not to be considered more credible simply because he was appointed by the Trial Chamber. The Defence therefore submits that the findings of Prof. Bilić raise reasonable doubts about the contentious documents analysed by Dr. Keržan.

67. The Trial Chamber reiterates that the fact that Dr. Keržan was appointed by it does not in any way prompt it to consider him credible or more credible than the other experts. The Trial Chamber has benefited from the live testimony of the three experts, including answers as to each expert's experience, expertise and methodology. In the course of this, the Trial Chamber has also observed the demeanour of each of the experts when handling counsel's questions challenging not only their findings but also their experience, expertise and objectivity.

68. The Trial Chamber notes Dr. Keržan's response to the Defence's proposition that his experience in the field of handwriting and signature examination was restricted and that he had at his disposal a more limited range of non-contentious signatures of the Accused. However, the Trial Chamber arrives at a completely opposite conclusion from that suggested by the Defence.<sup>124</sup> Dr. Keržan emerges as a young, but very learned and experienced hand-writing expert who, like Dr. Fagel, but unlike Prof. Bilić, has been, and continues to be, exposed to the modern developments in his field of expertise. He has also firmly refuted all insinuations from the Defence that he may have been biased and convincingly explained why he stood firm by his findings despite the suggested limited amount of non-contentious signatures, remaining at all times conservative in his assessments.<sup>125</sup> In the opinion of the Trial Chamber, although younger and arguably with quantitatively less experience than Prof. Bilić, Dr. Keržan undoubtedly is the more balanced, conservative, qualified and reliable of the two. Dr. Fagel and Dr. De Koeijer also stand out as more experienced, more qualified, more balanced and remained conservative in their findings.<sup>126</sup> Prof. Bilić, by contrast, while affirming that conclusions in the case of photocopies were not desirable

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Rules does not add to the provisions of Rule 89(C) of the Rules.”

<sup>123</sup> Hearing of 25 January 2006, T. 15670.

<sup>124</sup> Dorijan Keržan, T. 15969-15972, where he does not agree with the proposition put to him by the Defence that he had a poor sample of reference signatures because the importance lies with the quality of the signatures not their number. Further, when invited by the Defence to accept that he might have reached different conclusions, had he had reference signatures from a broader period of time, Dorijan Keržan replied that he could not rule out that possibility, but that he was quite confident that his findings would have remained unchanged.

<sup>125</sup> Dorijan Keržan, T. 15975; W.F.P. Fagel, T. 538.

<sup>126</sup> The Trial Chamber is satisfied with the credentials of W.F.P. Fagel and Jan. A. De Koeijer, two experts actively involved in ongoing research in their fields. In addition, the methods they described in carrying out their analyses are characterised by a conservative approach, which is also the subject of scrutiny by qualified peers.

because “highly uncertain”,<sup>127</sup> that he most often reached “inconclusive” findings when examining photocopies, and that in such cases he would rather not give any findings at all,<sup>128</sup> then proceeded to make a strong conclusion regarding one such photocopy.<sup>129</sup> In contrast to him, in those cases involving photocopies, experts Dr. Fagel and Dr. Keržan were only prepared to come to more neutral (“possible” or “inconclusive”) conclusions basing them on essentially visual features.

69. The Trial Chamber also heard Prof. Bilić speak in absolutist terms that elements such as a dot at the end of the signatures<sup>130</sup> or a correction to the document,<sup>131</sup> would necessarily render the document suspect. Equally, when asked to give a holistic overview on the contentious documents, he answered that “these are all suspect documents that have not been signed by their real authors, those who should have signed them, in which unknown writers have participated”.<sup>132</sup> He ultimately ended up by reiterating that “these are suspicious, suspicious, suspicious documents”.<sup>133</sup> While Prof. Bilić speaks with absolute certainty, the other experts are conservative in their overall assessment, never guaranteeing with absolute certainty that a signature is not forged.

70. All this has been taken into consideration by the Trial Chamber in deciding what weight to give to the findings of Prof. Bilić. The Defence submission that the findings of Prof. Bilić raise reasonable doubts about the contentious documents analysed by Dr. Keržan is unacceptable. This does not, however, lead to the conclusion that Prof. Bilić’s own findings are to be ignored in their entirety. The Trial Chamber has assessed each of Prof. Bilić’s findings in light of the totality of relevant evidence and has come to the conclusion that certain Prosecution exhibits should be used with caution where they are not corroborated by, or do not corroborate, other evidence that the Trial Chamber has deemed acceptable, and never as a sole basis for a finding of guilt.

71. The Trial Chamber makes one final consideration in relation to the authenticity of documents examined by the three experts. In its opinion, such expert analyses and reports can never be weighed in absolutist terms. Findings by equally qualified and experienced experts using the same methodology may still vary and even if they tally, they may still be proven wrong by other

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<sup>127</sup> Esad Bilić, T. 15647; *see also* ex. D1012, “Expert Report” of Esad Bilić of 2 December 2005, p. 17.

<sup>128</sup> Esad Bilić, T. 15531.

<sup>129</sup> Esad Bilić, T. 15647, regarding ex. P176.

<sup>130</sup> W.F.P. Fagel, T. 572-573, stating that the appearance of a distinctive dot is not that important; it is observed often that people sometimes use a dot and sometimes not when they are making signatures. Dr Keržan is equally not intrigued by the dot after the signature and explains that this could have disappeared due to the passage of nine years and that he does not consider it important.

<sup>131</sup> Esad Bilić, T. 15753.

<sup>132</sup> Esad Bilić, T. 15656.

<sup>133</sup> *Ibid.*

evidence. Undoubtedly, however, expert analyses and reports assist the Trial Chamber in its evaluation of the evidence. Each finding of each of the three experts has been weighed accordingly.

### **C. Allegations of Non-compliance with Prosecutorial Obligations Under Rule 68 of the Rules**

72. Throughout these proceedings, the Defence repeatedly contended that the Prosecution was failing to comply with its disclosure obligations under Rule 68 of the Rules. A detailed history, including sanctions imposed upon the Prosecution, is contained in the Procedural Background of this Judgement.

#### **1. Non-Disclosure of Documents Relating to Nurif Rizvanović**

73. The Trial Chamber will address in this part the last Defence allegation of prosecutorial Rule 68 non-compliance, which was raised toward the very end of the case. On 3 March 2006, the Defence filed an ‘Urgent Notification of Grievous Violation of Rule 68’ (“Defence Rule 68 Notification”), alleging that on 1 March 2006, the Prosecution disclosed 400 pages of documents pertaining to Nurif Rizvanović, Commander of the ‘Drina Division’ (“Nurif Rizvanović documents”), and which the Defence characterised as “highly exculpatory” and as running “contrary to central allegations which the Prosecution continues to maintain in this case, including that the Accused had overall control in the region of Bratunac, Vlasenica, Zvornik and Srebrenica and over all soldiers located therein.” The Defence did not request any specific relief in its Defence Rule 68 Notification but simply notified “the Trial Chamber of the above violation of Rule 68 in order to preserve its rights in the present trial and in any subsequent appeal.”<sup>134</sup> Subsequently, on 22 March 2006, in its ‘Defence Reply to Prosecution Response to the Defence’s Urgent Notification of Grievous Violation of Rule 68’, the Defence urged the Trial Chamber to order the Prosecution to provide the Bench with all the Nurif Rizvanović documents, to find a breach of Rule 68 of the Rules, and to impose the appropriate sanctions on the Prosecution.<sup>135</sup> The Prosecution has not contested that it possessed the Nurif Rizvanović documents prior to 1 March 2006.

74. Given the submissions of both Parties, the Trial Chamber comes to the conclusion that the Prosecution should have allowed for the probability that what it considered inculpatory could justifiably be viewed as exculpatory by the Defence and, consequently, should have disclosed the Nurif Rizvanović documents under Rule 68 of the Rules, as soon as practicable after obtaining knowledge that the said material was in its possession. The Trial Chamber therefore holds that the

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<sup>134</sup> ‘Urgent Notification of Grievous Violation of Rule 68’, 3 March 2006, (“Defence Rule 68 Notification”), paras 4, 38.

Prosecution has violated its Rule 68 disclosure obligation with regard to the Nurif Rizvanović documents.

75. In light of its ultimate findings on the Accused's criminal responsibility, particularly with respect to his alleged position of authority over Nurif Rizvanović and the 'Drina Division',<sup>136</sup> the Trial Chamber concludes that this Rule 68 violation did not result in any prejudice to the Accused such as would require the imposition of further sanctions on the Prosecution.

## 2. General Conclusions on Rule 68

76. Throughout the course of trial, the Trial Chamber dealt with each failure of the Prosecution to comply with its Rule 68 disclosure obligations as it deemed fit in the circumstances. Among the remedies, applied consistently with the case law of this Tribunal, it admonished the Prosecution and required it to come forward with a declaration of compliance. Owing to the continual violations, the Trial Chamber ultimately found it necessary to inform the Parties that it would reserve its right to draw reasonable inferences in favour of the Accused with respect to the specific evidence which had been the subject of a Rule 68 violation.<sup>137</sup>

77. In considering the overall or cumulative effect of the Prosecution's violations of its Rule 68 obligations, the Trial Chamber is satisfied that the Accused was not prejudiced to the extent of being denied a fair trial, particularly in light of the ultimate disposition of the Trial Chamber in this case. The Trial Chamber finds the Prosecution's approach to its disclosure obligations under Rule 68 of the Rules to be less than diligent. This failure caused repeated and unnecessary delays in the conduct of the trial, and at times exasperated not only the Defence, but the Trial Chamber as well. The final exasperation came less than a week before the issuance of this Judgement when the Trial Chamber was informed that the Prosecution disclosed two additional documents and a video pursuant to Rule 68 of the Rules (receipt 296).

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<sup>135</sup> 'Defence Reply to Prosecution Response to the Defence's *Urgent* Notification of Grievous Violation of Rule 68', 22 March 2006, para. 9.

<sup>136</sup> See paras 706, 711 *infra*; see also IV.B.2.ii., "Nurif Rizvanović and the Drina Division".

<sup>137</sup> 'Decision on Ongoing Complaints About Prosecutorial non-Compliance with Rule 68 of the Rules', 13 December 2005.

### III. GENERAL OVERVIEW

#### A. Background to the Conflict in Bosnia and Herzegovina

##### 1. Events Leading to the Independence of Bosnia and Herzegovina

78. Bosnia and Herzegovina was one of the six republics that once constituted the Socialist Federal Republic of Yugoslavia (“SFRY”).<sup>138</sup> Being populated primarily by Bosnian Muslims, Bosnian Serbs and Bosnian Croats, BiH was the only republic of the SFRY without a predominant ethnic group.<sup>139</sup> Whereas Bosnian Muslims followed Islam, Bosnian Serbs and Bosnian Croats were Orthodox and Roman Catholic, respectively. All three groups shared a common language, which at the time was referred to as Serbo-Croatian.<sup>140</sup>

79. In the early 1990s, it became obvious that the state concept of the SFRY would undergo substantial changes due to increasing tensions among the country’s different ethnic groups. These tensions were the result of political, economic and social pressures, the emergence of which coincided with the end of the ‘cold war’.<sup>141</sup> On the political level, there was no agreement on how to conduct inter-republic relations. Whereas Slovenia and Croatia proposed to substitute the SFRY with a looser federation, Serbia was in favour of strengthening central power. The economy suffered considerable setbacks, particularly in BiH. On the social level, memories from the Second World War, when Serbs in particular had suffered at the hands of the other two ethnic groups, contributed to the escalating tensions in which the future of the SFRY was discussed.<sup>142</sup>

80. With the dissolution of the communist party in 1990, BiH saw the emergence of predominantly ethnically defined political parties. The Party of Democratic Action (“SDA”) had the support of the Bosnian Muslims, the Serbian Democratic Party (“SDS”) that of the Bosnian Serbs and the Croatian Democratic Union (“HDZ”) that of the Bosnian Croats.<sup>143</sup>

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<sup>138</sup> James Gow, T. 1747.

<sup>139</sup> James Gow, T. 1749-1750. The Trial Chamber recognises that the terms “ethnic group” and “ethnicity” may not describe the distinguishing features of Bosnian Muslims, Bosnian Serbs and Bosnian Croats in their entirety, since other factors, such as religion, nationality and cultural heritage, are also of importance. For the sake of brevity, and following other Trial Chambers of the Tribunal, this Trial Chamber will nevertheless use this term for the purposes of the present Judgement.

<sup>140</sup> James Gow, T. 1751.

<sup>141</sup> James Gow, T. 1752-1753.

<sup>142</sup> James Gow, T. 1780-1781, 1834.

<sup>143</sup> James Gow, T. 1753, 1763, 1806.

81. In 1991, referenda held in Slovenia and Croatia accelerated the secession of these republics from the SFRY.<sup>144</sup> This impacted on the political situation in BiH, being the most ethnically divided republic within the SFRY.<sup>145</sup> In November 1991, the outcome of a Bosnian Serb plebiscite reflected support for BiH to remain within the SFRY.<sup>146</sup> From 29 February to 1 March 1992, however, an overwhelming majority of Bosnian Muslims and Bosnian Croats voted for the independence of BiH.<sup>147</sup> On 3 March 1992, the government of BiH declared the republic's independence.<sup>148</sup> This was followed on 27 March 1992 by the formal proclamation of the Serbian Republic of BiH, later renamed Republika Srpska.<sup>149</sup> On 6 April 1992, the European Community recognised BiH as an independent state,<sup>150</sup> and on 22 May 1992, the United Nations ("UN") admitted BiH as a member state.<sup>151</sup>

## 2. The Plan to Create a New Serbian State

82. When it appeared increasingly unlikely that BiH would remain within the SFRY, the Serbian leadership in Belgrade had already embarked upon a project to create the boundaries of a new Serbian state comprising all ethnic Serbs from the territories of the states breaking away from the SFRY ("New State Project").<sup>152</sup> This new Serbian state was intended to encompass territories both from Croatia and BiH which were predominantly inhabited by Serbs, as well as areas where the Serbs were a minority. From the outset, the New State Project was to be realised through a campaign of 'ethnic cleansing' which included the forcible removal or even the killing of the non-Serb population from the targeted territories in Croatia and BiH.<sup>153</sup> In the second half of 1991, the forceful implementation of the New State Project by means of force began in Croatia.

83. The SFRY defence rested on two pillars, the JNA at the federal level and the TO at the municipal and republican level.<sup>154</sup> By early 1992, the JNA, a multi-ethnic force by tradition, had already undergone conversion into an almost exclusively ethnic Serb army. Military equipment and weaponry were brought into BiH on a large scale during the JNA's retreat from areas in

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<sup>144</sup> James Gow, T. 1752-1754.

<sup>145</sup> Ex. P408, "Slovenia's Declaration of Independence" of 25 June 1991; ex. P409, "Croatia's Declaration of Independence" of 25 June 1991; James Gow, T. 1752-1754, 1760-1761.

<sup>146</sup> Ex. P562, "Agreed Facts", E.19.

<sup>147</sup> Ex. P562, "Agreed Facts", E.24. *See also* James Gow, T. 1760-1762.

<sup>148</sup> Ex. P562, "Agreed Facts", E.2.

<sup>149</sup> Ex. P562, "Agreed Facts", E.23, 25.

<sup>150</sup> Ex. P562, "Agreed Facts", E.3.

<sup>151</sup> Ex. P562, "Agreed Facts", E.4. *See also* UN General Assembly Resolution A/RES/46/237 of 22 May 1992.

<sup>152</sup> James Gow, T. 1764, who coined this term.

<sup>153</sup> James Gow, T. 1764, 1862-1863; ex. D71, "Political Propaganda and the Plan to Create a 'State for all Serbs'" by Renaud de la Brosse, pp. 91, 93-94; ex. D62, "Six Strategic Goals of the Serbian People of BiH" of 12 May 1992.

<sup>154</sup> James Gow, T. 1767-1768.



neighbouring Croatia following a cease-fire agreement.<sup>155</sup> Military equipment and weaponry of the TO had been placed under the control of the JNA as recent as the late 1980s.<sup>156</sup>

84. The implementation of the New State Project in BiH was overseen by the SDS.<sup>157</sup> As of mid-1991, associations of ‘Serbian’ municipalities, as well as ‘Serbian Autonomous Regions’, were created as a parallel structure to the legitimate republican institutions.<sup>158</sup> In December 1991, the SDS issued instructions outlining the takeover of power, utilising one of two operational plans depending on whether or not there was already an ethnic Serb majority in the area.<sup>159</sup> The SDS also identified potential sources of resistance from non-Serb individuals that were to be eliminated in the course of the takeover.<sup>160</sup>

### 3. Outbreak of Armed Conflict in Bosnia and Herzegovina

85. Sporadic fighting, which had already taken place in some areas of BiH, intensified at the beginning of April 1992.<sup>161</sup> Key strategic communications positions in eastern BiH were among the first to be taken over by Serb forces, they being of great importance for securing supply routes from Serbia.<sup>162</sup> The JNA played a significant role in these operations, using its artillery and armoured capabilities to surround and shell predominantly non-Serb towns and villages. In many places, Serb paramilitaries<sup>163</sup> were employed, assisted by the local Bosnian Serb TO and regular Serb controlled police forces.<sup>164</sup>

86. Although the presence of the JNA on the territory of BiH formally ended on 19 May 1992, a large number of JNA troops, weaponry and equipment remained in BiH and were merely re-designated ‘Army of the Serbian Republic of BiH’ (VRS).<sup>165</sup> Consequently, the VRS had at its disposal a significant cache of resources, outweighing by far those available to the Bosnian Muslims.<sup>166</sup>

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<sup>155</sup> James Gow, T. 1877-1878; Izet Redžić, T. 9216.

<sup>156</sup> Izet Redžić, T. 9197-9199; James Gow, T. 1767-1769, 1782-1783, 1784-1786, 1880.

<sup>157</sup> James Gow, T. 1892; ex. D30, “SDS Operating Instructions” of 15 August 1991.

<sup>158</sup> Ex. P562, “Agreed Facts”, E. 14-16. *See also* ex. D529, “Decision by the Bosnian Serb Assembly regarding Serbian Autonomous Regions” of 21 November 1991; ex. P282, “*Javnost* newspaper article” entitled “Regionalisation – the will of the people” of 28 September 1991.

<sup>159</sup> James Gow, T. 1830.

<sup>160</sup> James Gow, T. 1773.

<sup>161</sup> James Gow, T. 1771, 1799-1801.

<sup>162</sup> James Gow, T. 1771-1772; *see also* ex. P366, “Map”.

<sup>163</sup> For instance, the notorious ‘Serbian Volunteer Guard’.

<sup>164</sup> James Gow, T. 1772-1774; Eric Dachy, T. 9388, 9395.

<sup>165</sup> James Gow, T. 1770, 1798-1799.

<sup>166</sup> James Gow, T. 1777.

87. By contrast, the newly declared Republic of BiH faced the outbreak of armed conflict almost wholly unprepared. In municipalities where Bosnian Muslims formed the majority of the population and controlled the local TO, there was occasional armed resistance to the Bosnian Serb military campaign. However, they had at their disposal neither the structures nor the logistics to match the might of the VRS.<sup>167</sup> A UN-sponsored arms embargo further contributed to the imbalance of weaponry between the VRS and the emerging Bosnian Muslim forces.<sup>168</sup> Moreover, in April and May of 1992, the process of constituting and outfitting regular armed forces of the Republic of BiH was rudimentary at best.<sup>169</sup> Thus, during the early stages of the conflict in BiH, those units of the TO controlled by Bosnian Muslims formed their only means of engaging in military action.<sup>170</sup>

## **B. Srebrenica Area: The Specific Political, Military and Humanitarian Context of the Case**

### 1. General Information

88. The town of Srebrenica<sup>171</sup> lies in a mountainous valley in northeastern BiH, not more than 15 kilometres from the Drina River and the Serbian border.<sup>172</sup> The wider part of the bank of the Drina River, where Srebrenica is situated, is commonly referred to as the ‘Podrinje’ area.<sup>173</sup> During the Roman Empire, Srebrenica was an important silver mining settlement, and before the conflict, the area heavily depended on the exploitation of lead, zinc and iron ore.<sup>174</sup>

89. Prior to the conflict, Srebrenica formed part of the Tuzla region and the Zvornik sub-region.<sup>175</sup> Srebrenica municipality was divided into 17 local communes and had an overall population of 37,000. According to the 1991 census, 73% of the population living in the municipality of Srebrenica were Bosnian Muslim and 25% Bosnian Serb.<sup>176</sup> The town of Srebrenica had a population of approximately 3,500 with the same ethnic composition percentage.<sup>177</sup> While the

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<sup>167</sup> James Gow, T. 1796-1798.

<sup>168</sup> James Gow, T. 1818-1819.

<sup>169</sup> Sead Delić, T. 8682.

<sup>170</sup> James Gow, T. 1797-1798.

<sup>171</sup> The town of Srebrenica was visited by the Trial Chamber and the Parties during the site visit in June 2005.

<sup>172</sup> Ex. C1, “Map”, *see* Annex C. Unless stated otherwise, indications of distances in this Judgement are ‘as the crow flies’.

<sup>173</sup> Hakija Mehuljić, T. 6910.

<sup>174</sup> Nikola Petrović, T. 7248; Slavoljub Rankić, T. 2286-2287; Nedeljko Radić, T. 3488; ex. P90, “Srebrenica Testifies and Accuses” by Naser Orić, pp. 3, 5.

<sup>175</sup> Izet Redžić, T. 9189-9190.

<sup>176</sup> Ibrahim Bećirović, T. 7398; Izet Redžić, T. 9191.

<sup>177</sup> Ibrahim Bećirović, T. 7403.

town of Srebrenica was ethnically mixed, in the surrounding villages and hamlets there was usually one ethnic group that dominated.<sup>178</sup>

## 2. The Rise of Tensions in the Srebrenica Area

90. Despite their differences in cultural heritage and the lingering memories of the Second World War, the three ethnic groups peacefully coexisted for most of the time prior to the conflict.<sup>179</sup> In the late 1980s, however, misinformation began to be disseminated with the assistance of the State Security Service of Serbia raising the alarm of Bosnian Serbs from the Podrinje area about an imminent threat from Bosnian Muslims.<sup>180</sup> As a result, Bosnian Serbs became increasingly receptive to nationalistic ideas and inter-ethnic relations began to deteriorate.<sup>181</sup>

91. Reflective of the overall situation in BiH, tensions between the Bosnian Muslim and the Bosnian Serb communities in the Srebrenica area intensified in the early 1990s. In January 1992, a European Community delegation visiting Srebrenica was informed by local Bosnian Muslim leaders that they considered the JNA to be the most destabilising factor in the area.<sup>182</sup> With the economy almost at a standstill, disputes arose regarding the ethnic composition of local enterprises, with both Bosnian Muslims and Bosnian Serbs accusing one another of favouring employees of their own ethnicity and of stealing companies' assets.<sup>183</sup>

92. In implementing the SDS strategy to set up parallel institutions, on 9 January 1992, the 'Serbian Autonomous Region of Birač' was proclaimed, encompassing the entire municipalities of Šekovići and Vlasenica, as well as parts of the municipalities of Bratunac, Srebrenica and Zvornik.<sup>184</sup> On 27 February 1992, the 'Serbian Municipality of Skelani' was established.<sup>185</sup> In the following months, division of municipalities and public assets in the region along ethnic lines topped the list of priorities in the political agenda of the SDS.<sup>186</sup>

93. At about the same time, Serb paramilitary groups<sup>187</sup> arrived in the Srebrenica area and, together with the JNA and SDS, they began to distribute arms and military equipment to the local

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<sup>178</sup> Ex. D199, "War Hospital" by Sheri Fink, pp. 34-35.

<sup>179</sup> Izet Redžić, T. 9193; Nedeljko Radić, T. 3489; Nikola Petrović, T. 7232-7233.

<sup>180</sup> Izet Redžić, T. 9193-9195; Bečir Bogilović, T. 6356; ex. D635, "Letter" by SRBiH SDB of 21 September 1989; ex. D636, "Conclusions" of meeting of 21 October 1989; ex. D638, "Official Note" of 22 October 1989.

<sup>181</sup> Milenko Stevanović, T. 1615; Izet Redžić, T. 9196; Kada Hotić, T. 9651-9653; ex. D634, "Reply" by Tuzla CSB of 21 September 1989.

<sup>182</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 2.

<sup>183</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 3-8, 12-14, 17, 21-22.

<sup>184</sup> Izet Redžić, T. 9211-9212; ex. D696.1, "Transcript of Video".

<sup>185</sup> Ex. D603, "Decision" of 27 February 1992; Izet Redžić, T. 9369.

<sup>186</sup> Izet Redžić, T. 9255; ex. D604, "Protocol" on division of Vlasenica of 11 April 1992.

<sup>187</sup> For instance, the 'White Eagles' and the 'Serbian Volunteer Guard'.

Bosnian Serb population.<sup>188</sup> Weapons were also shipped into the area from Serbia across the Drina River or flown in by helicopter.<sup>189</sup> Paramilitary training was covertly provided in public buildings in Bosnian Serb villages throughout the area.<sup>190</sup>

94. In comparison, it appears that the Bosnian Muslim side did not adequately prepare for the looming armed conflict. In eastern BiH, military organisation of Bosnian Muslims, if at all, was taking place at the grass roots level.<sup>191</sup> There were not even firearms to be found in the Bosnian Muslim villages, apart from some privately owned pistols and hunting rifles; a few light weapons were kept at the Srebrenica police station.<sup>192</sup> The Srebrenica branch of the SDA convened at the end of January 1992 for the first time, but there was disagreement among the Bosnian Muslims over how to respond to the situation.<sup>193</sup> On 8 April 1992, the Srebrenica National Defence Council gave orders to set up 'police war stations' in the local communes of the municipality.<sup>194</sup> On the same day, the Accused was appointed commander of one such war station, the Potočari police sub-station.<sup>195</sup>

95. A propaganda war began to be waged in which all kinds of allegations and rumours about the other side were spread.<sup>196</sup> Frequently, the characterisation of one side or the other as the aggressor depended on the mindset and ethnicity of the author. Propaganda was used to a far greater extent by the Bosnian Serbs than by the Bosnian Muslims.<sup>197</sup> Influenced by Serb propaganda predicting an imminent massacre by Bosnian Muslims, many Bosnian Serbs left the town of Srebrenica in March and April 1992.<sup>198</sup>

96. Mutual distrust continued to rise. Bosnian Muslims and Bosnian Serbs alike started to form village guards to protect their property.<sup>199</sup> Barricades and checkpoints were set up at village

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<sup>188</sup> Hakija Mehuljić, T. 6906; Izet Redžić, T. 9236-9237; Nesib Burić, T. 10569-10571; ex. D524, excerpts from "Diary" by Petar Janković, pp. 42-48.

<sup>189</sup> Omer Ramić, T. 9873; Sidik Ademović, T. 12945.

<sup>190</sup> Sead Bekrić, T. 9502-9503; Omer Ramić, T. 9870-9871; Hamed Tiro, T. 10267; Ibro Alić, T. 12652; D005, T. 13800; Azir Malagić, T. 11252; Šuhra Sinanović, T. 11142-11143.

<sup>191</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 43-44. The 'Patriotic League', a paramilitary group consisting of Bosnian Muslim volunteers, had been active in other parts of the country as of mid-1991, see James Gow, T. 1793, 2004-2005.

<sup>192</sup> Hakija Mehuljić, T. 6733; Izet Redžić, T. 9360; Sidik Ademović, T. 12955; D005, T. 13813-13814.

<sup>193</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 9-12, 19-20.

<sup>194</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 35.

<sup>195</sup> Ex. P562, "Agreed Facts", no. A.10; see also Hakija Mehuljić, T. 6727-6728.

<sup>196</sup> Piers Tucker, T. 5887-5888, 6150-6151, 6154-6155, 6167; ex. P238, "Work Plan" of 6 July 1992, issued by the Tuzla District TO Staff, concerning the use of propaganda.

<sup>197</sup> Sidik Ademović, T. 12923-12926; Nedret Mujkanović, T. 5201-5202; Hakija Mehuljić, T. 6905; Ibrahim Bećirović, T. 7622; Izet Redžić, T. 9194-9195; Eric Dachy, T. 9459; ex. D70, "The Eradication of Serbs in Bosnia and Herzegovina 1992-1993" by Drago Jovanović.

<sup>198</sup> Edina Karić, T. 10980; ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 23.

<sup>199</sup> Ibrahim Bećirović, T. 7404; Staniša Stevanović, T. 1469-1470; Milo Ranković, T. 1080-1081; Slaviša Erić, T. 1170-1171.

entrances.<sup>200</sup> Water supplies and television broadcasts were interrupted.<sup>201</sup> People left their homes and headed for places where they felt safer.<sup>202</sup> Incidents of shooting occurred, causing the sporadic killing of members of both ethnic groups.<sup>203</sup> By mid-April 1992, people were already fleeing Srebrenica *en masse* in anticipation of an armed clash between the two sides.<sup>204</sup>

97. Srebrenica had become a focal point in the Serb strategy and was consequently gradually isolated by the Serb forces. By April 1992, the JNA had set up artillery at all the strategic points and elevations surrounding Srebrenica and many JNA units retreating from neighbouring Croatia were re-deployed to the Podrinje area.<sup>205</sup> On 8 April 1992, Serb forces forcibly took over the town of Zvornik, thereby isolating Srebrenica from Tuzla.<sup>206</sup> On 11 April 1992, the town of Skelani, southeast of Srebrenica, was forcibly taken over by Bosnian Serbs, who thereafter erected checkpoints on the road to Srebrenica.<sup>207</sup>

98. As in the other municipalities in the Podrinje area, the SDS strove for the territorial division of Srebrenica municipality along ethnic lines.<sup>208</sup> At the last multi-party session of the Srebrenica municipal assembly, held on 14 April 1992, representatives of the SDA and SDS agreed in principle on territorial division along ethnic lines.<sup>209</sup> This agreement, however, was never implemented<sup>210</sup> and within a few days, the SDS moved to evict the Bosnian Muslims from Srebrenica.

99. On 17 April 1992, a five-member Bosnian Muslim delegation from Srebrenica, headed by the president of the municipality, Bešim Ibišević, met with Bosnian Serb leaders in the Serb-held town of Bratunac. There, at the Hotel Fontana, the Bosnian Muslim population of Srebrenica was given a 24-hour ultimatum to surrender all weapons and leave town.<sup>211</sup> In response, most of the remaining Bosnian Muslim inhabitants of Srebrenica, some of them lightly armed, decided to hide in the nearby woods and wait for tensions to ease.<sup>212</sup>

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<sup>200</sup> Staniša Stevanović, T. 1467; Izet Redžić, T. 9237.

<sup>201</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 37.

<sup>202</sup> Slavka Matić, T. 2187; Ibrahim Bećirović, T. 7405.

<sup>203</sup> Staniša Stevanović, T. 1467-1468; Nedeljko Radić, T. 3494; Ibrahim Bećirović, T. 7611; Izet Redžić, T. 9208; [uhra Sinanović, T. 11134.

<sup>204</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 36, 38, 48.

<sup>205</sup> Hakija Meholfjić, T. 6909; Ibrahim Bećirović, T. 7623-7624.

<sup>206</sup> Hakija Meholfjić, T. 6910.

<sup>207</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 40-41.

<sup>208</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 34.

<sup>209</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 45; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 9.

<sup>210</sup> Ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, p. 48.

<sup>211</sup> Hakija Meholfjić, T. 6731-6735; Sidik Ademović, T. 12957-12958; ex. P564, "Srebrenica 1987-1992" by Bešim Ibišević, pp. 53-54; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 10.

<sup>212</sup> Hakija Meholfjić, T. 6737-6739; Bećir Bogilović, T. 6195; Kada Hotić, T. 9663.

### 3. The Takeover of Srebrenica by Bosnian Serb Forces and its Recapture by Bosnian Muslims

100. On 18 April 1992, after shelling, Srebrenica fell to the Bosnian Serbs. Following the takeover, a Serb flag was paraded through town. Serbs forces, accompanied by paramilitaries, plundered goods, damaged houses, and killed many of the remaining Bosnian Muslims.<sup>213</sup>

101. Sporadic Bosnian Muslim resistance around Srebrenica, however, was inflicting losses to the Serb side. The Accused and a handful of lightly-armed fighters based in Potočari set up ambushes and killed a number of Serb paramilitaries.<sup>214</sup> On 8 May 1992, the leader of the Srebrenica SDS, Goran Zekić, was killed in an ambush.<sup>215</sup> At about the same time, the Serb forces retreated from Srebrenica and the Bosnian Muslim fighters that had been operating in the vicinity moved back into the devastated town, followed by Bosnian Muslim civilians.<sup>216</sup>

### 4. Srebrenica Under Siege

#### (a) The Military Situation in and Around Srebrenica

102. Although the Bosnian Muslims had successfully retaken the town of Srebrenica, they remained encircled by Serb forces and cut off from outlying areas where pockets of Bosnian Muslims held out against the Serb military campaign.<sup>217</sup> Throughout the wider Podrinje area, for most of 1992, there were many scattered small patches of Bosnian Muslim-held land, including the villages of Kamenica,<sup>218</sup> Cerska,<sup>219</sup> Konjević Polje,<sup>220</sup> Velika Glogova,<sup>221</sup> Potočari,<sup>222</sup> Sućeska<sup>223</sup> and Osmače<sup>224</sup>. As a consequence, movement between Srebrenica and these places was extremely difficult.<sup>225</sup>

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<sup>213</sup> James Gow, T. 1965; Hakija Mehuljić, T. 6741-6742; Ibrahim Bećirović, T. 7411; Bećir Bogilović, T. 6223, 6380; Kada Hotić, T. 9664-9665, 9668; Sabra Kolenović, T. 10056-10057, 10060-10061, 10063-10064, 10068-10071; Nesib Burić, T. 10585-10587; Edina Karić, T. 10987-10990; Suad Smajlović, T. 14473.

<sup>214</sup> Sidik Ademović, T. 13237-13238; Nesib Burić, T. 10590-10593; ex. P269, "Report" of 23 June 1992; ex. P441, "Video"; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, pp. 80-81; ex. D199, "War Hospital" by Sheri Fink, pp. 44-47.

<sup>215</sup> Milenko Stevanović, T. 1615-1616, 1684; Ibrahim Bećirović, T. 7414.

<sup>216</sup> Hakija Mehuljić, T. 6742-6744; Bećir Bogilović, T. 6381-6382; Ibrahim Bećirović, T. 7413-7414; Sabra Kolenović, T. 10058, 10071; Šuhra Ćilović, T. 15178; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, pp. 82-83.

<sup>217</sup> Bećir Bogilović, T. 6386-6387; Nedret Mujkanović, T. 5200.

<sup>218</sup> Nedret Mujkanović, T. 5207; Pyers Tucker, T. 6116.

<sup>219</sup> Nedret Mujkanović, T. 5206-5207; Ejub Dedić, T. 12149.

<sup>220</sup> Slaviša Erić, T. 1202; Nedret Mujkanović, T. 5206.

<sup>221</sup> Safet Golić, T. 11789.

<sup>222</sup> C007, T. 4592.

<sup>223</sup> Hakija Mehuljić, T. 6923.

<sup>224</sup> Nesib Burić, T. 10699-10700.

<sup>225</sup> Bećir Bogilović, T. 6386-6387; Omer Ramić, T. 9888.

103. Between April 1992 and March 1993, Srebrenica town and the villages in the area held by Bosnian Muslims were constantly subjected to Serb military assaults, including artillery attacks, sniper fire, as well as occasional bombing from aircrafts.<sup>226</sup> Each onslaught followed a similar pattern. Serb soldiers and paramilitaries surrounded a Bosnian Muslim village or hamlet, called upon the population to surrender their weapons, and then began with indiscriminate shelling and shooting. In most cases, they then entered the village or hamlet, expelled or killed the population, who offered no significant resistance, and destroyed their homes.<sup>227</sup> During this period, Srebrenica was subjected to indiscriminate shelling from all directions on a daily basis.<sup>228</sup> Potočari in particular was a daily target for Serb artillery and infantry because it was a sensitive point in the defence line around Srebrenica.<sup>229</sup> Other Bosnian Muslim settlements were routinely attacked as well.<sup>230</sup> All this resulted in a great number of refugees<sup>231</sup> and casualties.<sup>232</sup>

104. While the Bosnian Serbs enjoyed military superiority, they were outnumbered by the Bosnian Muslims<sup>233</sup> who adopted a type of guerrilla warfare, which in the second half of 1992 and up to early 1993 was quite successful.<sup>234</sup> Between June 1992 and March 1993, Bosnian Muslims raided a number of villages and hamlets inhabited by Bosnian Serbs, or from which Bosnian Muslims had formerly been expelled.<sup>235</sup> One of the purposes of these actions was to acquire food,<sup>236</sup> weapons, ammunition and military equipment.<sup>237</sup> According to the Bosnian Serbs, these actions resulted in considerable loss to Bosnian Serb life and property.<sup>238</sup>

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<sup>226</sup> Nedret Mujkanović, T. 5210-5211, 5287; Omer Ramić, T. 9935-9940; Ibro Alić, T. 12708; Suad Smajlović, T. 14476-14477; [uhra ĩilović, T. 15178; Rex Dudley, T. 14917, 14926; ex. D184, "Letter" by the Srebrenica War Presidency of 17 January 1993.

<sup>227</sup> Bećir Bogilović, T. 6367-6368; Sead Bekrić, T. 9506, 9532; Hamed Tiro, T. 10294-10299; Nesib Burić, T. 10597-10600; Safet Golić, T. 11768- 11771 (partly in private session); Azir Malagić, T. 11275; Ibro Alić, T. 12552-12556; Mustafa [aćirović, T. 13266-13268, 13273-13275; D005, T. 13814-13816 (private session), 13822-13825; Suad Smajlović, T. 14480; ex. D742, "List".

<sup>228</sup> Bećir Bogilović, T. 6383-6384; Kada Hotić, T. 9673-9675; Omer Ramić, T. 9935; ex. D545, "Report" of 25 November 1992.

<sup>229</sup> Bećir Bogilović, T. 6492; ex. D240, "Report" of 2 October 1992.

<sup>230</sup> See, e.g., Suad Smajlović, T. 14535.

<sup>231</sup> In this Judgement, the Trial Chamber employs the word 'refugee' as it was used by witnesses giving testimony, notwithstanding the definition of that term under international law.

<sup>232</sup> See, e.g., ex. D765, "Report" of 13 November 1992; Simon Mardel, T. 11689-11690; D005, T. 13895.

<sup>233</sup> Nesib Burić, T. 10816-10822.

<sup>234</sup> James Gow, T. 1767-1769, 1968; Rex Dudley, T. 14921-14922. See also IV., "Structure of Srebrenica Military and Civilian Authorities" and VIII., "Charges and Findings With Regard to Wanton Destruction of Cities, Towns or Villages not Justified by Military Necessity (Counts 3 and 5)".

<sup>235</sup> The incidents alleged in the Indictment in this respect will be considered in detail in subsequent chapters of this Judgement. The Trial Chamber will use the term 'action', rather than 'attack' or 'raid' in this chapter.

<sup>236</sup> Sead Bekrić, T. 9562-9563, 9565.

<sup>237</sup> Pyers Tucker, T. 5897, 6005; Omer Ramić, T. 9907; Nesib Burić, T. 10681-10683, 10911-10916; ex. D740, "List" of 6 October 1992.

<sup>238</sup> Pyers Tucker, T. 5794-5796; Slavoljub Žikić, T. 3336; Savka ĩokić, T. 1435-1436; Novka Bo`ić, T. 1298; Slavoljub Filipović, T. 2423-2424; Slavoljub Rankić, T. 2316-2320; Slaviša Erić, T. 3122; Nikola Popović, T. 2811-2813.

105. For the Bosnian Serbs, these Bosnian Muslim raids were of great concern, not least because they tied down a considerable amount of their armed forces, making them unavailable for combat activity elsewhere. During meetings with international observers, Bosnian Serb leaders vigorously expressed their anger over these actions.<sup>239</sup>

106. By January 1993, after securing Kravica and its surrounding area, the Bosnian Muslims had successfully enlarged the territory under their control by pushing back the Serb lines and unifying previously isolated patches of Muslim-held territory, thereby creating a contiguous Bosnian Muslim area around Srebrenica.<sup>240</sup>

107. However, the relative advantage achieved by the Bosnian Muslims did not last long. By no later than early February of 1993, Bosnian Serbs launched a major operation against Muslim-held territory.<sup>241</sup> By March 1993, the size of the Srebrenica enclave was reduced to less than 20 kilometres in diameter, reaching roughly from Potočari in the north to Zeleni Jadar in the south.<sup>242</sup> Observers described the Serb advance as departing from the features of a classical military offensive. Rather, it involved the steady and deliberate shelling of front-line villages, causing the population to panic and flee in the direction of Srebrenica.<sup>243</sup> Kamenica and Cerska in the northwest of the enclave were the first to be attacked,<sup>244</sup> and fell to the Serbs sometime in February or March 1993.<sup>245</sup> Voljeвица and Sase in the northeast and Osmaće in the southeast of the enclave followed soon after.<sup>246</sup>

## (b) The Humanitarian Situation in and Around Srebrenica

### (i) The Influx of Refugees

108. As a consequence of the aforementioned Serb attacks, several tens of thousands of Bosnian Muslim refugees flooded into Srebrenica.<sup>247</sup> Most of them had been driven from their homes by the attacking Serb forces. Some had fled to the woods, meandering from village to village before finally

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<sup>239</sup> Pyers Tucker, T. 6154-6155.

<sup>240</sup> Nedret Mujkanović, T. 5207, 5287; Nesib Burić, T. 10738; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, pp. 93-94.

<sup>241</sup> This operation subsequently became known as the 'winter offensive': Pyers Tucker, T. 5974-5975. *See also* ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, pp. 95 *et seq.*

<sup>242</sup> Sead Bekrić, T. 9527; Azir Malagić, T. 11438; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 106.

<sup>243</sup> Pyers Tucker, T. 5958-5960, 5997, 6136-6137; Rex Dudley, T. 14927, 14951; ex. P510, "Diary", 04193455.

<sup>244</sup> Ibrahim Bečirović, T. 7568; ex. D493, "Information" of 7 February 1993.

<sup>245</sup> Pyers Tucker, T. 5817; Izet Redžić, T. 9327; Ejub Dedić, T. 12284; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 96.

<sup>246</sup> Nesib Burić, T. 10745-10747; Ibro Alić, T. 12718; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, pp. 97-98.

<sup>247</sup> Nedret Mujkanović, T. 5004-5007, 5193-5194; Sead Bekrić, T. 9593; Kada Hotić, T. 9680; Simon Mardel, T. 11610-11611.



ending up in the Srebrenica enclave.<sup>248</sup> Refugees were not registered,<sup>249</sup> but it is estimated that already by December 1992, around 40,000 people were crammed inside the enclave.<sup>250</sup> In March 1993, the number of refugees rose to approximately 80,000.<sup>251</sup>

109. Being cut off from all supply routes and overly-congested with refugees had serious implications for all aspects of life in Srebrenica. As early as the summer of 1992, there was a humanitarian disaster in the making. The situation in which people lived was further exacerbated by the fact that the majority of houses in the enclave were not suitable for living.<sup>252</sup>

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<sup>248</sup> Bećir Bogilović, T. 6368-6370, 6383; Sead Bekrić, T. 9595-9597; [uhra Sinanović, T. 11144-11145.

<sup>249</sup> Piers Tucker, T. 6011; [uhra \ilović, T. 15197.

<sup>250</sup> Hakija Meholjić, T. 6918.

<sup>251</sup> Nedret Mujkanović, T. 5208-5209; Piers Tucker, T. 5956, 6008; Kada Hotić, T. 9765-9766; Rex Dudley, T. 14951; ex. D571, "Appeal" by the Srebrenica War Presidency of 11 March 1993; ex. D229 (under seal), para. 9.

<sup>252</sup> Eric Dachy, T. 9410-9411, 9449-9451; Simon Mardel, T. 11640; Diego Arria, T. 14424; ex. D711 (under seal), p. 3.

(ii) The Shortage of Food and Shelter

110. Bosnian Serb forces controlling the access roads were not allowing international humanitarian aid – most importantly, food and medicine – to reach Srebrenica.<sup>253</sup> As a consequence, there was a constant and serious shortage of food causing starvation to peak in the winter of 1992/1993.<sup>254</sup> Numerous people died or were in an extremely emaciated state due to malnutrition.<sup>255</sup> Bosnian Muslim fighters and their families, however, were provided with food rations from existing storage facilities.<sup>256</sup> The most disadvantaged group among the Bosnian Muslims were the refugees, who usually lived on the streets and without shelter, in freezing temperatures.<sup>257</sup> Only in November and December 1992, did two UN convoys with humanitarian aid reach the enclave,<sup>258</sup> and this despite Bosnian Serb obstruction.<sup>259</sup>

111. Toward the end of February 1993, US planes began airdropping food and supplies over the Srebrenica enclave. ‘Operation Provide Promise’ gave some relief to the starving population. Incidents were reported, however, of Bosnian Muslims being injured or killed awaiting a pallet to land or while entering mined territory to retrieve the food and supplies. Fighting among Bosnian Muslims also occurred over the contents of airdrops.<sup>260</sup>

112. Threatened by starvation, almost everyone from Srebrenica participated in searches for food in nearby villages and hamlets under Bosnian Serb control.<sup>261</sup> These searches were very dangerous; many stepped on mines or were wounded or killed by Serbs.<sup>262</sup> Because of the bags in which the searchers carried the food, they were known as ‘*torbari*’.<sup>263</sup> These *torbari* also entered Serb villages, alongside Bosnian Muslim fighters during actions, in order to search for food and other items. Most of the time, the *torbari* greatly outnumbered the fighters themselves.<sup>264</sup>

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<sup>253</sup> Pyers Tucker, T. 5793-5794; ex. D242, “Report” of 21 September 1992.

<sup>254</sup> James Gow, T. 1971-1972; Nedret Mujkanović, T. 5239; Nesib Burić, T. 10760; Sabra Kolenović, T. 10079-10084.

<sup>255</sup> People largely lived on ‘surrogate bread’ made from cornstalks: Nedret Mujkanović, T. 5304-5306; Pyers Tucker, T. 5953; Kada Hotić, T. 9711; Simon Mardel, T. 11645; Rex Dudley, T. 14877.

<sup>256</sup> Nedret Mujkanović, T. 5154-5158, 5479-5480, 5497, explaining that the Accused’s family house in Potočari was one of the locations where food was stored.

<sup>257</sup> Milenija Mitrović, T. 1045; Pyers Tucker, T. 5972; Rex Dudley, T. 14872.

<sup>258</sup> Nedret Mujkanović, T. 5154-5155, 5497; Eric Dachy, T. 9398; Nesib Burić, T. 10697-10698.

<sup>259</sup> Pyers Tucker, T. 5793.

<sup>260</sup> Pyers Tucker, T. 5916-5917; Rex Dudley, T. 14875-14876; ex. D199, “War Hospital” by Sheri Fink, pp. 131-132.

<sup>261</sup> Sabra Kolenović, T. 10089, 10091, 10094.

<sup>262</sup> Sead Bekrić, T. 9538-9539; Hamed Tiro, T. 10353-10354; Omer Ramić, T. 9890; Kada Hotić, T. 9690-9691.

<sup>263</sup> The term ‘*torbari*’ originates from *torba* = bag. *See also* Nedret Mujkanović, T. 5268-5269; Sead Bekrić, T. 9563, 9594-9595; Sabra Kolenović, T. 10089-10090.

<sup>264</sup> *See* VIII., “Charges and Findings With Regard to Wanton Destruction of Cities, Towns or Villages not Justified by Military Necessity (Counts 3 and 5)”.

(iii) Medical, Hygienic and Other Living Conditions

113. Hygienic conditions throughout the Srebrenica enclave were appalling. There was a total absence of running water. Most people were left to drink water from a small river which was polluted.<sup>265</sup> Infestation with lice and fleas became widespread among the population.<sup>266</sup>

114. The Srebrenica war hospital functioned under these most adverse of circumstances.<sup>267</sup> It lacked almost all the essentials.<sup>268</sup> Nonetheless, between April 1992 and April 1993, more than 3,600 individuals – fighters and civilians alike – received some kind of medical treatment there.<sup>269</sup> Patients suffered in dreadful conditions, as no disinfectants, bandages, aspirins or antibiotics were available with which to treat them.<sup>270</sup> Limbs were amputated without anaesthesia, with brandy being administered to ease the pain.<sup>271</sup>

115. As there was no electricity available, people used makeshift power sources and candles.<sup>272</sup> A small water-wheel generator behind the Srebrenica post office (“PTT building”)<sup>273</sup> provided about two or three kilowatts per hour,<sup>274</sup> which was mainly used to provide light to the hospital and to sterilise equipment.<sup>275</sup> People used whatever they could find, such as ordinary sheets cut into pieces, to clothe themselves.<sup>276</sup>

(c) The Re-establishment of Authorities in Srebrenica

116. As almost all educated people had left Srebrenica in the early days of the conflict, government bodies ceased to function and public life came to a standstill.<sup>277</sup> As a consequence, the need arose to re-establish authorities and adapt their activities to the wartime situation in the

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<sup>265</sup> Water was contaminated with offal, human excrement, urine, washing water and oil: Pyers Tucker, T. 6081; Tony Birtley, T. 15111; [uhra \ilović, T. 15197.

<sup>266</sup> Pyers Tucker, T. 6149; Eric Dachy, T. 9441-9442; Kada Hotić, T. 9766; Sabra Kolenović, T. 10122-10123.

<sup>267</sup> Generally on the Srebrenica war hospital *see ex. D199*, “War Hospital” by Sheri Fink and the testimony given by Nedret Mujkanović, T. 4980-5499.

<sup>268</sup> Nedret Mujkanović, T. 5378; Rex Dudley, T. 14892.

<sup>269</sup> Nedret Mujkanović, T. 4998.

<sup>270</sup> Eric Dachy, T. 9400-9402.

<sup>271</sup> Kada Hotić, T. 9729. *See also ex. D699*, “Video”.

<sup>272</sup> Nedret Mujkanović, T. 5316-5317; Rex Dudley, T. 14872.

<sup>273</sup> This location was visited by the Trial Chamber and the Parties during a site visit in June 2005.

<sup>274</sup> Pyers Tucker, T. 5848; Nedret Mujkanović, T. 5316.

<sup>275</sup> Ibrahim Bećirović, T. 7440-7441. This witness also gave evidence of the existence of batteries and the use of a generator.

<sup>276</sup> Sabra Kolenović, T. 10121.

<sup>277</sup> Sabra Kolenović, T. 10055-10056; [uhra \ilović, T. 15180-15181; Rex Dudley, T. 14899.

besieged town.<sup>278</sup> However, as the evidence demonstrates,<sup>279</sup> this process unfolded in a haphazard fashion due to the prevailing circumstances.

(d) The Arrival of UNPROFOR in the Area

117. Initially created in Croatia to ensure demilitarisation of designated areas, the mandate of the United Nations Protection Force (“UNPROFOR”) was extended in the second half of 1992 to include BiH. UNPROFOR’s mission was to facilitate cease-fires between the warring factions in order to support the delivery of humanitarian relief.<sup>280</sup>

118. Prior to March 1993, there had been an absence of international peacekeeping troops in the Srebrenica area.<sup>281</sup> On 11 March 1993, when the Serb winter offensive was underway, a delegation headed by the UNPROFOR Commander for BiH, French General Philippe Morillon, arrived in Srebrenica to bring the fighting to a halt and to evacuate the wounded.<sup>282</sup> Spending an unforeseen 17 days in Srebrenica because his departure was initially prevented by Bosnian Muslim refugees,<sup>283</sup> General Morillon eventually secured the arrival of a convoy with humanitarian relief and the evacuation of the most desperate, mainly women and children.<sup>284</sup>

5. Srebrenica as a ‘Safe Area’

119. Alarmed by the “rapid deterioration of the situation in Srebrenica and its surrounding areas”, on 16 April 1993, the UN Security Council proclaimed Srebrenica a ‘Safe Area’.<sup>285</sup> Shortly thereafter, a Canadian UNPROFOR battalion was deployed in the enclave,<sup>286</sup> which was declared a ‘demilitarised zone’.<sup>287</sup> Later, a Dutch battalion replaced the Canadian troops.<sup>288</sup> The weapons of Bosnian Muslims were, at least to some extent, turned in or confiscated.<sup>289</sup> Larger military operations by both Bosnian Muslims and Serbs were effectively brought to a halt. However,

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<sup>278</sup> Bećir Bogilović, T. 6204, 6224-6225.

<sup>279</sup> See IV., “Structure of Srebrenica Military and Civilian Authorities”.

<sup>280</sup> Pyers Tucker, T. 5778-5780.

<sup>281</sup> Pyers Tucker, T. 5796.

<sup>282</sup> Pyers Tucker, T. 5837.

<sup>283</sup> Pyers Tucker, T. 5861-5866, 5870; ex. P432, “Video”, 26:50.

<sup>284</sup> Pyers Tucker, T. 5912-5915, 6004, 6072-6073; Nedret Mujkanović, T. 5248-5249.

<sup>285</sup> UN S/RES/819 of 16 April 1993; UN S/RES/824 of 6 May 1993; see also ex. D460, “Presidential Statement” of 3 April 1993.

<sup>286</sup> Nedret Mujkanović, T. 5181; Pyers Tucker, T. 5983; Azir Malagić, T. 11435.

<sup>287</sup> On 18 April 1993, UNPROFOR and both parties to the conflict agreed on demilitarisation: ex. P296, “Letter” signed by Hakija Mehlojić of 3 July 1995.

<sup>288</sup> Ex. D199, “War Hospital” by Sheri Fink, p. 146.

<sup>289</sup> Ejub Dedić, T. 12294; ex. P216, “Order” of 16 April 1993, p. 1, in which the ABiH 2<sup>nd</sup> Corps Commander in Tuzla orders the Bosnian Muslim fighters of Srebrenica not to surrender their weapons.

incidents of Serb military action continued to occur, causing casualties among the Srebrenica population.<sup>290</sup>

120. In the spring of 1995, the Accused was summoned to Tuzla<sup>291</sup> and did not return to the Srebrenica area during the period covered by the Indictment. The subsequent fate of Srebrenica has been a subject-matter of other judgements of this Tribunal.

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<sup>290</sup> See also Kada Hotić, T. 9783-9785; Sabra Kolenović, T. 10125; [uhra \ilović, T. 15283-15284.

<sup>291</sup> Suad Smajlović, T. 14699; Sidik Ademović, T. 13121; ex. D859, "Interview" of Sead Delić, published 17 March 2000.

## IV. STRUCTURE OF SREBRENICA MILITARY AND CIVILIAN AUTHORITIES

### A. Establishment of the Armed Forces of Bosnia and Herzegovina

#### 1. National Level

121. In the spring of 1992, following the outbreak of hostilities, BiH found itself largely unprepared for war and in need of building a defence capability from the ground up.<sup>292</sup> While rudimentary command and control structures already existed in April 1992, they developed throughout the conflict and, over time, provided the Bosnian Muslim armed forces with a certain operational degree of organisation and communication. However, these armed forces never fully achieved the coherence necessary to operate at the strategic level until the end of the hostilities in 1995.<sup>293</sup>

122. A first step toward building a defence capability was the creation of the Army of BiH (“ABiH”) in April 1992. On 6 April 1992, the TO, one of the components of the armed forces of the former Yugoslavia, was renamed the Territorial Defence of BiH (“TO of BiH”).<sup>294</sup> On 8 April 1992,<sup>295</sup> the BiH government in Sarajevo mobilised the units of the TO under its control and began to build up the capability of its armed forces, which would later become the ABiH. The newly-formed TO of BiH was given immediate authority over municipal TO staffs and issued a deadline for all other formations, including the Green Berets and the Patriotic League,<sup>296</sup> to subordinate themselves to its authority before 15 April 1992. This date is commonly regarded as the inception date of the ABiH.<sup>297</sup>

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<sup>292</sup> See para. 87 *supra*. See also James Gow, T. 1793, 2004-2005, stating that the Patriotic League was established to prepare for defence and recruited its members both inside and outside BiH. In 1991, the political leadership of the SDA had already begun laying the foundations of the Patriotic League. From April 1992 onward, the Patriotic League was integrated into the ABiH and served as a necessary unifying element. See also Sead Delić, T. 8682.

<sup>293</sup> James Gow, T. 1984-1987; Sead Delić, T. 8683.

<sup>294</sup> Ex. P286, “Decree Law on the Taking-over of the Law of Service in the Armed Forces”, published in the Official Gazette on 11 April 1992, p. 2. In the SFRY, the TO existed on a territorial basis and was part of the armed forces, along the JNA, see Mušir Brkić, T. 8240-8242. See also para. 83 *supra*.

<sup>295</sup> On 8 April 1992, the Presidency of BiH proclaimed an immediate threat of war, ex. P286, “Decision on Declaration of Imminent Threat of War” of 8 April 1992, p. 1; ex. P562, “Agreed Facts”, E.8.

<sup>296</sup> Although the Patriotic League was also known as the Green Berets, in the field, ‘Green Berets’ was a generic term used by Serbs to refer to Bosnian Muslim fighters: James Gow, T. 2006; see also Nedret Mujkanović, T. 5201-5202; Kada Hotić, T. 9658-9660; Rex Dudley, T. 15050.

<sup>297</sup> James Gow, T. 2007; Sead Delić, T. 8683-8684; see also Article 36 of ex. P543, “Decree Law on the Armed Forces of BiH” of 20 May 1992 which provides that “15 April 1992 shall be established as the date of the Army’s formation, the day when all armed formations in the Republic were united in the Territorial Defence of the Republic.”

123. The next step towards establishing a defence capability was the formation of administrative districts in May 1992.<sup>298</sup> On 20 May 1992, Alija Izetbegović, the President of the BiH Presidency (“BiH President”) issued a “Decree Law on the Armed Forces of the Republic of Bosnia-Herzegovina” (“Decree Law on the BiH Armed Forces”) organising the armed forces of BiH, including the ABiH, the police and other armed units, as “the joint armed forces of all citizens and nations of BiH”.<sup>299</sup> It was envisaged that until the ABiH was fully established, the TO of BiH would perform the ABiH’s wartime functions.<sup>300</sup>

124. On 27 May 1992, the BiH President ordered the creation of 39 municipal TO units throughout BiH. The establishment of 14 additional municipal TO units was ordered on 4 June 1992.<sup>301</sup> Some municipalities, however, including Srebrenica, remained without a *de jure* TO.<sup>302</sup> A number of these municipal TO units were established by municipal representatives in exile, who had fled Serb attacks on their areas. For instance, municipal TO units were established in Tuzla on behalf of the municipalities of Zvornik and Srebrenica.<sup>303</sup>

125. The initial stage of creating a defence capability was concluded on 20 June 1992, when the BiH President declared a state of war, ordering the general mobilisation of the BiH armed forces and claiming BiH’s right to self-defence under Article 51 of the UN Charter.<sup>304</sup> However, by this date, the ABiH did not yet have a clear organisational framework and the existing TO structures were instead used to implement the general mobilisation order.<sup>305</sup>

126. On 4 July 1992, the Presidency of BiH adopted a “Decision on the Organisation of the Armed Forces of the Republic of Bosnia and Herzegovina”, in which it established the founding structures of the ABiH. It was composed of various levels of staff (a main staff of the armed forces,

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<sup>298</sup> James Gow, T. 1986, stating that, in August 1992, these administrative districts were replaced by military districts; *see also* para. 127 *infra*.

<sup>299</sup> Ex. P543, “Decree Law on the Armed Forces of BiH” of 20 May 1992, p. 1; ex. P562, “Agreed Facts”, E.9.

<sup>300</sup> Although the TO of BiH was not to be considered as a regular armed force, Articles 1, 2 and 41 of the Decree Law on the BiH Armed Forces provided for the interim placement of all armed units in BiH under a single command: Ex. P543, “Decree Law on the Armed Forces of BiH” of 20 May 1992; Mušir Brkić, T. 8245-8246, 8252-8253.

<sup>301</sup> Ex. D296, “Decision on formation of TO units” of 27 May 1992; ex. D297, “Decision on formation of TO units” of 4 June 1992.

<sup>302</sup> *Ibid.*

<sup>303</sup> Sead Delić, T. 8776-8777; ex. P233, “Order by Srebrenica Municipal Assembly TO Staff in Tuzla” of 2 July 1992. With regard to the Srebrenica municipal TO staff in Tuzla, *see* Mirsad Mustafić, T. 14185-14130; *see also* IV.B.2.c.ii., “Parallel Existence of a Srebrenica Municipal TO in Tuzla”.

<sup>304</sup> Ex. P278, “Decision to declare a state of war in the Republic of BiH” of 20 June 1992; ex. P562, “Agreed Facts”, E.10.

<sup>305</sup> James Gow, T. 1795-1796.

district defence staffs and municipal defence staffs) and command (corps, divisions, brigades, regiments, battalions, detachments and companies).<sup>306</sup>

127. Further steps towards establishing a defence capability were taken in August 1992, when military districts were established<sup>307</sup> and a presidential Decree-Law on Service in the ABiH, intended to regulate the status of active duty members of the armed forces, was promulgated.<sup>308</sup>

## 2. Regional Level

128. The regional level of command in the BiH armed forces functioned through the military districts: initially through the district defence staffs and from late September 1992 onward, through the corps.<sup>309</sup> While formally, the municipal defence staffs ceased to function at the end of 1992,<sup>310</sup> a number of them continued to exist,<sup>311</sup> and municipalities maintained their independence over these district defence staffs and corps.<sup>312</sup> On 18 August 1992, the BiH President ordered that five corps of the ABiH be formed.<sup>313</sup> A supplementary order signed on 5 September 1992 by the Chief of Staff of the ABiH Supreme Command, Sefer Halilović, provided for the formation and re-formation of a number of military units in the area of responsibility of the ABiH district defence staff in Tuzla (“Tuzla District Staff”), including the Srebrenica municipality.<sup>314</sup> However, in light of the evidence adduced on the situation in the Srebrenica area, it remains uncertain whether this order was ever implemented by the relevant authorities in Srebrenica in a timely fashion, or that it was even received. The Prosecution has not proven this fact to the Trial Chamber’s satisfaction. The Second Corps of the ABiH (“2<sup>nd</sup> Corps”), headquartered in Tuzla, was established on 29 September 1992 and comprised the territory of the Srebrenica municipality within its zone of responsibility.<sup>315</sup>

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<sup>306</sup> Ex. P114, “Decision on Organisation of the Armed Forces of BiH” of 4 July 1992.

<sup>307</sup> James Gow, T. 1986.

<sup>308</sup> Ex. P544, “Decree-Law on Service in the ABiH” of 1 August 1992, published in the BiH Official Gazette No. 11/92 of 1 August 1992.

<sup>309</sup> Nedret Mujkanović, T. 5070; Sead Delić, T. 8689-8690.

<sup>310</sup> Sead Delić, T. 8690.

<sup>311</sup> Sead Delić, T. 8690, further stating that the municipalities of Srebrenik and Lukavac retained their municipal staffs for over a year after they were abolished. *See* IV.B.2.a., “From the Srebrenica TO Staff to the Srebrenica Armed Forces Staff”, for the vast amount of evidence on the establishment and functioning of the Srebrenica TO Staff outside the framework of regional level of command.

<sup>312</sup> Sead Delić, T. 8690-8695. With regard to the bodies created at the district level, *see* para. 127 *supra*.

<sup>313</sup> Ex. P279, “Decision on the formation of Corps of the ABiH” of 18 August 1992; ex. P562, “Agreed Facts”, E.11.

<sup>314</sup> Ex. P129, “Supplemental Order on Forming of ABiH Staffs and Units” of 5 September 1992, ordering, with regard to Srebrenica, the 12 hour mobilisation of the municipal defence staff and headquarters support units, and also providing for the establishment of a 1<sup>st</sup> and 2<sup>nd</sup> detachment, an infantry company and an independent platoon.

<sup>315</sup> Ex. P279, “Decision on the formation of Corps of the ABiH” of 18 August 1992; *see also* ex. P368, “Map of the ABiH Corps”; ex. P369, “Map of the 2<sup>nd</sup> Corps Area of Responsibility”; Sead Delić, T. 8689. In Tuzla, the order of 18 August 1992 was received via radio-link and came into effect immediately thereafter: Enver Hogić, T. 8147-8148; *but see* ex. P143, “Order on reorganisation of military police” of 14 October 1992, signed by @eljko Knez as commander of the Tuzla District Staff.



129. The second half of 1992 was marked by the co-existence of independent municipal defence staffs and an attempt by the central authorities to impose new organisational structures intended to enhance the functioning of the ABiH.<sup>316</sup>

130. Between 29 September 1992 and March 1993, the first Commander of the 2<sup>nd</sup> Corps was General @eljko Knez, who until then had been Commander of the Tuzla District Staff. He was then replaced by his former deputy, General Hazim Šadić, who remained in this position until October 1994. Thereafter, and until the end of the conflict, the 2<sup>nd</sup> Corps Commander was Brigadier Sead Delić.<sup>317</sup>

## **B. The Bosnian Muslim Forces in the Srebrenica Area**

### 1. Characteristics

131. The Defence submits that the ‘island of resistance’<sup>318</sup> of Bosnian Muslims in Srebrenica against Serb attacks was in fact a *levée en masse* composed of local groups of fighters acting independent of one another and lacking the essential features of an army, including an organised structure with a proper command, uniforms, weapons and headquarters.<sup>319</sup> More specifically, the Defence contends that because the actions of Bosnian Muslim fighters in Srebrenica amounted to a *levée en masse*, they were, by definition, not organised under a responsible commander.<sup>320</sup>

132. The Prosecution submits that the term *levée en masse* does not apply to the facts of the case beyond 20 May 1992 and that after this date, Bosnian Muslim forces in Srebrenica were under the command of the Accused.<sup>321</sup>

133. The definition of a *levée en masse* is well settled in international law. Article 2 of the 1907 Hague Regulations provides that

Ftǵhe inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, without having had time to organise

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<sup>316</sup> Sead Delić, T. 8696-8697; ex. D272, “Order of BiH Supreme Command Regarding Municipal Defence Staffs” of 25 September 1992.

<sup>317</sup> Sead Delić, T. 8603-8604, 8661; Enver Hogić, T. 8042-8043.

<sup>318</sup> Defence Final Brief, para. 4.

<sup>319</sup> Defence Final Brief, paras 66-76; Defence Closing Argument, T. 16416-16422.

<sup>320</sup> Defence Final Brief, para. 79.

<sup>321</sup> Prosecution Final Brief, paras 242, 247-249. *See also* Prosecution Closing Argument, T. 16119, 16122-16125, conceding that there was a *levée en masse* in Srebrenica between 17 April and 20 May 1992, when the Bosnian Muslims fighters in the woods around Srebrenica started organising themselves.

themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.<sup>322</sup>

#### Article 1 of the 1907 Hague Regulations requires such belligerents

1. to be commanded by a person responsible for his subordinates;
2. to have a fixed distinctive emblem recognisable at a distance;
3. to carry arms openly; and
4. to conduct their operations in accordance with the laws and customs of war.

134. In its Final Brief, the Prosecution alleges that members of the Srebrenica Armed Forces were sufficiently identifiable as combatants in that they adapted to the lack of a common military uniform “by using coloured ribbons and homemade uniforms, by appropriating the clothes of fallen enemy soldiers, and by conspicuously bearing arms.”<sup>323</sup> Conversely, the Defence submits that there were no emblems to distinguish civilians from fighters as the fighters wore neither uniform nor insignia, and carried very few weapons, which civilians also bore at times. The Defence further challenges the notion that coloured ribbons were uniformly and regularly used for the purpose of identification.<sup>324</sup>

135. From its inception, the ABiH sought to provide its members with means of identification such as uniforms, badges and insignia.<sup>325</sup> In the Srebrenica area, however, with the exception of the members of the 16<sup>th</sup> East Bosnian Muslim Brigade (“16<sup>th</sup> Muslim Brigade”) led by Nurif Rizvanović, very few individuals possessed a complete uniform in 1992 and 1993.<sup>326</sup> Before and after the arrival of this brigade in the area in early August 1992, most Bosnian Muslim fighters wore makeshift or parts of JNA uniforms.<sup>327</sup> To make up for the lack of adequate clothing, civilians also sometimes wore parts of uniforms.<sup>328</sup> There is evidence indicating that during some attacks, fighters wore coloured ribbons around their heads or arms for identification purposes amongst

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<sup>322</sup> 1907 Hague Regulations, Article 2; *see also* 1949 Geneva Convention III, Article 4(6). The Trial Chamber notes that the concept of *levée en masse* was created to provide protection for, and impose duties on, a certain category of ‘belligerents’, not falling under the purview of Article 1 of the 1907 Hague Regulations. The Defence, however, uses the term of *levée en masse* as a means to exclude any possible superior responsibility.

<sup>323</sup> Prosecution Final Brief, para. 327.

<sup>324</sup> Defence Final Brief, paras 66-76.

<sup>325</sup> Mušir Brkić, T. 8338, 8345.

<sup>326</sup> With regard to the uniforms worn by members of the 16<sup>th</sup> Muslim Brigade, *see* para. 156, fn. 386 *infra*. With regard to other individuals in the Srebrenica area wearing a uniform, namely the Accused, Zulfo Tursunović and Ahmo Tihic, *see* paras 162-163, fn. 424 *infra*. With regard to the lack of uniforms of others, *see* Nedret Mujkanović, T. 5001.

<sup>327</sup> Nedret Mujkanović, T. 5218; Sabra Kolenović, T. 10217-10218; ex. P328, “Interview” of the Accused, tape 6, p. 10; ex. P329, “Interview” of the Accused, tape 6, p. 15.

<sup>328</sup> Pyers Tucker, T. 5864, 5976; Milos Okanović, T. 7968-7969; Nedret Mujkanović, T. 5214.

themselves.<sup>329</sup> Apart from these disparate uniforms and ribbons, fighters did not wear fixed distinctive emblems recognisable at a distance.

136. The Trial Chamber comes to the conclusion that while the situation in Srebrenica may be characterised as a *levée en masse* at the time of the Serb takeover and immediately thereafter in April and early May 1992, the concept by definition excludes its application to long-term situations.<sup>330</sup> Given the circumstances in the present case, the Trial Chamber does not find the term *levée en masse* to be an appropriate characterisation of the organisational level of the Bosnian Muslim forces at the time and place relevant to the Indictment.

137. The evidence relating to the meeting held at Bajramovići on 20 May 1992, which will be examined later in this Judgement, indicates that while the population of the Srebrenica area had not until then had time to organise itself, the first concrete step to ensure some sort of co-ordinated defence was made during this meeting. This resulted in the appointment of an overall military commander, commander, a deputy-commander and a temporary commander of the civilian police.<sup>331</sup>

138. Notwithstanding the Trial Chamber's conclusion that after the Bajramovići meeting, a *levée en masse* no longer existed, the prevailing conditions then were still removed from what one would expect a fighting force to typically operate under. For instance, most fighters resided with their families or in makeshift accommodation.<sup>332</sup> Further, participation in all fighting groups within the Srebrenica area was voluntary, in the sense that no formal mobilisation order was ever implemented,<sup>333</sup> but once an individual chose to fight with a particular group, he normally aligned himself with that group's course of action.<sup>334</sup>

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<sup>329</sup> Nedret Mujkanović, T. 5153-5154; Hakija Meholfjić, T. 6854-6855, 6860, 7096; Ibro Alić, T. 12861; ex. P329, "Interview" of the Accused, tape 2, p. 7, tape 6, pp. 14-15; ex. P483 (under seal).

<sup>330</sup> Diego Arria, T. 14330; Pyers Tucker, T. 6076-6077, acknowledging the existence of a *levée en masse* in Srebrenica during the period relevant to the Indictment. However, the Trial Chamber reached its decision on the issue of the existence of a *levée en masse* in accordance with the aforementioned definition of the term under international law.

<sup>331</sup> See paras 141-143 *infra*.

<sup>332</sup> With regard to fighters residing with their families, see Hakija Meholfjić, T. 6960-6962; Nedret Mujkanović, T. 5450; ex. P329, "Interview" of the Accused, tape 21, p. 12. With regard to fighters living in makeshift accommodation, see para. 163 *infra*. An exception was the 16<sup>th</sup> Muslim Brigade led by Nurif Rizvanović, part of which was billeted in and around the school in Konjević Polje, see para. 156 *infra*. See Hakija Meholfjić, T. 6967; Nedret Mujkanović, T. 5221, pertaining to Hakija Meholfjić's group of fighters which was headquartered at the Domavija Hotel, in the centre of Srebrenica town.

<sup>333</sup> Hakija Meholfjić, T. 6968, 7079-7080; Kada Hotić, T. 9801; Omer Ramić, T. 9892-9894; Hamed Tiro, T. 10551; Nesib Burić, T. 10622, 10842, 10865; Ejub Dedić, T. 12222-12223, 12372, 12437, 12470; Sidik Ademović, T. 13092, 13159; D005, T. 13996-13997; see also fn. 1997.

<sup>334</sup> Hakija Meholfjić, T. 7079-7080; see also Pyers Tuckers, T. 6075-6077, 6166, giving evidence that he heard of instances in which people were forced to participate in fighting.

## 2. Evolution of Bosnian Muslim Forces in the Srebrenica Area

### (a) From the Srebrenica TO Staff to the Srebrenica Armed Forces Staff

139. At the outset of the conflict, at a time when the sole organisational structure for combat on the Bosnian Muslim side was the TO, the municipalities were left to organise their own defence.<sup>335</sup>

The process leading to the establishment of the Srebrenica armed forces, when the first fighting groups were formed on a territorial basis under the auspices of the Srebrenica TO Staff,<sup>336</sup> lasted from 20 May 1992 to mid-October 1992.<sup>337</sup>

140. By 18 April 1992, the day Srebrenica fell to the Serbs, nearly all representatives of the municipal authorities had left Srebrenica town. In the weeks that followed, most Bosnian Muslims who remained behind hid in the surrounding woods.<sup>338</sup> After the re-capture of the town subsequent to 8 May 1992,<sup>339</sup> there was a pressing need to co-ordinate the local Bosnian Muslim groups under a single military command in order to organise an effective defence.<sup>340</sup>

141. On 20 May 1992, an informal group of men who had set up individual fighting groups in the area after 18 April 1992, gathered in the nearby hamlet of Bajramovići and decided to co-ordinate their activities by setting up the Srebrenica TO Staff (“Bajramovići Decision”).<sup>341</sup> Several local group leaders, including Akif Ustić, Ahmo Tihić, Zulfo Tursunović and the Accused, were present at the meeting.<sup>342</sup> Others, including Hakija Meholjić and Sidik Ademović, did not attend, either because they believed the meeting to be illegitimate or because they had neither been informed nor invited.<sup>343</sup> Further, some Muslim-held villages in the area of Srebrenica and Bratunac which had

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<sup>335</sup> Ex. P286, “Decree Law on the Taking Over of the Law of Service in the Armed Forces” of 14 May 1992; ex. D282 “Decree Law on the establishment and work of districts” of 13 August 1992.

<sup>336</sup> These units include: TO Potočari, TO Sućeska, TO Osmaće, TO Biljeg, TO Kragljivoda, TO Skenderovići, TO Srebrenica and TO Luka, *see* IV.B.2.c.i., “Heterogeneity of the Bosnian Muslim Fighting Groups in Eastern Bosnia”. For ease of reference, the Trial Chamber will use the term of TO hereinafter when referring to local fighting units but will not draw any legal inference from this term.

<sup>337</sup> *But see* ex. D486, “Report Regarding the Establishment of Staffs and Units of Srebrenica Municipality TO” of 15 April 1992; [uhra \ilović, T. 15174.

<sup>338</sup> *See* paras 99, 100 *supra*.

<sup>339</sup> *See* para. 100 *supra*.

<sup>340</sup> Ex. P73, “Bajramovići Decision” of 20 May 1992; ex. P431, “Video”, 04:26-08-48; Suad Smajlović, T. 14622.

<sup>341</sup> Ex. P431, “Video”, 04:26-08:48, in which the Accused gives a speech on the occasion of the second anniversary of the Bajramovići Decision: “Commanding Officers of self-organised units met on today’s date two years ago in Bajramovići and established the joint command of the entire...Srebrenica staff”; Sidik Ademović, T. 13236-13237; Bećir Bogilović, T. 6201, 6205, 6208; Hakija Meholjić, T. 6930; ex. P328, “Interview” of the Accused, tape 3, p. 11; *see also* Suad Smajlović, T. 14622, stating that a meeting was held in Bajramovići on 20 May 1992 “to elect a body which would try to coordinate the different leaders” but who contested the denomination of “Srebrenica TO Staff” with regard to this body.

<sup>342</sup> Ex. P431, “Video Footage”, 04:26-08:48; Bećir Bogilović, T. 6201, 6203-6210; Suad Smajlović, T. 14621-14622; ex. P329, “Interview” of the Accused, tape 19, p. 14.

<sup>343</sup> Suad Smajlović, T. 14622; Hakija Meholjić, T. 6926-6928, Omer Ramić, T. 9956-9964; Azir Malagić, T. 11291-11292.

their own groups of fighters were not represented at Bajramovići and were organising their own defence at the time.<sup>344</sup>

142. The Trial Chamber finds that while the legitimacy, and even the existence, of the Bajramovići Decision has been contested by some,<sup>345</sup> it is undoubtedly the basis upon which local leaders in the Srebrenica area organised themselves after the start of hostilities.<sup>346</sup> The Bajramovići Decision marks the establishment of the Srebrenica TO Staff, although this provided only a rudimentary form of defence structure.

143. At Bajramovići, it was decided that the Srebrenica TO Staff would include the Accused from Potočari as overall commander,<sup>347</sup> Akif Ustić from Srebrenica<sup>348</sup> as deputy-commander, Bećir Bogilović from Srebrenica as temporary commander of the civilian police,<sup>349</sup> as well as Zulfo Tursunović from Sućeska, Hamdija Fejzić from Bajramovići, Ahmo Tihčić from Tihčići<sup>350</sup> and Ševket \ozić from Bojna as members.<sup>351</sup> On 26 May 1992, Atif Krdžić from Srebrenica, Nedžad Bektić from Karačići and Senahid Tabaković from Skenderovići<sup>352</sup> also joined the Srebrenica TO Staff as members.<sup>353</sup>

144. On 27 June 1992, Sefer Halilović, Chief of the Supreme Command Staff of the ABiH, officially confirmed the appointment of the Accused as commander of the Srebrenica TO Staff.<sup>354</sup> On 8 August 1992, the position of the Accused as commander of the Srebrenica TO Staff was re-confirmed by the BiH President, Alija Izetbegović.<sup>355</sup>

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<sup>344</sup> See paras 166-169 *infra*.

<sup>345</sup> Bećir Bogilović, T. 6389; Hakija Mehuljić, T. 6930; Azir Malagić, T. 11291; *see also* Sidik Ademović, T. 13090, who challenged that the Bajramovići meeting was even held.

<sup>346</sup> Bećir Bogilović, T. 6201-6204; Hakija Mehuljić, T. 6758.

<sup>347</sup> *Ibid.* *See also* Suad Smajlović, T. 14622-14623, 14836.

<sup>348</sup> Hakija Mehuljić, T. 6763; Sead Bekrić, T. 9536; *but see*, ex. P328, "Interview" of the Accused, tape 4, p. 12, stating that Zulfo Tursunović and Akif Ustić were both his deputies as they were equal men.

<sup>349</sup> Bećir Bogilović, T. 6205, 6217; ex. P74, "Letter of appointment of Bećir Bogilović as temporary police commander in Srebrenica" of 20 May 1992; Suad Smajlović, T. 14622.

<sup>350</sup> Azir Malagić, T. 11541-11543; with regard to the fact that Ahmo Tihčić was from Tihčići: Ibro Alić, T. 12728; Branislav Giglić, T. 4368; *but see* Ilija Ivanović, T. 4128; Nesib Burić, T. 10862; Mirsad Mustafić, T. 14290, stating that Ahmo Tihčić was from Liješće.

<sup>351</sup> Bećir Bogilović, T. 6309, 6512-6513; Suad Smajlović, T. 14622-14623, 14836; ex. P25, "Report of Srebrenica TO" of 3 July 1992; ex. P73, "Bajramovići Decision" of 20 May 1992; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 82; ex. P328, "Interview" of the Accused, tape 3, p. 12.

<sup>352</sup> Senahid Tabaković appears to have been born in Skenderovići but to have worked in Bratunac: Hakija Mehuljić, T. 6767. *But see* Nesib Burić, T. 10603, who gave evidence that Senahid Tabaković hailed from Sto`ersko.

<sup>353</sup> Ex. P75, "Decision to appoint three additional persons to Srebrenica TO Staff" of 26 May 1992; Bećir Bogilović, T. 6219, 6418.

<sup>354</sup> Ex. P76, "Appointment of Naser Orić as Commander of the Srebrenica TO" of 27 June 1992; *but see* Sead Delić, T. 8608-8609.

<sup>355</sup> Ex. P33, "Order on Appointment" of 8 August 1992.

145. During a meeting held on 3 September 1992, the Srebrenica TO Staff, referring to itself for the first time as the ‘Srebrenica Armed Forces Staff’,<sup>356</sup> established an Operations Staff as one of its constituent bodies. It appointed Osman Osmanović both as chief of the Operations Staff and as chief of staff of the Srebrenica Armed Forces Staff.<sup>357</sup> The decision also provided for the possibility of merging the Operations Staff with the Srebrenica Armed Forces Staff, which ultimately took place on 14 October 1992.<sup>358</sup> On 19 September 1992, Osman Osmanović proposed the names of 11 people to head the respective departments of the Operations Staff, a proposal which was adopted at a joint meeting of the Srebrenica War Presidency<sup>359</sup> and the Srebrenica Armed Forces Staff on the same day.<sup>360</sup> From that date onward, the Operations Staff, with only slight variance in composition, began meeting regularly to discuss issues both of a civilian and military nature, such as maintaining public order and planning military activities.<sup>361</sup>

146. In addition, on 5 September 1992, Sefer Halilović ordered the formation and re-formation of a number of units for which mobilisation, in Srebrenica, would be coordinated by the Srebrenica

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<sup>356</sup> For ease of reference, the Trial Chamber will use the term of ‘Srebrenica Armed Forces Staff’ when it refers to a period covering both the Srebrenica TO Staff as established in Bajramovići on 20 May 1992 and the Srebrenica Armed Forces Staff, as designated as of early September 1992.

<sup>357</sup> Ex. P176, “Decision on the establishment of the Srebrenica Armed Forces” of 3 September 1992; *but see* ex. P8, “Decision on Naming and Appointing” of 14 October 1992, whereby the Srebrenica War Presidency named and appointed Osman Osmanović as Chief of Staff of the Srebrenica Armed Forces. *See nevertheless*, Nedret Mujkanović, T. 5299-5300, stating that Osman Osmanović, in fact, assumed his duties a month before the War Presidency appointed him. *See also* ex. P79, “Proposal” of 19 September 1992, which is signed by Osman Osmanović as Chief of the Operations Staff and in which he states “?sgince the moment I was appointed Chief of the Operations Staff.”

<sup>358</sup> Ex. P176, “Decision on the establishment of the Srebrenica Armed Forces” of 3 September 1992; *see also* para. 147 *infra*. However, it is only as of 19 September 1992 that the Operations Staff began functioning as part of the Srebrenica Armed Forces.

<sup>359</sup> *See* IV.C.1.a., “Establishment and Composition”.

<sup>360</sup> Ex. P79, “Proposal” of 19 September 1992, mentioning 11 persons proposed to constitute the Operations Staff of the Srebrenica Armed Forces: 1. Chief of the Operations Staff: Osman Osmanović; 2. Department for moral and political guidance: Nijaz Mašić; 3. Organ for training and operations: Adil Muhić; 4. Department for logistics of the armed forces: Ibrahim Smajić; 5. Department for security and intelligence: Hamed Salihović; 6. Department for mobilisation and recruiting: Ramiz Bećirović; 7. Department for engineering: Hazim D`ananović; 8. Department for communications: Hamed Alić; 9. Department for medical and social welfare: Nedret Mujkanović; 10. Department for general affairs: Ned`ib Halilović; 11. Recording secretary; Mustafa Salihović; ex. P84, “Memo Pad”, meeting of the Operations Staff, date unspecified, p. 2, according to which Ramiz Bećirović was appointed to ‘operations and training’, and Adil Muhić to ‘recruitment and mobilisation’. With regard to the commencement of the term of office of certain members of the Srebrenica Operations Staff, *see also* ex. P255/D203, “Decision to leave the Srebrenica Armed Forces Staff” of 21 December 1992, which states, *inter alia*, that “we ?Hamed Salihović, Ramiz Bećirović, Ned`ib Halilović, Nijaz Mašić and Adil Muhić were chosen as members of the OS Staff at a joint meeting of the Srebrenica War Presidency, some of the Srebrenica OS unit commanders and the previous Srebrenica OS Municipal Staff, held on 19 September 1992. The official decisions /on appointment/ which we received on 15 October 1992 stated that we had been members of the Armed Forces since 14 October 1992, which is much later than when we were officially elected and accepted duties and obligations and almost no rights whatsoever.”

<sup>361</sup> Ex. P84, “Memo Pad”, meeting of the Operations Staff, date unspecified, p. 2, meeting of the Armed Forces Operations Staff, date unspecified, p. 3, meeting of the Srebrenica Armed Forces Staff of 3 October 1992, p. 4, meeting of the Srebrenica Armed Forces Staff of 7 October 1992, p. 6, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 7, meeting of the Srebrenica Armed Forces Staff of 14 October 1992, p. 10, meeting of the Srebrenica Armed Forces Staff of 15 October 1992, p. 12.

Armed Forces Staff.<sup>362</sup> However, in the particular circumstances prevailing in Srebrenica at the time, it remains uncertain whether this order was received by the relevant authorities in Srebrenica in a timely fashion. The Prosecution has not proven this fact to the Trial Chamber's satisfaction. However, the issuance of this order is immaterial as to whether a *de facto* 'municipal defence staff' existed in Srebrenica until then.<sup>363</sup> The establishment of the Srebrenica TO Staff in Bajramovići on 20 May 1992, which was in early September 1992 re-designated the Srebrenica Armed Forces Staff, leaves no doubt about this.

147. Members of both the Operations Staff and the Srebrenica Armed Forces Staff soon came to realise that a merger between them would increase military efficiency.<sup>364</sup> Hence, on 14 October 1992, they decided to merge into one joint staff, to be named the Srebrenica Armed Forces Staff.<sup>365</sup>

148. On the same day, a decision on the structure of the Srebrenica Armed Forces was adopted by the still existing Operations Staff, according to which the Srebrenica Armed Forces would be composed of the following units: 1<sup>st</sup> Potočari Brigade, 2<sup>nd</sup> Sućeska Brigade and 3<sup>rd</sup> Karačići Brigade. Furthermore, six independent battalions were envisaged: 1<sup>st</sup> Srebrenica Battalion, 2<sup>nd</sup> Srebrenica Battalion, 3<sup>rd</sup> Biljeg Battalion, 4<sup>th</sup> Osmače Battalion, 5<sup>th</sup> Skenderovići Battalion, and 6<sup>th</sup> Luka Battalion.<sup>366</sup> However, the Trial Chamber heard little evidence concerning the manner in which the Srebrenica Armed Forces operated on the ground.

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<sup>362</sup> Ex. P129, "Supplemental Order on Forming of ABiH Staffs and Units" of 5 September 1992. *See also* para. 128, fn. 314 *supra*.

<sup>363</sup> Sead Delić, T. 8691.

<sup>364</sup> Ex. P84, "Memo Pad", meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, pp. 7-8: "The meeting was called to order by O/šman Osmanović. He said we were faced with problems in the functioning of the system: the War Presidency[RP]-two staffs-Civilian Protection[CZ]. ... Ć Becir: 'Because of a lack of knowledge regarding this topic, we formed the War Staff, the War Presidency [RP] and the Operations Staff. Decisions taken by these organs are not implemented.'"

<sup>365</sup> Ex. P84, "Memo Pad", meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, pp. 8-9; ex. P80, "Formation structure of Srebrenica Armed Forces" of 19 September 1993, stating that as of 14 October 1992, the Srebrenica Armed Forces Staff would include: Naser Orić as commander, Osman Osmanović as Chief of staff, Ramiz Bećirović as Chief of training and operations, Nijaz Mašić as Chief of moral and political guidance, information and religious issues, Ibrahim Smajić as Chief of logistics, Hamed Salihović as Chief of Intelligence and security issues, Adil Muhić as Chief of communications, Hazim D`ananović as Chief of engineering, Zulfo Tursunović, Ned`ad Bektić, Ahmo Tihic, Senahid Tabaković and Atif Krd`ić as members of the staff without portfolio, Ned`ib Halilović as Officer for general administration and Mustafa Salihović as Recording clerk; ex. P255/D203, "Decision to leave the Srebrenica Armed Forces Staff" of 21 December 1992. The Trial Chamber notes that only Hamed Alić, in charge of the Department for Communications as per the proposal of 19 September 1992 by Osman Osmanović, did not become member of the Srebrenica Armed Forces Staff upon combination of both Staffs. Conversely, the Accused, Zulfo Tursunović, Ned`ad Bektić, Ahmo Tihic, Senahid Tabaković and Atif Krd`ić were not part of the Operations Staff but were all part of the Srebrenica Armed Forces Staff since May 1992.

<sup>366</sup> Ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 14 October 1992, pp. 10-11; *see also* ex. P80, "Formation Structure of Srebrenica Armed Forces" of 19 September 1993, pp. 4-5.

(b) Attempts at Joining the Forces in Eastern Bosnia

(i) The Establishment and Development of the Sub-region

149. As Bosnian Serb military activity in the area intensified from November 1992 onward, attempts were made to join Bosnian Muslim forces in eastern BiH under a single military authority. The establishment of a sub-region, which would have both a civilian and a military component, and encompass the Bosnian Muslim-held parts of the municipalities of Bratunac, Zvornik, Vlasenica and Srebrenica (“Sub-region”), was envisaged.<sup>367</sup>

150. Throughout November 1992, a number of meetings were held in Konjević Polje<sup>368</sup> and Cerska<sup>369</sup> to discuss the implementation of the initiative. On 4 November 1992, at a meeting held in Konjević Polje, the Sub-region was formally proclaimed. The session was attended by a number of Bosnian Muslim representatives from the municipalities concerned, including Hamed Salihović,<sup>370</sup> but not the Accused.<sup>371</sup> At meetings in the days that followed, the War Presidency of the Sub-region was established, with Hamed Salihović as its President, the Accused as Commander of the Sub-region,<sup>372</sup> and Ferid Hodžić as Chief of Staff of the Sub-region.<sup>373</sup>

151. In his capacity as President of the War Presidency of the Sub-region, Hamed Salihović was extremely active in trying to make the Sub-region operational. He issued reports to Tuzla, Sarajevo and the international community at large regarding the situation in eastern BiH via ham radio from Srebrenica.<sup>374</sup> He also attempted to establish radio communications between Srebrenica and Cerska, which were isolated from each other.<sup>375</sup>

152. Despite the strenuous efforts of Hamed Salihović, between November 1992 and demilitarisation of the Srebrenica enclave in April 1993, the Sub-region never materialised into an

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<sup>367</sup> Nedret Mujkanović, T. 5061; Hakija Meholjić, T. 7066; ex. P329, “Interview” of the Accused, tape 5, pp. 21-22, tape 13, p. 9.

<sup>368</sup> Nedret Mujkanović, T. 5330: Konjević Polje is located within the municipality of Bratunac.

<sup>369</sup> C007, T. 4552: Cerska is located within the municipality of Vlasenica.

<sup>370</sup> See VII.C.1.c.iii.a, “The Role of Hamed Salihović”.

<sup>371</sup> Ex. P181, “Decision on the Establishment of the Sub-region” of 4 November 1992; Ejub Dedić, T. 12241-12247.

<sup>372</sup> Ex. P562, “Agreed Facts”, A.21; Ejub Dedić, T. 12243, according to whom Hamed Salihović proposed the Accused as commander of the Sub-region.

<sup>373</sup> Ejub Dedić, T. 12242-12247; Suad Smajlović, T. 14676; ex. P181, “Decision on the Establishment of the Sub-region” of 4 November 1992. See also Izet Red`ić, T. 9274; Ejub Dedić, T. 12238, T. 12251, stating that Ferid Hod`ić, who led a fighting group from Vlasenica, refused the position of Chief of Staff of the Sub-region, unwilling to be placed under the authority of the Accused.

<sup>374</sup> Ex. D267, “Report” of 18 November 1992; Bećir Bogilović, T. 6461-6462, 7690-7691; ex. P329, “Interview” of the Accused, tape 13, p. 12.

<sup>375</sup> Ejub Dedić, T. 12248; ex. D824, “Order on Communications” of 6 November 1992, in which Hamed Salihović orders the training of specialised personnel.



entity exercising political or military authority in eastern BiH.<sup>376</sup> One integrated command over the armed groups of Kamenica<sup>377</sup>, Cerska, Konjević Polje and Srebrenica was not to be achieved before demilitarisation.<sup>378</sup> A number of factors made it impossible for the Sub-region to become functional. The main factor was the intense Serb attacks on Cerska and Konjević Polje, resulting in their complete isolation from Srebrenica.<sup>379</sup> To a lesser extent, the time and effort devoted to alleviating the dire humanitarian situation caused by the Serb attacks also played a role in the inability of the Sub-region to materialise.<sup>380</sup>

153. Based on this evidence, the Trial Chamber finds that, in the circumstances prevailing between November 1992 and March 1993 in eastern BiH, the numerous reports and orders emanating from the War Presidency of the Sub-region<sup>381</sup> did little to bring together the Bosnian Muslim forces in the area.

(ii) Nurif Rizvanović and the Drina Division

154. In the second half of 1992, Nurif Rizvanović, a Bosnian Muslim from Glogova who fought for the Croat armed forces in Croatia in 1991, led the 16<sup>th</sup> Muslim Brigade, one of the better organised and equipped Bosnian Muslim armed units in eastern BiH. In the ensuing months after his arrival in Konjević Polje, he strove to establish authority as commander of the 'Drina Division'<sup>382</sup> with aspirations to group together all Bosnian Muslim fighters, and their leaders, in the territory of Zvornik, Vlasenica, Bratunac and Srebrenica.<sup>383</sup>

155. Having been assigned by the command of the Tuzla District Staff to escort medical personnel and equipment from Tuzla to Srebrenica, Nurif Rizvanović set off from Tuzla on 29 July

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<sup>376</sup> Hakija Mehuljić, T. 7066; Mensud Omerović, T. 9302; Izet Red'ić, T. 9273, 9325; D005, T. 13884.

<sup>377</sup> C007, T. 4494: Kamenica is located within the municipality of Zvornik.

<sup>378</sup> Bećir Bogilović, T. 5323; Safet Golić, T. 11890.

<sup>379</sup> Ejub Dedić, T. 12252; Mustafa [ačirović, T. 13549.

<sup>380</sup> Izet Red'ić, T. 9325; Rex Dudley, T. 15032.

<sup>381</sup> Ex. P181, "Decision on establishment of Sub-region" of 4 November 1992; ex. D824, "Order of the War Presidency of the Sub-region on communications" of 6 November 1992; ex. D267, "Report" of 18 November 1992; ex. P39, "Permission by the Commander of the Sub-region" of 10 December 1992; ex. P164, "Order of the Commander of the Armed Forces of the Sub-region" of 11 December 1992; ex. P2, "Order of Commander of the Armed Forces of the Sub-region" of 11 December 1992; ex. P160, "Report of the Staff of the Armed Forces of the Sub-region" of 27 December 1992"; ex. P161, "Report to Commander of the Sub-region" of 29 December 1992; ex. P315, "Public Appeal for Urgent Intervention by President of the War Presidency of the Sub-region"; ex. D202, "Order of President of War Presidency and Commander of Armed Forces of the Sub-region" of 21 January 1993; ex. P177, "Decision of the War Presidency of the Sub-region" of 7 February 1993.

<sup>382</sup> The Trial Chamber notes that there is no evidence that the 'Drina Division' existed as a formal military unit. It is referred to as such only by Nurif Rizvanović.

<sup>383</sup> Ex. P82, "Decision".

1992 and reached Konjević Polje on 5 August 1992.<sup>384</sup> Along with his group, he remained there to provide support to the fighters in the area at a time when travel between Konjević Polje and Srebrenica was extremely difficult.<sup>385</sup>

156. The 16<sup>th</sup> Muslim Brigade was a group of over 400 well-equipped soldiers, including a number of women. They had complete uniforms bearing the insignia of the ABiH, were carrying a substantial amount of weapons and had communication devices at their disposal.<sup>386</sup> Some members of the group brought a number of spare uniforms, which they distributed in the Srebrenica area.<sup>387</sup> The 16<sup>th</sup> Muslim Brigade was billeted in various locations. While most soldiers were housed either in the Konjević Polje school or in nearby tents, a number stayed in empty houses from which the owners had fled. Those who were originally from the Konjević Polje area stayed with their families.<sup>388</sup>

157. Until his departure from the area in November 1992, Nurif Rizvanović played a central role in the fighting in eastern Bosnia and assisted other groups of Bosnian Muslim fighters, such as the one led by Ejub Golić.<sup>389</sup> During such time, Nurif Rizvanović attempted to impose himself as the overall commander of the fighting groups in the area: he introduced himself to local fighters as commander of the 'Drina Division' and issued instructions and orders to members of local fighting groups.<sup>390</sup> He appears to have acted quite independent from the Tuzla District Staff, and later the 2<sup>nd</sup> Corps, as well as of any other higher command.<sup>391</sup> However, because his authority was contested by a number of local group leaders, including Ferid Hodžić<sup>392</sup>, in September 1992, Nurif Rizvanović appealed to the 2<sup>nd</sup> Corps in Tuzla to impose his authority as Commander of the 'Drina Division'. His requests ranged from the issuance of an official stamp reflecting his position to the adoption of

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<sup>384</sup> Nedret Mujkanović, T. 4990-4991, 5205; D005, T. 14085; ex. D647, "List of conscripts of the 16<sup>th</sup> Muslim Brigade having crossed to free territory on 27 July 1992".

<sup>385</sup> Nedret Mujkanović, T. 4991, 5205; Ejub Dedić, T. 12466.

<sup>386</sup> Nedret Mujkanović, T. 5219; Safet Golić, T. 11826, 11982; ex. D801, "Photographs of members of the 16<sup>th</sup> Muslim Brigade" taken on 25 July 1992; ex. P328, "Interview" of the Accused, tape 11, p. 25; ex. P329, "Interview" of the Accused, tape 13, p. 10; *see also* Sidik Ademović, T. 13041, stating that the 16<sup>th</sup> Muslim Brigade had communication devices at its disposal.

<sup>387</sup> Sidik Ademović, T. 13049; Mustafa [ačirović, T. 13321.

<sup>388</sup> D005, T. 13864, 14065-14066.

<sup>389</sup> Safet Golić, T. 11836, 11847; Sidik Ademović, T. 13041, 13047; ex. D823, "Combat Order" of 26 October 1992.

<sup>390</sup> D005, T. 13873-13874; Ejub Dedić, T. 12330-12331, 12334-12338; ex. D921, "War Report" of 2 November 1992; ex. D822, "Letter to Edhem Ahmić"; ex. D823, "Combat Order" of 26 October 1992; ex. P150, "Order" of 1 November 1992; ex. P149, "Order" of 29 October 1992.

<sup>391</sup> Mustafa [ačirović, T. 13314-13315; D005, T. 13874, 13878.

<sup>392</sup> Ejub Dedić, T. 12238 expanding on ex. P232, "Report by Commander of Vlasenica Armed Forces", confirming the attitude of Ferid Hodžić towards Nurif Rizvanović; ex. D921, "War Report" of 2 November 1992. *See also* para. 150, fn. 373 *supra*.

concrete decisions on the future work of the 'Drina Division' and the mobilisation of all able-bodied men from Tuzla to fight in the Konjević Polje area.<sup>393</sup>

158. After his departure from the Konjević Polje area in November 1992, Nurif Rizvanović's men joined various groups and, while some stayed in Konjević Polje under the leadership of Refik Hasanović who had fought with the 16<sup>th</sup> Muslim Brigade, others joined Ejub Golić's group in ^izmići.<sup>394</sup>

159. During Nurif Rizvanović's presence in the Konjević Polje area, the 'Drina Division' failed to materialise into an effective body with authority over the fighting groups in the municipalities of Zvornik, Vlasenica, Bratunac and Srebrenica.

160. While Nurif Rizvanović seems to have expressed a degree of respect and deference toward the Accused as Commander of the Srebrenica Armed Forces, he nonetheless appears to have conducted his actions primarily independent of the Accused.<sup>395</sup> There is inconclusive evidence that the Accused exercised any command over Nurif Rizvanović and/or the 16<sup>th</sup> Muslim Brigade.

(c) A Geographically Dispersed Command Structure

(i) Heterogeneity of the Bosnian Muslim Local Fighting Groups in Eastern Bosnia

161. While the Bajramovići Decision, and subsequent decisions adopted until October 1992,<sup>396</sup> created a basic operational framework, the Srebrenica Armed Forces were not in fact structured along clearly defined hierarchical lines prior to the end of 1993 or early 1994. The situation on the ground was such that fighting groups were formed on territorial bases. Leaders of these local groups were chosen for their personal qualities, such as courage and achievement. The independence of a number of these leaders asserted in the early days of the conflict never weakened before demilitarisation.<sup>397</sup> Although some of these leaders were initially part of the Srebrenica TO Staff and of the later-established Srebrenica Armed Forces Staff, they were not easily integrated into a unitary military command structure.

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<sup>393</sup> Ejub Dedić, T. 12233-12234; ex. D822, "Letter to Edhem Ahmić".

<sup>394</sup> D005, T. 13882-13883, stating that Refik Hasanović's group continued as an independent fighting group in Grabovsko, after Nurif Rizvanović's departure in November 1992.

<sup>395</sup> Ex. P137, "Letter by Nurif Rizvanović to Naser Orić" of 28 September 1992, in which, although Nurif Rizvanović declares "igt is up to you, commander, to decide if this is a priority", he also refers to "oğur common struggle and good cooperation", convenes Naser Orić to a meeting and voices proposals to military issues. *See also* ex. P328, "Interview" of the Accused, tape 12, p. 20, in which the Accused stated that he met Nurif Rizvanović who had asked for a meeting to discuss future military activity.

<sup>396</sup> *See* paras 144-148 *supra*.

<sup>397</sup> Nedret Mujkanović, T. 5224, 5363; Bećir Bogilović, T. 6419; Ejub Dedić, T. 12266; Ibro Alić, T. 12733; ex. P328, "Interview" of the Accused, tape 13, p. 6.

162. From April 1992 onward, the Accused personally led a group of 20 to 30 Bosnian Muslim fighters from his native Potočari, a village located approximately four kilometres northeast of the town of Srebrenica on the way to Bratunac.<sup>398</sup> At the time, the Accused was chief of the Potočari police sub-station.<sup>399</sup> Most of the fighters in the Potočari group were armed, and a number of them took camouflage uniforms from Serb paramilitaries they killed in an ambush.<sup>400</sup> The Potočari fighting group was involved in holding the front line and resisting Serb attacks on Potočari, which was one of the locations most targeted by Serb shelling.<sup>401</sup> While the Trial Chamber is satisfied that the Accused exercised authority over his group of fighters in Potočari proper,<sup>402</sup> other fighters organised themselves in seemingly independent groups in the vicinity of Potočari, namely in Šušnjari, Jadići, Brezeva Njiva, Budak and Pećišta.<sup>403</sup> Similarly, in nearby Pale, Mirzet Halilović led a group of fighters.<sup>404</sup>

163. Originally from Skelani, southeast of Srebrenica, Ahmo Tihčić was the leader of a fighting group that settled in the woods near Biljeg<sup>405</sup> during the summer of 1992, after having fled Skelani when it fell to the Serbs in April 1992.<sup>406</sup> His group consisted of approximately 130 armed Bosnian Muslim men.<sup>407</sup> Ahmo Tihčić wore the uniform his brother, Džemal Tihčić, a member of the 16<sup>th</sup> Muslim Brigade, brought with him from Tuzla in August 1992.<sup>408</sup> Autonomous, and wielding a

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<sup>398</sup> Hamed Tiro, T. 10554; ex. C1, "Map".

<sup>399</sup> Ex. P562, "Agreed Facts", A.10; ex. P90, "Srebrenica Testifies and Accuses" by Naser Orić, p. 80; Nedret Mujkanović, T. 5364; Ibrahim Bećirović, T. 7407-7408.

<sup>400</sup> Sidik Ademović, T. 13143, 13146; ex. P95, "Supplement of the ABiH Chronicle" of 7 February 1994; *see para.* 101 *supra*.

<sup>401</sup> Bećir Bogilović, T. 6491-6492; Sead Bekrić, T. 9618-9619; Suad Smajlović, T. 14529; ex. P95, "Supplement of the ABiH Chronicle" of 7 February 1994; ex. D242, "Situation Report" of 21 September 1992; ex. D240, "Report from Srebrenica for 30 September 1992" of 2 October 1992.

<sup>402</sup> Mustafa [ačirović, T. 13333; Hakiija Mehiljić, T. 7084; Azir Malagić, T. 11501; Bećir Bogilović, T. 6491. The Trial Chamber notes the evidence that Ekrem Salihović replaced the Accused as the leader of the Potočari fighting group and on 8 December 1992, he was in turn replaced by Smajo Mandić until 5 February 1993: ex. P80, "Formation Structure of the Srebrenica Armed Forces" of 19 September 1993, p. 4; ex. P145, "List of the Srebrenica Armed Forces Staff" of 24 October 1992; ex. P95, "Supplement of the ABiH Chronicle" of 7 February 1994; ex. P328, "Interview" of the Accused, tape 4, p. 14; ex. P329, "Interview" of the Accused, tape 6, p. 5. The evidence demonstrates that despite his election as Commander of the Srebrenica TO Staff on 20 May 1992, the Accused remained the *de facto* leader of the fighting group from Potočari until demilitarisation.

<sup>403</sup> *See para.* 168 *infra*; Mustafa [ačirović, T. 13333; Suad Smajlović, T. 14619, 14684; *see also* ex. P607.1, "List of TO Unit Members Potočari", explaining that there was 120 fighters in the Potočari TO. *But see*, ex. P596, "List of Soldiers for Commendation from the Potočari Brigade", stating that, *inter alia*, groups from Pale, Gostilj, Budak, Pećišta, D'ogazi were part of the Potočari Brigade; ex. P80, "Formation Structure of the Srebrenica Armed Forces" of 19 September 1993, p. 1, stating that, between 17 April and mid-October 1992, the TO Potočari consisted of the Blječeva company, [ušnjari company, Pale company, Potočari company, Donji Potočari platoon, Podrinjski platoon, Pećišta company, Gostilj company, 'ogazi platoon and Budak company, in total numbering 853 fighters.

<sup>404</sup> Ex. P80, "Formation Structure of the Srebrenica Armed Forces" of 19 September 1993, p. 1; ex. P598, "Military Diary". *See also para.* 182 *infra*.

<sup>405</sup> Biljeg is situated north-west of Skelani: ex. D737, "Map".

<sup>406</sup> Azir Malagić, T. 11541-11543; Ibro Alić, T. 12727, 12738; ex. P433, "Video"; Omer Ramić, T. 9894, 9965; ex. P328, "Interview" of the Accused, tape 3, p. 16; *see also* Nesib Burić, T. 10643-10644; Mustafa [ačirović, T. 13318.

<sup>407</sup> Ex. P433, "Video"; Mustafa [ačirović, T. 13319; Nesib Burić, T. 10863; ex. P571, "List of members of Biljeg TO Unit".

<sup>408</sup> Sidik Ademović, T. 13048-13049; Mustafa [ačirović, T. 13315-13316.

great deal of influence in the Skelani region, Ahmo Tihic was not a local leader to whom orders from a higher authority were easily issued.<sup>409</sup> At Bajramovići, he was appointed member of the Srebrenica TO Staff and was reaffirmed in this position by the Accused on 15 June 1992.<sup>410</sup> Later in 1992 and early 1993, Ahmo Tihic played a role in the exchange of Bosnian Serb prisoners on several occasions.<sup>411</sup> In 1993, he, along with other local leaders who were dissatisfied with the course of action taken by the Srebrenica military authorities, attempted to create a separate military body after demilitarisation.<sup>412</sup>

164. Akif Ustic led the local fighting unit based in the old town of Srebrenica (“Stari Grad TO”) until he was killed on 13 October 1992.<sup>413</sup> He was present at Bajramovići on 20 May 1992 and elected deputy commander of the Srebrenica TO Staff.<sup>414</sup> Akif Ustic was another local leader who soon established, and later kept, his independence of action.<sup>415</sup> He repeatedly went into military action with his 60-strong group of men, informing neither the Accused, to whom Akif Ustic was the deputy, nor other local leaders who were, for a time, in charge of smaller units subordinate to his.<sup>416</sup> A few days after the Bajramovići Decision, Hakija Meholic and Hamdija Fezic agreed to place the members of their respective fighting groups under the leadership of Akif Ustic. This arrangement lasted only until June or July 1992, when Akif Ustic went into military action on his own initiative,

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<sup>409</sup> Hakija Meholic, T. 6951-6952, 6957; Ibro Alic, T. 12733. During the summer of 1992, Ahmo Tihic refused to join forces with a fighting group from Jagodjna and, on another occasion, he refused to transfer the leadership of the Biljeg group to Almaz Hasanovic, sent to Biljeg by the Srebrenica authorities, *see* Ibro Alic, T. 12727-12734; Suad Smajlovic, T. 14686.

<sup>410</sup> Ex. P73, “Bajramovići Decision” of 20 May 1992. There is conflicting evidence as to whether Ahmo Tihic was present at Bajramovići: Suad Smajlovic, T. 14628 (against); Bećir Bogilovic, T. 6203, 6210 (in favour). Ex. P73 does not claim that he was present but only that he was appointed to be part of Srebrenica TO; *see also* ex. P4, “Order” of 15 June 1992.

<sup>411</sup> Branislav Giglic, T. 4321; Bećir Bogilovic, T. 6324-6326, 6432; Ilija Ivanovic, T. 4052, 4090-4092.

<sup>412</sup> Hakija Meholic, T. 6951-6956; ex. D244, “Handwritten Assessment” of 24 April 1995, in which the author, Hakija Meholic states that Hamed Efendic, Ibran Mustafic and Hamed Salihovic, at meetings held at Hamed Efendic’s or Ahmo Tihic’s house, tried to rally “their supporters telling them that the struggle had not been worthwhile and that people had died in vain. ?...đ However, when their attempt to undermine the army failed ?...đ they started looking for support from disgruntled officers and dismissed commanders. ?...đ Their aim was to instigate dissatisfaction among the people and ruin the commander’s reputation. They stopped at nothing in pursuing their goals, and that was power, even at the cost of fomenting chaos in the region”; Hakija Meholic, T. 6954, stating that, although this report was drafted in 1995, he had drafted similar ones beforehand and was aware of attempts to create a separate army; *see also* Mustafa [acirovic, T. 13334.

<sup>413</sup> Hakija Meholic, T. 6763-6764; Sead Bekric, T. 9536; ex. P328, “Interview” of the Accused, tape 3, p. 17; *see also* Ibrahim Bećirovic, T. 7428-7434, stating that, on 29 May 1992, Akif Ustic had directed Ibrahim Bećirovic to monitor Bosnian Serb frequencies and that in turn Ibrahim Bećirovic provided Akif Ustic, and only him, with the notes he had taken. With regard to the date of Akif Ustic’s death, *see* ex. P95, “Supplement of the ABiH Chronicle” of 7 February 1994.

<sup>414</sup> Bećir Bogilovic, T. 6203-6206; Suad Smajlovic, T. 14620.

<sup>415</sup> Bećir Bogilovic, T. 6419; Hakija Meholic, T. 6949; Sead Bekric, T. 9535; Suad Smajlovic, T. 14683, 14796.

<sup>416</sup> Bećir Bogilovic, T. 6547; Hakija Meholic, T. 6948-6949, stating that Hamdija Fezic and himself were, for a short period of time, subordinated to Akif Ustic.

without informing anyone, and lost the trust of other group leaders.<sup>417</sup> After Akif Ustić's death on 13 October 1992, his cousin, Enes Ustić, took over the leadership of the Stari Grad TO.<sup>418</sup>

165. From May 1992 onward, Zulfo Tursunović, nicknamed "Ćića"<sup>419</sup>, led a fighting group of armed men in Sućeska<sup>420</sup> whose number fluctuated between 50 and 100.<sup>421</sup> Although present during the Bajramović meeting and part of the initial Srebrenica TO Staff,<sup>422</sup> he behaved as a fiercely independent local leader, often unwilling to accept superiority.<sup>423</sup> Whether due to his imposing stature,<sup>424</sup> personal background<sup>425</sup> or difficult character,<sup>426</sup> Zulfo Tursunović was clearly a man whose relationship with other local leaders was one of confrontation.<sup>427</sup> Throughout 1992 and 1993, he was present and active both in the field and in Srebrenica town and was also dealing with Serb prisoners.<sup>428</sup>

166. In the territory of Sućeska, there were other fighting groups composed of Bosnian Muslim refugees who were distinct from Zulfo Tursunović's group, and led independently of him.<sup>429</sup> For example, people fleeing Vlasenica in May 1992 rallied around men such as Fadil Turković, pre-war commander of the Vlasenica police station,<sup>430</sup> and Bećir Mekanić.<sup>431</sup> Like other Bosnian Muslim groups, they were armed primarily with hunting rifles and police weapons.<sup>432</sup> They were self-

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<sup>417</sup> Hakija Meholjić, T. 6759-6761, 6949.

<sup>418</sup> Hakija Meholjić, T. 7064.

<sup>419</sup> Hakija Meholjić, T. 6829; Ejub Dedić, T. 12243; Nedret Mujkanović, T. 5102.

<sup>420</sup> The village of Sućeska is situated approximately six kilometres west of Srebrenica: ex. C1, "Map".

<sup>421</sup> Nedret Mujkanović, T. 5023; Ibrahim Bećirović, T. 7631; Mustafa [aćirović, T. 13332; Ejub Dedić, T. 12243.

<sup>422</sup> Bećir Bogilović, T. 6289; Suad Smajlović, T. 14621.

<sup>423</sup> Nedeljko Radić, T. 3499; Nedret Mujkanović, T. 5222, 5482; Hakija Meholjić, T. 6948; Sead Bekrić, T. 9591; Mustafa [aćirović, T. 13332-13333.

<sup>424</sup> Ex. P548, "Photograph of Zulfo Tursunović"; Ratko Nikolić, T. 2597; Nedeljko Radić, T. 3499; Mensud Omerović, T. 8457-8457.

<sup>425</sup> Nedret Mujkanović, T. 5222-5223, according to whom Zulfo Tursunović had been sentenced to 20 years for a double homicide in 1975. However, he was paroled in 1989. *See also* ex. P328, "Interview" of the Accused, tape 13, p. 8; Ibrahim Bećirović T. 7409.

<sup>426</sup> Nedret Mujkanović, T. 5481; Hakija Meholjić, T. 6948.

<sup>427</sup> Sead Delić, T. 8761 (private session); ex. P560, (under seal); *but see* [uhra \ilović, T. 15192-15193, stating that Zulfo Tursunović was very 'close' to Hajrudin Avdić, President of the Srebrenica War Presidency, as they both hailed from Sućeska.

<sup>428</sup> Regarding Zulfo Tursunović's involvement in matters relating to Serb prisoners, *see* VII.C.1.c.iii.d., "The Role of Zulfo Tursunović". Regarding Zulfo Tursunović's involvement in matters relating to Bosnian Muslim attacks on Bosnian Serb villages, *see* para. 695 *infra*. *See also* Nedret Mujkanović, T. 5117, 5122-5123, giving evidence that Zulfo Tursunović and a number of his men were wounded during the attack on Fakovići early October 1992.

<sup>429</sup> Bećir Bogilović, T. 6390; Hakija Meholjić, T. 6927; Ibrahim Bećirović, T. 7625; Izet Red`ić, T. 9372. *But see* Sead Bekrić, T. 9537, claiming that Zulfo Tursunović had total command over the Sućeska area.

<sup>430</sup> Ibrahim Bećirović, T. 7625.

<sup>431</sup> Bećir Bogilović, T. 6390-6391; Izet Red`ić, T. 9266.

<sup>432</sup> Ibrahim Bećirović, T. 7625.

organised and acted independently of the Srebrenica Armed Forces Staff.<sup>433</sup> These groups were regularly in conflict with Zulfo Tursunović.<sup>434</sup>

167. In mid-April 1992, after Serb forces had captured Srebrenica, Hakija Mehlojić, a former policeman from Petrica and sector commander of the Srebrenica police, fled to the woods with a group of 56 men, most of whom were past colleagues.<sup>435</sup> They were the first group to re-enter Srebrenica in early May 1992, after the town was retaken by Bosnian Muslims.<sup>436</sup> Between May 1992 and demilitarisation, Hakija Mehlojić's group fluctuated between 60 and 150 men.<sup>437</sup> It was better armed than other groups in the area and was quartered at the Domavija Hotel, in the centre of Srebrenica.<sup>438</sup> This fighting group was holding the front-line southeast of Srebrenica and participated in a number of military actions.<sup>439</sup> Hakija Mehlojić was not present at Bajramovići on 20 May 1992 and, although his fighting group did not form part of the Srebrenica Armed Forces, he attended some of its staff meetings.<sup>440</sup> Despite having first contested the legality of the Accused's election as commander of the Srebrenica Armed Forces Staff, Hakija Mehlojić later reconciled himself to that fact.<sup>441</sup> For a short period in May and June 1992, he also accepted Akif Ustić's authority.<sup>442</sup> Nevertheless Hakija Mehlojić appears to have been an unyielding and independent leader who, for the most part between May 1992 and demilitarisation, recognised no superior authority.<sup>443</sup> On 26 April 1993, after demilitarisation, Hakija Mehlojić was appointed commander of the Srebrenica police. He remained in that position until the fall of Srebrenica in July 1995.<sup>444</sup>

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<sup>433</sup> Bećir Bogilović, T. 6389-6390; Ejub Dedić, T. 12169.

<sup>434</sup> Ibrahim Bećirović, T. 7625; Izet Red'ić, T. 9370-9372.

<sup>435</sup> Hakija Mehlojić, T. 6724-6726, 6737; *see also* Azir Malagić, T. 11466; Sabra Kolenović, T. 10140; Ibrahim Bećirović, T. 7415.

<sup>436</sup> Hakija Mehlojić, T. 6745; D005, T. 13882. *But see* Suad Smajlović, T. 14644, stating that Hakija Mehlojić and Akif Ustić had both entered Srebrenica on 9 May 1992.

<sup>437</sup> Hakija Mehlojić, T. 6772; Suad Smajlović, T. 14530. *But see* Sead Bekrić, T. 9535, stating that the group comprised 200 to 300 men.

<sup>438</sup> Hakija Mehlojić, T. 6739, stating that his group had a RAP (combat-set), a pistol, a machine-gun ("M53"), four PM's, 18 automatic rifles and some semi-automatic rifles and makeshift rifles; ex. P418, "Aerial Photo of Srebrenica", *see* Annex D; Nedret Mujkanović, T. 5483, stating that Hakija Mehlojić and his deputy, Velid Delić, both had a Motorola; ex. P328, "Interview" of the Accused, tape 2, pp. 2, 5, tape 5, p. 19.

<sup>439</sup> Anthony Birtley, T. 15111; *see also* Hakija Mehlojić, T. 6806-6809, 6823-6825, 6836-6839 6850-6854.

<sup>440</sup> Hakija Mehlojić, T. 6943-6946; *see also* Sead Delić, T. 8748-8749; ex. D299, "Combat Operation Sheet for Spat, ABiH". Although not formally part of the Srebrenica Armed Forces Staff, Hakija Mehlojić played a key role in the fighting activity in Srebrenica in 1992 and 1993.

<sup>441</sup> Hakija Mehlojić, T. 6760-6762.

<sup>442</sup> Hakija Mehlojić, T. 6759-6760.

<sup>443</sup> Bećir Bogilović, T. 6403; Sead Bekrić, T. 9536; Mustafa [a]ćirović, T. 13335; Anthony Birtley, T. 15110; Suad Smajlović, T. 14681, 14684; *see also* Hakija Mehlojić, T. 6767, 6810-6816, 6944, who, even after the election of the Accused as Commander of the Srebrenica TO Staff on 20 May 1992, kept command over his group of fighters. For instance, he refused to have them participate in the attack on Fakovići because he considered that the mined terrain in the vicinity was too dangerous.

<sup>444</sup> Hakija Mehlojić, T. 6724-6726.; Mensud Omerović, T. 8459. *See also* para. 219 *infra*.

168. Many other Bosnian Muslim-held villages around Srebrenica, not represented when the Bajramović Decision was adopted, generally functioned independent of the Srebrenica Armed Forces.<sup>445</sup> One such group, located in Močevići, was headed by Vekaz Husić.<sup>446</sup> The group was formed on a voluntary basis in response to Serb attacks during the early summer of 1992. It was small in number and had few weapons.<sup>447</sup> In Šušnjari, a group of approximately 25 men, each armed with a weapon, formed around Sidik Ademović.<sup>448</sup> This number increased marginally throughout 1992.<sup>449</sup> Near Šušnjari, toward the end of April 1992, 15 men gathered in Jagličići around Mujo Alispahić and Meho Smajlović. Ten men in Brezova Njiva aligned themselves with Velaga Zukić and, in Babuljice, 15 men rallied around Mensur Mensanović.<sup>450</sup> The village of Poznanovići and the hamlets of Dedići and Podkorjen likewise had their own fighting groups.<sup>451</sup> In Pobudje, a group of 25 men united under Ramiz Omerović, and in Hrnčići, Džemo Kadrić led a group of 20 men. Bego Muminović headed a group in Urkovići, and in Konjević Polje, a group joined forces under Velid Šabić.<sup>452</sup> The evidence demonstrates that all these groups, and others,<sup>453</sup> were active from the outset of the conflict in April 1992 until March 1993. While occasionally seeking assistance from each other since early July 1992,<sup>454</sup> they appear to have acted independently in the defence of their respective areas.<sup>455</sup>

169. The most prominent group of fighters established by Bosnian Muslim refugees was that of Ejub Golić. Having fled the Serb attack on Glogova in May 1992, his large group temporarily settled in the nearby hamlet of Čizmići.<sup>456</sup> As the number of displaced persons from Glogova and other locations in the Bratunac municipality increased, Ejub Golić became the leader of three additional groups in the area.<sup>457</sup> The number of weapons available to these groups varied.<sup>458</sup>

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<sup>445</sup> Bećir Bogilović, T. 6398; Ejub Dedić, T. 12228.

<sup>446</sup> Staniša Stevanović, T. 1569; Bećir Bogilović, T. 6397. *But see* Omer Ramić, T. 9896, for whom the Močevići group of fighters did not have a command and was more of a voluntary set-up where no one could give orders.

<sup>447</sup> Hamed Tiro, T. 10486-10487. For Vekaz Husić's participation in the action on Brađevina on 27 June 1992, *see* Staniša Stevanović, T. 1497-1498 (private session); Hamed Tiro, T. 10309-10310, 10491; *see also* para. 611 *infra*.

<sup>448</sup> Sidik Ademović, T. 12966-12967, 13093.

<sup>449</sup> Sidik Ademović, T. 13155-13156.

<sup>450</sup> Sidik Ademović, T. 12969.

<sup>451</sup> Bećir Bogilović, T. 6395-6396.

<sup>452</sup> D005, T. 14049-14050 (private session).

<sup>453</sup> The Trial Chamber does not seek to provide an exhaustive list of all the groups fighting independently in the area.

<sup>454</sup> For assistance and co-operation of the independent fighting groups around [ušnjari, Sidik Ademović, T. 13157, 13168-13175.

<sup>455</sup> Bećir Bogilović, T. 6410; ex. D237, "Note from Pobudje TO" of 6 June 1992.

<sup>456</sup> Ibrahim Bećirović, T. 7630; Nedret Mujkanović, T. 5169; Nesib Burić, T. 10708.

<sup>457</sup> The three additional groups which were led by Ejub Golić were located in Velika Glogova, Vladusići and in the woods between Glogova and Vladusići; *see* Sead Bekrić, T. 9547; Safet Golić, T. 11922, 11959. Some of the men fighting with Nurif Rizvanović joined Ejub Golić when the former left the area in November 1992: D005, T. 13882-13883. With regard to the total number of people under the authority of Ejub Golić in the Čizmići area, ex. D809, "Combat Report of the Drina Corps Command" of 4 January 1993, which states that "it is considered that there are still about 200 armed enemy soldiers in the area of Glogova." *See also* Safet Golić, T. 11966, 12013, where the witness estimates that there were between 300 and 400 fighters.



Whether Ejub Golić was formally appointed Commander of the Glogova Independent Battalion by the Accused on 24 December 1992<sup>459</sup> is largely immaterial in light of evidence that he was already the *de facto* leader of the aforementioned groups since April 1992 and continued to act independently of the Accused's authority following his appointment in December 1992. As Serb attacks intensified toward the end of 1992, the activities of Ejub Golić's groups grew exponentially. He planned, organised and carried out fighting activities, occasionally in collaboration with other leaders,<sup>460</sup> but always independent of higher authority.<sup>461</sup> Consequently, between April 1992 and March 1993, he was the only leader with authority over the groups in the ^izmići area, and acted independently of the Srebrenica Armed Forces Staff.<sup>462</sup> In January 1993, Ejub Golić assumed command of the Bratunac Armed Forces following his appointment at a meeting in Konjević Polje.<sup>463</sup>

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<sup>458</sup> Safet Golić, T. 11977-11978, 12013.

<sup>459</sup> Ex. P158, "Order on the Appointment of the Glogova Independent Battalion Commander by the Commander of the Srebrenica Armed Forces" of 24 December 1992; *see* Nedret Mujkanović, T. 5169; Bećir Bogilović, T. 6398; Safet Golić, T. 11892.

<sup>460</sup> Ex. P329, "Interview" of the Accused, tape 8, p. 24.

<sup>461</sup> For Ejub Golić's organisation and participation in the action on Kravica on 7 January 1993, Sead Bekrić, T. 9583; Nesib Burić, T. 10708; ex. P329, "Interview" of the Accused, tape 8, pp. 12, 15; *see also* paras 663, 714 *infra*. More specifically, during that period, Ejub Golić requested assistance from the fighting groups in Blječeva, Potočari, Sućeska and Pale: Safet Golić, T. 11877; Ejub Dedić, T. 12265; as well as from fighters in Osmaće: Nesib Burić, T. 10708-10711, 10919-10926.

<sup>462</sup> Hamed Tiro, T. 10397, 10474, 10478, 10552; Mustafa [aćirović, T. 13334; D005, T. 13857-13859 (partly in private session); ex. P329, "Interview" of the Accused, tape 8, p. 12, tape 20, p. 14; *but see*, ex. P204, "Order by Chief of Staff of the Srebrenica Armed Forces to Commander of the Unit in Glogova" of 18 January 1993.

<sup>463</sup> Safet Golić, T. 11886; D005, T. 13860; ex. D812, "Certificate by the Commander of the Bratunac Armed Forces" of 30 June 1993.

(ii) Parallel Existence of a Srebrenica Municipal TO Staff in Tuzla

170. In June 1992, a Srebrenica Municipal TO Staff in exile was established in Tuzla,<sup>464</sup> led by Mirsad Mustafić.<sup>465</sup> It originated as an association of displaced persons from Srebrenica in Tuzla to assist in matters of mobilisation and distribution of humanitarian aid.<sup>466</sup> The Srebrenica Municipal TO Staff in Tuzla was recognised by the Tuzla District Staff at the end of July 1992.<sup>467</sup> Throughout 1992 and 1993, the Srebrenica Municipal TO Staff in Tuzla was in constant communication with the Tuzla District Staff, and later the 2<sup>nd</sup> Corps. The Srebrenica Municipal TO Staff in Tuzla attended meetings and received the relevant rules and instructions as representatives of Srebrenica.<sup>468</sup> In October 1992, by letter, the President of the Srebrenica War Presidency, Hajrudin Avdić, tasked the Srebrenica Municipal TO Staff in Tuzla with allocating humanitarian aid to the Srebrenica population in Tuzla.<sup>469</sup>

(d) Military Authority in Srebrenica After Demilitarisation<sup>470</sup>

171. In the wake of the proclamation of Srebrenica as a safe area by the UN Security Council on 16 April 1993, the area was officially demilitarised.<sup>471</sup> Thereafter, the Accused issued orders with a view toward consolidating the various units of the Srebrenica Armed Forces.<sup>472</sup> However, it took

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<sup>464</sup> In this Judgement, the Trial Chamber consistently kept a clear distinction between documentary evidence emanating from and addressing the Srebrenica Armed Forces Staff in Srebrenica, and the Srebrenica Municipal TO Staff in Tuzla.

<sup>465</sup> Bećir Bogilović, T. 6488. Other TOs in exile were also formed by individuals who had fled the Serb attacks on the municipalities of Bratunac and Vlasenica, *see* Mirsad Mustafić, T. 14221, 14243-14244; Izet Red 'ić, T. 9263; ex. D656, "Order" of 19 January 1993; ex. D649, "Formation-reformation of units of the Armed Forces of the ABiH in Bratunac Municipality"; ex. D948, "Joint Meeting to Gain Insight into the Work of Municipal Secretariats of Defence in Tuzla District."

<sup>466</sup> Mirsad Mustafić, T. 14191, 14195; ex. P234/D567, "Inclusion of Srebrenica TO units in the front" of 3 July 1992, according to which to the association of refugees from Srebrenica registered on 5 June 1992; ex. P233, "Order on Formation of Rudarsko-Srebrenička Company" of 2 July 1992, whereby the Srebrenica Municipal TO Staff in Tuzla formed the Rudarsko-Srebrenička Company, a military unit composed of 40 refugees from Srebrenica, and placed it under the control of the Tuzla District Staff. *See also* Mirsad Mustafić, T. 14224, 14242-14243, who confirms that he implemented ex. D656, "Order" of 19 January 1993, and recruited members in Tuzla to provide to the 2<sup>nd</sup> Corps Command as prescribed by the aforementioned order.

<sup>467</sup> Mirsad Mustafić, T. 14199, 14203-14204, where the witness explains that in July 1992 the Srebrenica Municipal TO Staff in Tuzla was subordinated to the Tuzla District TO Staff.

<sup>468</sup> The Trial Chamber notes the testimony of Mirsad Mustafić, T. 14219-14220, 14226-14229, 14245, and the existence of a number of documents which were communicated to the Srebrenica Municipal TO Staff in Tuzla but which, in the absence of evidence that they ever reached Srebrenica, have no probative value for the Trial Chamber, *see* ex. P118, "Order on Organisation of Courier Lines"; ex. D946, "Instructions on International Law of War", 13 November 1992; ex. D667, "Rules on Incentives in the Armed Forces of BiH", of 23 January 1993; ex. D674, "Decision on Amendments to the Rules of Service in the ABiH", of 22 July 1993; ex. D948, "Joint Meeting to Gain Insight into the work of Municipal Secretariats of Defence of Tuzla District".

<sup>469</sup> Mirsad Mustafić, T. 14222. *But see* para. 205 *infra*.

<sup>470</sup> Because the crimes charged in the Indictment are alleged to have occurred between June 1992 and March 1993, the Trial Chamber limits its examination of the evidence presented with regard to military authority in Srebrenica after demilitarisation in April 1993 to what is strictly necessary to the assessment of the Accused's duty to punish these crimes under Article 7(3) of the Statute.

<sup>471</sup> *See* para. 119 *supra*.

<sup>472</sup> Ex. P179, "Order" of 4 April 1993; ex. P391, "Order" of 16 June 1993.

significant time for the Srebrenica Armed Forces to become a truly integral part of the ABiH, within the structure of the 2<sup>nd</sup> Corps.<sup>473</sup>

172. On 3 October 1993, the Supreme Command of the ABiH recognised the Srebrenica Armed Forces Staff.<sup>474</sup> On 1 January 1994, the Supreme Command Staff of the ABiH ordered the establishment of the 8<sup>th</sup> Srebrenica Operations Group (“8<sup>th</sup> SOG”), formerly the Srebrenica Armed Forces.<sup>475</sup> Zulfo Tursunović was appointed deputy commander of the 8<sup>th</sup> SOG.<sup>476</sup> The constituent units of the 8<sup>th</sup> SOG were formed from local fighting groups of the Srebrenica Armed Forces.<sup>477</sup> While discipline improved,<sup>478</sup> problems still existed in establishing overall professionalism in the 8<sup>th</sup> SOG.<sup>479</sup> As previously noted,<sup>480</sup> on or about March 1994, the Accused was awarded the highest military decoration in the ABiH – the Golden Lily – by Sefer Halilović, Chief of Staff of the Supreme Command of the ABiH, for having “demonstrated outstanding courage, self-sacrifice and the ability to command and execute the tasks given.”<sup>481</sup>

173. During January 1995, the 8<sup>th</sup> SOG was renamed the ABiH 2<sup>nd</sup> Corps 28<sup>th</sup> Division.<sup>482</sup> The Accused, holding the rank of Brigadier,<sup>483</sup> and Ramiz Bećirović, in the rank of Major<sup>484</sup>, were respectively appointed Acting Division Commander and Acting Division Chief of Staff.<sup>485</sup> In April 1995, the ABiH 2<sup>nd</sup> Corps 28<sup>th</sup> Division was still a military unit in transformation.<sup>486</sup>

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<sup>473</sup> Ex. P95, “Supplement of the ABiH Chronicle” of 7 February 1994.

<sup>474</sup> *Ibid.*

<sup>475</sup> For the preparations of the establishment of the 8<sup>th</sup> SOG, *see* ex. D566, “Proposal for Organisation and Establishment Changes” of 7 October 1993; ex. P31, “Order on organisational changes” of 1 January 1994.

<sup>476</sup> Ex. D433, “Organisation and Establishment Structure of the 8<sup>th</sup> Operations Group”.

<sup>477</sup> Ex. P31, “Order on Organisational Changes” of 1 January 1994.

<sup>478</sup> Ex. P538, “Breakdown of Unlawful Incidents in April and May 1994” of 6 June 1994.

<sup>479</sup> Ex. D278, “Request for Information” of 5 May 1994; ex. D855, “Warning on Appointments and Proposals for Appointments” of 24 February 1994; ex. P328, “Interview” of the Accused, tape 7, p. 3; ex. D280, “Overview of the Security Situation” of 18 April 1995, stating that, in April 1995, the lack of professional officers appointed to appropriate positions had an impact on the reorganisation of the 8<sup>th</sup> SOG. *See also* ex. P560, (under seal) which refers the Accused being in conflict with Zulfo Tursunović and the Chief of police in December 1994.

<sup>480</sup> *See* para. 4 *supra*.

<sup>481</sup> Ex. P28, “Award”; *see also* ex. P562, “Agreed Facts”, A.26.

<sup>482</sup> Ex. D280, “Overview of the Security Situation” of 18 April 1995.

<sup>483</sup> Ex. P27, “Decision on the Appointment to/Promotion in the ABiH” of 12 July 1994; ex. P562, “Agreed Facts”, A.24.

<sup>484</sup> Ex. P27, “Decision on the Appointment to/Promotion in the ABiH” of 12 July 1994.

<sup>485</sup> Ex. P30, “Order” of 18 January 1995.

<sup>486</sup> Ex. D280, “Overview of the Security Situation” of 18 April 1995; *see also* James Gow, T. 1984-1986; Sead Delić, T. 8682; ex. P328, “Interview” of the Accused, tape 11, p. 5.

### 3. Military Police

#### (a) The Creation of Military Police Units on the Republic and Regional Level

174. In May 1992, following the outbreak of the conflict in BiH, the government in Sarajevo ordered the establishment of military police<sup>487</sup> units to be attached to the staffs of the TO at the national and regional levels.<sup>488</sup> The creation of military police units on the municipal level was not initially envisaged.<sup>489</sup>

175. On 14 October 1992, Željko Knez, commander of the Tuzla District Staff, ordered the formation of military police units to be attached to the municipal defence staffs in its area of competence (“14 October 1992 Order”), which included Srebrenica. Each municipal military police unit was to be of company strength and include a commander, an assistant for moral guidance, a supply officer, a driver, a courier and a signalman.<sup>490</sup>

176. The 14 October 1992 Order further envisaged that the municipal military police would report to the chiefs of security in the municipal defence staffs.<sup>491</sup> The Chief of Security of the Tuzla District staff in turn was to supervise the municipal chiefs of security.<sup>492</sup> All municipal military police units were to provide a daily report to the district military police in Tuzla.<sup>493</sup> However, the

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<sup>487</sup> The military police is often referred to as ‘VP’ (*vojna policija*) in original documents.

<sup>488</sup> Ex. P253/D273, “Order on Organisation of Military Police Units” of 17 May 1992, issued by the BiH Ministry for National Defence in Sarajevo, stating that this military police on the *national* level should be of battalion strength, on the *regional* level, it should be of company strength as well as comprise a command, a detachment for protection of persons, a forensic and on-site investigations detachment, a platoon for securing facilities and a platoon for anti-terrorist combat; *see also* ex. P123, “Report” of 29 August 1992, confirming that the military police was indeed a component of the Tuzla TO District Staff.

<sup>489</sup> *See* ex. P286, “Decree Law on Defence”, published in the BiH Official Gazette no. 4/92 of 20 May 1992 (pp. 3 *et seq.*), not including the military police as a component of municipal defence staffs; ex. D272, “Wartime Provisional Establishment of the Municipal Defence Staff” of 25 September 1992; *see also* Enver Hogić, T. 8144.

<sup>490</sup> Ex. P143, “Order” of 14 October 1992. The Trial Chamber notes ex. D275, “Order on the Work of the Security Organs and Military Police” of 4 February 1993, providing for the subordination of the military police to brigades and corps commands and prohibiting municipal defence staffs from establishing military police units in the area of competence of the 3<sup>rd</sup> Corps of the ABiH. However, the fact that some municipalities had gone ahead in establishing municipal military police units was confirmed by Sead Delić, T. 8620. *See also* ex. P143, “Order” of 14 October 1992, signed by Željko Knez, item 6: “If you have already set up a military police, you must bring them in line with this order.” The Trial Chamber notes the evidence given by Enver Hogić, T. 8149-8150, according to whom the population of the municipalities referred to in paragraph 1 of ex. P143 were all in exile.

<sup>491</sup> Ex. P413, “Order” of 14 October 1992, item 2. *See also* ex. P221, “Decision” of 14 October 1992, appointing Hamed Salihović as Chief for Intelligence and Security Affairs.

<sup>492</sup> Ex. P143, “Order” of 14 October 1992. The Trial Chamber notes the overlapping of authority with respect to the municipal chief of security created by the 14 October 1992 Order and ex. P221, “Decision on Nomination and Appointment” of the same date, signed by the President of the Srebrenica War Presidency. In the former, “the chiefs of security in municipal defence staffs or brigades shall control the units of military police in professional terms, while the chief of security of the Tuzla District Defence Staff, or a person he appoints, shall check their work and completion of tasks and take complete control of the military security service”. In the latter, the Chief of Intelligence and Security Affairs “shall be obliged to report immediately to the Chief of Staff of the Armed Forces”.

<sup>493</sup> Ex. D656, “Order” of 19 January 1993, signed by Željko Knez, item 3: “You must send daily reports based on the list of questions provided on the work of the Military Police in the previous 24 hours with the situation at 1800 hours on

evidence is unclear as to whether the 14 October 1992 Order was ever communicated to Srebrenica, and whether the Chief of Security in Srebrenica, Hamed Salihović, was aware that he was required by law to report to the Chief of Security of the Tuzla District Staff. The Prosecution has not proved this fact to the Trial Chamber's satisfaction.

(b) Jurisdiction of the Military Police

177. According to the Rules of Service issued in September 1992 by the BiH President ("ABiH Rules of Service"), the military police was required to

perform special tasks for the protection of the most sensitive segments of military organisation, for which purpose they are engaged in physical protection of vital elements in the system of command and control; to carry on the struggle against saboteur and terrorist groups F...ğ

178. With respect to military police investigations in the pre-trial stage of proceedings, the following limitation was imposed:

When the perpetrators of crimes [...] which are under the jurisdiction of military courts are persons who are not members of the armed forces, the military police is not autonomous in investigation because it shall be done with the participation of the [civil] police.<sup>494</sup>

179. According to the ABiH Rules of Service, the civilian population did not fall under the jurisdiction of the military police. The military police could take the following measures: arrest, detention, use of physical force, use of restraint and other means of coercion, use of weapons and taking into custody up to three days in a military remand prison upon a written decision of the chief of security of the ABiH Main Staff. In the performance of its duties, the military police was at all times required not to violate the dignity of a person.<sup>495</sup>

180. There is no evidence that the ABiH Rules of Service, as other rules and regulations, were ever received in the Srebrenica area before demilitarisation and that members of the military police, including Hamed Salihović, Chief of Security of the Srebrenica Armed Forces Staff, were informed of their contents. The Prosecution has not proven this fact to the Trial Chamber's satisfaction.

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the current day. [...] To date, the Banovići, Srebrenik, Lukavac and Tuzla Municipal Defence Staffs have done this, while the other Municipal Defence Staffs do not report at all."

<sup>494</sup> Ex. P558, "Rules of Service", pp. 4-6.

<sup>495</sup> Ex. P558, "Rules of Service", p. 8; ex. P112, "Order" of 1 July 1992, signed by Željko Knez.

(c) The Srebrenica Military Police

(i) Organisation of the Srebrenica Military Police<sup>496</sup>

181. A decision to establish the Srebrenica military police was taken<sup>497</sup> at a meeting of the Srebrenica TO Staff on 1 July 1992, during which the Srebrenica War Presidency was also inaugurated.<sup>498</sup> The Defence submits that the Srebrenica military police was established by the Srebrenica War Presidency.<sup>499</sup> The Trial Chamber is not persuaded that the Srebrenica War Presidency brought into existence the military police at the very moment it was itself created by members of the Srebrenica TO Staff. Although some members of the newly-elected Srebrenica War Presidency were part of the Srebrenica TO Staff on 1 July 1992,<sup>500</sup> there is no evidence that the other members,<sup>501</sup> with the exception of Hajrudin Avdić,<sup>502</sup> were present when the decision to establish the Srebrenica military police was taken. Yet, from the evidence, it remains unclear whether on 1 July 1992, the Srebrenica military police was intended to fall under the exclusive authority of the Srebrenica TO Staff or that of the Srebrenica War Presidency. What is clear, however, is that the Srebrenica military police, distinct from the civilian police, was operational as early as August 1992.<sup>503</sup> The Trial Chamber observes that the authority over the Srebrenica military police in 1992 and 1993 is not necessarily determined by the circumstances of its establishment.

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<sup>496</sup> With regard to the involvement of the Srebrenica military police in the crimes charged in Counts 1 and 2, *see* VII.C.1.b., “Whether Members of the Srebrenica Military Police Bear Responsibility for the Crimes of Murder and Cruel Treatment”.

<sup>497</sup> Ex. P109, “Decisions of the Territorial Defence Staff” of 2 July 1992. There is an earlier indication that the establishment of a military police had been envisaged in Srebrenica prior to 1 July 1992: ex. P4, “Order” of 15 June 1992, providing that, as one of the services to be attached to the Srebrenica TO, “?ađt the VP/?firing positions/, the organisation to be carried out by Mirzet Halilovic.”

<sup>498</sup> Ex. P109, “Decisions of the Territorial Defence Staff” of 2 July 1992.

<sup>499</sup> *See* Defence Final Brief, paras 653-656, referring to Bećir Bogilović, T. 6422-6423; ex. D986, “Handwritten Document”, 1 July 1992.

<sup>500</sup> The Accused, Bećir Bogilović, Hamdija Fejzić and Senahid Tabaković were all members of the Srebrenica TO Staff and elected, on that day, members of the Srebrenica War Presidency: *see* para. 143 *supra*; ex. P42, “Decision” of 1 July 1992.

<sup>501</sup> Hajrudin Avdić, Rešid Efendić, D'emaludin Bećirović, Jusuf Halilović and Aziz Nekić were not part of the Srebrenica TO Staff on 1 July 1992, when they were elected members of the Srebrenica War Presidency.

<sup>502</sup> Hajrudin Avdić was elected President of the Srebrenica War Presidency on 1 July 1992. Although he was never part of the Srebrenica TO Staff, his signature on ex. P42, “Decision” of 1 July 1992 may suggest that he was present at the meeting of 1 July 1992, when the Srebrenica War Presidency and the Srebrenica Military Police were established.

<sup>503</sup> Bećir Bogilović, T. 6247; *see* IV.B.3.c.ii., “Activities of the Srebrenica Military Police between July 1992 and March 1993”. *But see* [uhra \ilović, T. 15369-15370, denying the very existence of a military police in Srebrenica in 1992 and 1993, conceding however that there was at least a formal distinction between civil and military police in that both had different commanders. *See also* Hakija Meholfjić, T. 6992-6993, stating that the military police in Srebrenica was part of the civilian police; *but see* ex. P296, “Letter” of 3 June 1995, signed by Hakija Meholfjić, confirming the existence of a military police force prior to demilitarisation.

182. During the same meeting, on 1 July 1992, Mirzet Halilović was appointed commander of the Srebrenica military police.<sup>504</sup> On 22 November 1992, during a meeting of the Srebrenica Armed Forces Staff in which at least one Srebrenica War Presidency member was present, Mirzet Halilović was replaced by Atif Krdžić.<sup>505</sup> There is an indication that in late 1992, the deputy military police commander was Avdo Husejnović.<sup>506</sup> In early 1993, this position was filled by Džanan Džananović.<sup>507</sup>

183. Prior to 27 November 1992, the Srebrenica military police were stationed entirely within Srebrenica town. On 27 November 1992, Osman Osmanović, the Chief of Staff of the Srebrenica Armed Forces Staff, ordered that the Srebrenica military police be restructured (“27 November 1992 Order”) into battalions of the Srebrenica Armed Forces, an independent military police battalion and a military police platoon in Srebrenica town.<sup>508</sup> The 27 November 1992 Order responded to the need to deploy military police in the field.<sup>509</sup> There is evidence that members of the Srebrenica military police began to be deployed on the field even before the issuance of this order.<sup>510</sup>

184. In April 1993, following demilitarisation, the Srebrenica military police were disbanded and their duties taken over by the civil police.<sup>511</sup>

(ii) Activities of the Srebrenica Military Police Between July 1992 and March 1993

185. The Srebrenica military police, together with the civilian police were headquartered at the Srebrenica Police Station.<sup>512</sup> The military police were located on the ground floor, whereas the civilian police was on the first floor of that building.<sup>513</sup>

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<sup>504</sup> Ex. P109, “Decisions of the Territorial Defence Staff” of 2 July 1992. *See also* Bećir Bogilović, T. 6237-6240, 6422-6425. Ex. P4, “Order” of 15 June 1992, already mentions the name of Mirzet Halilović in the context of military police, but Bećir Bogilović could not confirm Halilović’s prior engagement with the military police: T. 6294.

<sup>505</sup> Bećir Bogilović, T. 6329; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 22 November 1992, p. 28. *But see* [uhra \ilović, T. 15235; Mustafa [aćirović, T. 13287-13288, stating that Atif Krdžić was appointed by the Srebrenica War Presidency. *See also* ex. P329, “Interview” of the Accused, tape 3, p. 7, with regard to Atif Krdžić in general.

<sup>506</sup> Ex. P458/P561, “Military Police Log”, entry of 5 December 1992, p. 6. However, in the circumstances, the Trial Chamber cannot accept that the Prosecution has sufficiently proven this fact, *see* para. 28 *supra*.

<sup>507</sup> Ex. P183, “Official Record” of 11 February 1993, signed by Džanan Džananović.

<sup>508</sup> Ex. P11, “Decision on Reorganising the Military Police”, 27 November 1992. This Decision was discussed at a meeting of the Srebrenica Armed Forces Staff on 22 November 1992: ex. P84, “Memo Pad”, p. 28.

<sup>509</sup> Bećir Bogilović, T. 6330.

<sup>510</sup> In this context, *see* ex. P329, “Interview” of the Accused, tape 5, p. 2; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 3 October 1992, pp. 4-7, meeting of Srebrenica Armed Forces Staff of 7 October 1992, pp. 7-8.

<sup>511</sup> Hakija Meholfjić, T. 6996; ex. D246, “Assessment” of 23 May 1995, p. 1; *see also* para. 219 *infra*.

<sup>512</sup> Hakija Meholfjić, T. 7092. Bećir Bogilović gave evidence that between May and July 1992, the civilian police was headquartered in the TO Staff building: T. 6227, 6245; ex. P516, “Photo”.

186. Reflecting the overall situation and that of the Srebrenica Armed Forces in particular, the functioning of the Srebrenica military police during the time-period under consideration was restricted due to a lack of weapons and professional staff.<sup>514</sup>

187. Many of the activities of the Srebrenica military police were similar in nature to those of the civilian police.<sup>515</sup> For example, on 23 October 1992, reacting to the discontent of local leaders in the field regarding the lack of public order, the Srebrenica Armed Forces Staff ordered the Srebrenica military and civilian police to bring disorderly soldiers and civilians into custody.<sup>516</sup> In February 1993, the military police dealt with a murder case in which neither the perpetrator nor the local Serb victims had a military background.<sup>517</sup>

188. Other activities were more military in nature. For instance, the military police was ordered by the Srebrenica Armed Forces Staff to seize weapons from civilians and place them at the disposal of the Srebrenica Armed Forces,<sup>518</sup> although there are serious doubts that this was ever enforced.<sup>519</sup> There is documentary evidence indicating that units of the Srebrenica military police were involved, at various levels, in attacks conducted by Bosnian Muslims against Bosnian Serb villages in the area.<sup>520</sup>

189. In sum, the Trial Chamber finds that the Srebrenica Military Police was established on 1 July 1992 by the Srebrenica TO Staff. The Trial Chamber further finds that the Srebrenica Military Police was headed by Mirzet Halilović until 22 November 1992 when he was replaced by Atif Krdžić, who held this position until demilitarisation.

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<sup>513</sup> Bećir Bogilović, T. 6245-6246. For a more detailed description of the Srebrenica police station, *see* paras 358, 359 *infra*.

<sup>514</sup> Bećir Bogilović, T. 6443-6444; ex. P204, "Order" of 18 January 1993, signed by Osman Osmanović: "Ejub Golić [...] is herewith ordered to make possible to the military police to take over ten machine-guns seized in Kravica"; ex. D248, "Report" of 2 July 1994. During a meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff held on 9 November 1992, Osman Osmanović complained about the lack of support for the military police: ex. P84, "Memo Pad", joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, p. 21. *See also* ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 4 December 1992, p. 34: "Atif Krdžić: The VP has not been fully staffed. Many have given up because of food and accommodation. There are no weapons (only two rifles and two pistols). Three men are still needed"; Suad Smajlović, T. 14663.

<sup>515</sup> Ex. P329, "Interview" of the Accused, tape 4, p. 3.

<sup>516</sup> Ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 23 October 1992, pp. 12-13.

<sup>517</sup> Ex. P183, "Official Record" of 11 February 1993.

<sup>518</sup> Ex. P5, "Order" of 29 October 1992.

<sup>519</sup> Suad Smajlović, T. 14658-14659, stating that the contents of ex. P5 were "illogical" since the location in question, Krušev Do, was not part of the Srebrenica enclave at the time.

<sup>520</sup> *See* paras 638, 650, 663 *infra*.



#### 4. Communications

##### (a) Overview

190. Communications are an essential component of an effective command. In the words of one witness,

command, control, communications and intelligence, are all vital parts of good effective command and control on the ground for a commander. If you lack one or more of these areas, then you will not be able to effectively control your command.<sup>521</sup>

The Trial Chamber finds it useful to examine the extent to which means of communications, in particular, were available to the Srebrenica Armed Forces Staff during the period covered in the Indictment.

191. The terrain of the municipalities of Bratunac and Srebrenica is rugged and mountainous. In some remote areas, no telephone lines existed prior to the conflict and information was conveyed by radio.<sup>522</sup> In the town of Srebrenica, communications were carried out by the Centre for Monitoring, Informing and Alerting (“Information Centre”), located in the former TO building behind the municipal building.<sup>523</sup> When Srebrenica was recaptured by Bosnian Muslims in May 1992, a number of different communication devices in varying working condition were retrieved from the Information Centre, as well as other locations. These enabled limited communications within and beyond the Srebrenica area for some time.

192. In Srebrenica town, electricity was cut off in late June or early July 1992. At the end of April 1992, telephone lines between Srebrenica and Tuzla were severed by Bosnian Serb forces, and in early July 1992, between Srebrenica and Sarajevo.<sup>524</sup> Over time, ingenious methods were devised to make up for the lack of electricity and to partially power communications equipment.<sup>525</sup> After demilitarisation, half-a-dozen makeshift power plants were set up throughout Srebrenica.<sup>526</sup>

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<sup>521</sup> Rex Dudley, T. 15024. The Trial Chamber is mindful that these requirements were expressed from the viewpoint of a career military officer from a nation with a fully developed armed force.

<sup>522</sup> Ibrahim Bećirović, T. 7425.

<sup>523</sup> Ibrahim Bećirović, T. 7395; *see also* ex. P527, “Photograph”.

<sup>524</sup> *See* para. 115 *supra*. *See also* Mirsad Mustafić, T. 14192; Ibrahim Bećirović, T. 7453.

<sup>525</sup> *See* para. 115 *supra*; fn. 542 *infra*.

<sup>526</sup> Ibrahim Bećirović, T. 7440-7441.

193. It was not until mid-1994 that an effective system for encrypting communications was available in Srebrenica. Prior to that time, all communications were exposed to the danger of being intercepted by Bosnian Serbs.<sup>527</sup>

(b) Relevant Structures

194. Because of the pressing need for a functioning communications system, the Communications and Information Service was established at a meeting of the Srebrenica TO Staff of 1 July 1992.<sup>528</sup> This service was tasked to establish communications with the Staff of the TO of BiH in Sarajevo and the District Staff in Tuzla, as well as with the families of combatants.<sup>529</sup> Since 20 May 1992, such communications had been established on an *ad hoc* basis by Ibrahim Bećirović under the direction of Akif Ustić, deputy commander of the Srebrenica TO Staff.<sup>530</sup>

195. During the same meeting of 1 July 1992, Hamed Alić was simultaneously appointed member of the Srebrenica War Presidency and Chief of the Communication and Information Service, tasked with supervising the operation of the equipment in the PTT building.<sup>531</sup> Upon his departure from Srebrenica in December 1992, Ibrahim Bećirović informally took over the supervision of communication activities, assisted by others.<sup>532</sup> Radio and communication equipment was located primarily in the PTT building, but could also be found in the culture hall and Information Centre.<sup>533</sup>

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<sup>527</sup> Ibrahim Bećirović, T. 7427, 7578-7580; ex. D261, "Proposal for Encryption of Confidential Information" of 23 August 1993; ex. D262, "Telegram" of 2 March 1993. With regard to the situation between mid-1994 and July 1995, see Enver Hogić, T. 8100-8101.

<sup>528</sup> Ex. P109, "Decisions of the Srebrenica TO Staff" of 2 July 1992. The Srebrenica War Presidency was also established on 1 July 1992. The Prosecution submits in its Response to the Defence Final Brief, p. 43, that "there were two separate and distinct Communication and Information services in Srebrenica; one attached to the War Presidency; and the other to Srebrenica Armed Staff". However, the Trial Chamber does not agree that the evidence relied on by the Prosecution supports such a submission: see ex. P84 "Memo Pad", meeting of Srebrenica Armed Forces Staff, 7 November 1992, p. 17, which does not refer to the situation on the ground, but rather deals with the organisation of work. Again, p. 22 reflects an aspiration: "Communication and Information must be separated". The information contained on p. 27 deals with a prospective communications service to be established within the Sub-region, the existence of which has been examined by the Trial Chamber in IV.B.2.b.ii., "The Establishment and Development of the Sub-region".

<sup>529</sup> Ibrahim Bećirović, T. 7649-7650; ex. P84, "Memo Pad", meeting of Operations Staff, date unspecified, p. 2; see para. 202 *infra* for details on activities of the Communication and Information Service. Although ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 3 November 1992, p. 17 states that "[a]s for the work of the communications and information service, [...] in fact, it consists of two services [sl.]: the communications service operating within the armed forces and the information service /illegible/", no witness actually confirmed the existence of two separate services: see Ibrahim Bećirović, T. 7733-7734.

<sup>530</sup> Ibrahim Bećirović, T. 7429-7431.

<sup>531</sup> Ex. P100, "Letter of Srebrenica TO Staff" of 2 July 1992; see also Ibrahim Bećirović, T. 7497, 7505-7507.

<sup>532</sup> Ibrahim Bećirović, T. 7492, 7494, 7520-7521; Nedret Mujkanović, T. 5040.

<sup>533</sup> Ibrahim Bećirović, T. 7492-7494.

196. The Information and the Propaganda Service of the Tuzla District Staff was created on 6 July 1992 to coordinate the work of the relevant municipal services.<sup>534</sup> There is no evidence, however, that such coordination took place with the Srebrenica municipality.

197. On 12 November 1992, the President of the Srebrenica War Presidency established a three-member commission to report to the Srebrenica War Presidency on the problems faced by the Communication and Information Service.<sup>535</sup> A report was subsequently prepared.<sup>536</sup>

(c) Communications Within Srebrenica

198. After regular telephone lines had been cut by the Bosnian Serb forces, half-a-dozen temporary telephone lines, a switchboard and a number of telephone sets were installed in Srebrenica for the use of the hospital. Later, the Civilian Protection Staff and the civilian police had this system installed.<sup>537</sup>

199. Prior to the second half of 1993, no regular or reliable system of radio communications was available between the villages of Srebrenica municipality.<sup>538</sup> While some of the equipment retrieved after Srebrenica was recaptured by Bosnian Muslims in May 1992 could have enabled communications within Srebrenica, the lack of electricity after early July 1992 rendered it practically useless.<sup>539</sup> Despite this, communications between Cerska and Srebrenica were possible by means of short-wave radio.<sup>540</sup>

200. A number of hand-held, short-range radios known as 'Motorolas' appear to have been available in the Srebrenica area in 1992 and 1993, in particular to the Accused and Zulfo Tursunović.<sup>541</sup> Because of the lack of electricity described above, the most imaginative solutions

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<sup>534</sup> Ex. P238, "Work Plan of the Staff Information and Propaganda Service", of 6 July 1992.

<sup>535</sup> Ex. D263, "Decision on the Establishment of a Commission" of 12 November 1992; Mustafa [ačirović, T. 13302-13303. With regard to the problems in the functioning of the Communication and Information Service, *see* ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, p. 22.

<sup>536</sup> Ibrahim Bećirović, T. 7650-7651.

<sup>537</sup> Ibrahim Bećirović, T. 7453-7454.

<sup>538</sup> Ibrahim Bećirović, T. 7704-7705.

<sup>539</sup> Ibrahim Bećirović, T. 7425-7426, 7582, mentioning a radio device used by the local communes which did not have telephone lines to establish communications with Srebrenica. In Srebrenica town, such a device had been retrieved from the Information Centre after 20 May 1992: *see* para. 191 *supra*.

<sup>540</sup> Ibrahim Bećirović, T. 7579-80, 7594. With regard to a description of this 'Atlas 210-X' short-wave radio device, *see* Ibrahim Bećirović, T. 7426.

<sup>541</sup> *See* Branimir Mitrović, T. 3750; Kada Hotić, T. 9767; Sidik Ademović, T. 12966, 12980, 13000; Rex Dudley, T. 15071. With regard to Zulfo Tursunović and, in particular, the Accused, *see* Nedeljko Radić, T. 3501; Anđa Radović, T. 4809; Nedret Mujkanović, T. 5433. *See also* Ibrahim Bećirović, T. 7595, giving evidence that, in September 1992, the Accused had a small hand-held radio which covered a distance of ten kilometres, depending on the terrain; ex. P434, "Video".

were devised to recharge the batteries.<sup>542</sup> Scant evidence has been adduced as to the purpose for which the Motorolas were used, except for one occasion where intelligence was obtained from nearby Serb forces.<sup>543</sup>

201. Although no properly organised courier system<sup>544</sup> existed at any time in the Srebrenica area during the period relevant to the Indictment, the Trial Chamber is satisfied that a number of individuals were regularly tasked with relaying messages in person, when the need arose. Some of these messengers were killed while on duty.<sup>545</sup> This system of carrying messages, apart from posing inherent risks to life and limb, was slow and only relatively secure.<sup>546</sup>

(d) Communications Beyond Srebrenica

202. Only in July 1992, months after the siege of Srebrenica began, communications with ham radio operators in Tuzla were established from the ham radio station located in the PTT building. This made it possible for individuals in Srebrenica town to communicate with others, elsewhere.<sup>547</sup> From this time forward, reports regarding the humanitarian situation in Srebrenica were transmitted to Sarajevo and Tuzla two or three times a week.<sup>548</sup> There is also evidence that the Accused established ham radio connections on various occasions, first with his wife in Slovenia during the summer of 1992, and second, with Tuzla and Sarajevo in February and March 1993.<sup>549</sup> As of March 1993, further radio contacts were made between the Accused and the ABiH command in Sarajevo and Tuzla.<sup>550</sup> Further, there is evidence that the Accused communicated by radio with Bosnian

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<sup>542</sup> Sidik Ademović, T. 12981; ex. P328, "Interview" of the Accused, tape 10, pp. 12-13. For evidence relating to the generation of power, see Suad Smajlović, T. 14539.

<sup>543</sup> Sidik Ademović, T. 13021, 13023, 13035, 13041, 13075, 13186; ex. P328, "Interview" of the Accused, tape 10, pp. 10-11. *But see* ex. P328, "Interview" of the Accused, tape 8, p. 30; ex. P329, "Interview" of the Accused, tape 10, p. 26, tape 21, p. 23, stating that hand-held radios were used during actions; ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 3 October 1992, p. 5: "the military police [VP] to take mobile radio transmitters and walkie-talkies", meeting of the Srebrenica Armed Forces Staff of 10 November 1992, p. 23: "Find two filed radio stations. Naser has two".

<sup>544</sup> The Trial Chamber notes the diverging views of the Parties on the matter of communications by couriers: Defence Final Brief, paras 1495-1496; Prosecution Response to Defence Final Brief, paras 106-112.

<sup>545</sup> Bećir Bogilović, T. 6208, 6387; Ibrahim Bećirović, T. 7707; Enver Hogić, T. 8205; ex. P328, "Interview" of the Accused, tape 5, p. 6.

<sup>546</sup> Rex Dudley, T. 14991; ex. P328, "Interview" of the Accused, tape 7, p. 5.

<sup>547</sup> Nedret Mujkanović, T. 5067; Ibrahim Bećirović, T. 7440-7449, 7583-7637, mentioning radio contact with Bosnian Serb operators and ham radio operators in Tuzla to gather information on Bosnian Muslim refugees; ex. P522, "Photograph of radio equipment"; ex. P523, "Photograph of radio equipment".

<sup>548</sup> Nedret Mujkanović, T. 5202-5203.

<sup>549</sup> Ibrahim Bećirović, T. 7566-7572, adding that in February 1993, the Accused had several conversations with an individual from Tuzla, aka 'Munja', upon request of the latter, to discuss the situation in Srebrenica; moreover, in March 1993, the Accused contacted the BiH President, Alija Izetbegović, to ask for assistance. *See also* fn. 550 *infra* regarding the ham radio contact established between the Accused and Sefer Halilović in March 1993.

<sup>550</sup> With regard to radio contact between the Accused and Sefer Halilović, *see* Ibrahim Bećirović, T. 7572, 7576; ex. P359 and P364, "Intercepted Conversation" of 16 April 1993; ex. P361, "Intercepted Conversation" of 11 June 1993; ex. P362, "Intercepted Conversations" of 29 May 1993; ex. P363, "Intercepted Conversation" of 12 June 1993; ex.

Serbs about exchange of Serb prisoners.<sup>551</sup> The radio equipment was also used by General Morillon to give a series of interviews during his visit to Srebrenica between 11 and 28 March 1993.<sup>552</sup>

203. There is evidence that at least one additional radio receiver existed outside Srebrenica, located in Likari, the highest elevation between Srebrenica and Potočari.<sup>553</sup> It was used by the Likari fighting group to intercept Serb radio communications. The collected information was then passed on to nearby local fighting groups.<sup>554</sup>

204. After demilitarisation, private correspondence between Srebrenica and Tuzla was possible, albeit censored by the Bosnian Serb authorities in Bratunac.<sup>555</sup> Further, sending and receiving documents between Tuzla and Srebrenica became possible with the establishment of a communication system which linked a computer to radio equipment.<sup>556</sup> There were, however, numerous limitations to this system, such as the number of pages which could be transmitted and continuing power shortages.<sup>557</sup>

(e) Conclusion

205. The Trial Chamber concludes that during the period relevant to the Indictment, communications existed but were rudimentary and limited at best. Undoubtedly, there were great difficulties on the ground that made it impossible at the time to have a system of communication beyond what has been described above. Limitations existed also for the exercise of military activity but the Trial Chamber is convinced that some means of communication on the battlefield were available, and indeed used. This is proven not only by direct evidence but also indirectly, once the dynamics of some of the relevant attacks are considered, as further explained in the chapter of this Judgement dealing with the crime of wanton destruction of cities, towns or villages, not justified by military necessity.

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P328, "Interview" of the Accused, tape 5, pp. 33-34, tape 10, pp. 29-30. With regard to radio contact between the Accused and Hazim [adić, Commander of the 2<sup>nd</sup> Corps, *see* ex. P355, "Intercepted Conversation" of 2 March 1993.

<sup>551</sup> Ex. P97, "Intercepted Conversation"; Nedeljko Radić, T. 3567, 3581-3585.

<sup>552</sup> Piers Tucker, T. 5877-5880, 5883-5885.

<sup>553</sup> Azir Malagić, T. 11482; ex. D757, "Map".

<sup>554</sup> Azir Malagić, T. 11304-11307.

<sup>555</sup> Sidik Ademović, T. 13202, 13204.

<sup>556</sup> Ibrahim Bećirović, T. 7487-7491, stating that this 'packet system' was brought from Tuzla to Srebrenica in March 1993 and used both by civilian and military authorities, including the President of the Srebrenica War Presidency; *see also* ex. P329, "Interview" of the Accused, tape 4, p. 6; Sidik Ademović, T. 13201-13202.

<sup>557</sup> Mirsad Mustafić, T. 14229-14230.

## 5. Conclusion With Regard to the Structure of the Military Authorities in Srebrenica Before Demilitarisation

206. Considering the totality of the evidence, the Trial Chamber is satisfied that various attempts to assemble the fighting groups in the Srebrenica area under a single military authority were made in 1992 and 1993. It is further satisfied that as part of this effort, the Srebrenica Armed Forces Staff was established. However, the Trial Chamber is not convinced that one integrated Bosnian Muslim military authority in and around Srebrenica emerged before demilitarisation.

### C. Structure of the Civilian Authorities in Srebrenica

#### 1. War Presidency of the Srebrenica Municipality

##### (a) Establishment and Composition

207. Pursuant to the BiH Constitution and the Decree Law on Amendments to the Decree Law on the Formation and Operation of Districts (“Decree Law on War Presidencies”), war presidencies had jurisdiction over municipal affairs in time of war.<sup>558</sup>

208. When the Srebrenica War Presidency was established on 1 July 1992 at a meeting of the Srebrenica TO Staff, it was envisaged to be the highest governmental organ on the territory of Srebrenica, assuming all competencies of the pre-war Srebrenica Municipal Assembly.<sup>559</sup> This meeting was held at Stupina and attended by the majority of those elected to the Srebrenica TO Staff on 20 May 1992.<sup>560</sup> The Srebrenica War Presidency was initially located in the PTT building but, after a few weeks, moved to the municipal building, once it had been partially refurbished.<sup>561</sup>

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<sup>558</sup> Mušir Brkić, T. 8324; ex. D283, “Decree Law on Amendments to the Decree Law on the Formation and Operation of Districts” of 13 August 1992, Article 1; ex. D284, “Decision of BiH Presidency on the Appointment of Srebrenica War Presidency” of 2 September 1992. The Trial Chamber notes that, although not specifically mentioned, the Constitution referred to in these two exhibits seems to be that of the Socialist Republic of BiH.

<sup>559</sup> Ex. P42, “Decision on Formation of the War Presidency of Srebrenica Municipality” of 1 July 1992: “On 1 July 1992, pursuant to the Decision of the Presidency of Bosnia and Herzegovina to Declare a State of War, at the initiative of the armed forces and citizens of the free territory of Srebrenica and in order to fight as successfully as possible against the aggressor against Bosnia and Herzegovina, the following was adopted in Srebrenica: ... Article 2: The War Presidency is the most senior organ of government on the free territory of Srebrenica and has all the competencies of the Srebrenica Municipal Assembly”; *see also* ex. P109, “Decisions of the Srebrenica TO Staff” of 2 July 1992; Hakija Mehlojić, T. 6792.

<sup>560</sup> Bećir Bogilović, T. 6233-6234, stating that Stupina is a settlement located between Srebrenica and Bajramovići.

<sup>561</sup> [uhra ilović, T. 15182-15184, 15410, stating that, as of the end of July 1992, the Srebrenica War Presidency occupied offices on the ground and on the first floor of the municipal building. It had two old mechanical typewriters at its disposal, but lacked paper and ribbon; *see also* Mustafa [aćirović, T. 13478-13479, stating that the President of the Srebrenica War Presidency, Hajrudin Advić, had an office in the municipal building along with himself and War Presidency members D'emaludin Bećirović and Hamdija Fejzić. *See* Pyers Tucker, T. 5839, 5841-5848, stating that in March 1993, the PTT building was again the seat of the Srebrenica War Presidency.

209. At the meeting of 1 July 1992, members of the Srebrenica War Presidency were elected by those present.<sup>562</sup> However, because the newly-elected chairman of the Executive Committee of the Srebrenica War Presidency, Hamdija Fejzić, maintained that the members of the Srebrenica War Presidency could only be appointed by the BiH Presidency, the decision on appointment was delayed pending verification.<sup>563</sup> Verification did not take place prior to demilitarisation, nonetheless there is ample evidence to establish that the elected members of the Srebrenica War Presidency acted as such from the very first day.<sup>564</sup>

210. As of 1 July 1992, the core members of the Srebrenica War Presidency were Hajrudin Avdić as President, Rešid Efendić as Secretary, the Accused by virtue of being Commander of the Srebrenica Armed Forces Staff,<sup>565</sup> Hamdija Fejzić as Chairman of the Executive Committee in time of war, Džemaludin Bećirović as Secretary of the Secretariat for Economy and Social Services, Bećir Bogilović as Chief of the Public Security Station (“SJB”) and Jusuf Halilović as Commander of the Civilian Protection Staff. Other Srebrenica War Presidency members without portfolio, namely Mirsad Dudić from Osmaće,<sup>566</sup> Šefik Mandžić from Kragljivoda,<sup>567</sup> as well as Senahid Tabaković from Skenderovići<sup>568</sup> and Aziz Nekić,<sup>569</sup> were leaders of local fighting groups.<sup>570</sup>

211. After July 1992, the Srebrenica War Presidency was enlarged several times. On 26 August 1992, Murat Efendić became the representative of the Srebrenica War Presidency in Sarajevo.<sup>571</sup> Later, on 14 October 1992, a Secretariat for National Defence was created in Srebrenica with Suljo

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<sup>562</sup> Bećir Bogilović, T. 6233-6234.

<sup>563</sup> Suad Smajlović, T. 14654; ex. D986, “Handwritten Document” of 1 July 1992.

<sup>564</sup> Ex. D251, “Information and Request for the Verification of Srebrenica Municipal Presidency” of 13 May 1994.

<sup>565</sup> There is evidence that, as of 14 October 1992 at the latest, the Accused ceased to be a member of the Srebrenica War Presidency: ex. P84, “Memo Pad”, joint meeting of the Srebrenica War Presidency, the Operations Staff and Civilian Protection of 14 October 1992, p. 7.

<sup>566</sup> With regard to Mirsad Dudić being the leader of a fighting group from Osmaće, Nesib Burić, T. 10920-10921; Azir Malagić, T. 11405; Suad Smajlović, T. 14649, 14763; Bećir Bogilović, T. 6421.

<sup>567</sup> With regard to [efik Mand`ić being the leader of a fighting group from Kragljivoda, *see* Hakija Meholjić, T. 6799; Nesib Burić, T. 10602; Suad Smajlović, T. 14673. Ibro Dudić became a member of the Srebrenica War Presidency replacing [efik Mand`ić after he was killed in October 1992: ex. D251, “Information and Request for the Verification of the Srebrenica Municipal Presidency” of 13 May 1994.

<sup>568</sup> With regard to Senahid Tabaković being the leader of a fighting group from Skenderovići, *see* Bećir Bogilović, T. 6388; Nedret Mujkanović, T. 5345.

<sup>569</sup> Ex. P42, “Decision on Formation of the War Presidency of Srebrenica Municipality” of 1 July 1992; ex. P109, “Decisions of the Srebrenica TO Staff” of 2 July 1992; ex. D986, “Handwritten Document” of 1 July 1992; ex. D251, “Information and Request for the Verification of Srebrenica Municipal Presidency” of 13 May 1994; ex. P328, “Interview” of the Accused, tape 4, p. 23.

<sup>570</sup> Later in this Judgement, the Trial Chamber will examine the consequences to draw from the dual membership of some members in the Srebrenica War Presidency, and who as leaders of local fighting groups were members of the Srebrenica Armed Forces Staff, *see* IV.E., “Relationship Between the Military and the Civilian Authorities”. With regard to Mirsad Dudić, *see* Bećir Bogilović, T. 6421. With regard to [efik Mand`ić, *see* Hakija Meholjić, T. 6813; ex. P329, “Interview” of the Accused, tape 1, p. 31. With regard to Senahid Tabaković, *see* Bećir Bogilović, T. 6388.

<sup>571</sup> Ex. P162, “Report” of 25 May 1993.

Hasanović as its Secretary.<sup>572</sup> On 19 December 1992, the Srebrenica War Presidency was further enlarged by the co-option of representatives of additional geographical areas.<sup>573</sup>

212. In the wake of demilitarisation in April 1993, other civilian authorities were established, namely a court, a prosecutor's office, a prison under the authority of the civilian police and a commission for the distribution of humanitarian aid.<sup>574</sup> On 9 July 1993, Hajrudin Avdić submitted his resignation as President of the Srebrenica War Presidency. However, he remained a member of the Srebrenica War Presidency. Thereafter, Fahrudin Salihović was elected President of the Srebrenica War Presidency. On 22 June 1994, the BiH Presidency confirmed his election and that of other members.<sup>575</sup>

(b) Functioning

213. Every Srebrenica War Presidency member had an equal vote in the decision-taking process.<sup>576</sup> Decisions were taken during meetings held once or twice a month, which the Accused appears to have rarely attended.<sup>577</sup>

214. The Srebrenica War Presidency was involved in various activities ranging from law enforcement to humanitarian matters.<sup>578</sup> While it was initially envisaged to deal with civilian issues,<sup>579</sup> some of its members occasionally participated in joint meetings with the Srebrenica Armed Forces Staff where matters of a military and civilian nature were discussed.<sup>580</sup> Despite shortcomings,<sup>581</sup> the Srebrenica War Presidency generally strove to achieve its objectives.

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<sup>572</sup> Mensud Omerović, T. 8538-8539, stating that prior to the conflict, a national secretariat for defence existed in every municipality, including Srebrenica, which was tasked with military recruitment and wartime assignments. After demilitarisation, this body continued to compile lists of reserve military personnel.

<sup>573</sup> Ex. P162, "Report" of 25 May 1993, the additional members were Fahrudin Salihović, Ned'ad Bektić and Teufik Selimović.

<sup>574</sup> Ex. P162, "Report" of 25 May 1993. With regard to the organisation of a judicial system in Srebrenica, *see* IV.D.3., "Court Structure in the Srebrenica Area Between April 1992 and July 1995".

<sup>575</sup> Ex. D294, "Decision" of 22 June 1994, published in the BiH Official Gazette of 23 July 1994, according to which Hajrudin Avdić remained a member of the Srebrenica War Presidency as President of the SDA. *See also* ex. D251, "Information and Request for the Verification of Srebrenica Municipal Presidency" of 13 May 1994, stating that on 13 April 1994, the Srebrenica War Presidency adopted a decision to set up the 'Presidency of the Srebrenica Municipality', in line with the aforementioned Decree Law on War Presidencies which had recently been received.

<sup>576</sup> Nedret Mujkanović, T. 5337-5338.

<sup>577</sup> [uhra \ilović, T. 15188, 15217; ex. D1004.1 and D1004.2, "Photographs", depicting a meeting.

<sup>578</sup> [uhra \ilović, T. 15196, 15197, 15263-15264, 15363-15364; ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 9 October 1992, p. 7, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, pp. 7-10, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, pp. 19, 20, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, pp. 43, 44, joint meeting of of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff 29 December 1992, pp. 45-48.

<sup>579</sup> Ex. P328, "Interview" of the Accused, tape 4, p. 25.

<sup>580</sup> Ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 9 October 1992, pp. 6-7, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, pp. 7-10, joint meeting of the



## 2. Civilian Police

215. Prior to the conflict, Srebrenica had a functioning civilian police force with Hamed Salihović as its chief.<sup>582</sup> In late 1991, the Accused was transferred to the Srebrenica police station,<sup>583</sup> where he worked under the supervision of Hakija Meholjić.<sup>584</sup> On 8 April 1992, the Accused was appointed chief of the Potočari police sub-station.<sup>585</sup>

216. At the meeting in Bajramovići of 20 May 1992, Bećir Bogilović, a retired police officer, was temporarily appointed police commander of the town of Srebrenica. He was tasked with setting up a police station under the authority of the Srebrenica TO Staff and re-establishing law and order.<sup>586</sup> The civilian police was initially headquartered in the pre-war TO Staff building.<sup>587</sup> Bećir Bogilović started to staff the civilian police with former policemen. Nurija Jusufović was appointed as his deputy.<sup>588</sup> On 1 July 1992, upon the creation of the Srebrenica War Presidency, Bećir Bogilović was appointed chief of the Srebrenica SJB, reporting to the President of the Srebrenica War Presidency, Hajrudin Avdić. In August or September 1992, the civilian police moved back to its pre-war headquarters, the Srebrenica Police Station.<sup>589</sup>

217. Bećir Bogilović, the chief of Srebrenica SJB, described the duties of the civilian police in Srebrenica as of July 1992 as “Maintaining law and order, fighting crime, offering security and safety and assistance to other organisations and institutions.”<sup>590</sup>

218. During the second half of 1992, the Srebrenica civilian police also attempted to control the movement of civilians by establishing curfews and checkpoints.<sup>591</sup> They were also tasked with accounting for weapons in the possession of civilians.<sup>592</sup> While problems faced by the Srebrenica SJB were discussed at joint meetings of the Srebrenica War Presidency and the Srebrenica Armed

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Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, pp. 19-22, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, pp. 43-44, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 29 December 1992, pp. 45-48; ex. P328, “Interview” of the Accused, tape 11, pp. 25-26.

<sup>581</sup> Mustafa [aćirović, T. 13286-13288; Piers Tucker, T. 5975, 6005-6006; ex. P328, “Interview” of the Accused, tape 10, p. 19.

<sup>582</sup> Ex. P328, “Interview” of the Accused”, tape 1, p. 17.

<sup>583</sup> Ex. P562, “Agreed Facts”, A.8, A.9.

<sup>584</sup> Hakija Meholjić, T. 6729.

<sup>585</sup> Ex. P562, “Agreed Facts”, A.10; Hakija Meholjić, T. 6727, stating that in times of crisis, every municipality in the SFRY was divided into police sub-stations, formed on the local commune level.

<sup>586</sup> Bećir Bogilović, T. 6204, 6217; ex. P74, “Decision on the Appointment of Bećir Bogilović” of 20 May 1992.

<sup>587</sup> Bećir Bogilović, T. 6228; ex. P516, “Photograph”.

<sup>588</sup> Bećir Bogilović, T. 6225-6226.

<sup>589</sup> Bećir Bogilović, T. 6217, 6237.

<sup>590</sup> Bećir Bogilović, T. 6231.

<sup>591</sup> Bećir Bogilović, T. 6272, 6321. The Trial Chamber notes the futility of imposing curfews and checkpoints in an isolated town bursting with thousands of refugees.

Forces Staff, the Srebrenica SJB remained at all times a civilian institution under the authority of the Srebrenica War Presidency.<sup>593</sup>

219. After demilitarisation, the civilian police, headed by Hakiija Meholjić, took over all policing activities of the disbanded military police. This included preventing and investigating crimes and filing reports against both civilian and military perpetrators with the Misdemeanour Court and the Srebrenica Municipal Public Prosecutor's Office.<sup>594</sup> The scope of activity expanded to providing security for Serbian families who had remained in Srebrenica,<sup>595</sup> storing humanitarian aid, as well as conducting joint patrols with UNPROFOR. Despite lack of equipment, the civilian police contributed to a temporary improvement of the security situation.<sup>596</sup>

220. On 1 July 1992, the Civilian Protection Staff of Srebrenica was established and Jusuf Halilović was appointed its commander.<sup>597</sup> It was composed of several units whose tasks included fire-fighting, public utility maintenance and building construction. While this body seems to have been increasingly active from 1993 to 1995, its work, as all activity in the Srebrenica enclave, was hindered by the circumstances.<sup>598</sup>

221. In the absence of a fully functioning judicial system, however, all efforts to introduce and maintain public order could only have limited effect.<sup>599</sup>

## **D. Judicial System**

### **1. Applicable Law**

222. In the wake of its independence, BiH incorporated SFRY legislation in its legal system, including the criminal code which was applicable to both civilians and the military. As a consequence, 'war crimes against the civilian population', 'war crimes against prisoners of war' and 'cruel treatment of the wounded, sick and prisoners of war' automatically became punishable under BiH law.<sup>600</sup>

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<sup>592</sup> Bećir Bogilović, T. 6273, 6282, 6514-6515; ex. P254, "Order on possession of weapons" of 14 October 1992.

<sup>593</sup> Bećir Bogilović, T. 6332.

<sup>594</sup> Ex. D246, "Assessment" of 23 May 1995.

<sup>595</sup> See paras 95, 101 *supra*.

<sup>596</sup> Ex. D248, "Report on the Work of the Srebrenica SJB for the period from 18 April- 31 December 1993".

<sup>597</sup> Bećir Bogilović, T. 6236, 6239; ex. P328, "Interview" of the Accused, tape 4, p. 21.

<sup>598</sup> Ex. D434, "Report"; ex. P328, "Interview" of the Accused, tape 4, p. 20; ex. P329, "Interview" of the Accused, tape 7, p. 20, tape 8, p. 22.

<sup>599</sup> See IV.D., "Judicial System".

<sup>600</sup> See Mušir Brkić, T. 8239-8240, giving evidence as to the issuance of a decree law on the taking over of SFRY laws by BiH, published in the BiH Official Gazette of 11 April 1992; ex. P496, "SFRY Criminal Code", Article 142 which

223. The “Decree Law on the Armed Forces of BiH”, which entered into force on 20 May 1992, served as the foundation of all future ABiH regulations.<sup>601</sup> New rules and regulations began to be promulgated soon after.<sup>602</sup> On 28 May 1992, a code of conduct for soldiers of the TO of BiH was to be forwarded to the municipal TO staffs and their respective commanders along with an order advocating compliance with the “spirit of the 1949 Geneva Conventions and the rules of the International Law of War”.<sup>603</sup>

224. On 23 August 1992, a number of international conventions, including the 1949 Geneva Conventions and the 1977 Additional Protocols, were adopted by presidential decree.<sup>604</sup> The same day, the BiH President issued an order providing for the enforcement by the Armed Forces of BiH of the rules of international humanitarian law. Apart from tasking the BiH Ministry of Defence to pronounce a more detailed set of instructions on the enforcement of the rules of international humanitarian law, the BiH President ordered, *inter alia*, that

Fuĝnit commanders and every individual member of the armed forces shall be responsible for the application of the international laws of war. Competent officers must instigate proceedings to pronounce the sanctions prescribed by law against persons who violate the rules of the international laws of war.<sup>605</sup>

225. On 5 December 1992, the more detailed “Instructions for the Implementation of the International Laws of War within the ABiH” were published in the ABiH Official Journal.<sup>606</sup> They restate well-established rules on the conduct of war, the definition and treatment of prisoners of war<sup>607</sup>, the definition of war crimes,<sup>608</sup> and the obligation to bring charges against the members of one’s own forces for the alleged commission of war crimes.

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prohibits “illegal and self-willed destruction”, Article 144 which prohibits “murders, tortures or inhuman treatment of prisoners of war”, and Article 150 which proscribes cruel treatment of the wounded, sick or war prisoners.

<sup>601</sup> Ex. P543, “Decree Law on the Armed Forces of BiH” of 20 May 1992, Articles 9, 10.

<sup>602</sup> Mušir Brkić, T. 8239-8240.

<sup>603</sup> Ex. P29, “Order” of 28 May 1992.

<sup>604</sup> Ex. P271, “Decree Law on the Ratification of International Conventions”, signed on 23 August 1992, which entered into force on the day of its publication in the BiH Official Gazette of 15 November 1992; Izo Tankić, T. 5609.

<sup>605</sup> Ex. P272, “Order on the Application of the Rules of the International Laws of War in the Armed Forces of BiH” of 23 August 1992, published in the ABiH Official Journal on 15 November 1992; ex. P319, “Order on Enforcement of the Rules of the International Military Law” of 23 August 1992; Mušir Brkić, T. 8239-8240.

<sup>606</sup> Ex. P545, “Instructions for the Implementation of the International Laws of War within the ABiH” published in the ABiH Official Journal of 5 December 1992; Sead Delić, T. 8656-8657.

<sup>607</sup> Ex. P545, “Instructions for the Implementation of the International Laws of War within the ABiH”, item 19: “It is forbidden to wound or kill a combatant of the enemy after he surrenders”, item 21: “They are entitled to provide themselves with sufficient food ration, the necessary clothing and footwear and medical supplies. Moreover, they shall be able to correspond with their families and receive relief.”

<sup>608</sup> Ex. P545, “Instructions for the Implementation of the International Laws of War within the ABiH”, item 4, stating that “ill-treatment of war prisoners”, “injuring or killing of persons from the enemy side who have surrendered” and “wanton destruction of public or private property” are considered to be war crimes.

226. Based on the evidence concerning the isolation of Srebrenica, including the lack of adequate communications, it remains unclear whether the authorities in Srebrenica, including the Accused as Commander of the Srebrenica Armed Forces Staff, received the aforementioned rules and regulations prior to 1994.<sup>609</sup> Nonetheless, it is undisputed that the SFRY Criminal Code covered the type of underlying criminal conduct charged in the Indictment.

## 2. Court Structure in the SFRY

227. Prior to the war, the SFRY had a three-tiered criminal court system consisting of municipal courts, district courts and a supreme court in each of the six republics.<sup>610</sup> Municipal courts<sup>611</sup> had jurisdiction over minor criminal matters not exceeding a maximum punishment of 10 years confinement. While several smaller municipalities could fall under the jurisdiction of a single municipal court, Srebrenica had its own municipal court.<sup>612</sup> District courts<sup>613</sup> had jurisdiction in the first instance over more serious and complex crimes with sentences exceeding 10 years imprisonment, and also acted as appeals courts.<sup>614</sup> The Tuzla District Court had jurisdiction over Srebrenica.<sup>615</sup> The highest court of the Socialist Republic of BiH was the Supreme Court in Sarajevo, which heard appeals from the district courts.<sup>616</sup> Although no military courts existed at the time, military personnel could be tried by civilian courts.<sup>617</sup> Later, upon their inception, military courts applied the same substantive and procedural law as civilian courts.<sup>618</sup>

228. The investigative stage of the proceedings for all courts was conducted by the police, the prosecutor, and an investigating judge.<sup>619</sup> The police would conduct investigations into a crime and then forward a criminal report to the prosecutor. For the most serious crimes, such as those charged in the Indictment, the prosecutor would forward a request to investigate a suspect to the

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<sup>609</sup> See IV.B.4.d., “Communications beyond Srebrenica”, in particular with regard to the use of the packet communication system. The Trial Chamber underscores that in principle knowledge of rules of customary international law is *not* a prerequisite for criminal responsibility, see *Prosecutor v. Milan Milutinović, Nikola [ainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, paras 41-43.

<sup>610</sup> Vaso Erić, T. 4910-4913.

<sup>611</sup> Municipal courts were also referred to as ‘basic courts’, ‘lower courts’ or ‘courts of first instance’: Vaso Erić, T. 4911. For ease of reference, the term ‘municipal courts’ will be used hereinafter.

<sup>612</sup> Vaso Erić, T. 4910-4911; Izo Tankić, T. 5600.

<sup>613</sup> ‘District courts’ were also referred to as ‘senior courts’ or ‘high courts’. For ease of reference, the term ‘district court’ will be used hereinafter.

<sup>614</sup> Vaso Erić, T. 4912.

<sup>615</sup> The following municipalities were also covered by the jurisdiction of the Tuzla District Court: Orašje, Brčko, Bijeljina, Zvornik, Bratunac, Vlasenica, Kladanj, Lukavac, Gračanica, Tuzla, Kalesija, Srebrenik, Banovići and @ivinice: Izo Tankić, T. 5600; Vaso Erić, T. 4911-4913.

<sup>616</sup> Vaso Erić, T. 4913.

<sup>617</sup> Ex. P496, “Criminal Code of the SFRY”, particularly Article 113, sub-para. 5. For instance, in 1992, the Tuzla District Court had jurisdiction over military personnel: Izo Tankić, T. 5601-5602, 5604.

<sup>618</sup> Izo Tankić, T. 5611-5613; Mensud Omerović, T. 8479.

investigating judge. The investigating judge would then determine whether or not to open an investigation.<sup>620</sup>

### 3. Court Structure in the Srebrenica Area Between April 1992 and July 1995

#### (a) April to September 1992

229. In May 1992, the jurisdiction *ratione materiae* of municipal courts was extended to all criminal cases, including those over which, prior to the war, only district courts had jurisdiction. Thereafter, district courts dealt only with appeals.<sup>621</sup> In Srebrenica, no municipal court existed from the time the war began until June 1993. In May or June 1992, the jurisdiction of the municipal court in Zvornik was extended by the Bosnian Serb authorities to include the municipalities of Bratunac, Srebrenica and Skelani.<sup>622</sup> Accordingly, the Zvornik court had jurisdiction over Srebrenica, a territory that was not under Bosnian Serb control. No case was ever transferred from Srebrenica to Zvornik as there were no communications between the Bosnian Muslim and the Bosnian Serb authorities.<sup>623</sup>

230. In Srebrenica, the duties of the police in the investigative process remained unchanged.<sup>624</sup> The civilian police were authorised to arrest military personnel in situations where military police were unavailable, as in the case of Srebrenica. The nearest military unit would then be informed.<sup>625</sup> In Srebrenica, however, assuming the police had been able to perform their duties adequately, there was no prosecutor to initiate proceedings.<sup>626</sup>

#### (b) September 1992 to June 1993

##### (i) Military Courts

231. In August 1992, three types of military courts were established throughout BiH: district military courts,<sup>627</sup> military discipline courts<sup>628</sup> and special military courts or courts-martial<sup>629</sup>. These

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<sup>619</sup> Vaso Erić, T. 4913.

<sup>620</sup> Vaso Erić, T. 4913-4919.

<sup>621</sup> Vaso Erić, T. 4911-4912.

<sup>622</sup> Vaso Erić, T. 4950-4951.

<sup>623</sup> Vaso Erić, T. 4954.

<sup>624</sup> Bećir Bogilović, T. 6231.

<sup>625</sup> Bećir Bogilović, T. 6233.

<sup>626</sup> Bećir Bogilović, T. 6233; *see also* IV.B.3., “Military Police”; IV.C.2., “Civilian Police”.

<sup>627</sup> Ex. P497, “Statutory Order on District Military Court” of 13 August 1992, Article 6, providing that district military courts were competent to hear crimes committed by military personnel.

<sup>628</sup> Military discipline courts only heard cases of breaches of military discipline: Enver Hogić, T. 8069.

<sup>629</sup> Special military courts were competent to hear a limited range of crimes committed against the armed forces, *e.g.*, insubordination, *see ex.* P323, “BiH Law on Special Military Courts” of 13 August 1992, Article 3.

courts had exclusive jurisdiction over military personnel as of September 1992.<sup>630</sup> They ceased to exist in 1996 and their caseload was assumed by civilian courts.<sup>631</sup>

232. In effect, the Tuzla District Court turned over all cases involving military members to the district military court in Tuzla (“Tuzla District Military Court”).<sup>632</sup> The Tuzla District Military Court, which had first instance jurisdiction over Srebrenica, had a military prosecutor and investigating judges.<sup>633</sup> Thus, an institutional framework existed for reporting the type of underlying criminal conduct charged in the Indictment.<sup>634</sup>

233. Courts-martial could only be convened by a brigade commander or other high ranking officer for crimes committed by a subordinate against another ABiH member.<sup>635</sup> Courts-martial were reserved for situations where, in the interests of security, proceedings were required to be conducted immediately and could not be conducted before the competent district military court.<sup>636</sup> No courts-martial, however, were convened in the area of responsibility of the 2<sup>nd</sup> Corps between 1992 and 1995.<sup>637</sup> There is no evidence showing that the authorities in Srebrenica ever received the laws and regulations governing courts-martial.<sup>638</sup>

234. It appears that on 14 October 1992, a form of summary military court was created in Srebrenica, consisting of one lawyer and four local leaders,<sup>639</sup> including Zulfo Tursunović.<sup>640</sup> There is substantial evidence that this military court functioned only in a quasi-judicial capacity.<sup>641</sup> Documentary evidence in the form of interrogation notes, nonetheless, indicates that in January and February 1993, a body purporting to be a ‘Summary Court-Martial’ was actively involved in

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<sup>630</sup> Ex. P320, “Decree Law on Special Military Courts” of 13 August 1992; ex. P323, “BiH Law on Special Military Courts” of 13 August 1992; Izo Tankić, T. 5606-5609, 5667-5668, 5736.

<sup>631</sup> Enver Hogić, T. 8064; Izo Tankić, T. 5605.

<sup>632</sup> Izo Tankić, T. 5632.

<sup>633</sup> Izo Tankić, T. 5612.

<sup>634</sup> Izo Tankić, T. 5613.

<sup>635</sup> Enver Hogić, T. 8073; ex. P323, “BiH Law on Special Military Courts” of 13 August 1992.

<sup>636</sup> Ex. P323, “BiH Law on Special Military Courts” of 13 August 1992, Art. 10 and 14, stipulating that courts-martial could only find an accused guilty and sentence him to death, or refer the case to the competent district military court.

<sup>637</sup> Enver Hogić, T. 8073-8074.

<sup>638</sup> Ex. D210 “Request”.

<sup>639</sup> Ex. P162, “Report” of 25 May 1993, p. 2: “On 14 October 1992, at the insistence of the commander, a summary military court consisting of five members was formed”; ex. P84, “Memo Pad”, joint meeting of the Srebrenica War Presidency and the Armed Forces Staff of 14 October 1992, p. 9; *see also* ex. P328, “Interview” of the Accused, tape 13, pp. 7-8; ex. P329, “Interview” of the Accused, tape 3, p. 5.

<sup>640</sup> Ex. P328, “Interview” of the Accused, tape 13, p. 7-8, stating that the other members were Ahmed Tihic, Atif Krd'ic and Hamed Salihović; ex. P329, “Interview” of the Accused, tape 3, pp.4-5, stating that this summary military court was formed to investigate into the murder of a Serb prisoner allegedly committed by Mirzet Halilović.

<sup>641</sup> Mensud Omerović, T. 8429, 8437, 8548-8549; Suad Smajlović, T. 14677; *see also* Bećir Bogilović, T. 6475; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 7 November 1992, p. 21.

interrogating and taking decisions concerning Serb prisoners held at the Building.<sup>642</sup> The interrogation notes – most of which date from late January or early February 1993 and addressed to a body called the “Commission for liaison/mediation with the enemy” – were purportedly signed by Hamed Salihović, chief of security and intelligence of the Srebrenica Armed Forces.<sup>643</sup> The Trial Chamber believes that it is very likely that this commission is the body which was formed following the decision of the joint meeting of the Srebrenica Armed Forces Staff and of the Srebrenica War Presidency, held on 23 December 1992, to form a commission for the exchange of prisoners, and which would have as members Ibrahim Mandžić, Ramiz Bećirović and Hamdija Fejzić.<sup>644</sup> The Trial Chamber acknowledges that there is no further evidence as to the existence of this commission.<sup>645</sup> The interrogation notes further characterised a detainee as being fully criminally responsible<sup>646</sup>, recommended an exchange,<sup>647</sup> or advised increasing “the investigation regime” and continuing the “operative work”<sup>648</sup>. In most instances, reference is made to a “final decision” which, according to the document, was to be issued by the ‘Military High Court’.<sup>649</sup> However, there is no evidence that such a final decision was ever issued by the court, or indeed which court is being referred to.

## (ii) Civilian Courts

235. Srebrenica remained without a functioning civilian court between September 1992 and March 1993.<sup>650</sup> The Zvornik municipal court continued to assert jurisdiction over Srebrenica.<sup>651</sup>

236. In December 1992, the Srebrenica War Presidency established a misdemeanour court and appointed Mensud Omerović as judge.<sup>652</sup> From then on, there was at least a minimal capability to

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<sup>642</sup> A great many interrogation notes appear to emanate from this ‘Summary Court Martial’: ex. P491, “Interrogation Notes” of Anđa Radović, 6 February 1993; ex. P46, “Interrogation Notes” of Kostadin Popović, 30 January 1993; ex. P69, “Interrogation Notes” of Ratko Nikolić, 30 January 1993; ex. P44, “Interrogation Notes” of Ilija Ivanović, 28 January 1993; ex. P101, “Interrogation Notes” of Branko Sekulić, 31 January 1993; ex. P48, “Interrogation Notes” of Milisav Milovanović, 31 January 1993; ex. P56, “Interrogation Notes” of Mile Trifunović, 2 February 1993. As regards interrogation of female detainees, see Stana Stamenić, T. 6621; Milosava Nikolić, T. 7157-7158; Anđa Radović, T. 4828-4830.

<sup>643</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 1; See also tape 3, p. 21: “Hamed Salihović was the one who was mainly concerned with the prisoners [...]”. See ex. P221, “Decision on Nomination and Appointment” of 14 October 1992; ex. P255, “Decision to Leave the Srebrenica Armed Forces Staff” for Hamed Salihović’s appointment as chief of security and intelligence on 14 October 1992, and his official resignation from the Srebrenica Armed Forces Staff on 21 December 1992; see also Bećir Bogilović, T. 6460.

<sup>644</sup> Ex. P84, “Memo Pad”, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 45; see also para. 517 *infra*.

<sup>645</sup> See also Ilija Ivanović, T. 4109; C007, T. 4557; Mensud Omerović, T. 8549.

<sup>646</sup> Ex. P101, “Interrogation Notes” of Branko Sekulić, 31 January 1993.

<sup>647</sup> Ex. P56, “Interrogation Notes” of Mile Trifunović, 2 February 1993.

<sup>648</sup> Ex. P44, “Interrogation Notes” of Ilija Ivanović, 2 February 1993.

<sup>649</sup> Ex. P48, “Interrogation Notes” of Milisav Milovanović, 31 January 1993; ex. P46, “Interrogation Notes” of Kostadin Popović, 30 January 1993.

<sup>650</sup> Izo Tankić, T. 5715.

conduct a certain category of judicial proceedings in Srebrenica,<sup>653</sup> By definition, however, the misdemeanour court did not have jurisdiction over the type of underlying criminal conduct charged in the Indictment.<sup>654</sup> Additionally, judicial activity prior to demilitarisation was hindered, given that refugees had taken shelter in the court building and burned the archives to keep themselves warm.<sup>655</sup> The misdemeanour court only became fully operational after demilitarisation.<sup>656</sup> Following that, members of the Srebrenica War Presidency served as the appellate body for the misdemeanour court.<sup>657</sup>

237. By law, the type of underlying crimes charged in the Indictment should have been reported to the District Court in Tuzla.<sup>658</sup> However, at the time, there was neither an investigating judge nor a prosecutor in Srebrenica.<sup>659</sup> An individual wanting to report a crime would have had to address the civilian or military police.<sup>660</sup> Even then, due to the siege, either police would have only been able to secure evidence and await a more favourable moment to report the crime.<sup>661</sup> For crimes committed against Serbs, it was especially difficult to gain the co-operation of Bosnian Muslims in securing evidence.<sup>662</sup>

238. The Trial Chamber concludes that although on paper there was jurisdiction over the type of underlying criminal conduct charged in the Indictment, the attempts to set up a court in Srebrenica failed and it was practically impossible to refer a case to Tuzla.<sup>663</sup> Further, it is uncertain whether any rules and regulations were received in Srebrenica, if at all, prior to 1994.<sup>664</sup>

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<sup>651</sup> Vaso Erić, T. 4950-4954.

<sup>652</sup> Ex. P162, "Report" of 25 May 1993; Mensud Omerović, T. 8468, 8471.

<sup>653</sup> Mensud Omerović, T. 8553-8554.

<sup>654</sup> A misdemeanours court is an administrative court with jurisdiction over traffic law, tax law, the law on the use of natural resources and over issues related to public order: Mensud Omerović, T. 8420, 8481.

<sup>655</sup> Mensud Omerović, T. 8553-8554.

<sup>656</sup> Mensud Omerović, T. 8549.

<sup>657</sup> Mensud Omerović, T. 8471-8472; *see* ex. D209, "Information on the Operation of the Srebrenica Lower Court" of 10 December 1993.

<sup>658</sup> Izo Tankić, T. 5754; *see also* para. 227 *supra*.

<sup>659</sup> Enver Hogić, T. 8179-8180.

<sup>660</sup> Izo Tankić, T. 5682-5683.

<sup>661</sup> Izo Tankić, T. 5755-5756.

<sup>662</sup> Izo Tankić, T. 8540.

<sup>663</sup> Mensud Omerović, T. 8554.

<sup>664</sup> Enver Hogić, T. 8162-8163; Mensud Omerović, T. 8552-8553; ex. D209 "Information on the Operation of the Srebrenica Lower Court" of 10 December 1993; ex. P162 "Report" of 25 May 1993.



(c) June to December 1993

239. In June 1993, a prosecutor's office and a municipal court composed of four judges, appointed by the Presidency of BiH, were set up in Srebrenica.<sup>665</sup> However, this court did not have jurisdiction over serious crimes or those which would fall under the jurisdiction of military courts, such as the underlying crimes charged in the Indictment. The municipal court also took over the work of the Srebrenica misdemeanour court<sup>666</sup> and started to function as of 1 July 1993.<sup>667</sup>

240. The Srebrenica municipal court dealt with several cases of murder, theft and robbery.<sup>668</sup> Several cases in which the detention on remand had to be extended by the competent court were referred to Tuzla but it took several months for news of decisions from Tuzla to reach Srebrenica.<sup>669</sup> Of the 40 proceedings that were initiated between June and December 1993,<sup>670</sup> none proceeded beyond the investigative stage.<sup>671</sup> The fact that appeals could not be heard was dealt with creatively, for example in misdemeanour cases, one judge would hear the case at first instance and the other three judges would hear the appeal.<sup>672</sup>

241. During this period, the municipal court and the prosecutor in Srebrenica still had no jurisdiction over military personnel. District military courts were the only courts competent to try military personnel and there was no such court in Srebrenica. Only in exceptional cases, such as when a civilian and a military member jointly committed a crime, could a civilian court try the military member.<sup>673</sup> Although the public prosecutor in Srebrenica did not have jurisdiction, and as there was no military prosecutor, the police reported the crimes of military personnel to the public prosecutor and investigating judge.<sup>674</sup> The results of investigations were then to be reported by the prosecutor to the Tuzla District Military Court.<sup>675</sup> In reality, hardly any of the criminal cases involving military personnel were successfully transferred to the military prosecutor in Tuzla. Reasons for this included the difficulty in conducting investigations in Srebrenica<sup>676</sup> and in

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<sup>665</sup> The Prosecutor appointed was D`uzida Akagić: Izo Tankić, T. 5645. *See also* Mensud Omerović, T. 8477, referring to the appointment of Mensud Omerović, Smail Klempić, Jasmin Karamnjić and Enisa Dizdarević as judges.

<sup>666</sup> Mensud Omerović, T. 8478.

<sup>667</sup> Ex. P556, "Report by Srebrenica Basic Court" of 15 June 1995.

<sup>668</sup> Mensud Omerović, T. 8479-84780.

<sup>669</sup> [uhra \ilović, T. 15278.

<sup>670</sup> Izo Tankić, T. 5654.

<sup>671</sup> [uhra \ilović, T. 15277.

<sup>672</sup> Ex. D209, "Information on the Operation of the Srebrenica Lower Court" of 10 December 1993; Mensud Omerović, T. 8476-8478.

<sup>673</sup> Mensud Omerović, T. 8482-8483, 8558-8560, stating that the Srebrenica municipal court nonetheless ruled on the detention of military personnel.

<sup>674</sup> Mensud Omerović, T. 8541.

<sup>675</sup> Mensud Omerović, T. 8484; Izo Tankić, T. 5667-5668.

<sup>676</sup> Mensud Omerović, T. 8554, 8556.

transferring suspects and case materials to Tuzla.<sup>677</sup> A few cases were nonetheless referred to Tuzla in 1993 with the logistical assistance of UNPROFOR.<sup>678</sup>

242. In the second half of 1993, the police completed investigations for 35 suspected crimes, only five of which resulted in indictments. The prevailing circumstances in Srebrenica explain why criminal proceedings often did not progress beyond the investigatory stage.<sup>679</sup> This evidence nonetheless demonstrates the existence of a means for criminal proceedings to be initiated.

(d) January 1994 to February 1995

243. In January 1994, upon request of the Srebrenica municipal court, the BiH Ministry of Justice in Sarajevo transferred jurisdiction from the Tuzla District Court to the Srebrenica municipal court for cases which would normally have fallen under the jurisdiction of the district court. Even under its expanded jurisdiction, the municipal court of Srebrenica did not acquire jurisdiction over military personnel. This decision was not communicated to Srebrenica until March 1994. The working conditions in the Srebrenica municipal court were still primitive at best.<sup>680</sup>

(e) February to June 1995

244. On 6 February 1995, the Tuzla District Military Court delegated some of its powers to the Srebrenica municipal court, to enable the court to act in cases where proceedings could not be delayed.<sup>681</sup> As a consequence, the Srebrenica municipal court was temporarily authorised to exercise jurisdiction over crimes committed by military personnel.<sup>682</sup> In a letter dated 23 May 1995, the President and Prosecutor of the Tuzla District Military Court informed the mayor of Srebrenica municipality of the establishment of the Srebrenica office of the Tuzla District Military Court.<sup>683</sup> Thus, as of May 1995, shortly after the Accused left Srebrenica,<sup>684</sup> judicial proceedings against individuals for the type of criminal conduct charged in the Indictment could be initiated and conducted in Srebrenica.

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<sup>677</sup> Ex. P505, "Report" of 14 November 1995; Izo Tankić, T. 5725; Mensud Omerović, T. 8543.

<sup>678</sup> See ex. P507, "Criminal Report concerning Emir Halilović" of 28 July 1993; Mensud Omerović, T. 8558-8560.

<sup>679</sup> Ex. P501, "Work Report of the Srebrenica Public Prosecutor's Office for 1993" of 27 December 1993.

<sup>680</sup> Izo Tankić, T. 5723; ex. P556, "Report by Srebrenica Basic Court" of 15 June 1995.

<sup>681</sup> Ex. P549, "Letter" of 6 February 1995.

<sup>682</sup> *Ibid*; see also Mensud Omerović, T. 8487-8488.

<sup>683</sup> Ex. D205, "Letter" of 23 May 1995, stating that Avdo Majstorović, D'emal Bećirović and Ferid Otojagić were appointed as judges; see also Izo Tankić, T. 5700.

<sup>684</sup> Sead Delić, T. 8605, 8676; see also para. 120 *supra*.

245. As of early 1995, UNPROFOR provided logistical support to the Srebrenica municipal court,<sup>685</sup> but this had little effect on the overall lack of adequate resources. In the confined area of Srebrenica, no one was prepared to act as defence counsel, further complicating judicial proceedings.<sup>686</sup>

246. As communications between Srebrenica and Tuzla improved, it became possible to report crimes to the functioning judicial authorities in Tuzla. The Trial Chamber heard evidence that when it was felt necessary, avenues were identified to bring charges for crimes committed by members of the ABiH. One example, although not ending in formal trial or punishment, took place in March 1995. Ejub Golić, the commander of the Glogova Independent Battalion, was sent by the Accused to Tuzla upon suspicion of having committed a double murder in April 1993 and subsequent acts of disorderly conduct in Srebrenica.<sup>687</sup> After a hearing, he was returned by Sead Delić, Commander of the 2<sup>nd</sup> Corps, to the Serb frontlines in Srebrenica, where he was killed in action.<sup>688</sup>

#### **E. Relationship Between the Military and the Civilian Authorities**

247. Throughout the second half of 1992 and into 1993, a number of individuals were members of both the Srebrenica War Presidency and the Srebrenica Armed Forces Staff. At times, this led to a rather unclear line of demarcation between the respective areas of competence which sometimes overlapped.<sup>689</sup>

248. In terms of membership, leaders of local fighting units who had been elected to the Srebrenica TO Staff in Bajramovići were also elected to the Srebrenica War Presidency on 1 July 1992 as delegates from designated areas.<sup>690</sup> Furthermore, Hamdija Fejzić had also been a member of the Srebrenica TO Staff since 20 May 1992 when he was appointed Secretary of the Executive Council of the Srebrenica War Presidency on 1 July 1992.<sup>691</sup> The same applies to Bećir Bogilović, a member of both the Srebrenica TO Staff and the Srebrenica War Presidency upon their creation.

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<sup>685</sup> Mensud Omerović, T. 8559, stating that UNPROFOR provided typing paper and support as regards locating victims and accused for questioning.

<sup>686</sup> Mensud Omerović, T. 8559.

<sup>687</sup> Mensud Omerović, T. 8502; ex. P553, "Request for Information" of 30 December 1994; ex. D290, "Urgent Submission of Documents" of 22 February 1995; Mustafa [aćirović, T. 13574; ex. D858, "Request" of 25 April 1995; ex. P329, "Interview" of the Accused, tape 16, pp. 6-9.

<sup>688</sup> Mensud Omerović, T. 8589; Sidik Ademović, T. 13117-13122; Mirsad Mustafić, T. 14255; ex. P578/D295, "Telegram" of 11 March 1995; ex. D859, "Interview" of Sead Delić, published 17 March 2000.

<sup>689</sup> Bećir Bogilović, T. 6456, 6459; ex. P329, "Interview" of the Accused, tape 7, p. 20; *see also* para. 214 *infra*.

<sup>690</sup> Ex. D251, "Information and Request for the Verification of the Srebrenica Municipal Assembly" of 13 May 1994; [uhra \ilović, T. 15189-15190. *See* paras 141-143, 210-211 *supra*.

<sup>691</sup> Nedret Mujkanović, T. 5084, 5441, 5486; [uhra \ilović, T. 15183, 15186, 15208-15209.

The Accused initially wore the dual hats of Commander of the Srebrenica TO Staff, later Srebrenica Armed Forces Staff and, in this capacity, he was also member of the Srebrenica War Presidency.<sup>692</sup>

249. Meetings where issues of both military and civilian nature were discussed by members of the Srebrenica War Presidency and of the Srebrenica Armed Forces Staff further illustrate the lack of strictly delineated boundaries between the two bodies.<sup>693</sup> At times, arguments between members of the two bodies over the division of resources and tasks were exchanged.<sup>694</sup>

250. In light of the evidence adduced at trial, the Trial Chamber is satisfied that although the lines of demarcation of competence and jurisdiction between the Srebrenica War Presidency and the Srebrenica Armed Forces Staff during the period relevant to the Indictment were never clearly defined, it generally became accepted that the Srebrenica War Presidency was the highest authority in Srebrenica.<sup>695</sup> However, the extent of this hierarchy *vis-à-vis* the Srebrenica Armed Forces Staff was never the subject of a formal agreement.

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<sup>692</sup> There is evidence that, as of 14 October 1992, at the latest, the Accused was not a member of the Srebrenica War Presidency, *see* fn. 565 *supra*.

<sup>693</sup> Ex. P84, "Memo Pad", *e.g.*, meeting of the Srebrenica Armed Forces Staff of 3 October 1992, p. 4, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 7, meeting of the Srebrenica Armed Forces Staff, pp. 16-17, meeting of the Srebrenica Armed Forces Staff, of 7 November 1992, p. 17-18, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, meeting of the Srebrenica War Presidency of 8 December 1992, p. 39, joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency 23 December 1992, p. 43, joint meeting of the Srebrenica War Presidency and Srebrenica Armed Staff, 29 December 1992, p. 45.

<sup>694</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency, pp. 43-44, reflecting an exchange between Hajrudin Avdić, President of the Srebrenica War Presidency, Ramiz Bećirović, Chief of Training and Operations of the Srebrenica Armed Forces Staff, and the Accused: "Hajrudin: The War Presidency is superior to the Staff, but the Presidency cannot function without the Staff and vice versa. We must agree not to look to see who the boss is. There are problems... When we start trusting each other things will start to improve... I appeal for cooperation and compliance with decisions that are taken." Ramiz Bećirović adds: "There is no need for us to raise the issue of superiority and subordination." On the subject, 'Naser', who the Trial Chamber believes to be the Accused, is reported as stating: "I would ask for work, cooperation and trust between the Staff and the [War Presidency]. The important thing for me is to provide for the soldiers."

<sup>695</sup> Ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 7 October 1992, pp. 6-7, meeting of Srebrenica Armed Forces Operations Staff of 14 October 1992, p. 10, meeting of Srebrenica Armed Forces Staff of 7 November 1992, pp. 17-18, meeting of Srebrenica Armed Forces Staff of 22 November 1992, p. 28, meeting of Srebrenica Armed Forces Staff of 10 December 1992, pp. 39-41, meeting of Srebrenica Armed Forces Staff of 22 December 1992, pp. 41-43, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 44, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 29 December 1992, p. 46, meeting of Srebrenica Armed Forces Staff of 10 January 1993, p. 50; Nedret Mujkanović, T. 5012, 5299, 5495; Mustafa [aćirović, T. 13284; Suad Smajlović, T. 14657. *But see* Bećir Bogilović, T. 6271, 6429, 6459, 6469.

## V. JURISDICTION UNDER ARTICLE 3 OF THE STATUTE

### A. The Law

251. The Accused is charged with murder and cruel treatment (Count 1 and Count 2) and wanton destruction of cities, towns or villages not justified by military necessity (Count 3 and Count 5), punishable under Article 3 of the Statute.<sup>696</sup>

252. Article 3 of the Statute is entitled “Violations of the Laws or Customs of War”. This expression is a traditional term of art, which has now largely been replaced by the more recent and comprehensive notion of ‘international humanitarian law’.<sup>697</sup> Article 3 of the Statute constitutes a residual clause covering all serious violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, including, but not limited to, the violations of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Regulations annexed there to (“1907 Hague Regulations”), as well as violations of Article 3 common to the four 1949 Geneva Conventions (“Common Article 3”).<sup>698</sup> Under Article 3 of the Statute, it is immaterial whether the crimes alleged in the Indictment occurred within an internal or international armed conflict.<sup>699</sup>

#### 1. Preliminary Requirements

253. In order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute, two preliminary requirements must be satisfied: (i) a state of armed conflict must have existed at the time the offence was committed and (ii) the offence must be closely related to the armed conflict.<sup>700</sup>

254. As to the first requirement, it is well-settled in the jurisprudence of the Tribunal that an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups

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<sup>696</sup> Indictment, paras 22-37.

<sup>697</sup> *Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Jurisdiction Decision”), para. 87.

<sup>698</sup> *Tadić* Jurisdiction Decision, para. 91. See also *Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997 (“*Tadić* Trial Judgement”), para. 559; *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Land’o (aka “Zenga”)*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 125.

<sup>699</sup> *Tadić* Jurisdiction Decision, para. 137. See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”), para. 132; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić* Trial Judgement”), para. 161.

<sup>700</sup> *Tadić* Jurisdiction Decision, paras 67, 70 and most recently *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”), para. 342.

within a State.<sup>701</sup> This is distinct from “banditry, unorganised and short-lived insurrections, terrorist activities or civil unrest, which are not subject to international humanitarian law”.<sup>702</sup> Although the warring parties do not necessarily need to be as organised as the armed forces of a State, some degree of organisation is necessary to establish the existence of an armed conflict.<sup>703</sup> However, this determination depends upon an examination of the specific circumstances of each case.

255. The temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.<sup>704</sup> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved.<sup>705</sup> Thus, the norms of international humanitarian law apply regardless of whether actual combat activities are taking place in a particular location.<sup>706</sup>

256. The second requirement, namely that the alleged offences be closely related to the armed conflict, does not necessitate that the said offences be committed whilst fighting is actually taking place or at the scene of combat. As the Appeals Chamber has affirmed, the armed conflict need not have been causal to the commission of the crime. Yet, the existence of an armed conflict must at minimum have played a substantial part in the perpetrators’ ability to commit it, their decision to commit it, the manner in which it was committed or the purpose for which it was committed. Therefore, this requirement would be fulfilled if the alleged offence was committed either during or in the aftermath of the hostilities, provided that it was committed in furtherance of, or at least under the guise of, the situation created by the armed conflict.<sup>707</sup>

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<sup>701</sup> See *Tadić* Jurisdiction Decision, para. 70 and most recently *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 (“*Limaj* Trial Judgement”), para. 84.

<sup>702</sup> *Tadić* Trial Judgement, para. 562; *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”)*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići* Trial Judgement”), para. 184; *Limaj* Trial Judgement, para. 89. This interpretation is consistent with the spirit of Common Article 3 of the Geneva Conventions. See e.g. *Commentary to Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, pp. 35-36.

<sup>703</sup> *Limaj* Trial Judgement, para. 89.

<sup>704</sup> *Tadić* Jurisdiction Decision, paras 67-70.

<sup>705</sup> *Tadić* Jurisdiction Decision, para. 70. See also *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T&IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac* Trial Judgement”), para. 568; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac* Appeal Judgement”), para. 57; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 (“*Vasiljević* Trial Judgement”), para. 25; *Limaj* Trial Judgement, para. 84.

<sup>706</sup> *Čelebići* Trial Judgement, para. 185; *Tadić* Jurisdiction Decision, paras 67, 70; *Tadić* Trial Judgement, para. 566; *Blaškić* Trial Judgement, para. 64; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”), para. 27; *Kunarac* Appeal Judgement, para. 57; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin* Trial Judgement”), para. 123.

<sup>707</sup> *Kunarac* Appeal Judgement, paras 58-59. See also *Stakić* Appeal Judgement, para. 342. According to the *Kunarac* Appeal Judgement, the factors that a Trial Chamber may take into account in determining the nexus between the alleged crimes and the armed conflict, are, *inter alia*, whether (i) the perpetrator is a combatant; (ii) the victim is a non-

## 2. The Four *Tadić* Conditions

257. In addition to the two requirements above, the jurisprudence of the Tribunal has established that the following four conditions (“four *Tadić* conditions”) must be met for an offence to fall within the scope of Article 3 of the Statute:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>708</sup>

## 3. Additional Requirement Under Common Article 3

258. Some requirements for Article 3 of the Statute to apply may differ depending on the specific legal basis of the charges brought under this Article.<sup>709</sup> For instance, a violation of Common Article 3, such as murder and cruel treatment, must have been committed against “persons 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 sickness, wounds, detention or any other cause”.<sup>710</sup> To fulfil this requirement, it is sufficient to examine the relevant facts of each victim and to ascertain whether that person was actively involved in the hostilities at the relevant time.<sup>711</sup>

## **B. Findings**

### 1. Preliminary Requirements

259. On the basis of the conclusion reached in the General Overview of the Judgement, the Trial Chamber finds that during the period relevant to the Indictment, an armed conflict existed on the

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combatant; (iii) the victim is a member of the opposing party; (iv) the act may be said to serve the ultimate goal of a military campaign; and (v) the alleged offence is committed as part of or in the context of the perpetrator’s official duties. See also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda Appeal Judgement*”), paras 569-570.

<sup>708</sup> *Tadić* Jurisdiction Decision, para. 94.

<sup>709</sup> *Kunarac* Trial Judgement, para. 404 reads “[f]or example, a specific charge based on treaty law would not have the same requirements as customary law relevant to violations of common Article 3, Hague law or violations of the Geneva Conventions other than common Article 3 and the grave breaches provisions.”

<sup>710</sup> 1949 Geneva Conventions, common Article 3.

<sup>711</sup> *Tadić* Trial Judgement, para. 616.

territory of BiH.<sup>712</sup> Between June 1992 and March 1993, Bosnian Muslims and Bosnian Serbs were engaged in fierce hostilities in the Podrinje area.<sup>713</sup>

260. Against this backdrop, the alleged victims of murder and cruel treatment were all Serbs captured by Bosnian Muslims in the course, or aftermath, of combat activity.<sup>714</sup> Furthermore, the alleged wanton destruction of Bosnian Serb property took place in the context of combat activity in eastern BiH.<sup>715</sup> It follows that the alleged offences with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.

## 2. The Four *Tadić* Conditions

261. The charges of murder and cruel treatment in the present case are brought under Common Article 3. According to the jurisprudence of the Tribunal, Article 3 of the Statute includes violations of Common Article 3,<sup>716</sup> a provision which has acquired the status of customary international law.<sup>717</sup> Common Article 3 protects values “so fundamental that they are regarded as governing both internal and international conflicts”.<sup>718</sup> The jurisprudence of the Tribunal has consistently regarded that the crimes of murder and cruel treatment entail individual criminal responsibility.<sup>719</sup>

262. The charge of wanton destruction of cities, towns or villages not justified by military necessity is specifically enumerated in Article 3(b) of the Statute, which in turn is based on Article 23 of the 1907 Hague Regulations.<sup>720</sup> This provision was restated in Article 6(b) of the Nuremberg Charter<sup>721</sup> and forms part of customary international law.<sup>722</sup> The jurisprudence of the Tribunal also

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<sup>712</sup> See III.A.3., “Outbreak of Armed Conflict in Bosnia and Herzegovina”.

<sup>713</sup> See III.B.4.a., “The Military Situation in and Around Srebrenica”.

<sup>714</sup> See VII.B.3., “Murder” and VII.B.4., “Cruel Treatment”.

<sup>715</sup> See VIII.B., “The Facts and Findings”.

<sup>716</sup> *Tadić* Jurisdiction Decision, para. 89; *Čelebići* Appeal Judgement, para. 136.

<sup>717</sup> *Tadić* Jurisdiction Decision, paras 98, 134; *Čelebići* Appeal Judgement, para. 143; *Kunarac* Appeal Judgement, para. 68.

<sup>718</sup> *Čelebići* Appeal Judgement, para. 143 and accompanying footnote: “This interpretation is supported by the Preamble of Additional Protocol II which provides that ‘in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience’. This statement is founded on the Martens clause, which was set out in the preamble of the 1899 and 1907 Hague Conventions”. The Appeals Judgement further notes that “In the Appeals Chamber’s view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader”, para. 150.

<sup>719</sup> *Tadić* Jurisdiction Decision, para. 129. See also *Čelebići* Appeal Judgement, para. 174.

<sup>720</sup> Article 23(g) reads in part: “[I]t is especially forbidden- (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

<sup>721</sup> London Agreement and Annexed Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, London, 8 August 1945 (“Nuremberg Charter”), Article 6 reads: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: ... (b) War crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners or war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military



acknowledges that this crime constitutes a serious violation of international humanitarian law<sup>723</sup> and entails individual criminal responsibility.<sup>724</sup>

263. In view of the above, the Trial Chamber finds that all of the offences alleged in this case fulfil the four *Tadić* conditions.

### 3. Additional Requirement Under Common Article 3

264. The alleged victims of murder and cruel treatment were persons taking no active part in hostilities at the time the relevant crimes were alleged to have committed.<sup>725</sup> Therefore, this additional requirement under Common Article 3 is fulfilled.

### C. Conclusion

265. For the above reasons, the Trial Chamber determines that the jurisdictional requirements pursuant to Article 3 of the Statute are met.

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necessity.” See also Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, unanimously adopted by the U.N. General Assembly in 1950 (UNGAOR, 5<sup>th</sup> Session, Supp. No. 12, UN Doc. A/1316 (“Nuremberg Principles”).

<sup>722</sup> *Tadić* Jurisdiction Decision, para. 87; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić* Appeal Judgement”), para. 76. See also *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, 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, paras 26-30.

<sup>723</sup> *Tadić* Jurisdiction Decision, paras 90-91; *Brđanin* Trial Judgement, para. 157; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 (“*Strugar* Trial Judgement”), para. 231.

<sup>724</sup> *Brđanin* Trial Judgement, para. 157; *Strugar* Trial Judgement, para. 233.

<sup>725</sup> See VII.B.3., “Murder” and VII.B.4., “Cruel Treatment”.

## VI. INDIVIDUAL CRIMINAL RESPONSIBILITY: THE LAW

### A. Responsibility Under Article 7(1) of the Statute

266. The Prosecution charges the Accused pursuant to Article 7(1) of the Statute with instigating and aiding and abetting the crimes alleged in Count 5 (wanton destruction of cities, towns or villages not justified by military necessity) of the Indictment.<sup>726</sup>

267. Article 7(1) of the Statute provides as follows:

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.

268. The principle that an individual may be held criminally responsible under one of these modes of liability is firmly based in customary international law.<sup>727</sup>

269. Out of these various modes of individual criminal responsibility which are to be understood as separate alternatives,<sup>728</sup> the Accused is charged only with ‘instigating’ or otherwise ‘aiding and abetting’. Different from ‘committing’ which, in principle, would require an accused’s perpetration of the alleged crimes in person,<sup>729</sup> instigating as well as otherwise aiding and abetting are forms of ‘accessory liability’.<sup>730</sup> They are constituted by participating in the crime of a principal perpetrator.<sup>731</sup> This requires a three-step test: (i) on the side of the principal perpetrator, there must be proof of the conduct which is punishable under the Statute,<sup>732</sup> (ii) from the side of the participant,

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<sup>726</sup> Indictment, paras 12, 37; *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Pre-Trial Brief of the Prosecution Pursuant to Rule 65ter (E)(i) (“Prosecution Pre-Trial Brief”), para. 92.

<sup>727</sup> See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997 (“*Tadić* Trial Judgement”), paras 663-669, for a discussion of the customary basis of the modes of liability set out in Article 7(1).

<sup>728</sup> See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), para. 186; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda* Appeal Judgement”), paras 77, 401 *et seq.*; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 (“*Kayishema* Trial Judgement”), paras 194-197, rejecting the contention that the various modes of participation should be read “cumulatively”.

<sup>729</sup> See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić* Trial Judgement”), para. 265; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”), para. 373.

<sup>730</sup> This is explicitly phrased with regard to aiding and abetting in *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T&IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac* Trial Judgement”), para. 391. This is also obviously presupposed in the *Tadić* Appeal Judgement, para. 229; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević* Appeal Judgement”), para. 102. This is by the same token true with regard to any other mode of participation, including instigation. See also *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”), paras 259, 357.

<sup>731</sup> See *Tadić* Appeal Judgement, paras 185 *et seq.*, 229; *Kordić* Trial Judgement, para. 373.

<sup>732</sup> Instigation distinguishes itself from ‘incitement’: see *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (“*Akayesu* Trial Judgement”), para. 482. The former must lead to the ‘actual’ completion (or at least attempt, if this is punishable as in the case of genocide according to Article 4(3)(d) of the Statute) of the principal crime: see *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin*

the commission of the principal crime(s) must either be instigated or otherwise aided or abetted, and (iii) with regard to the participant's state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime.<sup>733</sup> Noting that the meaning and contents of these elements in the case law of the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") are partly described in different terms, the Trial Chamber will state its position as far as it may become relevant to rule on the crimes charged in the Indictment.

## 1. Instigation

### (a) Actus Reus

270. With regard to the participant's conduct,<sup>734</sup> instigating is commonly described as 'prompting' another to commit the offence.<sup>735</sup>

271. On the one hand, this has to be more than merely facilitating the commission of the principal offence, as it may suffice for aiding and abetting.<sup>736</sup> It requires some kind of influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime. This does not necessarily presuppose that the original idea or plan to commit the crime was

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Trial Judgement"), para. 267; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement"), para. 38; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement"), paras 116, 120; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement"), para. 378; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement, 22 January 2003 ("*Kamuhanda* Trial Judgement"), para. 589; *Prosecutor v. Emmanuel Nindabahizi*, Case No. ICTR-2001-71-T, Judgement, 15 July 2004 ("*Nindabahizi* Trial Judgement"), para. 456. The same requirement of a completed principal crime applies with regard to aiding and abetting: see *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 165; *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić* Trial Judgement"), para. 161; *Brđanin* Trial Judgement, para. 271.

<sup>733</sup> When taking steps (i) and (ii) together as constituting the stage of *actus reus* and step (iii) as the stage of *mens rea*, one can also speak of a "two-stage test": *Kayishema* Trial Judgement, para. 198; *Kayishema* Appeal Judgement, para. 186.

<sup>734</sup> See step (ii), para. 269 *supra*.

<sup>735</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 27, upholding *Kordić* Trial Judgement, para. 387; *Blaškić* Trial Judgement, para. 280; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement"), para. 601; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Draguljub Prcać*, Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), paras 243, 252; *Prosecutor v. Mladen Naletilić (aka "Tuta") and Vinko Martinović (aka "Štela")*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 60; *Brđanin* Trial Judgement, para. 269; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj* Trial Judgement"), para. 514; *Akayesu* Trial Judgement, para. 482; *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement"), para. 762; *Kamuhanda* Trial Judgement, para. 593; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004 ("*Gacumbitsi* Trial Judgement"), para. 279. Although differently phrased, the Trial Chamber in *Bagilishema* case speaks of "urging and encouraging", which is obviously meant in the same sense: *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement"), para. 30; see also *Semanza* Trial Judgement, para. 381.

<sup>736</sup> See para. 282 *infra*.

generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator is an ‘*omnimodo facturus*’ meaning that he has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.<sup>737</sup>

272. On the other hand, although the exertion of influence would hardly function without a certain capability to impress others, instigation, different from ‘ordering’, which implies at least a factual superior-subordinate relationship,<sup>738</sup> does not presuppose any kind of superiority.

273. Instigation can be performed by any means, both by express or implied conduct,<sup>739</sup> as well as by acts or omissions,<sup>740</sup> provided that, in the latter case, the instigator is under a duty to prevent the crime from being brought about.<sup>741</sup> As regards the way in which the perpetrator is influenced, different from ‘incitement’ to commit genocide (Article (4)(3)(c) of the Statute),<sup>742</sup> instigation to the crimes included in the Statute needs neither be direct<sup>743</sup> and public<sup>744</sup> nor require the instigator’s presence at the scene of the crime.<sup>745</sup> Thus, instigating influence can be generated both face to face and by intermediaries as well as exerted over a smaller or larger audience, provided that the instigator has the corresponding intent.<sup>746</sup>

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<sup>737</sup> See para. 281 *supra*.

<sup>738</sup> *Blaškić* Trial Judgement, paras 268, 281.

<sup>739</sup> *Blaškić* Trial Judgement, paras 270, 277, 280; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514.

<sup>740</sup> *Blaškić* Trial Judgement, paras 270, 280; *Kordić* Trial Judgement, para. 387; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Limaj* Trial Judgement, para. 514; *Kamuhanda* Trial Judgement, para. 593. See also *Kajelijeli* Trial Judgement, para. 762, referring to *Semanza* Trial Judgement, para. 381 where this position however is not explicitly stated.

<sup>741</sup> The requirement of a ‘duty to act’, which the offender must have derelicted in order to be held criminally liable for omission, appears to be considered as so obvious that it is rarely explicitly mentioned when judgements speak of ‘acts and omissions’ as a way of committing a crime without any differentiation, as *e.g.*, in the reference in fn. 740 *supra*. Even where a “culpable omission” is supposed to require “an act that was mandated by a rule of criminal law”, as done in *Tadić* Appeal Judgement, para. 188, it seems to refer only to omission by a principal offender, as *e.g.*, *Limaj* Trial Judgement, para. 509. There is no doubt, however, that participation presupposes a duty to act in the same way as commission by omission as correctly stated in *Rutaganda* Trial Judgement, para. 41.

<sup>742</sup> See *Musema* Trial Judgement, para. 120.

<sup>743</sup> *Kayishema* Trial Judgement, para. 200; *Semanza* Trial Judgement, para. 381; *Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.

<sup>744</sup> The Trial Chamber in the *Akayesu* case, although not yet with certainty, suggested this position: see *Akayesu* Trial Judgement, para. 481. The Appeal Chamber in the same case clarified this position: see *Akayesu* Appeal Judgement, paras 471 *et seq.*, 478, 483. See also *Kajelijeli* Trial Judgement, para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.

<sup>745</sup> *Kayishema* Trial Judgement, paras 200 *et seq.*

<sup>746</sup> See para. 279 *infra*.

(b) Nexus Between the Instigation and the Principal Crime

274. The necessary link between the instigating conduct<sup>747</sup> and the principal crime committed,<sup>748</sup> commonly described as ‘causal relationship’,<sup>749</sup> is not to be understood as requiring proof that, in terms of a ‘*condicio sine qua non*’, the crime would not have been committed without the involvement of the accused.<sup>750</sup> Because the commission of a crime may depend on a variety of activities and circumstances, it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime.<sup>751</sup> If no such effect is present, as in particular in the case of an ‘*omnimodo facturatus*’,<sup>752</sup> there may still be room for liability for aiding and abetting.<sup>753</sup>

275. To some degree differing from this position, the Prosecution contends that the conduct of the Accused was a “clear and contributing factor” of the commission of the crime.<sup>754</sup> To the contrary, the Defence submits that the conduct of the Accused must have had a “direct and substantial effect” on the perpetration of the crime.<sup>755</sup>

276. The Trial Chamber will follow neither of the theories put forward by the parties. Whereas, on the one hand, not any contributing factor can suffice for instigation, as it must be a substantial one, on the other hand, it needs not necessarily have direct effect, as prompting another to commit a crime can also be procured by means of an intermediary.

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<sup>747</sup> See step (ii), para. 269 *supra*.

<sup>748</sup> See step (i), para. 269 *supra*.

<sup>749</sup> *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387. In the same sense, the Trial Chamber in the *Brđanin* case speaks of ‘nexus’: see, e.g., *Brđanin* Trial Judgement, para. 269. The Trial Chambers of the ICTR appear to opt for ‘causal connection’: see, e.g., *Bagilishema* Trial Judgement, para. 30; *Semanza* Trial Judgement para. 381; *Kajelijeli* Trial Judgement para. 762; *Kamuhanda* Trial Judgement, para. 593; *Gacumbitsi* Trial Judgement, para. 279.

<sup>750</sup> *Kordić* Trial Judgement, para. 387; *Kvočka* Trial Judgement, para. 252; *Naletilić* Trial Judgement, para. 60; *Brđanin* Trial Judgement, para. 269; *Kordić* Appeal Judgement, para. 27.

<sup>751</sup> *Kordić* Appeal Judgement, para. 27; *Limaj* Trial Judgement, para. 514; *Bagilishema* Trial Judgement, para. 30; *Kamuhanda* Trial Judgement, para. 590; see also *Kamuhanda* Appeal Judgement, para. 65, stating that “a certain influence” enjoyed by the accused in the community was not considered sufficient.

<sup>752</sup> See 271 *supra*.

<sup>753</sup> See 281 *infra*.

<sup>754</sup> Prosecution Pre-Trial Brief, para. 94. Probably to the same effect, some Trial Chambers required a “clear contributing factor”: see, e.g., *Blaškić* Trial Judgment, paras 270, 277; *Kvočka* Trial Judgment, para. 252; *Brđanin* Trial Judgment, para. 269. However the Trial Chamber in the *Kordić* case merely demanded that “the contribution of the accused in fact had an effect on the commission of the crime”: see *Kordić* Trial Judgement, para. 387

<sup>755</sup> *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Defence Pre-Trial Brief Pursuant to Rule 65ter(F) (“Defence Pre-Trial Brief”), Annex I, Element 1.3.1.3. The requirement of direct and substantial effect seems endorsed in *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 (“*Kayishema* Appeal Judgement”), para. 185; *Tadić* Trial Judgement, para. 692; *Ndindabahizi* Trial Judgement, para. 466.

(c) *Mens Rea*

277. With regard to the usual description of the instigator's *mens rea*,<sup>756</sup> further clarification is required. Whereas the Trial Chamber in the *Kamuhanda* case was satisfied with the 'knowledge' of the instigator that his acts assisted in the commission of the crime,<sup>757</sup> the Trial Chamber in the *Bagilishema* case required that the instigator 'intended' that the crime be committed.<sup>758</sup> Further, while according to the Trial Chamber in the *Kordić* case, the instigator must have "directly intended" to provoke the commission of the crime,<sup>759</sup> for the Trial Chamber in the *Blaškić* case it would not matter whether the instigator "directly or indirectly intended" the crime in question be committed.<sup>760</sup> Again different, whereas the Trial Chamber in the *Semanza* case required the participant to act both "intentionally and with the awareness"<sup>761</sup> that he is influencing the principal perpetrators to commit the crime,<sup>762</sup> the Trial Chambers in the *Kvočka*,<sup>763</sup> *Naletilić*,<sup>764</sup> *Brđanin*<sup>765</sup> and *Limaj*<sup>766</sup> cases, found it sufficient that the instigator either "intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts."<sup>767</sup> Although the Appeals Chamber in the *Blaškić* case reached the same result with regard to 'ordering', it still opened new grounds by requiring for intention, in addition to the cognitive element of knowledge, some sort of acceptance of the final effect (or outcome or result). This volitional element is present if a person, in ordering an act, is aware that the execution of the order will result in a crime, because then he must be regarded as accepting that crime.<sup>768</sup> The same conclusion was also drawn by the Appeals Chamber in the *Kordić* case<sup>769</sup> with regard to instigation.

278. The position of the Parties also differs on the issue of *mens rea*: whereas the Prosecution is satisfied if the instigator was aware that the commission of the crime would likely be the

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<sup>756</sup> See step (iii), para. 269 *supra*.

<sup>757</sup> *Kamuhanda* Trial Judgement, para. 599; see also *Kayishema* Trial Judgement, para. 198, speaking of the "awareness by the actor of his participation in the crime".

<sup>758</sup> *Bagilishema* Trial Judgement, para. 31.

<sup>759</sup> *Kordić* Trial Judgement, para. 387. See also *Kordić* Appeal Judgement, para. 29, rephrasing that "the perpetrator acted with direct intent in relation to his own ?...ĝ instigating ?...ĝ".

<sup>760</sup> *Blaškić* Trial Judgement, para. 278.

<sup>761</sup> Italics added.

<sup>762</sup> *Semanza* Trial Judgement, para. 388, referring to other judgements, all of which, however, do not phrase it in the same way: see *Kayishema* Appeal Judgement, para. 186; *Kayishema* Trial Judgement, para. 201; *Bagilishema* Trial Judgement, para. 32. See also fn. 757 *supra*.

<sup>763</sup> *Kvočka* Trial Judgement, para. 252.

<sup>764</sup> *Naletilić* Trial Judgement, para. 60.

<sup>765</sup> *Brđanin* Trial Judgement, para. 269.

<sup>766</sup> *Limaj* Trial Judgement, para. 514.

<sup>767</sup> *Kvočka* Trial Judgement, para. 252 (italics added).

<sup>768</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 41, 42.

<sup>769</sup> *Kordić* Appeal Judgement, paras 32, 112.

consequence of his conduct,<sup>770</sup> the Defence requires that the Accused ‘intended’ to prompt another person to commit the crime.<sup>771</sup>

279. Considering this development in the interpretation of the instigator’s *mens rea* in light of the type and seriousness of crimes over which the Tribunal has jurisdiction, the Trial Chamber holds that individual criminal responsibility both for the commission of, and the participation through, instigation requires intention. The Trial Chamber further holds that intention contains a cognitive element of knowledge and a volitional element of acceptance, and that this intention must be present with respect to both the participant’s own conduct and the principal crime he is participating in. This means that, first, with regard to his own conduct, the instigator must be aware of his influencing effect on the principal perpetrator to commit the crime, as well as the instigator, even if neither aiming at nor wishing so, must at least accept that the crime be committed. Second, with regard to the principal perpetrator, the instigator must be both aware of, and agree to, the intentional completion of the principal crime.<sup>772</sup> Third, with regard to the volitional element of intent, the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence.<sup>773</sup> Although the latter does not require the instigator precisely to foresee by whom and under which circumstances the principal crime will be committed nor that it would exclude indirect inducement, the instigator must at least be aware of the type and the essential elements of the crime to be committed.<sup>774</sup>

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<sup>770</sup> Prosecution Pre-Trial Brief, para. 93.

<sup>771</sup> Defence Pre-Trial Brief, Annex 1, Element 1.3.1.5.

<sup>772</sup> This requirement of the instigator’s ‘double intent’ with regard to both his own influencing the principal perpetrator and that person’s intentional commission of the crime, does not mean, however, that the instigator would also have to share a ‘special intent’ as it may be required for the commission of certain crimes, such as genocide with regard to “destroying, in whole or in part, an ethnical group” (Article 4 (1) of the Statute). Although this specific aspect, which was addressed in the *Semanza* case as well as in the *Ntakirutimana* case, may not become relevant with regard to the crimes at stake in this case, it should not be confused with the ordinary ‘double intent’ that the instigator must have with regard to his own conduct and that of the principal: see *Semanza* Trial Judgement, para. 388; *Ntakirutimana* Appeal Judgement, para. 494 *et seq.*

<sup>773</sup> This position includes *dolus eventualis*, if understood as requiring the instigator to reconcile himself with the inducing effect of his conduct as assumed by the Appeal Chamber in *Blaškić* case, while mere recklessness would not suffice if the instigator did not expect and/or accept the conscious risk of his conduct: see *Blaškić* Appeal Judgement, paras 27, 34 *et seq.* The conceptual distinction between these mental states needs no further elaboration here as long as instigation is considered to require both a cognitive element of awareness and a volitional element of acceptance of the crime inducing effect of the instigator’s conduct: see *Blaškić* Trial Judgement, para. 267.

<sup>774</sup> *Kamuhanda* Trial Judgement, para. 599. For similar knowledge requirements in case of aiding and abetting, see para. 288 *infra*.

## 2. Aiding and Abetting

### (a) Actus Reus

280. The *actus reus* of this form of participation, due to its statutory phrasing as “otherwise aiding and abetting”, lends itself to varying descriptions. While the Trial Chambers of the ICTR even pondered on ‘aiding’ and ‘abetting’ as distinct legal concepts,<sup>775</sup> the case law of the Tribunal which in the meantime is followed by the ICTR, by interlinking the two terms into a broad singular legal concept ranges from quite general definitions as “rendering a substantial contribution to the commission of a crime”<sup>776</sup> to somehow more exemplary descriptions as “acts of practical assistance, encouragement or moral support.”<sup>777</sup> On the one hand, a broad understanding of ‘aiding and abetting’, as seemingly suggested by the statutory language of ‘otherwise’ aiding and abetting, appears wide enough to serve as a residual category for all forms of participation listed in Article 7(1) of the Statute. From this point of view, the aforementioned description of aiding and abetting as “rendering a substantial contribution to the commission of a crime”<sup>778</sup> is indeed expressing a feature which is common to all forms of participation, and even in direct perpetration. On the other hand, however, if ‘otherwise aiding and abetting’ is to be understood as a mode of participation on its own, it must be somehow distinguishable from the other more specific forms of perpetration and participation listed in the Statute.

281. As mere aiding and abetting is commonly considered as a less grave mode of participation, this term needs delineation particularly in two respects. First, ‘committing’ the crime in form of co-

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<sup>775</sup> Some judgements define aiding to mean “giving assistance to someone” and abetting to involve “facilitating the commission of an act by being sympathetic thereto”: see *Akayesu* Trial Judgement, para. 484; *Kayishema* Trial Judgement, para. 196; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-T&ICTR-96-17-T, Judgement, 21 February 2003 (“*Ntakirutimana* Trial Judgement”), para. 787. Concerning abetting in particular, the Trial Chamber in the *Semanza* case refers to it as “encouraging, advising or instigating the commission of a crime”: *Semanza* Trial Judgement, para. 384. Other cases further include ‘facilitating’ as well: see *Kajelijeli* Trial Judgement, para. 765; *Kamuhanda* Trial Judgement, para. 596. See also *Limaj* Trial Judgement, para. 516.

<sup>776</sup> *Krstić* Trial Judgement, para. 601; *Naletilić* Trial Judgement, para. 63.

<sup>777</sup> With slight modifications of the language in *Tadić* Trial Judgement, para. 689; *Tadić* Appeal Judgement, para. 229; *Aleksovski* Appeal Judgement, para. 6; *Kunarac* Trial Judgement, para. 391; *Kvočka* Trial Judgement, para. 253; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 (“*Krnojelac* Trial Judgement”), para. 88; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 (“*Vasiljević* Trial Judgement”), para. 70; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45 *et seq.*; *Brđanin* Trial Judgement, para. 271; *Prosecutor v. Blagojević and Dragan Jokić*, IT-02-60, Judgement, 17 January 2005 (“*Blagojević* Trial Judgement”), para. 726; *Prosecutor v. Pavle Strugar*, IT-01-42, Judgement, 31 January 2005 (“*Strugar* Trial Judgement”), para. 349; *Limaj* Trial Judgement, para. 516. See also *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”)*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići* Trial Judgement”), para. 327; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”), para. 249. *Semanza* Trial Judgement, para. 385, merely speaks of “encouragement or support”, omitting “moral”.

<sup>778</sup> See fn. 776 *supra*.



perpetration<sup>779</sup> would, in principle, require the accused's physical involvement in the commission of the crime.<sup>780</sup> Therefore, as long as a contribution to crimes such as murder, cruel treatment or wanton destruction falls short of the accused personally killing, beating or destroying, co-perpetration would be excluded and, instead, room left for aiding and abetting, if the accused otherwise assisted in, or contributed to, the commission of one of these crimes. Second, with regard to 'instigation' which shares common features with 'aiding and abetting' particularly in cases of encouragement, a line may be drawn along the strength of inducement and the motivation of the principal perpetrator. Indeed, as long as the principal perpetrator is not finally determined to commit the crime, any acts of demanding, convincing, encouraging or morally assuring him to commit the crime may constitute instigation, and even qualify as ordering if a superior-subordinate relationship exists.<sup>781</sup> As soon as the principal perpetrator is already prepared to commit the crime, but may still need or appreciate some moral support to pursue it or some assistance in performing the crime, any contributions making the planning, preparation or execution of the crime possible or at least easier may constitute aiding and abetting.

282. In summing up its conclusions, the Trial Chamber holds that aiding and abetting may be constituted by any contribution to the planning, preparation or execution of a finally completed crime,<sup>782</sup> provided that, on the one hand, the contribution falls short of one's own co-perpetration in or instigation or ordering of the crime, and, on the other hand, they are substantial and efficient enough to make the performance of the crime possible or at least easier.<sup>783</sup> Within this realm, any kind of physical or psychological, verbal or instrumental assistance or support, regardless whether rendered directly<sup>784</sup> to the perpetrator or by way of an intermediary,<sup>785</sup> as well as irrespective of

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<sup>779</sup> The Trial Chamber in the *Stakić* case held that co-perpetration was applied in various domestic jurisdictions: *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 29 October 2003 ("*Stakić* Trial Judgement"), paras 440 *et seq.* The Appeal Chamber, however, denied this concept on the ground that it is not consistent with the jurisprudence of this Tribunal: *see Prosecutor v. Milomir Stakić*, IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), paras 59, 62.

<sup>780</sup> *See* para. 269 *supra*.

<sup>781</sup> *See* para. 272 *supra*.

<sup>782</sup> In case of an attempted, but not completed, crime, the same exception with regard to genocide applies as with instigation: *see* to and in fn. 732 *supra*.

<sup>783</sup> Although the requirement of a 'significant' or 'substantial effect' is a common feature in the case law of the ICTY and ICTR, it is left open in what respect or to what degree the effect must be 'substantial' or 'significant'. As to a 'significant' effect, *see Kvočka* Trial Judgement, para. 256. As to a 'substantial effect', *see Furundžija* Trial Judgement, para. 249; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 61; *Kunarac* Trial Judgement, para. 391; *Krnjelac* Trial Judgement, para. 88; *Simić* Trial Judgement, para. 162; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45, 48; *Strugar* Trial Judgement, para. 349; *Bagilishema* Trial Judgement, para. 33; *Kajelijeli* Trial Judgement, para. 766; *Kamuhanda* Trial Judgement, para. 597.

<sup>784</sup> This aspect was required by the Trial Chambers in the *Tadić* case and recently taken up in the *Ndindabahizi* case: *see Tadić* Trial Judgement, paras 689, 692; *Ndindabahizi* Trial Judgement, paras 457, 466.

<sup>785</sup> *See* para. 285 *infra*.

whether the participant was present<sup>786</sup> or removed both in time and place from the actual commission of the crime,<sup>787</sup> may suffice as furthering or facilitating the performance of the crime, provided that it was rendered before, during or after the principal act,<sup>788</sup> but yet still prior to the full completion of the crime.<sup>789</sup>

283. To the same degree as it is the case with instigating, aiding and abetting can be fulfilled by express or implied conduct<sup>790</sup> as well as constituted by acts or omissions,<sup>791</sup> provided that in the latter case, under the given circumstances, the accused was obliged to prevent the crime from being brought about.<sup>792</sup> This can in particular become relevant in situations where the aider or abettor is aware of a crime to be committed while being present. As, on the one hand, participating in a crime does not require presence at the time and place when and where it is performed,<sup>793</sup> on the other hand, mere presence at the scene of the crime without preventing its occurrence does not *per se* constitute aiding and abetting.<sup>794</sup> This is different, however, if and as soon as a person present at the scene of a crime about to be committed has a duty to prevent it. Such an obligation to intervene can,

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<sup>786</sup> This position was also supported in other judgements: *see Kayishema* Trial Judgement, paras 200, 201; *Rutaganda* Trial Judgement, para. 43; *Musema* Trial Judgement, para. 125; *Bagilishema* Trial Judgement, para. 33. *See also* fn. 789 *infra*.

<sup>787</sup> *Čelebići* Trial Judgement, para. 327; *Aleksovski* Trial Judgement, para. 62; *Blaškić* Trial Judgement, para. 285; *Kvočka* Trial Judgement, para. 256; *Simić* Trial Judgement, para. 162; *Blaškić* Appeal Judgement, para. 48; *Strugar* Trial Judgement, para. 349; *Rutaganda* Trial Judgement, para. 43; *Musema* Trial Judgement para. 125.

<sup>788</sup> *Aleksovski* Trial Judgement, para. 62; *Blaškić* Trial Judgement, para. 285; *Kunarac* Trial Judgement, para. 391; *Krnojelac* Trial Judgement, para. 88; *Naletilić* Trial Judgement, para. 63; *Brđanin* Trial Judgement, para. 271; *Blagojević* Trial Judgement, para. 726; *Limaj* Trial Judgement, para. 517.

<sup>789</sup> This *provisio*, which the Trial Chambers in the *Vasiljević*, *Kajelijeli* and *Kamuhanda* cases may have had in mind when limiting the wider time frame of the aforementioned judgements (*see* fn. 787 *supra*) to contributions “before or during” the crime, may become relevant in cases in which the crime was approved or applauded after the fact: *see Vasiljević* Trial Judgement, para. 70; *Kajelijeli* Trial Judgement, para. 766; *Kamuhanda* Trial Judgement, para. 597. Such subsequent support may perhaps constitute aiding and abetting to a new offence, but must not be attributed to the already completed crime.

<sup>790</sup> Whereas ‘implied’ conduct was frequently found sufficient for instigation (*see* para. 273 *supra*), this seems so far not explicitly stated with regard to aiding and abetting although both modes of participation can hardly be treated differently.

<sup>791</sup> This is recognised without further qualification in the following judgements: *Krnojelac* Trial Judgement, para. 88; *Vasiljević* Trial Judgement, para. 70; *Kunarac* Trial Judgement, para. 391; *Brđanin* Trial Judgement, para. 271; *Blagojević* Trial Judgement, para. 726; *Kayishema* Trial Judgement, paras 206, 207; *Kajelijeli* Trial Judgement, para. 766; *Kamuhanda* Trial Judgement, para. 597. Although some judgements would make the *provisio* that the failure to act must have had a ‘decisive’ or ‘substantial effect’ on the commission of the crime, this requirement can hardly provide a criterion for distinguishing between act and omission as it is relevant for both types of conduct. As to a ‘decisive effect’, *see Blaškić* Trial Judgement, para. 284; *Blaškić* Appeal Judgement, para. 47; as to a ‘substantial effect’, *see Simić* Trial Judgement, para. 162.

<sup>792</sup> This requirement of a ‘duty’ is explicitly, or at least implicitly, addressed in the following judgements: *Simić* Trial Judgement, paras 162, 164; *Krnojelac* Trial Judgement, para. 17; *Naletilić* Trial Judgement, para. 63, stating the additional requirement of a ‘substantial’ effect; *Strugar* Trial Judgement, para. 349; *Limaj* Trial Judgement, para. 517, referring to “in the particular circumstances of a case”; *Kayishema* Trial Judgement, para. 202.

<sup>793</sup> *See* para. 282 *supra*.

<sup>794</sup> *Kvočka* Trial Judgement, para. 257; *Krnojelac* Trial Judgement para. 89; *Vasiljević* Trial Judgement, para. 70; *Limaj* Trial Judgement, para. 517.

in particular, be derived from a bystander's position of authority as a superior or actual leader.<sup>795</sup> A similar situation of being expected to intervene can arise when a person by his activities has knowingly created the risk of enticing people to engage in criminal acts.<sup>796</sup> In such situations of higher authority and/or antecedent dangerous conduct where criminal responsibility for aiding and abetting by omission due to failure to act can result from mere presence at the scene of the principal crime, it can be a short step even beyond the borderline into actively aiding and abetting, if not even into instigating, if the presence at the scene is to be understood as encouragement or approval of a crime about to be committed.<sup>797</sup> This can in particular apply to cases of an 'approving spectator'<sup>798</sup> or where the presence of a superior can be an "important *indicium* for encouragement or support"<sup>799</sup>.

(b) Nexus Between Aiding and Abetting and the Principal Crime

284. With regard to the link between aiding and abetting<sup>800</sup> and the principal crime committed,<sup>801</sup> the Trial Chamber, in accordance with the case law of the Tribunal, holds that, even less than for instigation,<sup>802</sup> it can not be required, in terms of a '*condicio sine qua non*', that without the contribution of the participant the principal crime would not have occurred.<sup>803</sup> Still, however, as indicated by requiring a 'substantial'<sup>804</sup> or 'significant effect',<sup>805</sup> the aiding and abetting

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<sup>795</sup> *Blaškić* Trial Judgement, para. 284, endorsed in principle in the following judgements: *Kvočka* Trial Judgement, paras 257, 260; *Krnojelac* Trial Judgement, para. 171; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 165; *Brđanin* Trial Judgement, para. 271; *Strugar* Trial Judgement, para. 349; *Kayishema* Appeal Judgement, para. 201; *Bagilishema* Trial Judgement, paras 34, 36; *Kajelijeli* Trial Judgement, para. 769; *Kamuhanda* Trial Judgement, para. 600; *Ndindabahizi* Trial Judgement, para. 457.

<sup>796</sup> See *Tadić* Trial Judgement, para. 690; *Aleksovski* Trial Judgement, paras 64 *et seq.*; *Furundžija* Trial Judgement, para. 274; *Kvočka* Trial Judgement, para. 259.

<sup>797</sup> Whereas the Trial Chamber in the *Limaj* case seems to take the same view, the Trial Chamber in the *Nijyetegeka* case appears to view this still as an omission: *Limaj* Trial Judgement, para. 517; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement, 25 February 2004 ("*Ntagerura* Trial Judgement"), para. 462.

<sup>798</sup> *Furundžija* Trial Judgement, para. 207; *Bagilishema* Trial Judgement, paras 34, 36; *Kayishema* Trial Judgement, para. 200; *Kayishema* Appeal Judgement, para. 201; *Semanza* Trial Judgement, paras 386, 389.

<sup>799</sup> *Aleksovski* Trial Judgement, para. 65; *Blaškić* Trial Judgement, para. 284; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 165; *Brđanin* Trial Judgement, para. 271; *Kajelijeli* Trial Judgement, para. 769; *Kamuhanda* Trial Judgement, para. 600. See also *Limaj* Trial Judgement, para. 517; *Ndindabahizi* Trial Judgement, para. 457.

<sup>800</sup> Step (ii), para. 269 *supra*.

<sup>801</sup> Step (i), para. 269 *supra*.

<sup>802</sup> See paras 274 *et seq. supra*.

<sup>803</sup> *Furundžija* Trial Judgement, paras 233 *et seq.*; *Aleksovski* Trial Judgement, para. 61; *Bagilishema* Trial Judgement, para. 33; *Kunarac* Trial Judgement, para. 391; *Kvočka* Trial Judgement, para. 255; *Krnojelac* Trial Judgement, para. 88; *Vasiljević* Trial Judgement, para. 70; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 162; *Blaškić* Trial Judgement, para. 285; *Blaškić* Appeal Judgement, para. 48; *Limaj* Trial Judgement, para. 517.

<sup>804</sup> *Krnojelac* Trial Judgement, para. 88; *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45, 48; *Brđanin* Trial Judgement, para. 271; *Blagojević* Trial Judgement, para. 726; *Limaj* Trial Judgement, para. 517.

<sup>805</sup> *Kvočka* Trial Judgement, para. 256. See also *Aleksovski* Trial Judgement, para. 61.

contribution, according to its supporting character, must further, or at least facilitate, the commission of the crime.<sup>806</sup>

285. Whereas the Prosecution suggests the same position,<sup>807</sup> the Defence requires the effect of the contribution not only to be substantial but also to be ‘direct’.<sup>808</sup> While this position seems supported by the terms used in the trial judgements in the *Tadić* case<sup>809</sup> and later in the *Strugar* case,<sup>810</sup> the Trial Chamber in the *Furundžija* case found such a ‘direct’ requirement misleading if it was to express more than the necessary ‘proximity’ (in terms of a link) between the assistance and the principal act.<sup>811</sup> Since the aiding and abetting contribution may be remote both in time and place from when and where the principal crime will be committed,<sup>812</sup> there is no reason why it should be treated differently from instigation which, as previously acknowledged, can be indirect.<sup>813</sup> Accordingly, aiding and abetting should not be limited to direct contributions, as long as the effect of facilitating the crime is the same, irrespective of whether produced directly or by way of indirect means or intermediaries, provided, of course, that the final result is covered by the participant’s corresponding intent.<sup>814</sup>

(c) Mens Rea

286. With regard to the varying descriptions of *mens rea* of the aider and abettor,<sup>815</sup> some clarification is needed. While it is undisputed that aiding and abetting requires intent,<sup>816</sup> the structure and contents of intent is described in different ways. Whereas a long line of judgements appear to identify intent with the knowledge/awareness of the aider and abettor that he is

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<sup>806</sup> See para. 282 *supra*.

<sup>807</sup> Prosecution Pre-Trial Brief, para. 95.

<sup>808</sup> Defence Pre-Trial Brief, Annex I, Element 1.3.2.1.

<sup>809</sup> *Tadić* Trial Judgement, para. 692.

<sup>810</sup> *Strugar* Trial Judgement, paras 349, 355.

<sup>811</sup> *Furundžija* Trial Judgement, paras 232, 234.

<sup>812</sup> See para. fn. 789 *supra*. This position is, at least with regard to the geographical distance, also expressed by the Trial Chamber in the *Strugar* case: *Strugar* Trial Judgement, para. 349. If the Trial Chamber in this case nevertheless seems to draw its requirement of a ‘direct and substantial effect’ from the Appeals Chamber’s language in the *Tadić* case which stated that the “aider and abettor carries out acts *specifically directed* to assist ... the perpetration of a certain specific crime”, the Appeals Chamber in the *Tadić* case is obviously merely indicating the necessary ‘direction’ to the principal crime: see *Strugar* Trial Judgement, para. 349, fn. 1042, referring to *Vasiljević* Appeal Judgement, para. 102 and *Blaškić* Appeal Judgement, para. 45; see also *Tadić* Appeal Judgement, para. 229. However, the Appeals Chamber in the *Vasiljević* case does not speak of “direct and substantial effect” and the Appeals Chamber in the *Blaškić* case even explicitly approves the standard set out in the *Furundžija* Trial Judgement, paras 232, 234: see *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, paras 45, 46.

<sup>813</sup> See paras 269, 273 *supra*.

<sup>814</sup> See paras 286-288 *infra*.

<sup>815</sup> See step (iii), para. 269 *supra*.

<sup>816</sup> *Tadić* Trial Judgement, para. 689.

contributing to the criminal act of the principal perpetrator,<sup>817</sup> others distinguish between knowledge and intention, either by requiring the intention only for co-perpetration<sup>818</sup> or by requiring both intention and awareness for aiding and abetting.<sup>819</sup> Apparently going beyond the line of mere knowledge, as was already done in the case of ordering and instigating,<sup>820</sup> recent judgements also demand some sort of acceptance of the final result.<sup>821</sup>

287. As concerns the positions of the parties, both are merely addressing the cognitive element. Whereas the Defence requires that the Accused must have known that his conduct would substantially have contributed to the commission of the crime,<sup>822</sup> the Prosecution lets it suffice that, instead of having known, the Accused “was aware of the substantial likelihood that his contribution would be an adequate consequence of his conduct”.<sup>823</sup>

288. Taking notice of these positions and developments, the Trial Chamber follows the same line as it was taken with regard to *mens rea* for instigation.<sup>824</sup> This means that (i) aiding and abetting must be intentional; (ii) the aider and abettor must have ‘double intent’, namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator;<sup>825</sup> (iii) the intention must contain a cognitive element of knowledge and a

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<sup>817</sup> *Čelebići* Trial Judgement, para. 328; *Tadić* Appeal Judgement, para. 229; *Kunarac* Trial Judgement, para. 392; *Kvočka* Trial Judgement, para. 253; *Krnojelac* Trial Judgement, para. 90; *Vasiljević* Appeal Judgement, para. 102; *Naletilić* Trial Judgement, para. 63; *Brđanin* Trial Judgement, paras 272 *et seq.*; *Strugar* Trial Judgement, para. 350; *Limaj* Trial Judgement, para. 518; *Kayishema* Appeal Judgement para. 198; *Kajelijeli* Trial Judgement para. 768; *Kamuhanda* Trial Judgement, para. 599.

<sup>818</sup> *Kayishema* Trial Judgement, para. 205.

<sup>819</sup> *Semanza* Trial Judgement, para. 388. This judgement refers to *Kayishema* Appeal Judgement, para. 186. However, that judgement reads itself just to the opposite by not speaking of intention *and* awareness, but of knowledge *or* intent. As to the reference to the *Bagilishema* Trial Judgement, para. 32 in *Semanza* Trial Judgement, para. 388, *see* fn. 821 *supra*.

<sup>820</sup> *See* para. 277 *supra*.

<sup>821</sup> The Trial Chambers in the *Blaškić* and *Bagilishema* cases required the aider and abettor that in addition to knowledge that he “intended to provide the assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct”: *see* *Blaškić* Trial Judgement, para. 286; *Bagilishema* Trial Judgement, para. 32. Although the Appeals Chamber in the *Vasiljević* and *Blaškić* cases seemed satisfied with the aider’s and abettor’s ‘knowledge’ that his acts assist the commission of the crime, it appears unlikely that the Appeals Chamber suggested to open the door to mere recklessness by renouncing its principal position that “the knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law” and that therefore, “an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard”: *see* *Blaškić* Appeal Judgement, paras 41, 49; *Vasiljević* Appeal Judgement, para. 102.

<sup>822</sup> Defence Pre-Trial Brief, Annex I, Element 1.3.2.2.

<sup>823</sup> Prosecution Pre-Trial Brief, para. 95.

<sup>824</sup> *See* para. 279 *supra*.

<sup>825</sup> This is in principal, though in partly different language, also required in the following judgements: *Krnojelac* Trial Judgement para. 90; *Vasiljević* Trial Judgement, para. 71; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 163; *Brđanin* Trial Judgement, para. 273; *Blagojević* Trial Judgement, para. 727; *see also* *Furundžija* Trial Judgement, para. 245; *Strugar* Trial Judgement, para. 350. This ‘double intent’ does not mean, however, that the aider and abettor would also have to share a ‘special intent’ as it may in certain crimes be required for the principal perpetrator. In the same sense, *see* *Kunarac* Trial Judgement para. 392; *Kvočka* Trial Judgement para. 262; *Krnojelac* Trial Judgement, para. 90; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 264; *Brđanin* Trial

volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not;<sup>826</sup> and (iv) with regard to the contents of his knowledge, the aider and abettor must at the least be aware of the type and the essential elements of the crime(s) to be committed.<sup>827</sup> This, however, does neither require that the aider and abettor already foresees the place, time and number of the precise crimes which may be committed in consequence of his supportive contributions,<sup>828</sup> nor that a certain plan or concerted action with the principal perpetrator must have existed.<sup>829</sup>

### **B. Responsibility Under Article 7(3) of the Statute**

289. The Prosecution charges the Accused pursuant to Article 7(3) of the Statute with the crimes alleged in Counts 1 and 2 (murder and cruel treatment) and Count 3 (wanton destruction of cities, towns or villages not justified by military necessity) of the Indictment. The crimes were allegedly committed by the Accused's subordinates whilst he was holding positions of superior authority.<sup>830</sup>

290. Article 7(3) of the Statute imposes criminal liability on superiors for failure to prevent or punish crimes committed by subordinates. It provides that

FTghe 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 take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

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Judgement, paras 273 *et seq.*; *Semanza* Trial Judgement, para. 388; *Ndindabahizi* Trial Judgement, para. 457. Since the culpability of the aider and abettor may be lessened if he does not share the 'special intent' of the main offender, this may serve as a mitigating factor: *see Vasiljević* Trial Judgement, para 71; *Brđanin* Trial Judgement, para. 274. As to the parallel situation in case of instigation, *see fn. 772 supra*.

<sup>826</sup> *See* paras 277, 279 *supra*.

<sup>827</sup> *Kvočka* Trial Judgement, para. 255; *Krnojelac* Trial Judgement, para. 90; *Naletilić* Trial Judgement, para. 63; *Simić* Trial Judgement, para. 163; *Vasiljević* Trial Judgement, para. 71; *Blagojević* Trial Judgement, para. 727; *Strugar* Trial Judgement, para. 350; *Semanza* Trial Judgement, para. 388. However, some judgements find that it is satisfied with the awareness of the aider and abettor "that one of a number of crimes will probably be committed, and one of those crimes is in fact committed": *see Furundžija* Trial Judgement, para. 246; *Blaškić* Trial Judgement, para. 287; *Blaškić* Appeal Judgement, para. 50; *Kvočka* Trial Judgement, para. 255; *Brđanin* Trial Judgement, para. 27; *Strugar* Trial Judgement, para. 350.

<sup>828</sup> In the same sense, *see Furundžija* Trial Judgement, para. 246; *Blaškić* Trial Judgement, para. 287; *Blaškić* Appeal Judgement, para. 50; *Kvočka* Trial Judgement, para. 255; *Brđanin* Trial Judgement, para. 272; *Limaj* Trial Judgement, para. 518. However, the following judgements require knowledge of the "specific crime": *Kunarac* Trial Judgement, para. 392; *Krnojelac* Trial Judgement, para. 90; *Simić* Trial Judgement, para. 163; *Blagojević* Trial Judgement, para. 727.

<sup>829</sup> *Kordić* Trial Judgement, para. 399; *Simić* Trial Judgement, para. 162.

<sup>830</sup> Indictment, paras 13-18, 26, 36; Prosecution Pre-Trial Brief, para. 105.

291. The principle of ‘superior criminal responsibility’<sup>831</sup> is firmly anchored both in conventional and customary law,<sup>832</sup> and applicable to both international and internal armed conflicts.<sup>833</sup>

### 1. Nature and Elements of ‘Superior Criminal Responsibility’

292. According to the jurisprudence of the Tribunal, paragraphs (1) and (3) of Article 7 of the Statute connote distinct categories of individual criminal responsibility,<sup>834</sup> which, if not encompassed in one count, may constitute the basis for two separate offences.<sup>835</sup> Notwithstanding this distinction, the modes of liability of instigation and aiding and abetting, with which the Accused is charged pursuant to Article 7(1) of the Statute,<sup>836</sup> share a common feature with that of superior criminal responsibility pursuant to Article 7(3) of the Statute in that both are accessory to principal crimes committed by other direct perpetrators.<sup>837</sup>

293. However, whereas for a finding of instigation and aiding and abetting, there ought to be a certain contribution to the commission of the principal crime, superior criminal responsibility is characterised by the mere omission of preventing or punishing crimes committed by (subordinate) others.<sup>838</sup> Therefore, it is not uncommon to find the superior described as responsible “for the acts of his subordinates”. This does not mean, however, that the superior shares the same responsibility as the subordinate who commits the crime in terms of Article 7(1) of the Statute, but that the

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<sup>831</sup> With regard to this terminology, *see* para. 308 *infra*.

<sup>832</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Land’o*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 195, noting that by the end of 1992, 119 states had ratified Additional Protocol I and stating that the standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature. *See also* *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005 (“*Halilović* Trial Judgement”), paras 39 *et seq.* This has become even more true since the number of ratifications has meanwhile increased to 164 states: “States Party to the Main Treaties,” International Committee of the Red Cross (“ICRC”), 22 June 2006 (*see* [www.icrc.org/web/eng](http://www.icrc.org/web/eng)).

<sup>833</sup> *Prosecutor v. Enver Had`ihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, (“*Had`ihasanović* Jurisdiction Appeal Decision”), paras 13, 20, 31, followed by *Brđanin* Trial Judgement, para. 275; *Strugar* Trial Judgement, para. 357.

<sup>834</sup> *Blaškić* Appeal Judgement, para. 91; *Kordić* Appeal Judgement, para. 34; *Halilović* Trial Judgement, para. 53. *See also* *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* Appeal Judgement”), para. 81.

<sup>835</sup> *Čelebići* Appeal Judgement, paras 741, 745, fn. 1261. As to the consequences of this relationship between Articles 7(1) and 7(3) of the Statute, *see* paras 339 *et seq. infra*.

<sup>836</sup> *See* para. 269 *supra*. The same would apply to planning and ordering, although with these modes of liability the Accused is not charged.

<sup>837</sup> With regard to Article 7(1) of the Statute, *see* para. 269 *supra*. As mere participants to the crime of the ‘direct’ perpetrator are, thus, only ‘indirectly’ involved in the crime, it may be misleading to characterise all modes of Article 7(1) liability as ‘direct’ involvement, in contrast to the ‘indirect’ type of responsibility under Article 7(3) of the Statute, as was done in *Kordić* Trial Judgement, para. 369, and *Naletilić* Trial Judgement, para. 78. Instead, with the exception of direct commission by the perpetrator, all other modes of criminal responsibility, whether under Article 7(1) or Article 7(3) of the Statute, may more appropriately be characterised as ‘indirect’.

<sup>838</sup> This character of superior criminal responsibility as a crime of omission which presupposes a legal obligation to act was highlighted in particular in *Halilović* Trial Judgement, paras 326 *et seq.*, 332 *et seq.* For further requirements and consequences of this distinct mode of criminal responsibility, *see* paras 325 *et seq.*, 332 *et seq. infra*.

superior bears responsibility for his own omission in failing to act. In this sense, the superior cannot be considered as if he had committed the crime himself, but merely for his neglect of duty with regard to crimes committed by subordinates.<sup>839</sup> By this essential element being distinct from the subordinate's responsibility under Article 7(1) of the Statute, the superior's responsibility under 7(3) of the Statute can indeed be called a responsibility *sui generis*.<sup>840</sup>

294. Taking together what has to be proven for individual criminal responsibility under Article 7(3) of the Statute, both with regard to the crime base performed by others and the superior's responsibility, four elements must be fulfilled:

- (i) an act or omission incurring criminal responsibility according to Articles 2 to 5 and 7(1) of the Statute has been committed by other(s) than the accused ('principal crime');
- (ii) there existed a superior-subordinate-relationship between the accused and the principal perpetrator(s) ('superior-subordinate-relationship');
- (iii) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so ('knew or had reason to know'); and
- (iv) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator(s) thereof ('failure to prevent or punish').<sup>841</sup>

## 2. Scope of the 'Principal Crime'

295. Until recently, both the requirement of a principal crime (committed by others than the accused) and its performance in any of the modes of liability provided for in Article 7(1)<sup>842</sup>

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<sup>839</sup> *Halilović* Trial Judgement, para. 54. As to the consequences for sentencing, see paras 339 *et seq. infra*.

<sup>840</sup> *Halilović* Trial Judgement, para. 78; *Prosecutor v. Enver Had'ıhasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 ("*Had'ıhasanović* Trial Judgement"), para. 75.

<sup>841</sup> Whereas requirement (i) has so far been rarely explicitly mentioned, the requirements (ii) - (iv) have repeatedly been articulated in the jurisprudence of the Tribunal, beginning with *Čelebići* Trial Judgement, para. 346, and followed by *Aleksovski* Trial Judgement, paras 69 *et seq.*; *Blaškić* Trial Judgement, paras 294 *et seq.*; *Kunarac* Trial Judgement, para. 395; *Kordić* Trial Judgement, para. 401; *Kordić* Appeal Judgement, para. 827; *Krstić* Trial Judgement, para. 604; *Kvočka* Trial Judgement, para. 314; *Krnjelac* Trial Judgement, para. 92; *Naletilić* Trial Judgement, para. 65; *Stakić* Trial Judgement, para. 457; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Trial Judgement"), para. 173; *Brdanin* Trial Judgement, para. 275; *Blagojević* Trial Judgement, para. 790; *Strugar* Trial Judgement, para. 358; *Kayishema* Trial Judgement, paras 217-231; *Bagilishema* Trial Judgement, para. 38; *Semanza* Trial Judgement, para. 400; *Kajelijeli* Trial Judgement, para. 772; *Kamuhanda* Trial Judgement, para. 603; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement, 25 February 2004 ("*Ntagerura* Trial Judgement"), para. 627.



appeared so obvious as to hardly need to be explicitly stated. Since this position, however, has been challenged by the Defence, some clarification is needed.

296. The Prosecution, as already emerges from the Indictment,<sup>843</sup> submits that “committing” under Article 7(3) of the Statute is a term of art which refers to any of the acts proscribed under Article 7(1) of the Statute.<sup>844</sup> Consequently, a superior has to prevent subordinates not only from committing the crime in person but also from instigating or aiding and abetting its commission by others, or from letting it occur by omission. The duty to punish is to be construed accordingly.

297. The Defence submits that Article 7(3) of the Statute, when declaring superiors responsible for crimes ‘committed’ by subordinates, merely refers to the ‘commission’ mode of Article 7(1) of the Statute, whereas all other modes of liability provided for in this Article<sup>845</sup> are not included and, thus, cannot serve as the basis for superior criminal responsibility. Therefore, according to the Defence, a superior can be held responsible only if the subordinates ‘committed’ the crimes themselves, and not if they merely aided and abetted the crimes of others.<sup>846</sup> Furthermore, the Defence seems to interpret the reference in Article 7(3) of the Statute to ‘acts’ in such a way that only positive contributions of subordinates to a crime may trigger criminal responsibility of the superior, whereas for mere passive omissions by subordinates, such as allowing crimes to be committed by others, the superior would not be obliged to prevent or punish.<sup>847</sup>

298. This Trial Chamber has already dealt with these legal aspects, and gave its position on them in the case of *Prosecutor v. Boškoski and Tarčulovski*.<sup>848</sup> It will accordingly, for the purposes of,

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<sup>842</sup> Article 7(1) of the Statute reads as follows: “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”.

<sup>843</sup> First, with regard to murder and cruel treatment (Counts 1 and 2), *see* Indictment, para. 22, alleging “members of the Military Police under the command and control of Naser Orić” to have detained several Serb individuals; Indictment, para. 23, referring to various modes of maltreatment of detainees “by the guards and/or by others with the support of the guards”. *See also* Prosecution Pre-Trial Brief, charging the Accused under Article 7(3) “for the acts or omissions of his subordinates” (para. 30), for severe beatings “by the guards and other persons admitted into the prison by the guards” (para. 55), and referring to “the military police, ABiH guards, soldiers, and other persons, who, as a result of the acts or omissions of the subordinates of Naser Orić” caused grievous injuries (para. 56), and declaring the Accused criminally responsible “through the culpable acts or omissions of his subordinates and other persons” (para. 57). Second, with regard to wanton destruction (Count 3), *see* Indictment, para. 27, referring to Bosnian Muslim armed units which burned and otherwise destroyed certain villages and hamlets. *See also* Prosecution Pre-Trial Brief, para. 82, referring to acts of wanton destruction as being committed “through the acts or omissions of [the Accused’s] subordinates”.

<sup>844</sup> Prosecution Final Brief paras 228 *et seq.*; Prosecution Response to the Defence Final Brief, paras 27 *et seq.*; Prosecution Closing Argument, T. 16491 *et seq.*

<sup>845</sup> *See* fn. 842 *supra*.

<sup>846</sup> This position of the Defence is mainly based on the wording of Article 7(3) of the Statute because it merely refers to ‘committing’, rather than also mentioning the other modes of liability in Article 7(1) of the Statute: *see* Defence Final Brief, paras 507 *et seq.*; Defence Closing Argument, T. 16438 *et seq.*, further elaborating on this point.

<sup>847</sup> Defence Final Brief paras 494 *et seq.*; Defence Closing Argument, T. 16431 *et seq.*

<sup>848</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment, 26 May 2006 (“*Boškoski* Decision”), paras 18 *et seq.*

and considering the particulars of this case, limit itself to the following reconfirmations and clarifications.

299. First, as regards the principal question whether ‘committing’ in Article 7(3) of the Statute is to be understood in a broad or narrow manner, the Trial Chamber holds that the better arguments speak for the former. As the use of ‘committing’ in various Articles (1, 2, 4, 5, 9, 16 and 29) of the Statute shows, this term is open to different interpretations, depending on the context in which it is used. Whereas Article 7(1) of the Statute lists various forms of individual criminal liability in terms of perpetration and participation, Article 7(3) of the Statute deals with criminal responsibility on the level of a superior by determining his or her duties. Even if this is done within the same Article, varied language in two different sections speaks against rather than for its understanding in only one sense. This is particularly true if, as submitted by the Defence, Article 7(1) and 7(3) of the Statute provide two “separate pillars” of responsibility,<sup>849</sup> in which case they might even be regulated in two different Articles.<sup>850</sup> Consequently, the possibility of a different interpretation can certainly not be excluded.

300. Since a broad interpretation of ‘committing’ in Article 7(3) of the Statute cannot be excluded, decisive weight must be given to the purpose of superior criminal responsibility: it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty. This enforcement of international humanitarian law would be impaired to an inconceivable degree if a superior had to prevent subordinates only from killing or maltreating in person, while he could look the other way if he observed that subordinates ‘merely’ aided and abetted others in procuring the same evil.<sup>851</sup>

301. For these and other reasons which, taking into account the relevant case law of this Tribunal,<sup>852</sup> are elaborated in more detail in the *Boškoski* case,<sup>853</sup> the Trial Chamber holds that the criminal responsibility of a superior under Article 7(3) of the Statute is not limited to crimes committed by subordinates in person but encompasses any modes of criminal responsibility

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<sup>849</sup> See Defence Closing Argument, T. 16441.

<sup>850</sup> As it is indeed provided for in Articles 25 and 28, respectively, of the Rome Statute.

<sup>851</sup> In these terms, the Trial Chamber finds itself in full agreement with the Report of the UN Secretary-General that a person in a position of superior authority should not only be held individually responsible for giving the unlawful order to commit a crime under the present Statute, but also “for failure to prevent a crime or to deter the unlawful behaviour of his subordinates”. The Secretary-General did not give any indication that only ‘committing’ in person should be considered unlawful behaviour. See Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (3 May 1993), UN DOC. S/25704 (“Report of the Secretary-General”), para. 56.

<sup>852</sup> In particular, *Krnjelac* Trial Judgement, para. 319; *Krstić* Trial Judgement, paras 605, 607-646; *Naletilić* Trial Judgement, paras 619-631; *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (“*Hadžihasanović* Jurisdiction Trial Decision”), para. 209.

<sup>853</sup> *Boškoski* Decision, paras 18-48.

proscribed in Article 7(1) of the Statute, in particular, instigating as well as otherwise aiding and abetting.<sup>854</sup>

302. Second, as regards the nature of the ‘acts’ referred to in Article 7(3) of the Statute, the Trial Chamber holds that a superior’s criminal responsibility for crimes of subordinates is not limited to the subordinates’ active perpetration or participation, but also comprises their committing by omission. First of all, this position is supported by the common usage of ‘act’ and ‘committing’ as legal umbrella-terms for conduct that consists of actively causing a certain result to occur or in failing to prevent its occurrence. Moreover, even where the Statute describes criminalised breaches of international laws and conventions in an active manner by referral to ‘acts’ against persons or property (Article 2 of the Statute), to any other ‘acts’ enumerated in paragraph 3 (of Article 4 of the Statute) or to other inhumane ‘acts’ (Article 5 of the Statute), this is, in the case law of the Tribunal, consistently understood as comprising both acts and omissions. This has not only been stated in general terms by defining ‘committing’ as covering “physically perpetrating a crime or engendering a culpable omission in violation of criminal law”,<sup>855</sup> but also in regard to particular crimes, such as in this case ‘murder’ and ‘cruel treatment’, both of which can be perpetrated by acts and omissions.<sup>856</sup>

303. Furthermore, since commission through culpable omission is not limited to perpetration but, according to the case of this Tribunal, is open to all forms of participation,<sup>857</sup> instigating as well as aiding and abetting can also be carried out by omission<sup>858</sup>.

304. In whatever mode, though, omission can incur responsibility only if there was a duty to act in terms of preventing the prohibited result from occurring.<sup>859</sup> Such a duty can, in particular, arise out of responsibility for the safety of the person concerned, derived from humanitarian law<sup>860</sup> or

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<sup>854</sup> Regarding the question as to what degree the principal crime must have been performed, *see* paras 328, 334 *infra*.

<sup>855</sup> *Blaškić* Appeal Judgment, para. 663; *Krstić* Trial Judgement, para. 601. *See also* *Tadić* Appeal Judgement, para. 188; *Naletilić* Trial Judgement, para. 62; *Kvočka* Trial Judgement, para. 313.

<sup>856</sup> In regard to ‘murder’, *see* *Kvočka* Appeal Judgement, para. 260; *Krnjelac* Trial Judgement, paras. 324, 329; *Galić* Trial Judgement, para. 150; *Brđjanin* Trial Judgement, para. 381; *Krstić* Trial Judgement, para. 485. In respect of ‘cruel treatment’, *see* *Krstić* Trial Judgement, para. 516. With regard to ‘other inhumane acts’, *see* *Blagojević* Trial Judgement, para. 626. For further details to this position, *see* *Boškoski* Decision, paras 22 *et seq*.

<sup>857</sup> In particular, *see* *Kvočka* Appeal Judgement, para. 187; *Galić* Trial Judgement, para. 168.

<sup>858</sup> For instigating, *see* para. 273 *supra*. For aiding and abetting, *see* para. 283 *supra*.

<sup>859</sup> Although this requirement is not always explicitly stated when criminal liability by omission is at stake, the duty to act is considered an obvious requirement for omission. *See* fn. 741 *supra*.

<sup>860</sup> *See* particularly Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (“1949 Geneva Convention III”), Article 13: “Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention”; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977, Article 11: “The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty [...] shall not be endangered in any

based on a position of authority,<sup>861</sup> or can result from antecedent conduct by which the person concerned has been exposed to a danger.<sup>862</sup>

305. Third, with regard to the consequences for the superior's responsibility, the Trial Chamber holds that his or her duty to prevent or punish concerns all modes of conduct a subordinate may be criminally responsible for under Article 7(1) of the Statute, be it perpetration by committing the relevant crime (alone or jointly with others) in person or be it participation, as in the form of instigation or otherwise aiding and abetting, and further, that any of these modes of liability may be performed by positive action or culpable omission. The superior's responsibility for omissions of subordinates is of particular relevance in cases where subordinates are under a protective duty to shield certain persons from being injured, as in the case of detainees kept in custody. If, due to a neglect of protection by subordinates, protected persons sustain injuries, it is these subordinates' culpable omissions (in terms of Article 7(1) of the Statute) for which the superior is made responsible under Article 7(3) of the Statute. Consequently, if for instance the maltreatment of prisoners by guards, and/or by outsiders not prevented from entering the location, is made possible because subordinates in charge of the prison fail to ensure the security of the detainees by adequate measures, it does not matter any further by whom else, due to the subordinates' neglect of protection, the protected persons are being injured,<sup>863</sup> nor would it be necessary to establish the identity of the direct perpetrators.

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unjustified act or omission". See *Blaškić* Appeal Judgment, para. 663; *Essen Lynching* case, British Military Court in Essen, Trial of Erich Heyer *et al.* 22 December 1945, in: UNWCC, Law Reports of Trials of War Criminals, volume 1(1947-1949), p.88, dealing with members of an escort of prisoners not protected against attacks by a mob; *Synagogue Fire* case, Oberster Gerichtshof für die Britische Zone, in re S. *et al.*, 20 April 1949, in: Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen, volume 2 (1949), 11 *et seq.*, establishing a duty of a police guard to prevent or stop attacks on prisoners in his custody; *Krnjelac* Trial Judgement, para. 318, holding the warden of a prison responsible for not having prevented guards from letting individuals enter from the outside and mistreating detainees.

<sup>861</sup> See *Fire Brigade* case, Oberster Gerichtshof für die Britische Zone, in re H., 22 February 1949, in: Entscheidungen des Obersten Gerichtshofs für die Britische Zone, vol. 1 (1949), pp. 316 *et seq.*, establishing a duty to act of the head of the local auxiliary fire brigade (against the destruction of property in a Nazi pogrom action) by virtue of his voluntary undertaking of the position of a fire fighter, though, in the final result denying his responsibility for lack of capacity to act against intimidations by local Gestapo members.

<sup>862</sup> See *Blaškić* Appeal Judgement, para. 668, holding the accused obliged to care for protected persons exposed to danger by being used as human shields.

<sup>863</sup> Thus, contrary to the submission of the Defence (Defence Final Brief, paras 494 *et seq.*, 506; Defence Closing Argument, T.16438), the responsibility of the superiors directly based on the responsibility of the subordinates for their own omission does not lead to a "double form of normative attribution". The Defence seems to misunderstand the concept of "objektive Zurechnung", when defining it as "attribution in normative terms going *beyond* mere naturalistic causality" (Defence Final Brief, para. 506) (italics added), because rather than a way of expanding, it is a means of limiting 'naturalistic causality'.

306. Fourth, the Trial Chamber finds that the criminal responsibility of subordinates of the Accused under Article 7(1) of the Statute, by virtue of omission, is sufficiently indicated in the Indictment and in the Prosecution Pre-Trial Brief.<sup>864</sup>

### 3. 'Superior-Subordinate Relationship'

307. As stated by the Trial Chamber in the *Čelebići* case, "the doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates".<sup>865</sup> This has two implications.

308. First, Article 7(3) of the Statute does not differentiate between 'commander' and 'superior' as was later done in Article 28 of the Rome Statute, but instead uses exclusively the generic term of 'superior'.<sup>866</sup> Consequently, the scope of Article 7(3) of the Statute extends beyond classical 'command responsibility' to a truly 'superior criminal responsibility', and does not only include military commanders within its scope of liability, but also political leaders and other civilian superiors in possession of authority.<sup>867</sup>

309. The second implication is that, in relation to the power of the superior to control, it is immaterial whether that power is based on a *de jure* or a *de facto* position.<sup>868</sup> Although formal appointment within a hierarchical structure of command may still prove to be the best basis for incurring individual criminal responsibility as a superior,<sup>869</sup> the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid.<sup>870</sup> This is particularly the case with regard to many contemporary conflicts where there may be only *de facto* self-proclaimed governments and/or *de facto* armies and paramilitary groups subordinate thereto.<sup>871</sup>

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<sup>864</sup> See fn. 843 *supra*.

<sup>865</sup> *Čelebići* Trial Judgement, para. 377; *Halilović* Trial Judgement, para. 57.

<sup>866</sup> *Čelebići* Trial Judgement, para. 356; *Aleksovski* Trial Judgement, para. 75.

<sup>867</sup> *Čelebići* Trial Judgement, paras 356, 378; *Aleksovski* Trial Judgement, para. 75; *Aleksovski* Appeal Judgement, para 76; *Kordić* Trial Judgement, para. 416; *Stakić* Trial Judgement, para. 459. See also *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 ("*Bagilishema* Appeal Judgement"), para. 51; *Musema* Trial Judgement, para. 135; *Kajelijeli* Trial Judgement, para. 773; *Kajelijeli* Appeal Judgement, para. 85; *Kamuhanda* Trial Judgement, para. 604.

<sup>868</sup> *Čelebići* Trial Judgement, paras 354, 370, 736, confirmed by *Čelebići* Appeal Judgement, paras 195 *et seq.* See also *Aleksovski* Trial Judgement, para. 76; *Blaškić* Trial Judgement, para. 301; *Kunarac* Trial Judgement, para. 396; *Kordić* Trial Judgement, para. 416; *Naletilić* Trial Judgement, para. 67; *Stakić* Trial Judgement, para. 459; *Halilović* Trial Judgement, paras 58, 60; *Musema* Trial Judgement, para. 148; *Kayishema* Trial Judgement, paras 218, 222.

<sup>869</sup> See *Kordić* Trial Judgement, para. 419; *Naletilić* Trial Judgement, para. 67.

<sup>870</sup> See *Kordić* Trial Judgement, para. 422; *Kajelijeli* Appeal Judgement, para. 87.

<sup>871</sup> *Čelebići* Appeal Judgement, para. 193. See also *Čelebići* Trial Judgement, para. 354; *Naletilić* Trial Judgement, para. 67.

310. Thus, regardless of which chain of command<sup>872</sup> or position of authority the superior-subordinate relationship may be based, it is immaterial whether the subordination of the perpetrator to the accused as superior is direct or indirect, and formal or factual.<sup>873</sup> In the same vein, the mere *ad hoc* or temporary nature of a military unit or an armed group does not *per se* exclude a relationship of subordination between the member of the unit or group and its commander or leader.<sup>874</sup>

311. Within this rather broad platform, however, proof of a superior-subordinate relationship ultimately depends on the existence of effective control which requires that the superior must have had the material ability to prevent or punish the commission of the principal crimes.<sup>875</sup> On the one hand, this needs more than merely having ‘general influence’ on the behaviour of others.<sup>876</sup> Likewise, merely being tasked with coordination does not necessarily mean to have command and control.<sup>877</sup> On the other hand, effective control does not presuppose formal authority to issue binding orders or disciplinary sanctions, as the relevant threshold rather depends on the factual situation, *i.e.*, the ability to maintain or enforce compliance of others with certain rules and orders. Whether this sort of control is directly exerted upon a subordinate or mediated by other superiors or subordinates is immaterial, as long as the responsible superior would have means to prevent the relevant crimes from being committed or to take efficient measures for having them sanctioned. In the same vein, proof of the existence of a superior-subordinate relationship does not require the identification of the principal perpetrators, particularly not by name, nor that the superior had knowledge of the number or identity of possible intermediaries, provided that it is at

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<sup>872</sup> See *Kordić* Trial Judgement, para. 419.

<sup>873</sup> *Čelebići* Appeal Judgement, para. 303. See also *Kordić* Trial Judgement, para. 416; *Stakić* Trial Judgement, para. 459; *Brđanin* Trial Judgement, para. 276; *Strugar* Trial Judgement, paras 362, 366; *Halilović* Trial Judgement, paras 53, 60, 63; *Musema* Trial Judgement, para. 148.

<sup>874</sup> See *Kunarac* Trial Judgement, para. 399; *Strugar* Trial Judgement, para. 362; *Halilović* Trial Judgement, para. 61.

<sup>875</sup> This decisive criterion of ‘effective control’ in terms of the actual possession, or non-possession, of powers of control over the actions of the subordinates, was first established by the Trial Chamber in *Čelebići*: *Čelebići* Trial Judgement, para. 378. For cases upholding this reasoning, see *Čelebići* Appeal Judgement, paras 192 *et seq.*, *Kayishema* Appeal Judgement, para. 294; *Bagilishema* Appeal Judgement, para. 50. For cases following *Čelebići* in principle but occasionally employing different terminology, see *Aleksovski* Trial Judgement, para. 76; *Blaškić* Trial Judgement, para. 301; *Kunarac* Trial Judgement, para. 396; *Kvočka* Trial Judgement, para. 315; *Stakić* Trial Judgement, para. 459; *Krnojelac* Trial Judgement, para. 93; *Naletilić* Trial Judgement, para. 67; *Galić* Trial Judgement, para. 173; *Brđjanin* Trial Judgement, para. 276; *Blagojević* Trial Judgement, para. 791; *Strugar* Trial Judgement, para. 360; *Bagilishema* Trial Judgement, para. 39; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 (“*Niyitegeka* Trial Judgement), para. 472; *Kajelijeli* Trial Judgement, para. 773; *Kamuhanda* Trial Judgement, para. 604.

<sup>876</sup> *Semanza* Trial Judgement, para. 402. Accordingly, even ‘substantial influence’ has not been found *per se* sufficient: see, *e.g.*, *Čelebići* Appeal Judgement, para. 266; *Kordić* Trial Judgment, para. 840; *Naletilić* Trial Judgement, para. 68; *Stakić* Trial Judgement, para. 459; *Brđanin* Trial Judgement, para. 276; *Blagojević* Trial Judgement, para. 791; *Ntagerura* Trial Judgement, para. 628.

<sup>877</sup> *Tadić* Trial Judgement, paras 597 *et seq.*

least established that the individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior.<sup>878</sup>

312. Although it is obvious that the requisite level of control is a matter to be determined on the basis of the evidence presented in each case,<sup>879</sup> the jurisprudence of the Tribunal provides certain criteria that are more or less indicative of the existence of some authority in terms of effective control. This is in particular true with regard to the formality of the procedure used for appointment of a superior,<sup>880</sup> the power of the superior to issue orders<sup>881</sup> or take disciplinary action,<sup>882</sup> the fact that subordinates show in the superior's presence greater discipline than when he is absent,<sup>883</sup> or the capacity to transmit reports to competent authorities for the taking of proper measures.<sup>884</sup> Likewise, the capacity to sign orders is an indicator of effective control,<sup>885</sup> provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others,<sup>886</sup> but that the indicated power is supported by the substance of the document<sup>887</sup> or that it is obviously complied with.<sup>888</sup> An accused's high public profile, manifested through public appearances and statements<sup>889</sup> or by participation in high-profile international negotiations,<sup>890</sup> although not establishing effective control *per se*, is an additional indicator of effective control. On the other hand, effective control does not necessarily presuppose a certain rank, so that even a rank-less individual commanding a small group of men can have superior criminal responsibility.<sup>891</sup> Nor is it required that the superior generally exercises the trappings of *de jure* authority.<sup>892</sup>

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<sup>878</sup> A first instance of this *proviso* with regard to identification requirements can be found in relation to the form of the indictment by the Trial Chamber's finding in the *Krnojelac* case that it would be sufficient for the prosecution to identify subordinates who allegedly committed the criminal acts at least by their 'category' or 'as a group' if it is unable to identify those directly participating in the alleged crimes by name: *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46. As may be concluded from the unchallenged reference to this decision by the Appeals Chamber in the *Blaškić* case (*Blaškić* Appeal Judgement, para. 217), to establish superior responsibility, the direct perpetrators of the relevant crimes need not be identified by name, nor must it be shown that the superior knew the identity of those individuals if it is at least proven that they belong to a category or group of people over whom the accused has effective control. *See also Had'hasanović* Trial Judgement, para. 90.

<sup>879</sup> *Blaškić* Appeal Judgement, para. 69; *Akayesu* Trial Judgement, para. 491; *Strugar* Trial Judgement, para. 366; *Halilović* Trial Judgement, para. 63.

<sup>880</sup> *Halilović* Trial Judgement, para. 58.

<sup>881</sup> *Aleksovski* Trial Judgement, paras 101, 104; *Blaškić* Trial Judgement, para. 302; *Kordić* Trial Judgement, para. 421. *See also Kajelijeli* Trial Judgement, paras 403-404.

<sup>882</sup> *Blaškić* Trial Judgement, para. 302; *Had'hasanović* Trial Judgement, paras 83 *et seq.*

<sup>883</sup> *Čelebići* Appeal Judgement, para. 206, endorsing the findings of *Čelebići* Trial Judgement, para. 743.

<sup>884</sup> *Aleksovski* Trial Judgement, para. 78; *Blaškić* Trial Judgement, para. 302.

<sup>885</sup> *Čelebići* Trial Judgement, para. 672; *Kordić* Trial Judgement, para. 421; *Naletilić* Trial Judgement, para. 67.

<sup>886</sup> *Kordić* Trial Judgement, para. 421.

<sup>887</sup> *Ibid.*

<sup>888</sup> *Naletilić* Trial Judgement, para. 67.

<sup>889</sup> *Kordić* Trial Judgement, para. 424; *Stakić* Trial Judgement, para. 454.

<sup>890</sup> *Aleksovski* Trial Judgement, para. 101; *Kordić* Trial Judgement, para. 424; *Strugar* Trial Judgement, para. 398.

<sup>891</sup> *Kunarac* Trial Judgement, para. 398; *Naletilić* Trial Judgement, para. 69.

<sup>892</sup> *Kajelijeli* Appeal Judgement, para. 87.

313. If a superior is proven to have possessed the effective control to prevent or punish relevant crimes, his or her own individual criminal responsibility is not excluded by the concurrent responsibility of other superiors.<sup>893</sup> If, however, a superior has functioned as a member of a collegiate body with authority shared among various members, the power or authority actually devolved on an accused may be assessed on a case-by-case basis, taking into account the cumulative effect of the accused's various functions.<sup>894</sup>

314. As concerns the point in time at which the superior must have had effective control over his subordinates and at which he should have acted to prevent or punish the relevant crimes, it seems to be commonly accepted that the critical time is when those crimes were committed. Since this, however, may be true only with regard to the duty to prevent crimes from occurring, but not necessarily so for the duty to punish crimes which have been committed, this element will be further examined in connection with those duties.<sup>895</sup>

315. Concerning the positions of the Parties on the superior-subordinate relationship, the Trial Chamber views the Prosecution's submissions in its Pre-Trial Brief<sup>896</sup> as being in accordance with the requirements set out before. With respect to the Defence's submission requiring the "identification of the person(s) who committed the crimes",<sup>897</sup> the Trial Chamber finds this requirement satisfied if it is at least proven that the individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior.<sup>898</sup>

#### 4. Mens Rea - 'Knew or had Reason to Know'

316. The basic mental requirement for superior criminal responsibility, although neither explicitly set forth in the Statute nor discussed to any significant extent in the case law of the Tribunal, is first of all that a superior be aware of his own position of authority, *i.e.*, that he or she has effective control, under the specific circumstances, over the subordinates who committed or were about to commit the relevant crimes.

317. Beyond this general requirement of *mens rea*, individual criminal responsibility under Article 7(3) requires no more than the superior either (a) having known or (b) having had reason to

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<sup>893</sup> *Blaškić* Trial Judgement, paras 296, 302, 303; *Krnojelac* Trial Judgement, para. 93; *Naletilić* Trial Judgement, para. 69; *Halilović* Trial Judgement, para. 62.

<sup>894</sup> *Brđanin* Trial Judgement, para. 277, referencing *Bagilishema* Appeal Judgement, para. 51 (endorsing the findings in *Musema* Trial Judgement, para. 135), and *Stakić* Trial Judgement, para. 494.

<sup>895</sup> See paras 327, 335 *infra*.

<sup>896</sup> Prosecution Pre-Trial Brief, paras 105-109.

<sup>897</sup> Defence Pre-Trial Brief Annex I, Element 1.4.1.1.

<sup>898</sup> See fn. 878 *supra*.



know that his subordinates were about to commit relevant criminal acts or had already done so. Whereas the former requires proof of actual knowledge, the latter requires proof only of some grounds which would have enabled the superior to become aware of the relevant crimes of his or her subordinates. By permitting the attribution of criminal responsibility to a superior for what is in actual fact a lack of due diligence in supervising the conduct of his subordinates, Article 7(3) in this respect sets itself apart by being satisfied with a *mens rea* falling short of the threshold requirement of intent under Article 7(1) of the Statute.

318. Nevertheless, superior criminal responsibility by no means involves the imposition of ‘strict liability’,<sup>899</sup> for even if it may be described as the “imputed responsibility or criminal negligence”,<sup>900</sup> a mental element is required at least in so far as an accused must have been aware of his position as a superior and of the reason that should have alerted him to relevant crimes of his subordinates.<sup>901</sup>

(a) Actual Knowledge

319. The actual knowledge of the superior, in terms of awareness that his subordinates were about to commit or have committed relevant crimes,<sup>902</sup> cannot be presumed.<sup>903</sup> In the absence of direct evidence, however, actual knowledge may still be established by way of circumstantial evidence.<sup>904</sup> Although in this regard, the superior’s position may *per se* appear to be a significant indication from which knowledge of a subordinate’s criminal conduct can be inferred,<sup>905</sup> such status is not to be understood as a conclusive criterion<sup>906</sup> but must be supported by additional factors.<sup>907</sup>

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<sup>899</sup> This kind of liability has been rightly denied: *see* *Čelebići* Trial Judgement, para. 383; *Brđanin* Trial Judgement, para. 278; *Blagojević* Trial Judgement, para. 792; *Halilović* Trial Judgement, para. 65; *Kajelijeli* Trial Judgement, para. 776.

<sup>900</sup> *See* Report of the Secretary-General, para. 56. *See also* *Bagilishema* Trial Judgement, para. 897, speaking in the context of Article 6(3) of the ICTR Statute of “gross negligence” as a “third basis of responsibility”; *Blaškić* Trial Judgement, para. 562, holding the accused responsible “on the basis of his negligence, in other words for having ordered acts which he could only reasonably have anticipated would lead to crimes”.

<sup>901</sup> For further details to this alternate mental state, *see* paras 321 *et seq. infra*.

<sup>902</sup> *Kordić* Trial Judgement, para. 427.

<sup>903</sup> *Čelebići* Trial Judgement, para. 386; *Naletilić* Trial Judgement, para. 71; *Strugar* Trial Judgement, para. 368; *Halilović* Trial Judgement, para. 66; *Limaj* Trial Judgement, para. 524. Even though the Trial Chamber in the *Blagojević* case, somewhat misleadingly, speaks of “presumed knowledge” (*Blagojević* Trial Judgement, para. 792), it is in fact not dealing with actual knowledge, but with the alternative of “reason to know”, as evidenced by the reference to the *Čelebići* Appeal Judgement, para. 227.

<sup>904</sup> *Čelebići* Trial Judgement, paras 383, 386; *Kordić* Trial Judgement, para. 427; *Krnojelac* Trial Judgement, para. 94; *Naletilić* Trial Judgement, para. 71; *Galić* Trial Judgement, para. 174; *Brđanin* Trial Judgement, para. 278; *Strugar* Trial Judgement, para. 368; *Halilović* Trial Judgement, para. 66; *Limaj* Trial Judgement, para. 524; *Had`ihasanović* Trial Judgement, para. 94; *Bagilishema* Trial Judgement, para. 46; *Kajelijeli* Trial Judgement, para. 778.

<sup>905</sup> *Aleksovski* Trial Judgement, para. 80; *Blaškić* Trial Judgement, para. 308.

<sup>906</sup> *Blaškić* Appeal Judgement, para. 57; *Bagilishema* Trial Judgement, para. 45; *Semanza* Trial Judgement, para. 404; *Kajelijeli* Trial Judgement, para. 776.

<sup>907</sup> *Naletilić* Trial Judgement, para. 71; *Bagilishema* Trial Judgement, para. 45; *Semanza* Trial Judgement, para. 404; *Kajelijeli* Trial Judgement, para. 776.

According to the case law of the Tribunal, circumstantial evidence can in particular be gained from the indicia listed by the United Nations Commission of Experts in its final report on the armed conflict in the former Yugoslavia,<sup>908</sup> such as the type and scope of illegal acts, the time during which they occurred, the number and type of troops involved, the logistics involved, if any, the geographical location of the acts, their widespread occurrence, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved and the location of the commander at the time.<sup>909</sup>

320. Although the required knowledge is in principle the same both for military and civil superiors,<sup>910</sup> the various indications must be assessed in light of the accused's position of command. This may, in particular, imply that the threshold required to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalised chain of command with established reporting and monitoring systems.<sup>911</sup>

(b) Imputed Knowledge

321. Different from actual knowledge, be it proven by direct or circumstantial evidence, is the alternative of having had 'reason to know'. Here, the superior is deemed not to have possessed actual knowledge. Instead, the superior can be held responsible for having had reason to know, had he made use of information which, by virtue of his superior position and in compliance with his duties, was available to him, that subordinates were about to commit or had already committed the relevant crimes.<sup>912</sup> In these terms, this mode of mental state may indeed be coined 'imputed knowledge'.<sup>913</sup>

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<sup>908</sup> Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, p. 17.

<sup>909</sup> This list of criteria is in particular referred to in *Čelebići* Trial Judgement, para. 386; *Blaškić* Trial Judgement, para. 307; *Kordić* Trial Judgement, para. 427; *Galić* Trial Judgement, para. 174; *Brđanin* Trial Judgement, para. 276; *Strugar* Trial Judgement, para. 368; *Limaj* Trial Judgement, para. 524; *Had'ihasanović* Trial Judgement, para. 94; *Bagilishema* Trial Judgement, para. 968. With regard to geographical and temporal circumstances, it has to be kept in mind that the more physically distant the commission of the subordinate's acts from the superior's position, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, if the crimes were committed close to the superior's duty-station, the easier it would be to establish a significant indicium of the superior's knowledge, and even more so if the crimes were repeatedly committed. See *Aleksovski* Trial Judgement, para. 80; *Brđanin* Trial Judgement, para. 276, fn. 736; *Halilović* Trial Judgement, para. 66.

<sup>910</sup> *Krnojelac* Trial Judgement, para. 94, referencing *Čelebići* Appeal Judgement, paras 196 *et seq.*

<sup>911</sup> *Kordić* Trial Judgement, para. 428; *Naletilić* Trial Judgement, para. 73; *Galić* Trial Judgement, para. 174; *Halilović* Trial Judgement, para. 66.

<sup>912</sup> *Čelebići* Trial Judgement, paras 387 *et seq.*, 393; *Blaškić* Trial Judgement, para. 332; *Bagilishema* Trial Judgement, para. 46.

<sup>913</sup> *Kordić* Trial Judgement, para. 429. See also *Brđanin* Trial Judgement, para. 278, speaking of "constructive knowledge".

322. In determining whether a superior had ‘reason to know’ that subordinates were committing or were about to commit a crime, it must be shown that the superior was in possession of information which put him/her on notice of criminal acts committed or about to be committed by subordinates.<sup>914</sup> This determination does not require the superior to have actually acquainted himself/herself with the information in his or her possession,<sup>915</sup> nor that the information would, if read, compel the conclusion of the existence of such crimes.<sup>916</sup> It rather suffices that the information was available to the superior and that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.<sup>917</sup> Although the information may be general in nature,<sup>918</sup> it must be sufficiently specific to demand further clarification.<sup>919</sup> This does not necessarily mean that the superior may be held liable for failing to personally acquire such information in the first place.<sup>920</sup> However, as soon as the superior has been put on notice of the risk of illegal acts by subordinates,<sup>921</sup> he or she is expected to stay vigilant and to inquire about additional information, rather than doing nothing<sup>922</sup> or remaining ‘wilfully blind’.<sup>923</sup>

323. Whether the relevant information has become available to the superior in written or oral form is immaterial.<sup>924</sup> In particular, it is not necessary for the information to have been submitted in the form of a specific report.<sup>925</sup> Examples of information which have been found to place a superior on notice of the risk of criminal conduct by a subordinate include that of a subordinate having a notoriously violent or unstable character and that of a subordinate drinking prior to being sent on a

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<sup>914</sup> *Čelebići* Appeal Judgement, para. 241; *Čelebići* Trial Judgment, para. 393; *Blaškić* Appeal Judgement, para. 62; *Kordić* Trial Judgement, para. 437; *Kvočka* Trial Judgement, para. 318; *Krnojelac* Trial Judgement, para. 94; *Naletilić* Trial Judgement, para. 74; *Galić* Trial Judgement, para. 175; *Brđanin* Trial Judgement, para. 278; *Blagojević* Trial Judgement, para. 792; *Strugar* Trial Judgement, para. 369; *Halilović* Trial Judgement, para. 68; *Kayishema* Trial Judgement, para. 228; *Semanza* Trial Judgement, para. 405; *Kajelijeli* Trial Judgement, para. 778; *Kamuhanda* Trial Judgement, para. 609.

<sup>915</sup> *Čelebići* Appeal Judgement, para. 239; *Galić* Trial Judgement, para. 175.

<sup>916</sup> *Čelebići* Trial Judgement, para. 393; *Naletilić* Trial Judgement, para. 74; *Halilović* Trial Judgement, para. 68; *Had'hasanović* Trial Judgement, para. 97.

<sup>917</sup> *Čelebići* Trial Judgement, para. 393.

<sup>918</sup> *Čelebići* Appeal Judgement, para. 238; *Bagilishema* Appeal Judgement, para. 28; *Galić* Trial Judgement, para. 175; *Strugar* Trial Judgement, paras 370, 416; *Limaj* Trial Judgement, para. 525.

<sup>919</sup> *Čelebići* Trial Judgement, para. 393; *Halilović* Trial Judgement, para. 68.

<sup>920</sup> *Čelebići* Appeal Judgement, para. 226; *Blaškić* Appeal Judgement, para. 62; *Halilović* Trial Judgement, para. 69; *Limaj* Trial Judgement, para. 525. *See also* para. 325, fn. 934 *infra*.

<sup>921</sup> Instead of the “risk” of crimes by subordinates, as used in describing the standard of possible awareness in the case law of this Tribunal (*Krnojelac* Appeal Judgement, para. 155; *Čelebići* Trial Judgement, para. 383; *Strugar* Trial Judgement, para. 416), some judgements speak of “likelihood” (*Kordić* Trial Judgement, para. 437; *Limaj* Trial Judgement, para. 525) or even of “substantial” and “clear likelihood” (*Strugar* Trial Judgement, paras 420, 422). Yet this language, rather than requiring a higher standard, seems merely to express that with such a degree of likelihood the risk test is definitely satisfied. *See also* *Had'hasanović* Trial Judgement, paras 98, 102 *et seq.*

<sup>922</sup> *Strugar* Trial Judgement, para. 416.

<sup>923</sup> *Čelebići* Trial Judgement, para. 387; *Halilović* Trial Judgement, para. 69.

<sup>924</sup> *Čelebići* Appeal Judgement, para. 238; *Galić* Trial Judgement, para. 175.

<sup>925</sup> *Čelebići* Appeal Judgement, para. 238.

mission.<sup>926</sup> Even where such indications are present, the Trial Chamber would find that a ‘reason to know’ existed only if, as appears also to be required by the Appeals Chamber,<sup>927</sup> these indications point to the same type of crimes as the superior was supposed to prevent or punish, as opposed to merely general criminal activity.

324. As concerns the positions of the Parties on the mental element of superior responsibility, the Trial Chamber views the Prosecution’s submission in its Pre-Trial Brief<sup>928</sup> as being in accordance with the requirements set out above. The same is true with regard to the submission of the Defence in so far as it requires that “the Accused had *specific information* in his possession providing notice of the risk of offences having been committed or about to be committed”,<sup>929</sup> as it may be construed accordingly. With respect to the Defence submission requiring that “the Accused’s negligence was so serious as to amount to malicious intent”,<sup>930</sup> such a position may find support in trial judgements of the ICTR where it was held proper to ensure “that there has been malicious intent, or, at least, Š...Ć negligence was so serious as to be tantamount to acquiescence or even malicious intent”.<sup>931</sup> However, not only were such references to ‘negligence’ found by the Appeals Chamber to be “likely to lead to confusion of thought”,<sup>932</sup> but it appears no less misleading to require a mental standard tantamount to ‘malicious intent’. By contenting itself with having had ‘reason to know’ instead of requiring actual knowledge, superior criminal responsibility under Article 7(3) of the Statute obviously does not presuppose intent of the superior with regard to crimes of his subordinates, let alone a malicious one. What is required though, beyond solely negligent ignorance, is the superior’s factual awareness of information which, due to his position, should have provided a reason to avail himself or herself of further knowledge. Without any such subjective requirement, the alternative basis of superior criminal responsibility by having had ‘reason to know’ would be diminished into a purely objective one and, thus, run the risk of transgressing the borderline to ‘strict liability’. This is not the case, however, as soon as he or she has been put on notice by available information as described above.

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<sup>926</sup> *Čelebići* Appeal Judgement, para. 238; *Krnjelac* Appeal Judgement, para. 154; *Had`ihasanović* Trial Judgement, para. 100.

<sup>927</sup> *Krnjelac* Appeal Judgement, para. 155. See also *Had`ihasanović* Trial Judgement, paras 97 *et seq.*

<sup>928</sup> Prosecution Pre-Trial Brief, paras 132-136.

<sup>929</sup> Defence Pre-Trial Brief, Annex I, Element 1.4.2.2.

<sup>930</sup> Defence Pre-Trial Brief, Annex I, Element 1.4.2.3; Defence Closing Argument, T. 16432 *et seq.*

<sup>931</sup> *Akayesu* Trial Judgement, para. 489; *Musema* Trial Judgement, para. 131. See also *Bagilishema* Trial Judgement, paras 897, 1007.

<sup>932</sup> *Bagilishema* Appeal Judgement, para. 35, endorsed in *Blaškić* Appeal Judgement, para. 63. See also *Halilović* Trial Judgement, para. 71.

## 5. 'Failure to Prevent or Punish'

### (a) Two Distinct Duties

325. In order to incur individual criminal responsibility under Article 7(3) of the Statute, the superior having actual or imputed knowledge of crimes being about to be committed or having been committed by his subordinates must have “failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.<sup>933</sup> Thus, what a superior is liable for is not just the failure to have acquired sufficient knowledge about the criminal conduct of his subordinates, but ultimately the failure to react appropriately by preventing or punishing the relevant crimes.<sup>934</sup>

326. As a mode of liability based on omission,<sup>935</sup> superior criminal responsibility presupposes a duty of the superior<sup>936</sup> the purpose of which is, first and foremost, the prevention of crimes of subordinates that are about to be committed, and in the second place, the punishment of subordinates who have already committed crimes.<sup>937</sup> This duty does not, in terms of an alternative, permit a superior to choose, *i.e.*, to either prevent the crimes or to await their commission and then punish.<sup>938</sup> The superior’s obligations are instead consecutive: it is his primary duty to intervene as soon as he becomes aware of crimes about to be committed, while taking measures to punish may only suffice, as substitute, if the superior became aware of these crimes only after their commission. Consequently, a superior’s failure to prevent the commission of the crime by a subordinate, where he had the ability to do so, cannot simply be remedied by subsequently punishing the subordinate for the crime.<sup>939</sup> Therefore, the failure to prevent or to punish constitutes two distinct, but related, aspects of superior responsibility which correlate to the timing of a subordinate’s commission of a crime. Hence, the duty to prevent concerns future crimes whereas the duty to punish concerns past crimes of subordinates.<sup>940</sup>

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<sup>933</sup> See para. 290 *supra*.

<sup>934</sup> Consequently, as already stated by the Appeals Chamber in the *Čelebići* and *Blaškić* cases, the “neglect of duty to acquire such knowledge” does not feature within Article 7(3) of the Statute as a separate offence on its own but, as may be added, is merely an element within the superior criminal responsibility for having failed to prevent or punish: see *Čelebići* Appeal Judgement, para. 226; *Blaškić* Appeal Judgement, para. 62

<sup>935</sup> See fn. 838 *supra*.

<sup>936</sup> *Čelebići* Trial Judgement, para. 334; *Kordić* Trial Judgement, para. 369; *Halilović* Trial Judgement, para. 38.

<sup>937</sup> For the extension of superior criminal responsibility in customary international criminal law by criminalising the failure to punish as a separate form of liability, see *Halilović* Trial Judgement, paras 42 *et seq.*, 91.

<sup>938</sup> *Blaškić* Trial Judgement, para. 336; *Strugar* Trial Judgement, para. 373; *Blagojević* Trial Judgement, para. 793; *Limaj* Trial Judgement, para. 527; *Semanza* Trial Judgement, para. 407.

<sup>939</sup> *Stakić* Trial Judgement, para. 461; *Brđjanin* Trial Judgement, para. 279; *Halilović* Trial Judgement, para. 72.

<sup>940</sup> *Blaškić* Appeal Judgement, para. 83; *Halilović* Trial Judgement, para. 93; *Limaj* Trial Judgement, para. 527; *Had'ihasanović* Trial Judgement, paras 125 *et seq.*

(b) Necessary and Reasonable Measures to Prevent

327. The duty to take necessary and reasonable measures to prevent crimes from being committed presupposes that a superior is in a position to take the required measures prior to, or at least, during the commission of the crimes to be prevented. This implies that, both in temporal and in functional terms, the superior, as soon and as long as he or she has effective control over subordinates which he or she knows, or has reason to know, are about to commit relevant crimes, must counteract with appropriate measures. This requirement of actual control, in terms of the coincidence of the time at which the relevant crimes are to be prevented and the superior's effective power of taking the necessary measures, is substantially the same as that which is reflected by different terms in the case law of the Tribunal.<sup>941</sup>

328. This basic requirement, however, needs further determination with regard to what a superior must prevent and at what time he must do so. While the case law on the matter is scarce, one decision seems to suggest that only the commission of a completed, as opposed to inchoate, crime must be prevented.<sup>942</sup> Other judgements, however, understand the duty to prevent as existing "at any stage before the commission of a subordinate crime" and refer to the knowledge of a superior that such crime was "being prepared or planned",<sup>943</sup> thus imposing a duty upon a superior to already intervene at the planning and preparation stage of the subordinate's crime. In the Trial Chamber's view, this latter position finds support both in the language of the Statute and in the concept of superior criminal responsibility. Article 7(3) of the Statute obliges a superior to prevent a subordinate's 'acts' which, according to the underlying modes of liability set out in Article 7(1) of the Statute comprise not only the 'execution' but also the 'planning' and 'preparation' of crimes. Thus, it cannot be merely the completion of a crime which must be prevented, but also its planning

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<sup>941</sup> See *Aleksovski* Appeal Judgement, para. 76; *Čelebići* Appeal Judgement, paras 197 *et seq.*, 255 *et seq.*, approving the reasoning of *Čelebići* Trial Judgement, para. 647; *Kayishema* Appeal Judgement, para. 294, approving the reasoning of *Kayishema* Trial Judgement, para. 491; *Bagilishema* Appeal Judgement, para. 50; *Kunarac* Trial Judgement, para. 399; *Krnjelac* Trial Judgement, para. 93; *Strugar* Trial Judgement, para. 362, fn. 1072, reference the ICRC Commentary in relation to Article 87 Additional Protocol I; *Halilović* Trial Judgement, para. 61; *Semanza* Trial Judgement, para. 402; *Niyitegeka* Trial Judgement, para. 472; *Kajelijeli* Trial Judgement, para. 773; *Kamuhanda* Trial Judgement, para. 604.

<sup>942</sup> The Trial Chamber in the *Hadžihasanović* Decision, in discussing the defence argument that Article 7(3) of the Statute does "not impose liability on a superior for failing to prevent or punish the *planning* or *preparation* of an offence but only the *commission* of the offence", appears to follow the defence in the case by stating that "criminal liability under the Statute cannot attach because subordinates 'were about to plan, prepare' crimes within the jurisdiction of the Statute": see *Hadžihasanović* Decision, paras 204, 209. This restrictive view is, however, somewhat darkened by the Trial Chamber's finding that "the inclusion of the words 'were about to', 'plan', and 'prepare' before 'execute' in [...] the Amended Indictment are [*sic*] related to the superior's knowledge that subordinates were allegedly 'about to commit such acts' and therefore falls within the scope of Article 7(3) of the Statute": para. 210. This might be interpreted as requiring the superior to step in, provided that he has knowledge of, already during the planning and preparation stage.

<sup>943</sup> *Kordić* Trial Judgement, para. 445, followed by *Halilović* Trial Judgement, para. 79. With a certain shift in timing, see *Semanza* Trial Judgement, para. 407, requiring measures if the superior becomes aware of "the impending or on-going commission of a crime".

and preparation, if for no other reason than as a matter of efficiency. Further, since a superior is duty bound to take preventive measures when he or she becomes aware that his or her subordinates 'are about to commit such acts', and, as stated before, such acts comprise the commission of a crime from its planning and preparation until its completed execution, the superior, being aware of what might occur if not prevented, must intervene against imminent planning or preparation of such acts. This means, first, that it is not only the execution and full completion of a subordinate's crimes which a superior must prevent, but the earlier planning or preparation. Second, the superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing.

329. The type of measures a superior must take in order to prevent the crimes of his subordinates has been described as a matter of evidence rather than of substantive law.<sup>944</sup> This characterisation is correct in the sense that the appropriate measures to be taken may vary from case to case depending upon the particular circumstances.<sup>945</sup> Therefore any attempt to formulate a general standard *in abstracto* may not be meaningful.<sup>946</sup> This cannot mean, however, that the necessary and reasonable measures a superior is expected to take may be determined without reference to a normative yardstick.<sup>947</sup> Such guidance can be drawn from four criteria: first, as a superior cannot be asked for more than what is in his or her power,<sup>948</sup> the kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act<sup>949</sup>; second, in order to be efficient, a superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the

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<sup>944</sup> *Blaškić* Appeal Judgement, paras 72, 77; *Brđanin* Trial Judgement para. 279; *Halilović* Trial Judgement, para. 74; *Had'ihasanović* Trial Judgement, para. 124.

<sup>945</sup> *Čelebići* Trial Judgement, para. 394; *Aleksovski* Trial Judgement, para. 81; *Naletilić* Trial Judgement, para. 77; *Galić* Trial Judgement, para. 176; *Strugar* Trial Judgement, para. 378; *Halilović* Trial Judgement, para. 73; *Bagilishema* Trial Judgement, para. 48.

<sup>946</sup> *Čelebići* Trial Judgement, para. 394; *Had'ihasanović* Trial Judgement, para. 123. See also *Aleksovski* Trial Judgement, para. 81.

<sup>947</sup> The need for "guidance" in the assessment of necessary measures is also expressed in the following Judgements: *Blaškić* Trial Judgement, para. 335; *Bagilishema* Trial Judgement, para. 48; *Kajelijeli* Trial Judgement, para. 779; *Semanza* Trial Judgement, para. 406. It seems that the Appeals Chamber also recognises this position in the *Blaškić* case, conceding that, even though the question of measures is a matter of evidence, "the effect of such measures can be defined by law," and when further referring to *Čelebići* Appeal Judgement, para. 198, where considerable weight is given to the extent of effective control the superior has over his subordinates, the Appeals Chamber seems to suggest this criterion as a substantive guideline. See *Blaškić* Appeal Judgement, para. 72.

<sup>948</sup> *Čelebići* Trial Judgement, para. 395; *Kordić* Trial Judgement, para. 446; *Krnojelac* Trial Judgement, para. 95; *Naletilić* Trial Judgement, para. 77; *Stakić* Trial Judgement para. 461; *Brđanin* Trial Judgement para. 279; *Blagojević* Trial Judgement, para. 793; *Strugar* Trial Judgement, paras 372, 374, 378; *Had'ihasanović* Trial Judgement, paras 122 *et seq.*; *Bagilishema* Trial Judgement, para. 48. In this regard, the question of the measures to be taken by the superior is, indeed, "intrinsicly connected to the question of that superior's position of power": *Strugar* Trial Judgement, para. 372, followed by *Halilović* Trial Judgement, para. 73.

<sup>949</sup> *Blaškić* Appeal Judgement, para. 72, upholding *Blaškić* Trial Judgement, para. 335; *Čelebići* Appeal Judgement, para. 198; *Limaj* Trial Judgement, para. 526.

prospective crime; third, the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react; and fourth, since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible.<sup>950</sup>

330. It should be emphasised, however, that these guiding criteria must be applied in light of the case-specific situation. As distinguished by the Trial Chamber in the *Halilović* case,<sup>951</sup> the duty to prevent cannot simply be founded upon those general obligations a military commander or civilian superior may have with regard to ensuring order among, or exercising control over, troops or subordinates, for example, by informing them of their legal responsibilities and cautioning them to act in an orderly and lawful fashion. Although a superior's neglect of such elementary obligations may be a contributing factor considered in the assessment of a failure to prevent subordinates' crimes, it does not entail superior criminal responsibility *per se*. What is required is a finding that the superior, in view of the factual circumstances of the case, failed to do what would have been necessary, reasonable and possible to prevent the criminal activities of his subordinates. However, a superior cannot simply be relieved of the special obligation to prevent subordinates' crimes by the mere showing of adherence to general obligations. Thus, while a superior cannot be held responsible solely for neglecting a general obligation, neither can he or she avoid superior criminal responsibility by proving diligence in meeting those general duties while failing to take the necessary measures under his or her special obligation in the particular circumstances.<sup>952</sup>

331. Provided that, in the individual case, the aforementioned criteria are met, according to the case law of the Tribunal, the superior may have to take certain measures as are necessary and reasonable for preventing crimes by his or her subordinates.<sup>953</sup> First, beyond issuing mere routine instructions, a superior may have to give special orders aimed at bringing unlawful practices of subordinates in compliance with the rules of war<sup>954</sup> and to secure the implementation of these orders.<sup>955</sup> Second, where information indicates, a superior may be required to investigate whether crimes are about to be committed,<sup>956</sup> to protest against or criticise criminal action,<sup>957</sup> to take

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<sup>950</sup> *Čelebići* Trial Judgement, para. 395; *Krnjelac* Trial Judgement, para. 95; *Stakić* Trial Judgement, para. 461; *Galić* Trial Judgement, para. 176; *Brđanin* Trial Judgement, para. 279; *Blagojević* Trial Judgement, para. 793; *Halilović* Trial Judgement, paras 73 *et seq.*

<sup>951</sup> *Halilović* Trial Judgement, paras 79 *et seq.*, followed by *Had'ihasanović* Trial Judgement, paras 145 *et seq.*

<sup>952</sup> *Halilović* Trial Judgement, para. 88.

<sup>953</sup> As to the determination of concrete measures to be taken, *see also* *Had'ihasanović* Trial Judgement, paras 156 *et seq.*

<sup>954</sup> *Strugar* Trial Judgement, para. 374, referencing the *Hostages* case, 11 TWC 759, p. 1311; *Halilović* Trial Judgement, para. 74; *see also* *Bagilishema* Trial Judgement, para. 265.

<sup>955</sup> *Strugar* Trial Judgement, para. 378; *Halilović* Trial Judgement, para. 74; *Had'ihasanović* Trial Judgement, para. 153.

<sup>956</sup> *Strugar* Trial Judgement, para. 416; *Halilović* Trial Judgement, para. 90.



disciplinary measures against the commission of atrocities,<sup>958</sup> or to report to<sup>959</sup> and/or to insist before a superior authority that immediate action be taken.<sup>960</sup> Such measures may be required of a superior even if he or she lacks the formal capacity or legal competence to perform them in person. Requiring measures to be taken beyond a superior's formal powers<sup>961</sup> reflects a definition of responsibility that is based more on the superior's material ability to effectively control than on formal status.<sup>962</sup> An obvious case of failure would be if a superior, despite awareness of the criminal activities of his or her subordinates, did nothing,<sup>963</sup> for instance by simply ignoring such information.<sup>964</sup> A further example of failure would be that of a superior who failed to give any instructions to subordinates due to his frequent absence,<sup>965</sup> provided of course that the superior's lack of presence was not necessitated by other overriding obligations.

(c) Necessary and Reasonable Measures to Punish

332. As stated previously, the duty to punish is a subsidiary duty that becomes relevant when the superior learns of the crime of a subordinate after its commission.<sup>966</sup> If a superior, however, was already aware of the crime while it was ongoing, he or she can be found responsible both for the failure to prevent the crime and for not having punished it.

333. Just as with the duty to prevent,<sup>967</sup> the basic requirement of a duty to punish needs further determination. Specifically, the question arises, first, what stage a crime needs to have reached in order for the superior to take measures to punish; and, second, it needs to be determined what position of authority the superior must have held at that time.

334. With regard to the first issue, the usual description of the superior's duty, as "arising after the commission of the crime",<sup>968</sup> seems to suggest that only completed crimes may be sanctioned. This, however, is only partly conclusive. On the one hand, unless the attempt to commit a crime is

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<sup>957</sup> *Strugar* Trial Judgement, para. 374, referencing *High Command* case, 11 TWC 1, p. 623; *Halilović* Trial Judgement, para. 89.

<sup>958</sup> *Strugar* Trial Judgement, para. 374, referencing *Tokyo Judgement* I, p. 452; *Halilović* Trial Judgement, para. 89.

<sup>959</sup> *Blaškić* Trial Judgement, paras 329, 335; *Had' ihasanović* Trial Judgement, para. 154..

<sup>960</sup> *Strugar* Trial Judgement, para. 374, referencing *Tokyo Judgement* I, p. 448; *Halilović* Trial Judgement, para. 89.

<sup>961</sup> *Stakić* Trial Judgement, para. 461; *Brđanin* Trial Judgement, para. 279; *Blagojević* Trial Judgement, para. 793; *Halilović* Trial Judgement, para. 73; *Limaj* Trial Judgement, para. 526; *Kajelijeli* Trial Judgement, para. 779.

<sup>962</sup> *Čelebići* Trial Judgement, para. 395; *Kordić* Trial Judgement, para. 443; *Stakić* Trial Judgement para. 461; *Strugar* Trial Judgement, para. 372.

<sup>963</sup> *Čelebići* Trial Judgement, paras 772, 774; *Aleksovski* Trial Judgement, para. 117; *Strugar* Trial Judgement, para. 416; *Halilović* Trial Judgement, para. 90; *Ntagerura* Trial Judgement, paras 654-657.

<sup>964</sup> *Čelebići* Trial Judgement, para. 387.

<sup>965</sup> *Čelebići* Appeal Judgement, para. 206; *Čelebići* Trial Judgement, para. 773.

<sup>966</sup> See para. 326 *supra*.

<sup>967</sup> See paras 327 *et seq. supra*.

<sup>968</sup> *Strugar* Trial Judgement, para. 373.

punishable as such,<sup>969</sup> superior criminal responsibility according to Article 7(3) of the Statute appears indeed to presuppose that the crime of a subordinate must have been completed in the same way as would be necessary for other modes of participation.<sup>970</sup> On the other hand, this is not to say that only a subordinate who completes a crime should be punished. Since Article 7(3) of the Statute, in referring to Article 7(1) of the Statute, does not restrict the participation in a crime exclusively to acts which complete its execution, but includes those acts which comprise its planning and preparation, it is necessary only to prove that the criminal activities of a subordinate finally leads to a completed principal crime.<sup>971</sup> This means that the superior must also bring to justice those subordinates who contributed to the principal crime merely by participating in the planning and preparation of it. Thus, although it is certainly true that without a violation of the law there is not yet a violator to be punished,<sup>972</sup> such a violator can already be seen in a subordinate participating in the direct crime of others.

335. Similar considerations of a coherent system of prevention and punishment could also provide guidance as to what position the superior must have held while the crime of a subordinate was committed and as to when it was to be punished. The superior must certainly have effective control of the relevant subordinates at the time when measures of investigation and punishment are to be taken against them.<sup>973</sup> Such a link, however, appears less essential, if necessary at all, with regard to the time at which the crime was committed. The duty to prevent calls for action by the superior prior to the commission of the crime, and thus presupposes his power to control the conduct of his subordinates. The duty to punish, by contrast, follows the commission of a crime of which the superior need not have been aware, and thus at the moment of commission was in fact out of his or her control to prevent. Since a superior in such circumstances is obliged to take punitive measures notwithstanding his or her inability to prevent the crime due to his or her lack of awareness and control, it seems only logical that such an obligation would also extend to the situation wherein there has been a change of command following the commission of a crime by a subordinate. The new commander in such a case, now exercising power over his or her subordinates and being made aware of their crimes committed prior to the change of command, for the sake of coherent prevention and control, should not let them go unpunished. This is best understood by realising that a superior's duty to punish is not derived from a failure to prevent the crime, but rather is a subsidiary duty of its own. The cohesive interlinking of preventing and punishing would

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<sup>969</sup> As in the case of genocide (Article 4(3)(d) of the Statute of the Tribunal), *see fn. 732 supra*.

<sup>970</sup> *See paras 269, 328 supra*.

<sup>971</sup> There is an exception in the case of genocide for which, as already mentioned, the attempt suffices.

<sup>972</sup> *Blaškić Appeal Judgement*, para. 83.

<sup>973</sup> *See Had' ihasanović Trial Judgement*, paras 194 *et seq.*

be disrupted if the latter were made dependent on the superior's control at the time of commission of the crimes. Consequently, for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime.<sup>974</sup> Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here,<sup>975</sup> the Trial Chamber finds itself bound to require that with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken.

336. In principle, the same criteria required for the duty to prevent,<sup>976</sup> apply with respect to the duty to punish, with the following qualification: whereas measures to prevent must be taken as soon as the superior becomes aware of the risk of potential illegal acts about to be committed by subordinates,<sup>977</sup> the duty to punish commences only if, and when, the commission of a crime by a subordinate<sup>978</sup> can be reasonably suspected. Under these conditions, the superior has to order or execute appropriate sanctions<sup>979</sup> or, if not yet able to do so, he or she must at least conduct an investigation<sup>980</sup> and establish the facts<sup>981</sup> in order to ensure that offenders under his or her effective control are brought to justice.<sup>982</sup> The superior need not conduct the investigation or dispense the punishment in person,<sup>983</sup> but he or she must at least ensure that the matter is investigated<sup>984</sup> and transmit a report to the competent authorities for further investigation or sanction.<sup>985</sup> As in the case of preventing crimes,<sup>986</sup> the superior's own lack of legal competence does not relieve him from pursuing what his or her material ability enables him or her to do.<sup>987</sup> Since the duty to punish aims at preventing future crimes of subordinates,<sup>988</sup> a superior's responsibility may also arise from his or

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<sup>974</sup> The same position had been taken by the Trial Chamber in *Kordić* Trial Judgement, para. 446, and in *Had'ihasanović* Jurisdiction Trial Decision, paras 180 *et seq.*, 202. It is also supported by the dissenting opinions of Appeals Judges Shahabuddeen and Hunt in *Had'ihasanović* Jurisdiction Appeal Decision: Partial Dissenting Opinion of Judge Shahabuddeen, para. 1; Separate and Partially Dissenting Opinion of Judge David Hunt, paras 7 *et seq.*

<sup>975</sup> *Had'ihasanović* Jurisdiction Appeal Decision, paras 37 *et seq.*, 51, deciding by majority.

<sup>976</sup> See paras 327-328 *supra*.

<sup>977</sup> See para. 328 *supra*.

<sup>978</sup> In terms of Article 7(1) of the Statute, see paras 266 *et seq. supra*.

<sup>979</sup> As, for instance, by suspending a subordinate: *Ntagerura* Trial Judgement, para. 650.

<sup>980</sup> *Kordić* Trial Judgement, para. 446; *Brđanin* Trial Judgement, para. 279; *Strugar* Trial Judgement, para. 378; *Halilović* Trial Judgement, paras 74, 97, 100.

<sup>981</sup> *Halilović* Trial Judgement, paras 97, 100.

<sup>982</sup> *Strugar* Trial Judgement, para. 378; *Halilović* Trial Judgement, para. 98.

<sup>983</sup> *Kvočka* Trial Judgement, para. 316; *Halilović* Trial Judgement, para. 100.

<sup>984</sup> *Halilović* Trial Judgement, para. 97.

<sup>985</sup> *Blaškić* Appeal Judgement, para. 632; *Blaškić* Trial Judgement, paras 302, 335, 464; *Kordić* Trial Judgement, para. 446; *Kvočka* Trial Judgement, para. 316; *Stakić* Trial Judgement, para. 461; *Brđanin* Trial Judgement, para. 279; *Halilović* Trial Judgement, paras 97, 100.

<sup>986</sup> See para. 331 *supra*.

<sup>987</sup> *Aleksovski* Trial Judgement, para. 78; *Blaškić* Trial Judgement, paras 302, 335, 464; *Halilović* Trial Judgement, para. 100.

<sup>988</sup> See para. 326 *supra*.

her failure to create or sustain, amongst the persons under his or her control, an environment of discipline and respect for the law.<sup>989</sup>

(d) Position of the Parties

337. As concerns the law, the Trial Chamber finds the submissions of both Parties with regard to the duties to prevent and punish as agreeing in principle. Whereas the Prosecution describes the measures to prevent and punish in more detail,<sup>990</sup> the Defence in particular stresses proof of the existence of “concrete measures” which would have been within the Accused’s authority to take for preventing or punishing crimes of the perpetrators.<sup>991</sup> This is, in substance, not different from what the Trial Chamber is requiring in terms of a specific obligation to prevent or punish.<sup>992</sup>

6. Relationship Between a Superior’s Failure and Subordinates’ Crimes

338. In a similar way as the various modes of participation according to Article 7(1) of the Statute require a causal contribution to the principal crime,<sup>993</sup> superior responsibility according to Article 7(3) of the Statute would need some sort of causal link to the principal crime committed by subordinates.<sup>994</sup> Although the superior’s measures must be directed at preventing imminent crimes of subordinates or at deterring future crimes through punishment, and thereby at least pursue a causal aim,<sup>995</sup> this represents mere finality on the level of the superior’s intention. As concerns objective causality, however, it is well established case law of the Tribunal that it is not an element of superior criminal responsibility to prove that without the superior’s failure to prevent, the crimes of his subordinates would not have been committed.<sup>996</sup> This is so for good reasons. First, with regard to the superior’s failure to punish, it would make no sense to require a causal link between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.<sup>997</sup> Second, even with regard to the superior’s failure to prevent, a requirement of causation would run counter to the very basis of this type of superior responsibility as criminal liability of omission.<sup>998</sup> For if it had to be proven, and in fact is proven, that the

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<sup>989</sup> *Bagilishema* Trial Judgement, para. 50, referencing *Čelebići* Trial Judgement, paras 772 *et seq.*

<sup>990</sup> Prosecution Pre-Trial Brief, paras 151 *et seq.*

<sup>991</sup> Defence Pre-Trial Brief, Annex I, Element 1.4.3.1, 1.4.3.2.

<sup>992</sup> See para. 326 *supra*.

<sup>993</sup> See paras 274, 284 *supra*.

<sup>994</sup> See *Čelebići* Trial Judgement, paras 399 *et seq.*

<sup>995</sup> *Ibid.*

<sup>996</sup> *Blaškić* Appeal Judgement, paras 73 *et seq.*, 75, 77 (implicitly correcting partly deviating language in *Čelebići* Trial Judgement, paras 399 *et seq.* and *Kordić* Trial Judgement, para. 447); see furthermore, *Kordić* Appeal Judgement, para. 832; *Brđanin* Trial Judgement, para. 280; *Halilović* Trial Judgement, paras 75 *et seq.*

<sup>997</sup> *Čelebići* Trial Judgement, para. 400; *Hadžihasanović* Trial Judgement, para. 188.

<sup>998</sup> *Halilović* Trial Judgement, para. 78. With regard to the specific nature of wrongdoing in the liability of a superior, see also paras 341 *et seq. infra*.

superior's conduct *causally* contributed to the commission of the crimes of subordinates, then the borderline between Article 7(3) of the Statute and participation according to Article 7(1) of the Statute would be transgressed and, thus, superior criminal responsibility would become superfluous. Hence, it is not necessary that the superior's failure to act cause the commission of the crimes of subordinates.<sup>999</sup> However, if measures taken by the superior have in fact been successful in preventing or repressing relevant crimes of subordinates, this can serve as *prima facie* evidence that he did not fail in his duties.

### C. The Relationship of Responsibility Under Articles 7(1) and 7(3) of the Statute

339. As the Accused is charged with both types of criminal responsibility, if he is found guilty of both, the question as to the relationship between different counts both with regard to a conviction and the sentence to be imposed arises. Such a possible concurrence is, first, apparent between murder (Count 1), cruel treatment (Count 2) and wanton destruction of cities, towns or villages, not justified by military necessity (Counts 3 and 5). A second form of concurrence can result from individual criminal responsibility both for the commission of, or participation in, the principal crime according to Article 7(1), as in this case by instigating and/or aiding and abetting wanton destruction (Count 5), and for superior criminal responsibility according to Article 7(3) of the Statute (Count 3). The first mentioned issue of 'cumulative convictions' mainly, although not exclusively, concerns the sentencing level and would therefore be dealt with in that part of this Judgement if it becomes necessary. The other issue is immediately relevant to the relationship of Article 7(1) and 7(3) of the Statute, and must therefore be addressed here. As in this respect the case law of the Tribunal is still in development, the following clarifications appear appropriate.

340. If with regard to wanton destruction of villages not justified by military necessity, the charge of instigating and/or aiding and abetting according to Article 7(1) of the Statute (Count 5), as well as of superior criminal responsibility according to Article 7(3) of the Statute (Count 3), are supported by sufficient evidence, the question arises as to whether the Accused would have to be found guilty of both modes of criminal liability or only of one of them. In the latter case, a further issue arises first as to which mode should prevail over the other, and then as to the way the non-prevailing mode of liability may still find some consideration in sentencing.

341. Thus far, the case law of the Tribunal has followed a varied course with respect to these matters. In the *Čelebići* Trial Judgement, the accused was, in a single conviction, found guilty with

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<sup>999</sup> *Brđanin* Trial Judgement, para. 280. Therefore, not even the presumption of a causal link, as suggested in *Hadžihasanović* Trial Judgement, para. 193, appears appropriate.

regard to each of two counts, both for his own direct participation (for having wilfully caused great suffering and cruel treatment respectively) under Article 7(1) of the Statute and for his superior responsibility (for not having prevented his subordinates from participating in those violent acts) under Article 7(3) of the Statute. The Trial Chamber, however, did not take this dual criminal responsibility into account in considering the sentence.<sup>1000</sup> The Appeals Chamber in the *Čelebići* case went further, leaving room even for – alternatively – “imposing punishment on the accused for two separate offences encompassed in the one count” or for either aggravating his responsibility under Article 7(3) of the Statute with his direct participation or aggravating his direct responsibility under Article 7(1) of the Statute with his position of authority.<sup>1001</sup> Between these Trial and Appeal Judgements in the *Čelebići* case, however, the Trial Chamber in the *Blaškić* case, in considering it “illogical” to hold a superior liable for participation in crimes (under Article 7(1) of the Statute) and, at the same time, for not preventing them (under Article 7(3) of the Statute),<sup>1002</sup> implicitly suggested that it would even exclude the possibility of dual liability on the same count based on the same facts. Such a result would leave room for responsibility under both heads only where a commander’s failure to prevent or punish crimes of his or her subordinates may be “the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes”.<sup>1003</sup> While this “either-or” approach of the Trial Chamber in the *Blaškić* case did not find further following and was even implicitly contradicted by the Trial Chamber’s finding in the *Stakić* case that “specific acts *could* satisfy the requirements of both Articles”,<sup>1004</sup> the Appeals Chamber in the *Aleksovski* case already opened a new course in holding that the appellant’s superior responsibility (in terms of Article 7(3) of the Statute) seriously “aggravated” his offences (in terms of Article 7(1) of the Statute).<sup>1005</sup> Furthermore, without explicitly excluding a conviction under both Articles, in a case of one’s own participation and failing as a superior, the Trial Chamber in the *Kordić* case would nonetheless find this type of criminal responsibility “better characterised by Article 7(1)”.<sup>1006</sup> Again with some variation, in merely considering it “inappropriate” to convict under both heads of responsibility for the same count based on the same acts – and, thus, by no means excluding a dual conviction as “illogical” – the Trial Chamber in the *Krnojelac* case claimed its “discretion” to choose which is the most appropriate heading of responsibility under which to attach criminal

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<sup>1000</sup> *Čelebići* Trial Judgement, paras 1120, *et seq.*

<sup>1001</sup> *Čelebići* Appeal Judgement, paras 743, *et seq.* The Appeals Chamber’s caveat, set out in para. 745, fn. 1261, though lending itself to misunderstanding, stresses its relevance for dual liability under the same count even more by distinguishing its position from “two types of responsibility [...] independently charged under different counts”.

<sup>1002</sup> *Blaškić* Trial Judgement, para. 337.

<sup>1003</sup> *Ibid.*

<sup>1004</sup> *Stakić* Trial Judgement, para. 912.

<sup>1005</sup> *Aleksovski* Appeal Judgement, para. 183.

responsibility to the accused, while ultimately, however, finding his criminality “better characterised” as that of an aider and abettor (according to Article 7(1) of the Statute) and by taking his position as superior as an aggravating factor into account.<sup>1007</sup> Lastly, in finding it not merely “not appropriate”, but even constituting a legal error to convict in relation to the same counts based on the same facts under both Articles 7(1) and 7(3) of the Statute, the Appeals Chamber in the *Blaškić* case held that where the legal requirements pertaining to both of these heads of responsibility are met under the same count, “a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused’s superior position as an aggravating factor in sentencing”.<sup>1008</sup>

342. In the Trial Chamber’s view, because the charges of Articles 7(1) and 7(3) of the Statute are raised in two different counts of the Indictment, namely Counts 3 and 5, the aforementioned precedents do not appear to be conclusive for this case because all concern instances in which Articles 7(1) and 7(3) were invoked in one count on basically the same facts. Nevertheless, the Trial Chamber does not consider this formal splitting in two counts (rather than being combined into one) so decisive that principally different results would be feasible. In giving particular significance to the crime base to which the individual criminal responsibility is attached, and to the peculiar content of wrongfulness by which each of the two types of responsibilities in Articles 7(1) and 7(3) of the Statute are characterised, the Trial Chamber finds that active involvement by way of participating in the principal crime carries greater weight than failure by omission. Further, the Trial Chamber finds that participation in the crime means to have made a causal contribution to the impairment of the protected interest, whereas the failure as a superior need not necessarily contribute to the injury as such,<sup>1009</sup> but may merely involve the omission of his duty, as is particularly evident in the case of failure to punish.

343. These differences in the substance and degree of wrongfulness of active participation and passive non-preventing or non-punishing crimes of subordinates warrant the following holding. First, if the accused’s conduct fulfils the elements both of commission or of participation according to Article 7(1) of the Statute and of superior criminal responsibility according to Article 7(3) of the Statute with regard to the same principal crime on basically the same facts, regardless of whether

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<sup>1006</sup> *Kordić* Trial Judgement, para. 371. In the same sense, the Trial Chamber in the *Krstić* case sees the fulfilment of the elements of Article 7(3) “sufficiently expressed in a finding of guilt under Article 7(1)”: *Krstić* Trial Judgement, para. 652, endorsed by *Krstić* Appeal Judgement, para. 143, fn. 250.

<sup>1007</sup> *Krnjelac* Trial Judgement, para. 173, followed by *Naletilić* Trial Judgement, para. 81, and *Galić* Trial Judgement, para. 177.

<sup>1008</sup> *Blaškić* Appeal Judgement, para. 91 *et seq.*, followed by *Kajelijeli* Appeal Judgement, paras 81 *et seq.*, 91, 318; *Kordić* Appeal Judgement, para. 34; *Brđanin* Trial Judgement, para. 285.

<sup>1009</sup> *See* para. 293 *supra*.

indicted in the same or in different counts, the accused will be convicted only under the heading of Article 7(1) of the Statute in terms of the more comprehensive wrongdoing. Second, however, as the final sentence should reflect the totality of the culpable conduct,<sup>1010</sup> the additional wrongfulness associated with an accused's failure in his duties as a superior in terms of Article 7(3) of the Statute must be taken into account as an aggravating factor in the sentencing. Third, since the status of an accused and his neglect of legal obligations can be a general sentencing factor in any event, his or her position as the superior of subordinates who have committed crimes may serve as an aggravating factor even if not all elements of Article 7(3) of the Statute are fulfilled.<sup>1011</sup>

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<sup>1010</sup> *Naletilić* Trial Judgement, para. 81.

<sup>1011</sup> *See Stakić* Trial Judgement, para. 912.



## VII. CHARGES AND FINDINGS WITH REGARD TO MURDER (COUNT 1) AND CRUEL TREATMENT (COUNT 2)

### A. The Law

#### 1. Murder

344. The Prosecution charges the Accused in Count 1 of the Indictment with ‘murder’ as a violation of the laws or customs of war pursuant to Article 3 of the Statute. Common Article 3(1)(a) of the 1949 Geneva Conventions provides the basis for the inclusion of murder under Article 3 of the Statute.<sup>1012</sup>

345. The definition of murder as a violation of the laws or customs of war is now settled in the jurisprudence of this Tribunal and of the ICTR. The elements defining murder under Article 3 of the Statute are identical to those required for ‘wilful killing’ as a grave breach of the 1949 Geneva Conventions under Article 2 of the Statute and murder as a crime against humanity under Article 5 of the Statute.<sup>1013</sup>

346. The Trial Chamber adopts the following elements of the crime of ‘murder’:

- (i) The person alleged in the indictment is dead;
- (ii) The death was caused by an act, or an omission notwithstanding an obligation to act, of the accused, or by a person for whose acts or omissions the accused bears criminal responsibility; and
- (iii) The act or omission was committed with an intent to kill or inflict grievous bodily harm or serious injury, in the knowledge and with the acceptance that such act or omission was more likely than not to cause death.<sup>1014</sup>

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<sup>1012</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 970 (“1949 Geneva Convention I”); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 971 (“1949 Geneva Convention II”); 1949 Geneva Convention III; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 973 (“1949 Geneva Convention IV”): “[T]he following acts are and shall remain prohibited at any time and in any place whatsoever [...]: (a) violence to life and person, *in particular murder of all kinds*, mutilation, *cruel treatment* and torture; [...]” (emphasis added).

<sup>1013</sup> *Brđanin* Trial Judgement, para. 380; *Strugar* Trial Judgement, para. 236.

<sup>1014</sup> *Kvočka* Appeal Judgement, para. 261; *Čelebići* Appeal Judgement, paras 422-423; *Brđanin* Trial Judgement, para. 381.

347. To establish the *actus reus* of murder, the Prosecution must prove beyond reasonable doubt that the perpetrator's conduct contributed substantially<sup>1015</sup> to the death of the person.<sup>1016</sup> This does not necessarily require proof that the dead body of that person has been recovered.<sup>1017</sup> A person's death can be inferred circumstantially, provided that is the *only* reasonable inference that can be drawn.<sup>1018</sup>

348. Intent to kill is required in order to fulfil the *mens rea* of murder. This includes proof of a mental state wherein the perpetrator foresees as more likely than not that the death of the victim could occur as a consequence of his act or omission, and he nevertheless accepts the risk.<sup>1019</sup> Negligence and gross negligence<sup>1020</sup> do not satisfy the *mens rea* requirement. Further, premeditation is not a *mens rea* requirement.<sup>1021</sup>

## 2. Cruel Treatment

349. The Prosecution charges the Accused in Count 2 of the Indictment with 'cruel treatment' as a violation of the laws or customs of war pursuant to Article 3 of the Statute. Common Article 3(1)(a) of the 1949 Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute.<sup>1022</sup>

350. Trial Chambers of the Tribunal have consistently recognised that the crimes of cruel treatment under Article 3 of the Statute, 'inhumane treatment' under Article 2(b) of the Statute and 'inhumane acts' under Article 5(i) of the Statute share the same elements.<sup>1023</sup>

351. The Trial Chamber adopts the following elements for the crime of cruel treatment:

- (i) An act, or omission notwithstanding an obligation to act, of the accused, or of a person for whose acts or omissions the accused bears criminal responsibility, causing serious mental or physical suffering, serious injury, or constituting a serious attack on human dignity; and

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<sup>1015</sup> See *Čelibići* Trial Judgement, fn. 435 for relevant domestic case-law on the 'substantiality' requirement.

<sup>1016</sup> See *Brdanin* Trial Judgement, para. 382; *Čelebići* Trial Judgement, para. 424.

<sup>1017</sup> See *Krnjelac* Trial Judgement, para. 326; *Tadić* Trial Judgement, para. 240.

<sup>1018</sup> See *Brdanin* Trial Judgement, para. 385; *Krnjelac* Trial Judgement, paras 326-327.

<sup>1019</sup> See *Stakić* Trial Judgement, para. 587; see also para. 277 *et seq.*, 286 *et seq.*, *supra*.

<sup>1020</sup> In this respect, the Trial Chamber agrees with the Defence submission that intent does not include recklessness: Defence Pre-Trial Brief, para. 37.

<sup>1021</sup> *Brdanin* Trial Judgement, para. 386; *Kordić* Trial Judgement, para. 235.

<sup>1022</sup> See fn. 1012 *supra*.

<sup>1023</sup> *Simić* Trial Judgement, para. 74; *Krnjelac* Trial Judgement, para. 130.

(ii) The act or omission was committed with the intent to inflict serious mental or physical suffering, or cause serious injury or a serious attack upon human dignity.<sup>1024</sup>

352. Regarding the *actus reus* of cruel treatment, the seriousness of the harm or injury must be assessed on a case-by-case basis, taking into account such factors as the severity of the alleged conduct, the nature of the act or omission, the context in which the conduct occurred, its duration and/or repetition, its physical and mental effects on the victim, and in some instances, the personal circumstances of the victim, including age, gender and health.<sup>1025</sup> The case-law of this Tribunal has found the following conduct to constitute cruel treatment, inhumane treatment or inhumane acts: beatings,<sup>1026</sup> inhumane living conditions in a detention centre,<sup>1027</sup> attempted murder,<sup>1028</sup> use of human shields and trench digging.<sup>1029</sup>

353. The *mens rea* requirement for the crime of cruel treatment is met when the perpetrator intends to inflict serious mental or physical suffering, or cause serious injury or a serious attack upon human dignity of the victim, or knows or foresees as more likely than not that such result could occur as a consequence of his acts or omissions, and nonetheless accepts that risk.<sup>1030</sup>

## **B. The Facts and Findings**

### **1. Introduction**

354. The Prosecution alleges that between 24 September 1992 and 20 March 1993, members of the military police under the command and control of the Accused detained several Serb individuals at the Srebrenica Police Station and at the Building behind the Srebrenica municipal building.<sup>1031</sup> It is alleged that these detainees were confined in overcrowded and unsanitary conditions and were subjected to physical abuse, serious suffering and injury to body and health, as well as inhumane treatment by the guards and/or by others with the support of the guards. It is further alleged that in some instances, detainees were beaten to death or otherwise killed.<sup>1032</sup>

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<sup>1024</sup> See *Čelebići* Appeal Judgement, para. 424; *Strugar* Trial Judgement, para. 261.

<sup>1025</sup> *Blagojević* Trial Judgement, para. 586; *Krnojelac* Trial Judgement, para. 131. See also *Naletilić* Trial Judgement, para. 343; *Tadić* Trial Judgement, para. 724.

<sup>1026</sup> *Jelisić* Trial Judgement, paras 42-45.

<sup>1027</sup> *Čelebići* Trial Judgement paras 554-558; *Krnojelac* Trial Judgement, paras 146-165.

<sup>1028</sup> *Vasiljević* Trial Judgement, para. 239.

<sup>1029</sup> *Blaškić* Trial Judgement, paras 186, 735-738, 742-743.

<sup>1030</sup> See *Strugar* Trial Judgement, para. 261; *Simić* Trial Judgement, para. 76; see also paras 277 *et seq.* and 286 *et seq. supra.*

<sup>1031</sup> Indictment, para. 22.

<sup>1032</sup> Indictment, paras 23-25.

355. The Trial Chamber notes that, apart from the individual incidents pleaded in the Indictment and examined below, there is evidence that between June 1992 and January 1993, a number of Serbs – men, women and a few children – were captured by Bosnian Muslim fighters and brought to Srebrenica.<sup>1033</sup> With the exception of certain women and children,<sup>1034</sup> these Serb detainees were confined at the Srebrenica Police Station and at the Building, for a period of time ranging from a few days to approximately two months.<sup>1035</sup> There is no evidence that any of the detainees were ever informed why they were being detained. While in detention, a number of detainees were interrogated by Bosnian Muslim officials about their involvement in actions against Bosnian Muslims and about Serb military capabilities.<sup>1036</sup> Some of the detainees were subsequently exchanged for Bosnian Muslim corpses.<sup>1037</sup> There is no evidence of Serb prisoners remaining in Srebrenica at the time of demilitarisation in April 1993.

356. Against this backdrop, the Trial Chamber finds that the detention of Serbs by Bosnian Muslim authorities in Srebrenica appears to have served a dual purpose. First, the detainees could reveal information relevant to the ongoing fighting, and second, they could be used in exchange for Bosnian Muslim corpses.<sup>1038</sup>

## 2. General Conditions at the Srebrenica Detention Facilities

### (a) Preliminary Remark

357. The Trial Chamber has already observed that the living conditions prevailing in Srebrenica during the relevant time were appalling.<sup>1039</sup> The conditions at the Srebrenica Police Station and the Building were no exception. In the whole of Srebrenica town, there was no electricity, water or heating, and in addition, the Serb detainees suffered, along with the population, from a lack of food and inadequate hygienic facilities. The extent to which these conditions were exacerbated by the treatment of the detainees by guards and others will be examined below.

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<sup>1033</sup> See, e.g., Mustafa [ačirović, T. 13307-13308 and ex. D245, “Official Note”, p. 2 with regard to Serb detainees from Karno. See also ex. P59, “Note” regarding a certain Stanko Hristić; Mustafa [ačirović, T. 13537 regarding unidentified Serb detainees.

<sup>1034</sup> Branimir Mitrović, T. 3759; Mira Stojanović, T. 3879.

<sup>1035</sup> See, e.g., Milenija Mitrović, T. 1015; Rado Pejić, paras 459-461 *infra*.

<sup>1036</sup> See, e.g., Ilija Ivanović, T. 4060; Stana Stamenić, T. 6621; ex. P44, “Interrogation Notes” of Ilija Ivanović; ex. P54, “Interrogation Notes” of Milisav Milovanović; ex. P51, “Interrogation Notes” of Branko Sekulić.

<sup>1037</sup> Slavoljub Žikić, T. 3230-3231; Nedeljko Radić, T. 3589; Ilija Ivanović, T. 4090-4096.

<sup>1038</sup> See ex. P329, “Interview” of the Accused, tape 18, pp. 5, 6, acknowledging that Serb detainees were interrogated before they were exchanged. See also Rex Dudley, T. 14973.

<sup>1039</sup> See III., “General Overview” *supra*.

(b) Srebrenica Police Station<sup>1040</sup>

358. The 'Srebrenica Police Station'<sup>1041</sup> is a multi-storied building located in the northern part of Srebrenica on the main street leading into the centre of town coming from the direction of Bratunac.

359. As of August 1992, the Srebrenica Police Station housed both the military and civilian police.<sup>1042</sup> The offices of the military police were on the ground floor, while those of the civilian police were located on the first floor.<sup>1043</sup>

360. Some guards at the Srebrenica Police Station wore blue uniforms like those used by the civilian police in the former Yugoslavia,<sup>1044</sup> while others were dressed in different uniforms or simply wore civilian clothes.<sup>1045</sup> Some carried a weapon.<sup>1046</sup>

361. In September and October 1992, five male Serbs (from BiH and Serbia proper) were detained in a cell on the ground floor of the Srebrenica Police Station from one to several weeks.<sup>1047</sup> In December 1992 and January 1993, a number of male Bosnian Serbs were detained in the same cell.<sup>1048</sup> In addition, a number of Bosnian Serb females and minors were detained in a room on the first floor of the building.<sup>1049</sup> With one exception,<sup>1050</sup> all detainees were held at the Srebrenica Police Station for a period of time not exceeding a few days before being transferred to the Building.<sup>1051</sup>

362. When entering the building, there was a reception room immediately on the right-hand side.<sup>1052</sup> The reception room had a small opening in the wall towards the entrance, a wood-burning

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<sup>1040</sup> Ex. P418, "Aerial photo of Srebrenica"; ex. P419, "Photographs"; ex. C2.87, "Photo". This location was visited by the Trial Chamber and the Parties during a site visit in June 2005.

<sup>1041</sup> As there is now a new police station in Srebrenica, some witnesses referred to this building as the "old police station": Ratko Nikolić, T. 2658; Branimir Mitrović, T. 3756; Bećir Bogilović, T. 6245.

<sup>1042</sup> See IV.B.3.c., "The Srebrenica Military Police".

<sup>1043</sup> Bećir Bogilović, T. 6245-6246.

<sup>1044</sup> Ilija Ivanović, T. 4003-4004.

<sup>1045</sup> Branimir Mitrović, T. 3764; Milenija Mitrović, T. 1007, 1046; Ratko Nikolić, T. 2713.

<sup>1046</sup> Branimir Mitrović, T. 3757.

<sup>1047</sup> Nedjelko Radić, T. 3508-3511.

<sup>1048</sup> Ratko Nikolić, T. 2625.

<sup>1049</sup> Branimir Mitrović, T. 3756-3757, 3781; Milosava Nikolić, T. 7144-7145, 7151-7154; Milenija Mitrović, T. 1006-1007; Anda Radović, T. 4817-4819.

<sup>1050</sup> See paras 470-474 *infra*.

<sup>1051</sup> See c., "Building Behind the Municipal Building".

<sup>1052</sup> Ilija Ivanović, T. 4009; Nedeljko Radić, T. 3555; Ratko Nikolić, T. 2600, 2675; ex. P473, "Sketch" by Ilija Ivanović, designating this room as the 'beating room'; ex. P467, "Sketch" by Nedeljko Radić, see Annex E, designating this room as the 'reception room'.

stove, a desk, and a window facing the main street. Male Serb detainees were interrogated and beaten in this room,<sup>1053</sup> as well as in another room on the left side of the building entrance.<sup>1054</sup>

363. Turning right on the ground floor, diagonally opposite the reception room and a few metres down a corridor, was the cell in which the male Serb detainees were held. The cell, which could be accessed through a small ante-room, measured approximately three or four square metres and was secured from the ante-room by an iron-barred door.<sup>1055</sup> Prior to 1991, this cell had been used to detain individuals for up to 24 hours.<sup>1056</sup> The Serb detainees were beaten inside this cell, as well as through the iron bars of the door.<sup>1057</sup>

364. In this cell, there were no beds or mattresses on which the detainees could sleep.<sup>1058</sup> On occasions, over-crowding prevented the detainees from even having a place to lie down.<sup>1059</sup> In the exterior wall, there was a window without a pane. As a result, it was very cold inside the cell, and no means of heating were available.<sup>1060</sup>

365. While there is evidence that the male detainees obtained a small ration of food twice a day,<sup>1061</sup> other evidence suggests that they were rarely given anything to eat.<sup>1062</sup> Drinking water was provided to them only irregularly.<sup>1063</sup> Contiguous to the cell where the male detainees were confined was a makeshift lavatory which they were occasionally allowed to use.<sup>1064</sup>

(c) Building Behind the Municipal Building<sup>1065</sup>

(i) General

366. The Srebrenica municipal building and court building are adjacent buildings located on the main street in the centre of town,<sup>1066</sup> a couple of hundred metres from the Srebrenica Police

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<sup>1053</sup> Nedeljko Radić, T. 3516-3517, 3555-3556.

<sup>1054</sup> Nedeljko Radić, T. 3512, 3556-3558; ex. P467, "Sketch" by Nedjelko Radić, designating this room as the 'chief's office'.

<sup>1055</sup> Nedjelko Radić, T. 3510-3512; Ilija Ivanović, T. 4009, 4026-4027; Ratko Nikolić, T. 2680; Slavoljub @ikić, T. 3207; ex. P473, "Sketch by Ilija Ivanović".

<sup>1056</sup> Bećir Bogilović, T. 6253.

<sup>1057</sup> Slavoljub Žikić, T. 3211; Nedeljko Radić, T. 3529; Ilija Ivanović, T. 4181.

<sup>1058</sup> Slavoljub Žikić, T. 3207; Nedeljko Radić, T. 3510-3511; Ilija Ivanović, T. 4019.

<sup>1059</sup> Nedeljko Radić, T. 3540.

<sup>1060</sup> Ilija Ivanović, T. 4025; Nedjelko Radić, T. 3619-3621.

<sup>1061</sup> Slavoljub @ikić, T. 3208-3209.

<sup>1062</sup> Ilija Ivanović, T. 4019; Ratko Nikolić, T. 2627.

<sup>1063</sup> Nedjelko Radić, T. 3613.

<sup>1064</sup> Nedjelko Radić, T. 3541; Slavoljub Žikić, T. 3216.

<sup>1065</sup> This location was visited by the Trial Chamber and the Parties during a site visit in June 2005.

<sup>1066</sup> Ilija Ivanović, T. 4020 (referring to the building in question as the "All Peoples' Defence Building"); ex. P418, "Aerial photo of Srebrenica"; ex. P419, "Photo".

Station.<sup>1067</sup> A narrow alley leads up to the Building which in 1992 and early 1993 consisted of only one floor.<sup>1068</sup> Before the conflict, its left wing accommodated the local TO, whereas its right one was used by the Red Cross and as a storage facility.<sup>1069</sup>

367. From January to March 1993, up to 15 Bosnian Serb men<sup>1070</sup> and between 12 and 15 Bosnian Serb women were detained separately in two cells in the Building,<sup>1071</sup> for a period of time ranging from three weeks<sup>1072</sup> to almost two months.<sup>1073</sup>

368. Detainees at the Building were guarded.<sup>1074</sup> Some guards wore police uniforms,<sup>1075</sup> whereas others were dressed in different uniforms or in civilian clothes.<sup>1076</sup>

369. Immediately on the right-hand side when entering the Building, there was a reception room in which interrogations and beatings of the Serb male detainees took place.<sup>1077</sup> Passing the reception room and turning right, the female cell was located on the left side of a corridor, while the male cell was at the end of it.<sup>1078</sup> Opposite the female cell and contiguous to the male cell was a makeshift lavatory.<sup>1079</sup>

370. Whereas the Serb men were routinely beaten while detained at the Building,<sup>1080</sup> the Serb women and children were not.<sup>1081</sup> Detainees, both male and female, were occasionally taken out of the Building to other locations for interrogation.<sup>1082</sup>

#### (ii) Male Cell

371. The male cell of the Building was of rectangular shape and measured approximately 10 square metres.<sup>1083</sup> Guards ensured that the cell remained securely locked.<sup>1084</sup> Rain dripped into the room,<sup>1085</sup> and according to one witness, the walls and the floor were stained with blood.<sup>1086</sup>

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<sup>1067</sup> Ratko Nikolić, T. 2679.

<sup>1068</sup> Ratko Nikolić gave evidence that the upper floor of the Building was added later: T. 2662, 2681; ex. C2.79 and 80, "Photos". See also Branimir Mitrović, T. 3781-3782; Svetlana Trifunović, T. 2035.

<sup>1069</sup> Bećir Bogilović, T. 6227-6229, 6344-6345; ex. P516, "Photo".

<sup>1070</sup> Ilija Ivanović, T. 4041; Branimir Mitrović, T. 3765.

<sup>1071</sup> Ilija Ivanović, T. 4040; Milosava Nikolić, T. 7151-7152; Svetlana Trifunović, T. 2035-2036.

<sup>1072</sup> Milenija Mitrović, T. 1015.

<sup>1073</sup> C007, T. 4492, 4569.

<sup>1074</sup> Branimir Mitrović, T. 3764.

<sup>1075</sup> Ilija Ivanović, T. 4182.

<sup>1076</sup> Anđa Radović, T. 4821-4822; Svetlana Trifunović, T. 2037; Milosava Nikolić, T. 7161; Branimir Mitrović, T. 3764; Stana Stamenić, T. 6613-6614.

<sup>1077</sup> Ilija Ivanović, T. 4044, 4069-4070.

<sup>1078</sup> Ex. P474, "Sketch" by Ilija Ivanović, see Annex F; Ilija Ivanović, T. 4084; Anđa Radović, T. 4826.

<sup>1079</sup> Branimir Mitrović, T. 3763-3764; Ilija Ivanović, T. 4025; ex. P474, "Sketch" by Ilija Ivanović.

<sup>1080</sup> See, e.g., Branimir Mitrović, T. 3767-3768; Ilija Ivanović, T. 4031.

<sup>1081</sup> Stana Stamenić, T. 6666. See also Branimir Mitrović, T. 3803; Milenija Mitrović, T. 1022.

372. In this cell, there was a table with two or three chairs.<sup>1087</sup> There were no beds or mattresses, so the detainees had to sleep on the concrete floor.<sup>1088</sup> The two windows on the short side of the room had no panes, but iron bars on the outside.<sup>1089</sup> As a consequence, it was very cold inside during the winter months.<sup>1090</sup> The guards occasionally lit a small stove with firewood.<sup>1091</sup>

373. The male detainees were usually provided with soup and/or a piece of bread once or twice a day. Other days, they received nothing at all.<sup>1092</sup> The quality of the food, however, appears to have been the same for the guards and the detainees.<sup>1093</sup> The water given to the detainees was dirty.<sup>1094</sup> They were beaten on the way to the lavatory when they were allowed to use it.<sup>1095</sup>

### (iii) Female Cell

374. The female cell of the Building was smaller than the male cell<sup>1096</sup> and was secured by a metal door.<sup>1097</sup> It had two barred windows, a bench and a wood-burning stove.<sup>1098</sup> The children detainees were in the female cell during the days, but spent most of the nights elsewhere.<sup>1099</sup> Some of the female detainees slept on the bench, while others had to sleep on the floor on blankets.<sup>1100</sup> Temperatures inside this cell were very cold, although the guards, or male detainees ordered by the guards, regularly brought in firewood to light the stove.<sup>1101</sup>

375. As women and children detainees were not always allowed to go to the lavatory, they used a bucket in the corner of the cell to relieve themselves.<sup>1102</sup> They were provided with water, soup and/or a piece of bread once or twice a day.<sup>1103</sup> The quality of the food appears to have been largely

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<sup>1082</sup> Ilija Ivanović, T. 4077; Stana Stamenić, T. 6621; Milosava Nikolić, T. 7157-7158; Branimir Mitrović, T. 3769-3770.

<sup>1083</sup> Ex. P474, "Sketch" by Ilija Ivanović.

<sup>1084</sup> C007, T. 4527.

<sup>1085</sup> C007, T. 4542.

<sup>1086</sup> C007, T. 4537-4539.

<sup>1087</sup> Ilija Ivanović, T. 4080-4081.

<sup>1088</sup> Ilija Ivanović, T. 4080.

<sup>1089</sup> Bečir Bogilović, T. 6229; Ilija Ivanović, T. 4079-4080; ex. P474, "Sketch" by Ilija Ivanović.

<sup>1090</sup> C007, T. 4541-4542.

<sup>1091</sup> Ilija Ivanović, T. 4024-4025.

<sup>1092</sup> C007, T. 4541; Ilija Ivanović, T. 4041.

<sup>1093</sup> Branimir Mitrović, T. 3802-3803.

<sup>1094</sup> Ilija Ivanović, T. 4191.

<sup>1095</sup> Ilija Ivanović, T. 4025, 4068-4069.

<sup>1096</sup> Ex. P474, "Sketch" by Ilija Ivanović.

<sup>1097</sup> Stana Stamenić, T. 6606.

<sup>1098</sup> Milosava Nikolić, T. 7159-7160; Stana Stamenić, T. 6604, 6606; Branimir Mitrović, T. 3763.

<sup>1099</sup> Stana Stamenić, T. 6681-6682.

<sup>1100</sup> Anđa Radović, T. 4821; Milosava Nikolić, T. 7160; Stana Stamenić, T. 6678.

<sup>1101</sup> Stana Stamenić, T. 6609-6611; Milosava Nikolić, T. 7160; Ilija Ivanović, T. 4040; Milenija Mitrović, T. 1014; Svetlana Trifunović, T. 2038-2039; Anđa Radović, T. 4833.

<sup>1102</sup> Stana Stamenić, T. 6612-6613; Svetlana Trifunović, T. 2041.

<sup>1103</sup> Anđa Radović, T. 4823; Stana Stamenić, T. 6612, 6677.



the same for both guards and female detainees.<sup>1104</sup> On one occasion, a nurse came to the female cell and provided medical assistance to one of the female detainees.<sup>1105</sup>

376. The Trial Chamber heard evidence from some detainees held in the female cell that they regularly heard the sound of beatings coming from the male cell, as well as male detainees crying, wailing or moaning.<sup>1106</sup> The female detainees were visited periodically by Zulfo Tursunović, who also enquired about their welfare.<sup>1107</sup> Sometimes, guards and unidentified Bosnian Muslims came to the female cell and uttered threats against the detainees.<sup>1108</sup>

(d) The Srebrenica Hospital

377. Evidence shows that some of the detainees, male and female, were taken to the Srebrenica hospital<sup>1109</sup> for a number of days where they were treated using the means available at the time.<sup>1110</sup> Given the circumstances, detainees were generally treated well at the hospital. They were not beaten or ill-treated, but they remained under guard.<sup>1111</sup> It remains unclear from the evidence on whose authority the decision to transfer the detainees to and from the hospital was taken.

### 3. Murder

(a) Incident at the Srebrenica Police Station in September 1992: Dragutin Kukić

378. The Indictment alleges that Dragutin Kukić, born 12 May 1934, was detained at the Srebrenica Police Station, where he was subjected to serious maltreatment. It is alleged that on or about 25 September 1992, Dragutin Kukić was beaten to death.<sup>1112</sup>

379. Based primarily on evidence given by Nedeljko Radić, the Trial Chamber finds as follows. Dragutin Kukić was originally from Inlija in Serbia. At some time in 1992, he was hired to work as a security guard at the Braćan bauxite mine, in the area of Podravanje.<sup>1113</sup> On 24 September 1992, he was captured in the vicinity of the mine during combat with Bosnian Muslim fighters.<sup>1114</sup> During

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<sup>1104</sup> Branimir Mitrović, T. 3802-3803.

<sup>1105</sup> Stana Stamenić, T. 6615-6616.

<sup>1106</sup> Anđa Radović, T. 4826-4827; Milenija Mitrović, T. 1021-1022; Milosava Nikolić, T. 7164-7167; Svetlana Trifunović, T. 2042-2043; Stana Stamenić, T. 6625.

<sup>1107</sup> Stana Stamenić, T. 6616-6617; Milenija Mitrović, T. 1024. As regards Zulfo Tursunović, *see* para. 165 *supra*.

<sup>1108</sup> Svetlana Trifunović, T. 2042; Stana Stamenić, T. 6620.

<sup>1109</sup> Ilija Ivanović, T. 4086-4088; C007, T. 4537, 4563-4566; Nedret Mujkanović, T. 5000; ex. P52, "Letter of Discharge".

<sup>1110</sup> *See* para. 114 *supra*.

<sup>1111</sup> Ilija Ivanović, T. 4086-4088; C007, T. 4537, 4563-4566.

<sup>1112</sup> Indictment, para. 25(a).

<sup>1113</sup> Nedeljko Radić, T. 3506.

<sup>1114</sup> Nedeljko Radić, T. 3504.

the same night, with his hands tied behind his back, Dragutin Kukić was transferred to Srebrenica together with other Serb captives in a small truck. Bosnian Muslims in camouflage uniforms and in civilian clothes beat Dragutin Kukić on the way.<sup>1115</sup> Upon arrival in Srebrenica, he was detained in the cell on the ground floor of the Srebrenica Police Station, together with four other Serbs<sup>1116</sup> who had been captured in the Podravanje area.

380. In the evening of 25 September 1992, an individual in civilian clothes named Šabahudin Omerović, known as Čude,<sup>1117</sup> took Dragutin Kukić out of the cell to the reception room. There, he was met by a certain Kemo in camouflage uniform and a person in civilian clothes known as Mrki.<sup>1118</sup> Kemo, whose proper name was Kemal Mehmetović,<sup>1119</sup> hailed from the hamlet of Pale near Potočari and was about 30 years of age.<sup>1120</sup> In 1992, he was a member of one of the local fighting groups.<sup>1121</sup> Kemo was a notoriously violent person<sup>1122</sup> who resisted subordination.<sup>1123</sup> The evidence is inconclusive as to the identity of Mrki.<sup>1124</sup>

381. In the reception room, Kemo and Mrki started to beat Dragutin Kukić.<sup>1125</sup> As Mrki threw Dragutin Kukić to the ground, the latter cursed Mrki's and Kemo's "ustaša mothers".<sup>1126</sup> In response to this insult, Kemo took a wooden log and forcefully hit Dragutin Kukić with it on his chest.<sup>1127</sup> He immediately lost any sign of life and seems to have died instantly. In an ostensible attempt to revive him, Kemo poured water from a bottle into Dragutin Kukić's mouth, but to no

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<sup>1115</sup> Nedeljko Radić, T. 3504-3507.

<sup>1116</sup> The other detainees were Nevenko Bubanj, Veselin [arac, Zoran Branković and Nedeljko Radić: Nedeljko Radić, T. 3508-3510.

<sup>1117</sup> Slavoljub Žikić, T. 3210, 3215. *See also* ex. P590, "List of Military Police Staff" of 31 July 1992, listing a certain Selahudin Omerović (no. 15). However, the Trial Chamber cannot safely conclude that [abahudin Omerović (referred to by Slavoljub Žikić) and Selahudin Omerović (as in ex. P590) are the same person.

<sup>1118</sup> Nedeljko Radić, T. 3516-3519.

<sup>1119</sup> Although Nedeljko Radić referred to 'Kemo' as Kemal *Ahmetović*, the Trial Chamber understands that this is the same person referred to by other witnesses as Kemal *Mehmetović*, since all witnesses uniformly refer to an individual nicknamed Kemo who was from Pale: Nedeljko Radić, T. 3518; Nedret Mujkanović, T. 5041-5042; Hakija Mehuljić, T. 6885; [uhra Djilović, T. 15255. *See also* ex. P329, "Interview" of the Accused, tape 3, pp. 25, 26; *but see* Defence Final Brief, para. 176; Defence Closing Argument, T. 16576.

<sup>1120</sup> Miladin Simić, T. 841; Nedret Mujkanović, T. 5041-5042.

<sup>1121</sup> Hakija Mehuljić, T. 6885; ex. P329, "Interview" of the Accused, tape 3, p. 26. The evidence is inconclusive whether Kemo was affiliated with the Potočari or the Pale group of fighters.

<sup>1122</sup> Mira Stojanović, T. 3862; Nedret Mujkanović, T. 5041-5046; Nikola Petrović, T. 7308-7309; ex. P329, "Interview" of the Accused, tape 3, pp. 25-26.

<sup>1123</sup> Nedret Mujkanović, T. 5253.

<sup>1124</sup> There is evidence showing that Mrki is Hazim Omerović: Ibrahim Bećirović, T. 7700; Mira Stojanović, T. 3889. However, others, including the Accused, stated that Mrki is Ibrahim Mandić: ex. P329, "Interview" of the Accused, tape 3, p. 24; Nedret Mujkanović, T. 5164.

<sup>1125</sup> Nedeljko Radić, T. 3516-3519, 3529-3530.

<sup>1126</sup> Nedeljko Radić, T. 3530-3532, 3605.

<sup>1127</sup> Nedeljko Radić, T. 3530-3532, 3605-3607.

avail.<sup>1128</sup> Two Serb detainees subsequently brought Kukić's dead body back to the cell, where it remained until the following day.<sup>1129</sup>

382. The next morning, Kemo came to the cell and enquired of the other Serb detainees about Dragutin Kukić, as if he did not know of his fate. Out of fear, the detainees responded that Dragutin Kukić had suffered a heart attack.<sup>1130</sup> Kemo then ordered three of the detainees to put the dead body on a truck parked outside the Srebrenica Police Station.<sup>1131</sup> The truck then headed to the Podravanje area, where Kemo disposed of Dragutin Kukić's body in a water reservoir.<sup>1132</sup> Before it was thrown into the reservoir, Kemo fired a few shots at the dead body. Dragutin Kukić's mortal remains have not been recovered.<sup>1133</sup>

383. The Trial Chamber finds that the blow inflicted by Kemo on Dragutin Kukić's chest caused his immediate death. In addition, it is satisfied that Kemo acted with reasonable knowledge and acceptance that this would more likely than not cause the death of Dragutin Kukić. Consequently, the Trial Chamber finds beyond reasonable doubt that the circumstances of Dragutin Kukić's death at the Srebrenica Police Station fulfil the elements of murder.

384. The Trial Chamber does not accept the Defence submission that Dragutin Kukić's cursing of Mrki's and Kemo's mothers constituted provocation such as to exclude the required *mens rea* for murder on the part of Kemo.<sup>1134</sup> Apart from the fact that Kukić's offensive words were in themselves a reaction to the maltreatment that was being inflicted on him, Kemo's violent response was completely out of proportion to the alleged provocation. In addition, the *modus agendi* of Kemo is such that it cannot shake the conclusion the Trial Chamber reaches as to his *mens rea*.

(b) Incidents at the Building Behind the Municipal Building Between 6 February 1993 and 20 March 1993

(i) Jakov Đokić

385. The Indictment alleges that Jakov Đokić, born in 1972, was detained at the Building, where he was killed between 6 February and 20 March 1993.<sup>1135</sup>

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<sup>1128</sup> Nedeljko Radić, T. 3530, 3607.

<sup>1129</sup> Nedeljko Radić, T. 3530-3532.

<sup>1130</sup> Nedeljko Radić, T. 3534-3535, 3609-3610.

<sup>1131</sup> Nedeljko Radić, T. 3535. The three detainees were Nedeljko Radić, Veselin Šarac and Zoran Branković.

<sup>1132</sup> Nedeljko Radić, T. 3535-3536, stating that the detainee who observed this incident was Veselin Šarac.

<sup>1133</sup> Nedeljko Radić, T. 3536.

<sup>1134</sup> See Defence Final Brief, paras 179-184.

<sup>1135</sup> Indictment, para. 25(b).

386. Based primarily on the evidence given by Anđa Radović, witness C007, Ilija Ivanović, Ratko Nikolić and Vidosav \okić, the Trial Chamber finds that on 17 May 1992, Jakov Đokić, who was wearing parts of a camouflage uniform, was captured by Bosnian Muslims in the area of Konjević Polje upon his return home from military service.<sup>1136</sup> He was then detained at a stable in the area of Cerska for more than seven months, together with other Serb and Bosnian Muslim detainees.<sup>1137</sup> Conditions at the stable were horrid. The detainees received little or no food, there were no hygienic facilities and all the detainees were infested with lice.<sup>1138</sup> In addition, the guards sometimes admitted individuals from the outside into the stable where they beat Jakov \okić and the other detainees.<sup>1139</sup>

387. On 26 January 1993, when the Cerska area was attacked by Bosnian Serb forces,<sup>1140</sup> Jakov Đokić and the other detainees were transferred from the stable to Srebrenica. They were escorted by armed Bosnian Muslims, some of whom were uniformed. One of them was Zulfo Tursunović. The journey lasted the entire day and was made partly on foot and partly in a vehicle.<sup>1141</sup>

388. When the group arrived in Srebrenica, Jakov \okić was already in a poor physical condition as a result of the earlier maltreatment.<sup>1142</sup> He was first taken to the Srebrenica Police Station, where he was beaten with sticks by several young men until he fainted.<sup>1143</sup> Thereafter, he was taken to the Building and confined in the male cell, together with other Serb detainees.<sup>1144</sup> At this location, Jakov \okić was routinely beaten and maltreated with various objects, including sticks and rifle butts.<sup>1145</sup> The assailants, some of whom were armed, wore civilian clothes or parts of military uniforms.<sup>1146</sup> His bruised and bloody appearance was described as terrible to behold.<sup>1147</sup>

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<sup>1136</sup> Anđa Radović, T. 4799; C007, T. 4494-4495, 4524; Vidosav \okić, T. 4221-4223; ex. P66, "Interrogation Notes" of Jakov \okić.

<sup>1137</sup> C007, T. 4490-4494, 4524. The three Bosnian Muslim detainees were apparently accused of having given food and weapons to the Serbs; they were removed from the stable soon after the arrival of Jakov \okić. The other detainees were Rado Pejić, Branko Sekulić, Dragan Ilić, Dušan Čestić, an unidentified gypsy, and a woman named Anđa: C007, T. 4493-4509.

<sup>1138</sup> C007, T. 4495-4496.

<sup>1139</sup> Anđa Radović, T. 4799, 4801-4802; C007, T. 4496-4497, 4503-4504. Although the Indictment is confined to events alleged to have taken place only in Srebrenica, the Trial Chamber will examine the conditions of prior detention and transfer of the detainees to Srebrenica with a view to ascertain their state, including possible injuries, upon arrival in Srebrenica.

<sup>1140</sup> See para. 107 *supra*.

<sup>1141</sup> C007, T. 4514-4519; Anđa Radović, T. 4808-4809; ex. P16, "Report" of 26 January 1993; ex. P197, "List" of 23 February 1993.

<sup>1142</sup> See Anđa Radović, T. 4880-4881.

<sup>1143</sup> C007, T. 4520; Anđa Radović, T. 4814-4816.

<sup>1144</sup> C007, T. 4526-4527, 4533, listing the other detainees at that time period as Branko Sekulić, Dragan Ilić, Rado Pejić, a certain Mićo (who the Trial Chamber believes to be Milisav Milovanović, see fn. 1165 *infra*) and a certain Kosta (who the Trial Chamber believes to be Kostadin Popović: C007, T. 4533-4534).

<sup>1145</sup> C007, T. 4536, 4540.

<sup>1146</sup> C007, T. 4540-4541.

389. It is unknown what became of Jakov \okić after 21 March 1993, when he was last seen alive.<sup>1148</sup> There is only vague evidence hinting that Jakov \okić subsequently succumbed to injuries caused by beatings while in detention<sup>1149</sup> and that he was buried in Srebrenica.<sup>1150</sup>

390. There is no conclusive evidence that Jakov \okić was killed while in detention on or *before* 20 March 1993, as alleged in the Indictment. Considering his state of health and the absence of information that he was exchanged, it is very likely that he died in detention sometime *after* that date. Yet, the circumstantial evidence does not reach a level sufficient to conclude beyond reasonable doubt that Jakov \okić was killed, as alleged, while detained at the Building. The Trial Chamber therefore finds that the elements of murder have not been proven with respect to Jakov \okić.

(ii) Dragan Ilić

391. The Indictment alleges that Dragan Ilić, born in 1975, was detained at the Building, where he was killed between 6 February and 20 March 1993.<sup>1151</sup>

392. Based primarily on the evidence given by Anđa Radović and witness C007, the Trial Chamber finds the following. In the summer of 1992, Dragan Ilić was captured by Bosnian Muslims in Kasaba.<sup>1152</sup> He was then confined at the already mentioned stable in the area of Cerska for several months, together with other Serb detainees<sup>1153</sup> and under the aforementioned conditions.<sup>1154</sup> He also was beaten by individuals allowed into the stable by the guards.<sup>1155</sup> On 26 January 1993, he was transferred to Srebrenica under the circumstances which have been described earlier.<sup>1156</sup>

393. When the group arrived in Srebrenica, Dragan Ilić was already in a poor physical condition as a result of the earlier maltreatment.<sup>1157</sup> As with Jakov \okić, he was first taken to the Srebrenica Police Station, where he was beaten with sticks by several young men until he fainted.<sup>1158</sup> Thereafter, he was taken to the Building and confined in the male cell, together with other Serb

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<sup>1147</sup> Anđa Radović, T. 4836-4837; C007, T. 4536-4540.

<sup>1148</sup> C007, T. 4622-4623.

<sup>1149</sup> Vidosav \okić heard from others, including Anđa Radović, that his son Jakov had died while in detention: T. 4224, 4227-4231. Anđa Radović gave evidence that also she had received this information from third persons: T. 4840, 4897.

<sup>1150</sup> Vidosav \okić, T. 4224-4225, 4230.

<sup>1151</sup> Indictment, para. 25(b).

<sup>1152</sup> C007, T. 4501-4502. *See also* ex. C1, "Map".

<sup>1153</sup> C007, T. 4492-4494, 4501-4502.

<sup>1154</sup> *See* para. 386 *supra*.

<sup>1155</sup> Anđa Radović, T. 4799, 4801-4802; C007, T. 4496-4497, 4503-4504.

<sup>1156</sup> *See* para. 387 *supra*.

<sup>1157</sup> *See* Anđa Radović, T. 4880-4881.

detainees.<sup>1159</sup> At this location, Dragan Ilić was routinely beaten and maltreated with various objects, including sticks, knives and rifle butts.<sup>1160</sup> The assailants, some of whom were armed, wore civilian clothes or parts of military uniforms.<sup>1161</sup> His bruised and bloody appearance was likewise described as being terrible to look at.<sup>1162</sup>

394. Dragan Ilić died in the male cell of the Building on an unspecified date between 9 February and 20 March 1993.<sup>1163</sup>

395. The Trial Chamber is satisfied that the death of Dragan Ilić was caused by the treatment he received while detained in the Building. Although Dragan Ilić was already in poor state when he arrived in Srebrenica, there can be no doubt that his assailants must have been well aware of his condition, and yet assumed the risk of death by continuing to beat and maltreat him. Consequently, there can be no reasonable doubt that the circumstances of Dragan Ilić's death at the Building fulfil the elements of murder.

(iii) Milisav Milovanović

396. The Indictment alleges that Milisav Milovanović, called Mićo, born in 1950, was detained at the Building, where he was killed between 6 February and 20 March 1993.<sup>1164</sup>

397. Based on the evidence given by Anđa Radović, witness C007, Ilija Ivanović, Ratko Nikolić and Vojka Milovanović, the Trial Chamber finds that on 24 December 1992, Milisav Milovanović, nicknamed Mićo,<sup>1165</sup> a skilled flotation worker at the Sase mine, was captured by Bosnian Muslims in the area of Glogova.<sup>1166</sup> Thereupon, he was detained at the Srebrenica Police Station,<sup>1167</sup> where he was later joined by other Serb detainees.<sup>1168</sup> In the cell, Milisav Milovanović was beaten and kicked every day by unknown assailants. He was covered with blood.<sup>1169</sup> On 15 or 16 January 1993, Milisav Milovanović and the other Serb detainees were transferred to the Building, where they were

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<sup>1158</sup> C007, T. 4520; Anđa Radović, T. 4814-4816.

<sup>1159</sup> C007, T. 4526-4527, 4533; *see* para. 388 *supra*.

<sup>1160</sup> *See* C007, T. 4536, 4540-4541.

<sup>1161</sup> C007, T. 4540-4541.

<sup>1162</sup> Anđa Radović, T. 4836-4837; C007, T. 4536-4540, 4559.

<sup>1163</sup> C007, T. 4559-4560.

<sup>1164</sup> Indictment, para. 25(b).

<sup>1165</sup> Notwithstanding the submission in the Defence Final Brief (para. 209), the Trial Chamber is satisfied that the individual identified by witness C007, Ratko Nikolić and Ilija Ivanović as 'Mićo' is in fact Milisav Milovanović.

<sup>1166</sup> Vojka Milovanović, T. 4241-4243; ex. P54, "Handwritten notes". The Trial Chamber accepts the explanation given by Milisav Milovanović's wife, Vojka Milovanović, that she presented the date of 24 December 1992, the date of her husband's disappearance, as the date of his death: *see* T. 4260-4263; ex. D45, "List"; ex. D798, "List", no. 11.

<sup>1167</sup> Vojka Milovanović, T. 4246-4247; ex. P15, "Military Police Report", p. 2, entry of 27 December 1992.

<sup>1168</sup> Ratko Nikolić, T. 2600-2602; Ilija Ivanović, T. 4005.

<sup>1169</sup> *See* Ratko Nikolić, T. 2602-2603, 2626-2627, 2719.

confined in the male cell.<sup>1170</sup> At this location, he was routinely beaten and maltreated with various objects, including sticks, knives and rifle butts.<sup>1171</sup> His physical appearance was described as bloody and beaten “black and blue”.<sup>1172</sup> The assailants wore civilian clothes or parts of military uniforms.<sup>1173</sup>

398. On an unspecified date in early February 1993, a youth between 16 and 20 years of age, entered the male cell, asked Milisav Milovanović where he had hidden some flour, and beat him repeatedly on his chest.<sup>1174</sup> Shortly thereafter, and possibly at the Srebrenica hospital, Milisav Milovanović died and was buried in Srebrenica.<sup>1175</sup>

399. The Trial Chamber is satisfied that the death of Milisav Milovanović was caused by the maltreatment suffered in detention, culminating in the beating on his chest by the said youth. It is further satisfied that this person acted with reasonable knowledge and acceptance that this beating would more likely than not result in the death of Milisav Milovanović. Therefore, there can be no reasonable doubt that the circumstances of Milisav Milovanović’s death fulfil the elements of murder.

400. In its Final Brief, the Defence submits that even if the beating by the youth was considered to have caused Milisav Milovanović’s death, there can be no criminal liability for a war crime committed by an individual below the age of 18.<sup>1176</sup> The Trial Chamber considers this submission as completely unfounded in law, as no such rule exists in conventional or customary international law.<sup>1177</sup> What is relevant for this case is not the age of the perpetrator, but the alleged acts or omissions of the Srebrenica military police to prevent this incident.<sup>1178</sup>

(iv) Kostadin Popović

401. The Indictment alleges that Kostadin Popović, born 20 September 1947, was detained at the Building, where he was killed between 6 February and 20 March 1993.<sup>1179</sup>

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<sup>1170</sup> Ratko Nikolić, T. 2628-2630; Ilija Ivanović, T. 4040.

<sup>1171</sup> C007, T. 4540.

<sup>1172</sup> See Vojka Milovanović, T. 4246-4247, 4249; C007, T. 4536-4541.

<sup>1173</sup> C007, T. 4540-4541.

<sup>1174</sup> Ilija Ivanović, T. 4040, 4073-4074, 4111, 4194-4195; C007, T. 4560.

<sup>1175</sup> Vojka Milovanović, T. 4246-4252; C007, T. 4560; ex. P50, “Forensic Report”, stating that Milisav Milovanović died due to “massive bilateral pneumonia” on 12 February 1993 after having been treated in the Srebrenica hospital. *But see* Ilija Ivanović, T. 4111, giving evidence that Milisav Milovanović never received medical treatment there.

<sup>1176</sup> Defence Final Brief, paras 214-215, referring to Article 26 of the Rome Statute of the International Criminal Court.

<sup>1177</sup> Reference to Article 26 of the Rome Statute is of no relevance as the age limit mentioned therein is only for jurisdictional purposes.

<sup>1178</sup> See C.I.b.iii., “Responsibility of the Srebrenica Military Police”.

<sup>1179</sup> Indictment, para. 25(b).

402. Based primarily on the evidence given by Anđa Radović, witness C007, Ilija Ivanović, Ratko Nikolić and Nikola Popović, the Trial Chamber finds the following. On 7 January 1993, Kostadin Popović was captured by Bosnian Muslims during combat in Kravica.<sup>1180</sup> Thereupon, he was brought to the Srebrenica Police Station where he was detained in a cell together with other Serbs.<sup>1181</sup> In the cell, Kostadin Popović was beaten and kicked every day by unknown assailants. He was covered with blood.<sup>1182</sup> On 15 or 16 January 1993, Kostadin Popović and the other Serb detainees were transferred to the Building, where they were confined in the male cell.<sup>1183</sup> At this location, he was routinely beaten and maltreated with various objects, including sticks and rifle butts.<sup>1184</sup> As a result, he was bleeding and “black and blue” all over his body.<sup>1185</sup> The assailants wore civilian clothes or parts of military uniforms.<sup>1186</sup>

403. Kostadin Popović died in the male cell of the Building on or about 7 February 1993,<sup>1187</sup> after severe beatings had been inflicted on him.<sup>1188</sup> Thereafter, Zulfo Tursunović arrived and asked the other detainees what had happened. Ostensibly out of fear, the detainees did not respond.<sup>1189</sup> Later, Bosnian Muslims put Kostadin Popović’s body on a military blanket and wrote his name on a slip of paper placed inside one of his trouser pockets.<sup>1190</sup>

404. In October 1995, a body was exhumed in Srebrenica and examined by Dr. Zoran Stanković, who established it to be that of Kostadin Popović. The body was found wrapped in a woollen blanket inside which a piece of paper was also found. The writing on the piece of paper read: “Kostadin (son of Risto) POPOVIĆ taken prisoner in Kravica 7 January 1993, died 6 February 1993.”<sup>1191</sup> Against this backdrop, the Trial Chamber has no doubt about the reliability of the conclusions reached by Dr. Stanković in relation to the identification of the body as being that of Kostadin Popović.

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<sup>1180</sup> Nikola Popović, T. 2797-2799, 2874-2875; 2935; ex. P46, “Interrogation Notes” of 30 January 1993; ex. P458/P561, “Military Police Log”, p. 31. Against this evidence, the Trial Chamber is not persuaded by D985, “List”, no. 35, stating that Kostadin Popović was killed on 7 January 1993, during the attack on Kravica; *see also* VIII.B.6., “Attack on the Villages of Kravica, [iljkovići and Je`estica on 7 and 8 January 1993”.

<sup>1181</sup> Nikola Popović, T. 2797-2798; Ratko Nikolić, T. 2600-2602.

<sup>1182</sup> Ratko Nikolić, T. 2603, 2626-2627, 2719.

<sup>1183</sup> Ratko Nikolić, T. 2628-2630.

<sup>1184</sup> C007, T. 4540.

<sup>1185</sup> C007, T. 4536-4540.

<sup>1186</sup> C007, T. 4540-4541.

<sup>1187</sup> Ratko Nikolić, T. 2639-2640, 2717; C007, T. 4561-4562; Ilija Ivanović, T. 4072-4073.

<sup>1188</sup> Ratko Nikolić, T. 2635, Ilija Ivanović, T. 4073.

<sup>1189</sup> Ratko Nikolić, T. 2643.

<sup>1190</sup> Ilija Ivanović, T. 4072-4074; Ratko Nikolić, T. 2643, 2723.

<sup>1191</sup> Ex. P81, “Autopsy Report” of 7 October 1995, describing massive multiple fractures of bones, ribs and cranium indicative of the injuries sustained by Kostadin Popović, especially the ones to his head which, according to the autopsy finding, must have been fatal. *See also* Nikola Popović, T. 2799, 2896-2900; Ratko Nikolić, T. 2635, 2643.



405. The Trial Chamber is satisfied that the death of Kostadin Popović was caused by maltreatment while detained in the Building. It is equally satisfied that the assailants acted with reasonable knowledge and acceptance that this maltreatment would more likely than not cause the death of Kostadin Popović. Consequently, there can be no reasonable doubt that the circumstances of Kostadin Popović's death at the Building fulfil the elements of murder.

(v) Branko Sekulić

406. The Indictment alleges that Branko Sekulić, born 1 January 1967, was detained at the Building, where he was killed between 6 February and 20 March 1993.<sup>1192</sup>

407. Based primarily on the testimony of An|a Radović, witness C007, Ratko Nikolić and Ilija Ivanović, the Trial Chamber finds the following. On 30 June 1992, Branko Sekulić was captured in the area of Milići during combat with Bosnian Muslim forces. He was wounded in his leg or ankle and lost a lot of blood.<sup>1193</sup> He was then detained at an unknown location for several days<sup>1194</sup> before being transferred to the above mentioned stable in the area of Cerska where he was confined for several months together with other Serb detainees<sup>1195</sup> and under the same conditions described before.<sup>1196</sup> He too was beaten by individuals admitted from outside by the guards.<sup>1197</sup> One of these assailants, a certain Alaga, who knew Branko Sekulić from before the conflict, beat him so severely that his hearing became impaired.<sup>1198</sup> On 27 January 1993, one day after the other Serb detainees, Branko Sekulić was transferred to Srebrenica on horseback due to his weak physical condition.<sup>1199</sup>

408. Upon arrival, Branko Sekulić was first taken to the Srebrenica Police Station, where he was beaten with sticks by several young men until he fainted.<sup>1200</sup> Thereafter, he was taken to the Building and confined in the male cell, together with other Serb detainees.<sup>1201</sup> At this location, Branko Sekulić was routinely beaten and maltreated with various objects, including sticks and rifle butts.<sup>1202</sup> The assailants, some of whom were armed, wore civilian clothes or parts of military

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<sup>1192</sup> Indictment, para. 25(b).

<sup>1193</sup> C007, T. 4499-4501, 4604; An|a Radović, T. 4799; ex. P51, "Interrogation Notes" of Branko Sekulić (undated); ex. P101, "Interrogation Notes" of Branko Sekulić dated 31 January 1993.

<sup>1194</sup> C007, T. 4500.

<sup>1195</sup> C007, T. 4499-4502; An|a Radović, T. 4799.

<sup>1196</sup> See para. 386 *supra*.

<sup>1197</sup> C007, T. 4497, 4503; An|a Radović, T. 4799, 4801-4802.

<sup>1198</sup> An|a Radović, T. 4799-4800.

<sup>1199</sup> An|a Radović, T. 4810, 4880; see para. 387 *supra*.

<sup>1200</sup> C007, T. 4520; An|a Radović, T. 4814-4817.

<sup>1201</sup> C007, T. 4526-4527, 4533.

<sup>1202</sup> C007, T. 4533, 4536, 4540.

uniforms.<sup>1203</sup> Branko Sekulić's bruised and bloody appearance was described as being frightening.<sup>1204</sup>

409. Some time in February 1993, Branko Sekulić was admitted into the Srebrenica hospital for several days, where he received medical treatment.<sup>1205</sup> No further beatings were inflicted on him while in the hospital.<sup>1206</sup> On 3 March 1993, he was discharged due to a lack of space at the hospital.<sup>1207</sup>

410. Branko Sekulić died on or about 19 March 1993 in the Building.<sup>1208</sup>

411. The Trial Chamber is satisfied that the death of Branko Sekulić was caused by the treatment inflicted on him while he was detained at the Building. Although Branko Sekulić was already in a poor state when he arrived in Srebrenica, the Trial Chamber finds that his assailants must have been well aware of his condition, and yet assumed the risk of death by continuing to beat and maltreat him. Consequently, there can be no reasonable doubt that the circumstances of Branko Sekulić's death at the Building fulfil the elements of murder.

#### 4. Cruel Treatment

##### (a) Incidents at the Srebrenica Police Station in September and October 1992

###### (i) Nedeljko Radić

412. The Indictment alleges that Nedeljko Radić, born 15 July 1951, was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, where he was subjected to physical abuse, serious suffering and injury to body and health, and inhumane treatment by the guards and/or others with the support of the guards. According to the Indictment, Nedeljko Radić was assaulted with various objects including wooden poles and iron bars, punched and kicked all over his body, and beaten about the head with an iron bar. The Indictment alleges that his teeth were forcibly extracted using rusty pliers, that a soldier urinated into his injured mouth

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<sup>1203</sup> C007, T. 4540-4541.

<sup>1204</sup> Anđa Radović, T. 4836-4837; C007, T. 4536-4540.

<sup>1205</sup> Ilija Ivanović, T. 4086, 4200; ex. P52, "Letter of Discharge"; ex. P53, "Record of On-Site Investigation" of 19 March 1993, stating that Branko Sekulić was undergoing medical treatment until 3 March 1993.

<sup>1206</sup> Ilija Ivanović, T. 4197-4198.

<sup>1207</sup> Ex. P52, "Letter of Discharge"; ex. P53, "Record of On-Site Investigation" of 19 March 1993.

<sup>1208</sup> C007, T. 4561; Anđa Radović, T. 4840; ex. P53, "Record of On-Site Investigation" of 19 March 1993.

and that he was forced to swallow the urine. As a result of this maltreatment, it is alleged, Nedeljko Radić bled from his mouth and nose, his teeth were broken and his ribs fractured.<sup>1209</sup>

413. The Trial Chamber bases its findings primarily on the evidence given by the victim and by Slavoljub Žikić. On 24 September 1992, Nedeljko Radić, who was an air compressionist at the Braćan bauxite mine in the area of Podravanje,<sup>1210</sup> was captured in the vicinity of the mine during combat with Bosnian Muslim fighters.<sup>1211</sup> He identified Zulfo Tursunović as the individual in command at the time of his capture.<sup>1212</sup> With his hands tied behind his back, Nedeljko Radić was beaten by Bosnian Muslims who wore camouflage uniforms and civilian clothes. Accompanied by armed Bosnian Muslims, and together with four other Serb captives, Nedeljko Radić was transported to Srebrenica in a small truck during the same night.<sup>1213</sup>

414. Upon arrival in Srebrenica, Nedeljko Radić was detained in the cell on the ground floor of the Srebrenica Police Station.<sup>1214</sup> On 25 September 1992, he was taken to another room at the end of the corridor for interrogation. A bearded individual in civilian clothes, whom Nedeljko Radić believed to be the chief of police, conducted the questioning.<sup>1215</sup> He kicked Nedeljko Radić a couple of times in the chest and face.<sup>1216</sup>

415. In the evening of the same day, Čude took the detainees from the cell one-by-one. Nedeljko Radić was brought to an adjacent room with a stove, very likely the reception room of the Srebrenica Police Station.<sup>1217</sup> Kemo and Mrki beat Nedeljko Radić with their fists and with wooden logs and kicked him several times. His teeth were smashed and he sustained bone fractures.<sup>1218</sup>

416. In the evening of 26 September 1992, Nedeljko Radić was again taken to the same room where he was beaten by Kemo and Mrki. Using broad pliers, Kemo forcibly extracted two or three broken teeth from Nedeljko Radić's mouth and then urinated on his mouth, purportedely to disinfect the wound.<sup>1219</sup>

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<sup>1209</sup> Indictment, paras 23, 24(a)(i).

<sup>1210</sup> Nedeljko Radić, T. 3489.

<sup>1211</sup> Nedeljko Radić, T. 3495-3501.

<sup>1212</sup> Nedeljko Radić, T. 3498-3501.

<sup>1213</sup> Nedeljko Radić, T. 3502-3508, listing the other detainees as Dragutin Kukić, Nevenko Bubanj, Veselin [arac and Zoran Branković.

<sup>1214</sup> Nedeljko Radić, T. 3508-3510; *see* para. 361 *supra*.

<sup>1215</sup> Nedeljko Radić, T. 3511-3513; ex. P467, "Sketch".

<sup>1216</sup> Nedeljko Radić, T. 3513-3514.

<sup>1217</sup> Nedeljko Radić, T. 3516-3518.

<sup>1218</sup> Nedeljko Radić, T. 3519-3520.

<sup>1219</sup> Nedeljko Radić, T. 3525-3526.

417. Throughout his period of detention, Nedeljko Radić and the other inmates were routinely beaten at night, except for occasions when Čude was on duty.<sup>1220</sup> The beatings took place inside the cell, as well as in the reception room and in the corridor by which the detainees walked to the lavatory. Most of the beatings were administered by or in the presence of Kemo and Mrki, but some were inflicted by individuals who had, according to Nedeljko Radić, entered the building from the outside.<sup>1221</sup>

418. On 16 October 1992, Nedeljko Radić and other Serb detainees were taken by Kemo to the Yellow Bridge, located on the confrontation line between Bratunac and Potočari,<sup>1222</sup> where they were handed over to Bosnian Serbs in exchange for the dead bodies of some 20 Bosnian Muslims.<sup>1223</sup>

419. The Trial Chamber finds that the treatment of Nedeljko Radić while being detained at the Srebrenica Police Station is serious enough to amount to cruel treatment and that it was inflicted with the required intent. The elements of cruel treatment pursuant to Article 3 of the Statute are therefore proven beyond reasonable doubt.

(ii) Slavoljub Žikić

420. The Indictment alleges that Slavoljub Žikić, called Drago, born 18 May 1935, was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, where he was punched with fists, kicked with boots and beaten with rifle butts, in some instances into a state of unconsciousness. According to the Indictment, Slavoljub Žikić's ribs were fractured and the teeth in his upper jaw and one of his shoulders were broken. As a consequence of the beatings, it is alleged, his hearing and vision are badly impaired.<sup>1224</sup>

421. Based primarily on the evidence given by the victim himself, the Trial Chamber finds as follows. On 5 October 1992, Slavoljub Žikić, who was the manager of the Fakovići post office,<sup>1225</sup> was captured by two armed men wearing uniforms during combat with Bosnian Muslim fighters in Fakovići.<sup>1226</sup> One of his captors hit Slavoljub Žikić with a rifle butt in his ribs.<sup>1227</sup> Zulfo Tursunović,

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<sup>1220</sup> Nedeljko Radić, T. 3526-3528; Slavoljub Žikić, T. 3215.

<sup>1221</sup> See Nedeljko Radić, T. 3528-3529, 3538, 3541, 3698-3700.

<sup>1222</sup> Pyers Tucker, T. 5883; ex. C2.100, "Photo".

<sup>1223</sup> Nedeljko Radić, T. 3589-3591.

<sup>1224</sup> Indictment, paras 23, 24(a)(ii).

<sup>1225</sup> Slavoljub Žikić, T. 3179.

<sup>1226</sup> Slavoljub Žikić, T. 3189-3190; see also VIII.B.4., "Attack on the Village of Fakovići and the Hamlet of Divovići on 5 October 1992".

<sup>1227</sup> Slavoljub Žikić, T. 3191.

who sat on a white horse and was wearing an olive-drab uniform, prevented further beatings.<sup>1228</sup> Slavoljub Žikić was forced to walk in a column of Bosnian Muslims towards Srebrenica, where he was occasionally beaten and kicked along the way.<sup>1229</sup> The last part of the journey took place in a truck. He arrived at the Srebrenica Police Station on the same day after nightfall<sup>1230</sup> and was confined in the cell on the ground floor with four other Serb detainees.<sup>1231</sup>

422. According to Slavoljub Žikić, throughout his detention, individuals from the outside were routinely allowed to enter the cell and beat him and the other detainees. On several occasions, detainees themselves were forced to beat each other. This did not occur when Čude was on duty.<sup>1232</sup> On two instances, a uniformed individual known as Beli,<sup>1233</sup> whom Slavoljub Žikić believed was from the hamlet of Pale near Potočari, was given the keys to the cell by the guards. Beli ordered him to crouch down behind the cell bars before hitting him with a stick on his head, as a result of which he suffered walnut-sized knobs.<sup>1234</sup>

423. A couple of times, Slavoljub Žikić and the other detainees were beaten in another room of the Srebrenica Police Station, in the presence of numerous fighters. Fists, shoes or rifle butts were used for the beatings. Once, Slavoljub Žikić was ordered to lie down on his back, and one of the soldiers stepped on top of him pretending to perform a fast Serbian dance. Afterwards, Slavoljub Žikić felt pain in his bladder and developed a hernia.<sup>1235</sup> On another occasion, his teeth were smashed with a rifle butt.<sup>1236</sup> Moreover, during an interrogation conducted by a certain Mirzet – who the Trial Chamber does not doubt was Mirzet Halilović<sup>1237</sup> – Slavoljub Žikić was hit by the other fighters whenever Mirzet looked away.<sup>1238</sup> Mirzet also kicked him in the stomach on one occasion.<sup>1239</sup>

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<sup>1228</sup> Slavoljub Žikić, T. 3192-3193, 3313-3314.

<sup>1229</sup> Slavoljub Žikić, T. 3195-3197.

<sup>1230</sup> Slavoljub Žikić, T. 3201-3203.

<sup>1231</sup> Slavoljub Žikić, T. 3203-3205, listing the other detainees as Veselin [arac, Nedeljko Radić, Zoran Branković and Nevenko Bubanj.

<sup>1232</sup> Slavoljub Žikić, T. 3209-3211, 3215, 3319; Nedeljko Radić, T. 3526-3528.

<sup>1233</sup> See also ex. P329, “Interview” of the Accused, tape 3, p. 25, referring to a certain Beli from Likari as being a member of the Srebrenica military police. However, the Trial Chamber cannot conclude that this individual and the Beli mentioned by Slavoljub Žikić are the same person.

<sup>1234</sup> Slavoljub Žikić, T. 3210-3212.

<sup>1235</sup> Slavoljub Žikić, T. 3212-3214.

<sup>1236</sup> Slavoljub Žikić, T. 3214-3215, 3350.

<sup>1237</sup> See ex. P329, “Interview” of the Accused, tape 3, p. 1: “Commander of the military police was Mirzet Halilović. He later interrogated [Serb prisoners] together with Hamed Salihović [...]”.

<sup>1238</sup> Slavoljub Žikić, T. 3217-3218.

<sup>1239</sup> Slavoljub Žikić, T. 3219.

424. On 16 October 1992 Slavoljub Žikić was exchanged, along with other Serb detainees at the Yellow Bridge, for the dead bodies of Bosnian Muslims.<sup>1240</sup> On the way to the place of exchange, Beli hit Slavoljub Žikić with the butt of his rifle on the right shoulder, resulting in a permanent limited range of motion of his right arm.<sup>1241</sup> From the maltreatment inflicted on him while in detention, Slavoljub Žikić sustained at least one fractured rib. Furthermore, his hearing is permanently impaired, and he continues to have digestive problems.<sup>1242</sup>

425. The Trial Chamber finds that the treatment of Slavoljub Žikić while detained at the Srebrenica Police Station is serious enough to amount to cruel treatment, and that it was inflicted with the required intent. It therefore concludes that the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(iii) Zoran Branković

426. The Indictment alleges that Zoran Branković, born in 1975, was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, where he was punched and kicked all over his body. It is alleged that he was beaten with various objects, including wooden poles and iron bars.<sup>1243</sup>

427. The Trial Chamber bases its findings primarily on the evidence given by Nedeljko Radić and Slavoljub Žikić, as the victim was not called to give evidence.

428. Zoran Branković<sup>1244</sup> was originally from Smeđerovo in Serbia.<sup>1245</sup> He worked as a security guard at the Braćan bauxite mine<sup>1246</sup> when, on the night of 24 to 25 September 1992, he was captured in the vicinity of the mine and brought to the cell on the ground floor of the Srebrenica Police Station.<sup>1247</sup> Nedeljko Radić, who was routinely beaten in the reception room,<sup>1248</sup> observed that Zoran Branković was also kicked and beaten there.<sup>1249</sup> When Slavoljub Žikić arrived at the Srebrenica Police Station on 5 October 1992, he found Zoran Branković exhausted and covered in

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<sup>1240</sup> Slavoljub Žikić, T. 3230-3231; Nedeljko Radić, T. 3589.

<sup>1241</sup> Slavoljub Žikić, T. 3244, 3349-3350.

<sup>1242</sup> Slavoljub Žikić, T. 3243-3245; ex. P464, "Medical Report" of 19 October 1992.

<sup>1243</sup> Indictment, paras 23, 24(a)(iii).

<sup>1244</sup> Notwithstanding the submission in the Defence Final Brief (paras 236-237), the Trial Chamber is satisfied that the individual identified by Slavoljub Žikić and Nedeljko Radić is in fact Zoran Branković.

<sup>1245</sup> Ex. P83, "Record of Witness Interview" of Veselin [arac of 25 August 1994, p. 2.

<sup>1246</sup> Slavoljub Žikić, T. 3205.

<sup>1247</sup> Nedeljko Radić, T. 3508-3510.

<sup>1248</sup> See para. 362 *supra*.

<sup>1249</sup> Nedeljko Radić, T. 3529.

blood, one of several detainees looking “more like dead people than people who were still alive”. Slavoljub Žikić was told by the other detainees that this was the result of beatings.<sup>1250</sup>

429. Zoran Branković was part of the group of Serb detainees that were exchanged at the Yellow Bridge on 16 October 1992.<sup>1251</sup> When the group was about to board a truck in front of the Srebrenica Police Station, men wearing military uniforms smashed Zoran Branković’s body against a block of concrete. Zoran Branković was covered in blood, and foam was seeping out of his mouth.<sup>1252</sup> After the exchange, he was immediately admitted into hospital with severe injuries.<sup>1253</sup>

430. The Defence contends that Zoran Branković had to be hospitalised after his exchange because of the injuries sustained after he left the Srebrenica Police Station.<sup>1254</sup> Irrespective of his subsequent beating in front of the Srebrenica Police Station, the Trial Chamber finds that the treatment of Zoran Branković, while detained at the Srebrenica Police Station, is serious enough to amount to cruel treatment and that it was inflicted with the required intent.<sup>1255</sup> Consequently, the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(iv) Nevenko Bubanj

431. The Indictment alleges that Nevenko Bubanj, called Slavenko, date of birth unknown, was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, where he was punched and kicked all over his body. It is alleged that Nevenko Bubanj was beaten with various objects, including wooden poles and iron bars.<sup>1256</sup>

432. The Trial Chamber bases its findings primarily on the evidence given by Nedeljko Radić and Slavoljub Žikić. The victim is now deceased.

433. Nevenko Bubanj was originally from Injija in Serbia. Some time in 1992, he was hired to work as a security guard at the Braćan bauxite mine.<sup>1257</sup> On 24 September 1992, Nevenko Bubanj was captured during combat with Bosnian Muslim fighters in the Podravanje area and confined in

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<sup>1250</sup> Slavoljub Žikić, T. 3205.

<sup>1251</sup> Slavoljub Žikić, T. 3243; Nedeljko Radić, T. 3589.

<sup>1252</sup> Slavoljub Žikić, T. 3221-3222, 3319-3320, 3349.

<sup>1253</sup> Slavoljub Žikić, T. 3243.

<sup>1254</sup> Defence Final Brief, para. 239.

<sup>1255</sup> The Trial Chamber reaches this conclusion independently of the consideration whether the smashing of Zoran Branković’s body against a block of concrete can be treated separately from his detention at the Srebrenica Police Station.

<sup>1256</sup> Indictment, paras 23, 24(a)(iii).

<sup>1257</sup> Nedeljko Radić, T. 3506.

the cell on the ground floor of the Srebrenica Police Station on the same day.<sup>1258</sup> Nedeljko Radić, who was routinely beaten in the reception room,<sup>1259</sup> observed that Nevenko Bubanj was also kicked and beaten there.<sup>1260</sup> Nevenko Bubanj was often beaten in the corridor when he was allowed to go to the lavatory.<sup>1261</sup> When Slavoljub Žikić arrived at the Srebrenica Police Station on 5 October 1992, he found Nevenko Bubanj sitting in a corner of the cell with his hands on his knees, covered in blood, looking more dead than alive. Nevenko Bubanj was beaten black and blue and could neither stand up nor lie down. Slavoljub Žikić was told by the other detainees that this was the result of beatings.<sup>1262</sup>

434. Nevenko Bubanj was part of the group of Serb detainees exchanged at the Yellow Bridge on 16 October 1992. He died several days later in the Zvornik hospital.<sup>1263</sup>

435. The Trial Chamber concludes that the treatment suffered by Nevenko Bubanj while detained at the Srebrenica Police Station is serious enough to amount to cruel treatment and that it was inflicted with the required intent. It follows that the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(v) Veselin Šarac

436. The Indictment alleges that Veselin Šarac, born 17 November 1938, was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, where he was punched and kicked all over his body. It is alleged that he was beaten with various objects, including wooden poles and iron bars.<sup>1264</sup>

437. The Trial Chamber bases its findings primarily on the evidence given by Nedeljko Radić and Slavoljub Žikić, as the victim was not called to give evidence.

438. On 24 September 1992, Veselin Šarac, an employee of the Braćan bauxite mine,<sup>1265</sup> was captured during combat with Bosnian Muslim fighters in the vicinity of the mine and subsequently brought to the cell on the ground floor of the Srebrenica Police Station.<sup>1266</sup> On 25 September 1992, he was taken from the cell to the first floor to be interrogated by an individual

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<sup>1258</sup> Nedeljko Radić, T. 3504, 3506-3508.

<sup>1259</sup> See para. 362 *supra*.

<sup>1260</sup> Nedeljko Radić, T. 3529.

<sup>1261</sup> Nedeljko Radić, T. 3541.

<sup>1262</sup> Slavoljub Žikić, T. 3205; Nedeljko Radić, T. 3538, 3547.

<sup>1263</sup> Slavoljub Žikić, T. 3242; Nedeljko Radić, T. 3589-3591.

<sup>1264</sup> Indictment, paras 23, 24(a)(iii).

<sup>1265</sup> Slavoljub Žikić, T. 3219.

<sup>1266</sup> Nedeljko Radić, T. 3508.



in uniform who kicked him in the ribs;<sup>1267</sup> there he was beaten until bloody and unconscious, and then was taken back to the cell.<sup>1268</sup> Interrogations continued throughout his time in detention. They were conducted mostly at night and were always accompanied by beatings.<sup>1269</sup> Nedeljko Radić, who was routinely beaten in the reception room,<sup>1270</sup> also observed that Veselin Šarac was kicked and beaten there.<sup>1271</sup> When Slavoljub Žikić arrived at the Srebrenica Police Station on 5 October 1992, he found Veselin Šarac exhausted and covered in blood, looking more dead than alive. Slavoljub Žikić was told by the other detainees that this was the result of beatings.<sup>1272</sup>

439. Veselin Šarac was part of the group of Serb detainees exchanged at the Yellow Bridge on 16 October 1992.<sup>1273</sup>

440. The Trial Chamber concludes that the treatment suffered by Veselin Šarac while being detained at the Srebrenica Police Station is serious enough to amount to cruel treatment and that it was inflicted with the required intent. Thus, the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(b) Incidents at the Srebrenica Police Station and the Building Behind the Municipal Building Between December 1992 and March 1993

(i) Ilija Ivanović

441. The Indictment alleges that Ilija Ivanović, born 1 February 1962, was detained between 15 December 1992 and 20 March 1993, first at the Srebrenica Police Station, and later at the Building. During his detention, he was beaten with bare fists, wooden poles, metal bars, baseball bats and kicked with boots. It is alleged that he was stabbed with knives, beaten all over his body, smashed against the metal bars on the door and on concrete walls. According to the Indictment, on numerous occasions, he fell into a state of unconsciousness as a result of these beatings. His ribs, teeth, nose and a cheekbone were also broken.<sup>1274</sup>

442. Based primarily on the evidence given by the victim himself, the Trial Chamber finds the following. On 16 January 1993, Ilija Ivanović, a plumber by profession, while fleeing with his cousin from a Bosnian Muslim attack on the village of Čosići, in the area of Skelani, was wounded

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<sup>1267</sup> Ex. P83, “Record of witness interview” of Veselin [arac of 25 August 1994, p. 3.

<sup>1268</sup> Ex. P83, “Record of witness interview” of Veselin [arac of 25 August 1994, p. 3; Nedeljko Radić, T. 3514-3516.

<sup>1269</sup> Ex. P83, “Record of witness interview” of Veselin [arac of 25 August 1994, p. 3.

<sup>1270</sup> See para. 362 *supra*.

<sup>1271</sup> Nedeljko Radić, T. 3529.

<sup>1272</sup> Slavoljub Žikić, T. 3205; ex. P98, “Video” of 16 October 1992.

<sup>1273</sup> Slavoljub Žikić, T. 3243; Nedeljko Radić, T. 3589.

in the face and hands by a grenade which had been activated by his cousin.<sup>1275</sup> Thereupon, he was captured by uniformed Bosnian Muslims and forced to walk in the direction of Srebrenica. He was beaten and kicked on the way.<sup>1276</sup> The last part of the journey was by truck. Ilija Ivanović arrived at the Srebrenica Police Station on the same day after dark.<sup>1277</sup>

443. Upon arrival, officers in blue uniforms took Ilija Ivanović to the cell on the ground floor, where there were already a number of detainees.<sup>1278</sup> As Ilija Ivanović entered the cell, he was kicked in the back. His head banged against a metal radiator and he fell unconscious.<sup>1279</sup>

444. While in detention, he was routinely beaten, usually at night, by various unidentified individuals wearing civilian clothes or camouflage uniforms. The beatings were carried out with bare hands, metal rods and baseball bats, typically through the bars of the cell door.<sup>1280</sup> As a result, Ilija Ivanović frequently fell unconscious, and according to his own account, he spent most of the time at the Srebrenica Police Station in a “sort of a coma”.<sup>1281</sup>

445. After two to four days, Ilija Ivanović and the other detainees were taken out of the Srebrenica Police Station and transferred to the Building,<sup>1282</sup> where they were confined in the male cell.<sup>1283</sup> In late January 1993, other Serb detainees from Cerska were brought in.<sup>1284</sup>

446. Every day after dusk, throughout his period of detention at the Building, guards and individuals wearing camouflage uniforms or a combination of civilian and military clothes beat Ilija Ivanović. Men in uniform, who disembarked from a truck parked nearby, would often enter the building and beat the detainees. Among those who beat him the most was a certain Budo. Occasionally, even females participated in the maltreatment. Ilija Ivanović was beaten all over his body with rifle butts, metal rods and baseball bats, and was also stabbed with knives.<sup>1285</sup> He was

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<sup>1274</sup> Indictment, paras 23, 24(b)(i).

<sup>1275</sup> Ilija Ivanović, T. 3980, 3989-3990, 3992-3995.

<sup>1276</sup> Ilija Ivanović, T. 3995-4000, 4177-4178.

<sup>1277</sup> Ilija Ivanović, T. 4000-4003.

<sup>1278</sup> Ilija Ivanović, T. 4004-4005, 4008, listing the other detainees as a man called Kojo or Kosta, a certain Bogdan, Ratko Nikolić, and possibly Mile Trifunović, who might also have arrived on the next day.

<sup>1279</sup> Ilija Ivanović, T. 4004-4005, 4009.

<sup>1280</sup> Ilija Ivanović, T. 4015-4019, 4181.

<sup>1281</sup> Ilija Ivanović, T. 4017.

<sup>1282</sup> Ilija Ivanović, T. 4020-4021. The witness referred to this location as the ‘All People’s Defence Building’.

<sup>1283</sup> Ilija Ivanović, T. 4021-4023; ex. P474, “Sketch”.

<sup>1284</sup> Ilija Ivanović, T. 4030-4031, 4036, 4041, listing Branko Sekulić, Jakov Đokić, a certain Mićo from Sase – who the Trial Chamber believes to be Milisav Milovanović, *see* fn. 1165 *supra* – Dragan Ilić, Rade Pejić, and a woman called Anđa. Later on, a certain Cane and Mile Radovanović were brought in as well: Ilija Ivanović, T. 4039.

<sup>1285</sup> Ilija Ivanović, T. 4042-4046, 4179.

particularly maltreated after the return of a Bosnian Muslim who had been abused while detained by Bosnian Serbs in Bratunac.<sup>1286</sup>

447. Halfway through Ilija Ivanović's time in detention, he was taken out of the cell to the reception room. According to him, his cheekbone and nose were broken during interrogation by a certain Džemo Tihic.<sup>1287</sup> At times, he was interrogated in the presence of the following: a certain Ismet Odžić, someone referred to as Mandža, Zulfo Tursunović and an individual who Ilija Ivanović presumed to be the Accused.<sup>1288</sup> On one occasion, he was taken to the municipal building for questioning. The Bosnian Muslim fighter who took him there hit him "in the head with a knife".<sup>1289</sup> During the time spent in detention, Ilija Ivanović was often unconscious. As a result of the maltreatment, he sustained fractures to his ribs and broken teeth, and was left with many scars on his body.<sup>1290</sup>

448. In late February 1993, Ilija Ivanović was admitted to the Srebrenica hospital, where he spent five or six days receiving medical treatment. He was not beaten while at the hospital.<sup>1291</sup>

449. At the end of February 1993, after two unsuccessful exchange attempts during which Ilija Ivanović and Ratko Nikolić were taken out of Srebrenica, they were exchanged for the dead bodies of Bosnian Muslims. They were taken in a truck by Mandža, Ahmo Tihic and Zulfo Tursunović to a location near Kragljivoda and handed over to the Bosnian Serbs.<sup>1292</sup> Today, Ilija Ivanović is partially disabled due to the maltreatment he suffered, and he must remain under permanent medical supervision.<sup>1293</sup>

450. The Trial Chamber concludes that the treatment of Ilija Ivanović while detained at the Srebrenica Police Station and the Building is serious enough to amount to cruel treatment and that it was inflicted with the required intent. Therefore, the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(ii) Ratko Nikolić

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<sup>1286</sup> Ilija Ivanović, T. 4158-4159.

<sup>1287</sup> Ilija Ivanović, T. 4044, 4069-4070.

<sup>1288</sup> Ilija Ivanović, T. 4050-4060. *See also* para. 544 *infra*.

<sup>1289</sup> Ilija Ivanović, T. 4060-4061.

<sup>1290</sup> Ilija Ivanović, T. 4043, 4049; Svetlana Trifunović, T. 2042.

<sup>1291</sup> Ilija Ivanović, T. 4086-4088.

<sup>1292</sup> Ilija Ivanović, T. 4090-4096; ex. P45, "List" of 9 February 1993.

<sup>1293</sup> Ilija Ivanović, T. 4097-4101; ex. P476, "Specialist's Report" of 1 March 1993/23 April 1996; ex. P477, "Specialist's Report" of 2 April 1993; ex. P478, "Report" of 22 April 1993; ex. P479, "Diagnosis" of 29 December 1993; ex. P480, "Specialist's Report" of 27 April ?/5 November 1994 (date illegible).

451. The Indictment alleges that Ratko Nikolić, a Serb civilian born 12 July 1945, was detained between 15 December 1992 and 20 March 1993 first at the Srebrenica Police Station and later at the Building. During his detention, he was subjected to severe beatings. It is alleged that he was beaten with wooden poles, baseball bats and metal bars, as well as kicked and punched, and stabbed with knives. According to the Indictment, his ribs were fractured, and on numerous occasions, he fell into a state of unconsciousness as a result of these beatings.<sup>1294</sup>

452. The Trial Chamber bases its findings primarily on the evidence given by the victim. Following the Bosnian Muslim attack on Kravica on 7 January 1993,<sup>1295</sup> Ratko Nikolić, a watchman by profession,<sup>1296</sup> had been hiding in various places around his native village of Zonjići.<sup>1297</sup> On 12 January 1993, he was captured by seven armed Bosnian Muslims,<sup>1298</sup> when he was also wounded in his left leg.<sup>1299</sup> Ratko Nikolić was then forced to walk to a nearby location called Lolići, where he was picked up by a passenger van. Inside the vehicle, there were more than a dozen armed Bosnian Muslim men dressed in white camouflage uniform or civilian clothes, among them Zulfo Tursunović and the Accused. The group arrived in Srebrenica, having walked part of the distance, later that same day.<sup>1300</sup>

453. Upon arrival in Srebrenica, Ratko Nikolić was confined in the cell on the ground floor of the Srebrenica Police Station where other Serb detainees were already held.<sup>1301</sup> The next morning, Ratko Nikolić was taken to the first floor of the Srebrenica Police Station, where he was interrogated by a man armed with a pistol and a knife.<sup>1302</sup> On or around 16 January 1993, four more Serb detainees were brought in.<sup>1303</sup> During his first night in detention, Ratko Nikolić was beaten through the bars of the cell.<sup>1304</sup> He was subsequently beaten and kicked on a daily basis by unidentified individuals, in particular by two persons wearing black balaclavas with eye slits.<sup>1305</sup> On occasion, Zulfo Tursunović came to the detainees' cell and asked what had happened to them. The detainees remained silent.<sup>1306</sup>

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<sup>1294</sup> Indictment, paras 23, 24(b)(ii).

<sup>1295</sup> See VIII.B.6., "Attack on the Villages of Kravica, [iljkovići and Je`estica on 7 and 8 January 1993".

<sup>1296</sup> Ratko Nikolić, T. 2574.

<sup>1297</sup> Ratko Nikolić, T. 2587-2588.

<sup>1298</sup> Ratko Nikolić, T. 2587, 2592-2593; ex. P47, "Interrogation Notes" of Ratko Nikolić of 13 January 1993.

<sup>1299</sup> Ratko Nikolić, T. 2703.

<sup>1300</sup> Ratko Nikolić, T. 2592-2600.

<sup>1301</sup> Ratko Nikolić, T. 2600-2601, listing the other detainees at the time as Kostadin Popović, aka Kojo, a certain Mićo – who the Trial Chamber believes to be Milisav Milovanović, *see fn. 1165 supra* – and a man named Drago.

<sup>1302</sup> Ratko Nikolić, T. 2605.

<sup>1303</sup> Ratko Nikolić, T. 2625, 2629.

<sup>1304</sup> Ratko Nikolić, T. 2604.

<sup>1305</sup> Ratko Nikolić, T. 2625-2626.

<sup>1306</sup> Ratko Nikolić, T. 2627-2628.

454. On or around 16 January 1993, Ratko Nikolić and the other detainees were transferred to the Building, where the beatings continued unabated.<sup>1307</sup> The guards regularly allowed people from the outside to enter the cell, although on one occasion, the guards tried to prevent such intrusion.<sup>1308</sup> He was beaten all over by unidentified individuals with fists, sticks, rifle butts, or whatever the perpetrators had at hand.<sup>1309</sup> In late January 1993, the detainees were joined by a number of Serbs who had spent several months in a stable in the Cerska area.<sup>1310</sup> On or around 6 February 1993, unidentified men took Ratko Nikolić and the other detainees to the reception room, stripped them to the waist, and then kicked and stomped on them. As a result, five of his ribs were broken, and he lost consciousness.<sup>1311</sup> Thereafter, as almost every day, Zulfo Tursunović came to see the detainees.<sup>1312</sup> One day, the guards admitted a bearded man into the cell who cut Ratko Nikolić's throat with a knife.<sup>1313</sup> In addition to his fractured ribs, Ratko Nikolić lost some of his teeth.<sup>1314</sup>

455. On or about 27 February 1993, after two unsuccessful exchange attempts, Ratko Nikolić and Ilija Ivanović were exchanged at Kragljivoda.<sup>1315</sup> Having also lost a significant amount of weight during detention, he was treated in hospital for about two weeks subsequent to his exchange.<sup>1316</sup>

456. The Trial Chamber concludes that the treatment incurred by Ratko Nikolić while detained at the Srebrenica Police Station and at the Building is serious enough to amount to cruel treatment and that it was inflicted with the required intent. Therefore, the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(iii) Rado Pejić

457. The Indictment alleges that Rado Pejić, called Mišo, a Serb civilian born 27 March 1956, was detained between 15 December 1992 and 20 March 1993 first at the Srebrenica Police Station and later at the Building. During his detention, he was subjected to severe beatings. It is alleged that Rado Pejić was beaten with wooden sticks, wooden poles, baseball bats, metal bars and rifle butts, as well as kicked and beaten all over his body. According to the Indictment, on numerous

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<sup>1307</sup> Ratko Nikolić, T. 2629, 2634-2635.

<sup>1308</sup> Ratko Nikolić, T. 2721-2722.

<sup>1309</sup> Ratko Nikolić, T. 2635; Ilija Ivanović, T. 4042.

<sup>1310</sup> Ratko Nikolić, T. 2629-2633.

<sup>1311</sup> Ratko Nikolić, T. 2638-2639, 2717.

<sup>1312</sup> Ratko Nikolić, T. 2636-2637.

<sup>1313</sup> Ratko Nikolić, T. 2636.

<sup>1314</sup> Ratko Nikolić, T. 2635, 2651.

<sup>1315</sup> Ratko Nikolić, T. 2644-2645; ex. P45, "List" of 9 February 1993.

<sup>1316</sup> Ratko Nikolić, T. 2649-2650.

occasions, he fell into a state of unconsciousness as a result of these beatings, lost a significant portion of his body weight, and being unable to walk, had to be exchanged on a stretcher.<sup>1317</sup>

458. Based primarily on the evidence given by Ilija Ivanović, witness C007 and Anja Radović, the Trial Chamber finds that in June 1992, Rado Pejić, a farmer,<sup>1318</sup> was captured in the Cerska area by armed and uniformed Bosnian Muslim men, who beat him until he lost consciousness.<sup>1319</sup> He was then confined at the already mentioned stable in the area of Cerska for more than six months, together with other Serb and Bosnian Muslim detainees,<sup>1320</sup> and under the same conditions as previously described.<sup>1321</sup>

459. On 26 January 1993, Rado Pejić and the other detainees from the stable were transferred to Srebrenica.<sup>1322</sup> Upon arrival, he was taken to the Srebrenica Police Station, where he was beaten unconscious by several young men with sticks.<sup>1323</sup> Thereafter, he was taken to the Building and confined in the male cell, together with other Serb detainees.<sup>1324</sup> At this location, he was routinely maltreated during the day and at night-time with various objects, including sticks, knives and rifle butts.<sup>1325</sup> The assailants wore civilian clothes or parts of military uniforms.<sup>1326</sup> One of them appeared to beat Rado Pejić in revenge for treatment suffered by him while detained by Bosnian Serbs in Bratunac.<sup>1327</sup> On one occasion, Džemo Tihčić lit Rado Pejić's beard with a match in the reception room.<sup>1328</sup> Zulfo Tursunović visited the detainees at least once.<sup>1329</sup>

460. Sometime at the end of February 1993, Rado Pejić was brought to the Srebrenica hospital to receive medical care. He was not beaten during his stay at the hospital. Thereafter, he was taken back to the Building, where maltreatment continued.<sup>1330</sup>

461. On 21 March 1993, Rado Pejić was released from detention. UNPROFOR soldiers arrived at the Building and asked him to come with them. As he was barely able to walk due to his state of

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<sup>1317</sup> Indictment, paras 23, 24(b)(iii).

<sup>1318</sup> C007, T. 4479.

<sup>1319</sup> C007, T. 4485-4492; ex. P62, "Interrogation Notes" of Rado Pejić (undated).

<sup>1320</sup> C007, T. 4490-4494, 4524.

<sup>1321</sup> See para. 386 *supra*.

<sup>1322</sup> See para. 387 *supra*.

<sup>1323</sup> C007, T. 4520, 4606; Anja Radović, T. 4814-4815.

<sup>1324</sup> C007, T. 4526-4527, 4533, listing the other detainees as Branko Sekulić, Dragan Ilić, Jakov \okić, a certain Mićo (who the Trial Chamber believes to be Milisav Milovanović, *see* fn. 1165 *supra*) and a certain Kosta (who the Trial Chamber believes to be Kostadin Popović: C007, T. 4533-4534).

<sup>1325</sup> C007, T. 4536-4540.

<sup>1326</sup> C007, T. 4541.

<sup>1327</sup> C007, T. 4540, 4607-4608.

<sup>1328</sup> C007, T. 4640-4641; Ilija Ivanović, T. 4069.

<sup>1329</sup> C007, T. 4542, 4609.

<sup>1330</sup> C007, T. 4536-4540, 4563-4566; Ilija Ivanović, T. 4201.

exhaustion, he was put on a stretcher. A white UNPROFOR APC took him to the Yellow Bridge, where he was handed over to the Bosnian Serbs.<sup>1331</sup> Rado Pejić's body weight was reduced to some 30 kilograms while in detention, and he had to be treated in a hospital in Zvornik for several weeks subsequent to his release.<sup>1332</sup>

462. The Trial Chamber does not find the account of maltreatment of Rado Pejić given by witness C007 to be in contradiction with video evidence adduced by the Defence,<sup>1333</sup> where Rado Pejić is depicted without visible injuries on his face.<sup>1334</sup>

463. As a result, the treatment suffered by Rado Pejić while detained at the Srebrenica Police Station and the Building is serious enough to amount to cruel treatment and it was inflicted with the required intent. The Trial Chamber concludes that the elements of cruel treatment pursuant to Article 3 of the Statute have been established beyond reasonable doubt.

(iv) Stanko Mitrović

464. The Indictment alleges that Stanko Mitrović, called Čane, a Serb civilian whose date of birth is unknown, was detained between 15 December 1992 and 20 March 1993 first at the Srebrenica Police Station and later at the Building. During his detention, he was subjected to severe beatings which were carried out with wooden sticks, wooden poles, baseball bats, metal bars and rifle butts. It is alleged that he was kicked and beaten all over his body, and, on numerous occasions, fell unconscious as a result of this treatment.<sup>1335</sup>

465. The Trial Chamber bases its findings primarily on the evidence given by Ilija Ivanović and Branimir Mitrović, as the victim was not called to give evidence.

466. On 16 January 1993, Stanko Mitrović, nicknamed Čane, who was physically and mentally handicapped,<sup>1336</sup> was captured by Bosnian Muslim fighters in the Skelani area and confined at the Srebrenica Police Station.<sup>1337</sup> Several days later, he was transferred to the Building.<sup>1338</sup> Once, while

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<sup>1331</sup> C007, T. 4573-4575; Piers Tucker, T. 5921-5924; ex. D1010, "Video"; Ejub Gušter, T. 15448-15466; Rex Dudley, T. 14953-14956; Anthony Birtley, T. 15124-15125; Anđa Radović, T. 4840.

<sup>1332</sup> C007, T. 4576; ex. P384, "Patient History" of May 1993.

<sup>1333</sup> Ex. D1010, "Video". In its Final Brief (paras 249-253), the Defence argues that Rado Pejić's physical state did not differ from that of an average male in Srebrenica at the time. What ex. D1010 *does* reveal, however, is that Rado Pejić was in a much more emaciated state than the observing locals.

<sup>1334</sup> See Defence Final Brief, para. 248. However, the Trial Chamber notes that C007 did not allege that Rado Pejić had sustained any injuries to his head.

<sup>1335</sup> Indictment, paras 23, 24(b)(iv).

<sup>1336</sup> Ilija Ivanović, T. 4068-4069; Branimir Mitrović, T. 3755, 3806.

<sup>1337</sup> Branimir Mitrović, T. 3749, 3753-3756.

<sup>1338</sup> Ilija Ivanović, T. 4031, 4039.

in detention, he wandered out of the Building, but was immediately brought back to the male cell.<sup>1339</sup>

467. Like the other detainees at the Building, Stanko Mitrović was beaten on a daily basis with various objects such as rods, bats and rifle butts. His assailants beat him on his way to the toilet and specifically targeted his disabled limbs.<sup>1340</sup>

468. On or around 6 February 1993, Stanko Mitrović was exchanged at Vitez, halfway between Srebrenica and Skelani.<sup>1341</sup>

469. The Trial Chamber concludes that the treatment of Stanko Mitrović while detained at the Building is serious enough to amount to cruel treatment and that it was inflicted with the required intent.<sup>1342</sup> Thus, the elements of cruel treatment pursuant to Article 3 of the Statute have been established.

(v) Mile Trifunović

470. The Indictment alleges that Mile Trifunović, a Serb civilian born in 1920, was detained between 15 December 1992 and 20 March 1993 first at the Srebrenica Police Station and later at the Building. During his detention, he was subjected to severe beatings which were carried out with wooden sticks, wooden poles, baseball bats, metal bars and rifle butts. It is alleged that he was kicked and beaten all over his body, and on numerous occasions even to unconsciousness.<sup>1343</sup>

471. The Trial Chamber bases its findings primarily on the evidence given by Ilija Ivanović and Svetlana Trifunović, as the victim is deceased.

472. On or about 16 January 1993, Mile Trifunović was captured by Bosnian Muslim fighters in the area of Kostolomci, beaten, and brought to the Building.<sup>1344</sup> His granddaughter Svetlana, who was detained in a separate cell within the same building, regularly heard that the male detainees were beaten. She specifically heard Mile Trifunović crying out in pain several times and observed that his face was severely bruised.<sup>1345</sup>

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<sup>1339</sup> Branimir Mitrović, T. 3806.

<sup>1340</sup> Ilija Ivanović, T. 4068-4069.

<sup>1341</sup> Branimir Mitrović, T. 3770-3774; Ilija Ivanović, T. 4075.

<sup>1342</sup> However, there is no evidence that Stanko Mitrović was cruelly treated while he was detained at the Srebrenica Police Station.

<sup>1343</sup> Indictment, paras 23, 24(b)(iv).

<sup>1344</sup> Svetlana Trifunović, T. 2025-2035, 2059; Ilija Ivanović, T. 4005-4006; ex. P19, "List" of 3 February 1993, p. 2.

<sup>1345</sup> Svetlana Trifunović, T. 2042-2045.



473. Mile Trifunović was exchanged in mid-February 1993. He died a few days later at a hospital in Užice, Serbia.<sup>1346</sup>

474. The Trial Chamber concludes that the treatment suffered by Mile Trifunović while detained at the Building is serious enough to amount to cruel treatment and that it was inflicted with the required intent.<sup>1347</sup> As a result, the elements of cruel treatment pursuant to Article 3 of the Statute have been established.

### **C. Individual Criminal Responsibility of the Accused**

#### **1. Superior-Subordinate Relationship**

475. Whether the Accused bears individual criminal responsibility pursuant to Article 7(3) of the Statute for the crimes established in the preceding section of this Chapter depends, in the first place, on whether a superior-subordinate relationship existed between him and the subordinates responsible for murder and cruel treatment during the relevant time.<sup>1348</sup>

##### **(a) Submissions**

476. In the Indictment, the Prosecution alleges that “members of the military police under the command and control” of the Accused detained several Serb individuals who were subjected to cruel treatment and, in some instances, killed “by the guards and/or by others with the support of the guards”.<sup>1349</sup> The Prosecution submits that there is evidence that the Accused exercised effective control over “his Srebrenica military police subordinates” and that the guards both at the Srebrenica Police Station and the Building were members of the Srebrenica military police.<sup>1350</sup>

477. On the same point, the Defence submits that the perpetrators of murder and cruel treatment, with the possible exception of ‘Kemo’,<sup>1351</sup> remain unknown and unidentified. According to the Defence, most, if not all of the crimes in question were committed by so-called ‘opportunistic

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<sup>1346</sup> Svetlana Trifunović, T. 2051-2053, 2056.

<sup>1347</sup> Although the Indictment alleges that Mile Trifunović was detained at the Srebrenica Police Station, there is no evidence in support of this allegation.

<sup>1348</sup> See VI.B.3., “Superior-Subordinate Relationship”.

<sup>1349</sup> Indictment, paras. 22, 23. These charges were further specified in the Prosecution Pre-Trial Brief by charging the Accused under Article 7(3) of the Statute “for the acts or omissions of his subordinates” (para. 30), for severe beatings “by the guards and other persons admitted into the prison by the guards” (para. 55), further by referring to “the military police, ABiH guards, soldiers, and other persons, who, as a result of the acts or omissions of the subordinates of Naser Orić” caused grievous injuries (para. 56), and by alleging that the Accused was responsible “through the culpable acts or omissions of his subordinates and other persons” (para. 57).

<sup>1350</sup> Indictment, paras 22, 26; Prosecution Final Brief, paras 335, 341-351. See also Prosecution Pre-Trial Brief, paras 20, 55-57, 62-65; Prosecution Closing Argument, T. 16530-16531.

<sup>1351</sup> Regarding the identification of Kemo, see fn. 1119 *supra*.

visitors', *i.e.*, persons who entered the detention facilities from the outside, as opposed to the guards. No link has been established between the Accused and these perpetrators, much less that a superior-subordinate relationship existed between them.<sup>1352</sup> The Defence disputes that the ground floor of the Srebrenica Police Station and the Building were controlled by members of the Srebrenica military police, and moreover, that the Accused had any control over this body.<sup>1353</sup>

478. Before examining the Defence submission that murder and cruel treatment were committed by persons entering the detention facilities from the outside, the Trial Chamber refers to its earlier finding regarding the law on superior criminal responsibility, which does not presuppose that the direct perpetrators of a crime punishable under the Statute be identical to the subordinates of a superior. It is only required that the relevant subordinates, by their own acts or omissions, be criminally responsible for the acts and omissions of the direct perpetrators.<sup>1354</sup>

479. As the Prosecution alleges that members of the Srebrenica military police are responsible for acts of murder and cruel treatment at the Srebrenica Police Station and at the Building, the Trial Chamber will first examine whether criminal responsibility can be attached to members of this body, either for their own acts or for their omissions with respect to others.

(b) Whether Members of the Srebrenica Military Police Bear Responsibility for the Crimes of Murder and Cruel Treatment

(i) Identity of the Direct Perpetrators

480. Recapitulating from the previous Section of this Chapter, the conclusions of the Trial Chamber are that 'Kemo' or Kemal Mehmetović is responsible for the murder of Dragutin Kukić and an unidentified youth is responsible for the murder of Milisav Milovanović. As regards Dragan Ilić, Kostadin Popović and Branko Sekulić, the finding is that their deaths were caused by the treatment inflicted upon them by unknown perpetrators. The evidence further establishes that perpetrators of cruel treatment were the aforementioned 'Kemo', 'Mrki', 'Beli', 'Budo', Džemo Tihiić, as well as a number of unidentified individuals who appeared to be either guards or to have entered the detention facilities from the outside.<sup>1355</sup>

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<sup>1352</sup> Defence Final Brief, paras 483-496.

<sup>1353</sup> Defence Final Brief, paras 532-549, 578-730.

<sup>1354</sup> See VI.B.2., "Scope of the 'Principal Crime'".

<sup>1355</sup> The Trial Chamber notes the evidence given by Slavoljub Žikić, which was corroborated by Nedeljko Radić and Ilija Ivanović, to the effect that "anybody who wanted to beat [us] could enter the room" and that it was "as if [the guards] weren't there": Slavoljub Žikić, T. 3209; Nedeljko Radić, T. 3529; Ilija Ivanović, T. 4018, 4045. Slavoljub Žikić claimed that on one occasion, the guards even provided an assailant with the keys to the cell: T. 3210.

481. None of the above-mentioned perpetrators known by name or nickname were identified to be members of the Srebrenica military police.<sup>1356</sup>

(ii) Identity of the Detaining Force

482. When asked during his Interview whether the military police were in charge of the “prison”, the Accused answered: “Yes. That is the commander of the military police”.<sup>1357</sup> This statement, however, needs to be evaluated in light of other evidence.

483. The Serb detainees who gave evidence did not specifically allege that they had been detained by the *military police*.<sup>1358</sup> Some of these witnesses even gave evidence indicating that it was the *civilian police*, at least to some degree, that was involved with their detention.<sup>1359</sup> Šuhra \ilović gave evidence that in January 1993, civilian police commander Nurija Jusufović enquired about the possibility of obtaining blankets for the Serb detainees at the Building.<sup>1360</sup> Several witnesses described that a one-armed civilian policeman, Elvir \ozić, nicknamed ‘Ze’le’,<sup>1361</sup> had some involvement with the Serb detainees.<sup>1362</sup> However, Nedret Mujkanović gave evidence that Serb detainees were handed back to the military police following treatment at the Srebrenica hospital.<sup>1363</sup> Bećir Bogilović, who was the chief of the civilian police at the relevant time, explicitly excluded the possibility that the civilian police confined Serbs between April 1992 and March 1993.<sup>1364</sup> There is convincing evidence that the ground floor of the Srebrenica Police Station, where the Serb detainees were held, was used by the Srebrenica military police.<sup>1365</sup>

484. In evaluating the evidence regarding the identity of the detaining force, the Trial Chamber considers the Serb detainees to have been the least able to distinguish between civilian and military police, especially considering the exceptional circumstances, including the apparent lack of

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<sup>1356</sup> See fns 1117, 1233 *supra*.

<sup>1357</sup> Ex. P329, “Interview” of the Accused, tape 17, p. 20. The Trial Chamber accepts the Defence submission as regards the correct translation of both the question posed to the Accused and his answer; *see also* para. 56 *supra*. From the context, the Trial Chamber understands the term “prison” to refer only to the Srebrenica Police Station.

<sup>1358</sup> Witness C007 stated he had “no idea” whether it was the civilian or the military police that detained him: T. 4607.

<sup>1359</sup> Ilija Ivanović gave evidence that in the Srebrenica Police Station, there were “police officers who were wearing blue uniforms, the kind they used to wear in the former Yugoslavia”: T. 4004. Slavoljub Žikić and Ratko Nikolić both gave evidence that they were interrogated on the first floor of the Srebrenica Police Station, which, according to the testimony of Bećir Bogilović, was used by the civilian police: *see* Slavoljub Žikić, T. 3218; Ratko Nikolić, T. 2605; Bećir Bogilović, T. 6245.

<sup>1360</sup> [uhra \ilović, T. 15256-15258.

<sup>1361</sup> *See* Nedret Mujkanović, T. 5262-5264; Sabra Kolenović, T. 10218-10219; Mustafa [aćirović, T. 13337-13338; [uhra \ilović, T. 15260-15261; Ejub Gušter, T. 15462-15463; ex. D1011, “Photo”. However, Rex Dudley was uncertain whether ‘Ze’le’ was a military or a civilian policeman: T. 14889. Bećir Bogilović referred to Elvir \ozić as being one of his policemen: T. 6499.

<sup>1362</sup> Svetlana Trifunović, T. 2064, 2070; Ejub Gušter, T. 15462; [uhra \ilović, T. 15260-15261.

<sup>1363</sup> Nedret Mujkanović, T. 5000.

<sup>1364</sup> Bećir Bogilović, T. 6249-6250.

uniforms, insignia and other means of identification. The Trial Chamber has attached some weight to the evidence given by Nedret Mujkanović, especially in view of his contacts with the Accused at the time and his close ties with the Srebrenica authorities. In evaluating the testimony of Bećir Bogilović, the Trial Chamber has balanced his former position as Chief of the Srebrenica Public Security Station and his consequent informed knowledge of the situation, against the interest he may have to disengage the civilian police and himself from the events that took place at the Srebrenica Police Station and the Building. More important is his evidence that the Srebrenica military police used the ground floor of the Srebrenica Police Station. Against this backdrop, the evidence given by Šuhra \ilović standing alone does not exclude the possibility that the Srebrenica military police were responsible for the said detention facilities. Finally, the Trial Chamber has given due consideration to the part of the Accused's Interview referred to above,<sup>1366</sup> which corroborates the evidence that the Srebrenica military police was the detaining force.

485. The Trial Chamber has also considered numerous documents referred to by the Prosecution which lend support to the assumption that the Srebrenica military police was the competent authority dealing with Serb detainees,<sup>1367</sup> particularly, exhibits P458/P561 and P15, P16, P17 and P18, which have been contested by the Defence.<sup>1368</sup> The relevant parts of these exhibits show that the Srebrenica military police were recording the arrival and detention of Serb detainees, taking them from the Srebrenica Police Station for interrogation and returning them thereafter.

486. The Building was initially used as a storage facility,<sup>1369</sup> but then was re-designated to house a detention facility during a joint meeting of the Srebrenica War Presidency and the Srebrenica

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<sup>1365</sup> Bećir Bogilović, T. 6245.

<sup>1366</sup> See para. 482 *supra*.

<sup>1367</sup> Prosecution Final Brief, paras 344, 440, 458; ex. P15, P16, P17, P18, "Military Police Reports", purportedly authored by the Srebrenica military police from various dates in 1992/1993; ex. P458/P561, "Military Police Log", purportedly authored by the Srebrenica military police from various dates between 3 December 1992 and 18 January 1993. There is other written evidence allowing for the inference that, at another time, the *civilian* authorities in Srebrenica were involved in detaining Serbs as well: ex. D987, "Handwritten note" (undated), signed by Nurija Jusufović, asking [Hajrudin] Avdić what to do with nine Serb prisoners from Karno. In that context, see Suad Smajlović, T. 14660; Mustafa [aćirović, T. 13303-13310; ex. D866, "Video"; ex. D245, "Official Note" of 22 October 1996.

<sup>1368</sup> Defence Final Brief, paras 607-608, 636-646; Defence Closing Argument, T. 16362. Regarding ex. P458/P561, see para. 28 *supra*. Regarding ex. P15, P16, P17 and P18, it is highly significant that all the entries relating to Serb detainees are signed by persons other than \anan \ananović. In addition, the question of signatures does not necessarily have an impact on the accuracy of the contents of these documents.

<sup>1369</sup> Bećir Bogilović, T. 6227-6229, 6344-6345; ex. P516, "Photo".

Armed Forces Staff held on 23 December 1992, during which the Accused was present.<sup>1370</sup> It became operational, at the latest, as of January 1993.<sup>1371</sup>

487. Although there appears to be no direct evidence that any of the perpetrators of the crimes committed in the Building were in fact members of the military police, it is significant that almost all of the Serb detainees confined in the Building were previously held at, and transferred from, the Srebrenica Police Station,<sup>1372</sup> where they had been detained under the authority of the Srebrenica military police. The Trial Chamber does not doubt that this authority remained unchanged with the transfer of the detainees to the Building.

488. The Trial Chamber thus finds that between 24 September 1992 and 20 March 1993, the Srebrenica military police detained the Serb individuals identified in the Indictment at both the Srebrenica Police Station and the Building, where they were cruelly treated and some of them were killed.

(iii) Responsibility of the Srebrenica Military Police

489. The Trial Chamber recalls that some of the perpetrators of murder and cruel treatment were guards, while others came from the outside and were not prevented from entering and maltreating the detainees. Although some of the perpetrators are identified by name or nickname, there is no evidence to prove that they were part of the Srebrenica military police.

490. From the very moment the Srebrenica military police started to detain Serbs, it assumed all duties and responsibilities under international law relating to the treatment of prisoners in time of conflict.<sup>1373</sup> These responsibilities primarily entailed the duty to ensure that, at all times, the Serb detainees were treated humanely, without any discrimination based on ethnicity.<sup>1374</sup> In particular, the Srebrenica military police were bound to ensure that the detainees were not subjected to any kind of violence to life and person such as murder, mutilation, cruel treatment, torture, degrading or humiliating treatment, or to any reprisals.<sup>1375</sup> In fulfilment of these obligations, the commander of the Srebrenica military police were required to select suitable guards and provide adequate space

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<sup>1370</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, pp. 43-44, discussing the question of providing "weapons for guards" and taking a decision to "ensure premises for the prison".

<sup>1371</sup> [uhra \ilović was aware that a detention facility existed in the vicinity of the municipal building in January 1993: T. 15256-15258.

<sup>1372</sup> The only exception concerns Mile Trifunović, for whom there is no evidence that he was detained at the Srebrenica Police Station; *see* fn. 1347 *supra*.

<sup>1373</sup> *See, e.g.*, 1949 Geneva Convention III, fn. 860 *supra*.

<sup>1374</sup> *See* 1949 Geneva Convention III, Articles 13, 16.

and facilities for the detainees. He had a responsibility to ensure that these duties were met at all times.

491. The Trial Chamber recalls that although the Srebrenica military police was formally established on 1 July 1992, it only became operational as of August 1992.<sup>1376</sup> On 14 October 1992, Mirzet Halilović, who had been appointed the first commander of the Srebrenica military police, was placed under the authority of SJB chief Bećir Bogilović.<sup>1377</sup> On 22 November 1992, when Mirzet Halilović was removed and replaced by Atif Krdžić, Bećir Bogilović's authority over Mirzet Halilović came to an end. Atif Krdžić remained commander of the Srebrenica military police beyond 20 March 1993.

a. September-October 1992

492. Mirzet Halilović headed the Srebrenica military police when Dragutin Kukić was killed and Nedeljko Radić, Slavoljub Žikić, Zoran Branković, Nevenko Bubanj and Veselin Šarac were cruelly treated at the Srebrenica Police Station between 24 September 1992 and 16 October 1992.<sup>1378</sup> Mirzet Halilović's office was on the same floor and located at a distance of only a few metres from the cell where these crimes took place. The events proved to have happened during this time-period are indicative of lack of adequate supervision on his part of the detention facility or the activities of the guards while carrying out their duties. Neither is there evidence that Mirzet Halilović ever visited the Serb detainees, during the day or at night, to assure himself of their conditions of detention. Rather than evidence that diligence was exercised in selecting the guards and ensuring that they were treating the detainees according to the rules of international law, there is ample proof that some of the guards beat prisoners and, on one occasion, even killed one. The evidence does not show that any guard was ever admonished or disciplined in relation to the treatment of the detainees, or for having failed to prevent individuals from entering the Srebrenica Police Station and maltreat the detainees. There is also no indication that Mirzet Halilović ever delegated this responsibility to any of his subordinates.

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<sup>1375</sup> See 1949 Geneva Convention III, Article 13: “[P]risoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults [...]”

<sup>1376</sup> Bećir Bogilović, T. 6247; *see also* para. 181 *supra*.

<sup>1377</sup> Bećir Bogilović gave evidence that it was only Mirzet Halilović, as opposed to the entire Srebrenica military police, which was placed under his command: T. 6257, 6315.

<sup>1378</sup> The fact that between 14 and 16 October 1992, Mirzet Halilović was placed under the authority of the SJB chief, Bećir Bogilović, is of no relevance for Mirzet Halilović's responsibility because he remained commander of the Srebrenica military police until his replacement in November 1992.

493. In addition, Slavoljub Žikić gave evidence that on one occasion, he was kicked in the stomach by a certain ‘Mirzet’, who the Trial Chamber has no doubt was Mirzet Halilović. During one interrogation, soldiers hit Slavoljub Žikić whenever ‘Mirzet’ looked away.<sup>1379</sup> The violent and uncontrolled behaviour of Mirzet Halilović, and the suspicion of his involvement in the killing of one of the detainees,<sup>1380</sup> ultimately led to his placement under the authority of Bećir Bogilović, and finally, in November 1992, to his replacement as commander of the Srebrenica military police.<sup>1381</sup>

b. December 1992-March 1993

494. Atif Krdžić was commander of the Srebrenica military police between 15 December 1992 and 20 March 1993 when Dragan Ilić, Milisav Milovanović, Kostadin Popović and Branko Sekulić were killed at the Building, and when Ilija Ivanović, Ratko Nikolić, Rado Pejić, Stanko Mitrović and Mile Trifunović were cruelly treated while detained at the Srebrenica Police Station and the Building. As stated above, the Trial Chamber is satisfied that the Srebrenica military police continued to be the force detaining these individuals after their transfer from the Srebrenica Police Station to the Building.<sup>1382</sup>

495. Following the appointment of Atif Krdžić as commander, the Srebrenica military police underwent structural changes in order to enhance its performance.<sup>1383</sup> However, the replacement of its commander and other changes, regardless of whether they were implemented, did not benefit the Serb detainees at the Building. To the contrary, the number of detainees maltreated or killed during this period increased. Although it is uncertain whether any of the guards present in September and October 1992 were still on duty between December 1992 and March 1993, as a matter of fact, guards continued to maltreat the prisoners and either permitted individuals from the outside or failed to prevent them from entering to maltreat the detainees. Likewise, there is no evidence of any supervision over the guards, of any disciplinary measures against them, or of any visit by Atif Krdžić, or a person assigned by him, for that matter at any time.

c. Conclusion as to the Responsibility of the Srebrenica Military Police

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<sup>1379</sup> Slavoljub Žikić, T. 3218-3219.

<sup>1380</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 4, referring to the suspicion that Mirzet Halilović had killed a Serb detainee.

<sup>1381</sup> See para. 182 *supra*, paras 505-506 *infra*.

<sup>1382</sup> See para. 488 *supra*.

<sup>1383</sup> See paras 505-511 *infra*.

496. The only conclusion to draw from this evidence is that the Srebrenica military police, through its commanders, *i.e.*, Mirzet Halilović and Atif Krdžić respectively, are responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building. In the case of Mirzet Halilović, the evidence shows that his presence at the Srebrenica Police Station, rather than serving as a means to prevent the cruel treatment of detainees, contributed to it. The inferences to be drawn from this for the purpose of his *mens rea* are obvious.<sup>1384</sup> In the case of Atif Krdžić, his conspicuous absence from the Srebrenica Police Station and the Building<sup>1385</sup> at a time when he could not but have been aware of what had happened during his predecessor's tenure, coincides with more killings and more maltreatment. The Trial Chamber has no hesitation in concluding that there is no reason why Atif Krdžić, the head of the Srebrenica military police after 22 November 1992, should not have become aware of the crimes committed, except for wilful blindness.

(c) Whether the Accused Effectively Controlled the Srebrenica Military Police

497. During his Interview, the Accused was asked about the Srebrenica military police. There is doubt as to whether in answering a particular question, he ever acknowledged that the Srebrenica military police came under his command.<sup>1386</sup> In addition, even if he did, his answer is not related to a specific time-frame. The Trial Chamber, therefore, does not attach undue weight to the submission of the Prosecution that the Accused admitted that the Srebrenica military police fell under his command.<sup>1387</sup>

498. No conclusive evidence has been adduced which would shed light on the internal structure of the Srebrenica military police.<sup>1388</sup> In addition, there are different accounts as to whom this body reported and who effectively controlled the Srebrenica military police at any given time between August 1992 and its dissolution in April 1993. As the case-law of the Tribunal recognises certain criteria as indicative of authority in terms of effective control,<sup>1389</sup> the Trial Chamber will next

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<sup>1384</sup> As regards *mens rea*, the Defence submits that "severe malnutrition and the psychological effects of being under siege [severely affected] the judgement of people in Srebrenica": Defence Final Brief, para. 520. The Trial Chamber finds that this would have been an additional reason for the Accused, who surely was aware of this phenomenon, to take appropriate measures not to expose the Serb detainees to the crimes that were committed against them.

<sup>1385</sup> No witness and no other evidence indicate that Atif Krdžić was ever present in either of the two detention facilities.

<sup>1386</sup> Ex. P329, "Interview" of the Accused, tape 17, p. 20. The Trial Chamber accepts the Defence submission that an accurate translation of the question posed to the Accused should read: "Is the military police a part of the military structure under which you were a commander", as opposed to the official English transcript, which reads: "Is the military police a branch of the military under which, of which you were the Commander?" See also para. 56 *supra*.

<sup>1387</sup> Prosecution Final Brief, paras 332-351.

<sup>1388</sup> Two lists however provide information about who might have been among the members of the Srebrenica military police: ex. P590, "List of military police staff" of 31 July 1992, signed by Mirzet Halilović, containing 67 names; ex. P458/P561, "Military Police Log", entry of 5 December 1992, containing 27 names. See also ex. P329, "Interview" of the Accused, tape 3, pp. 24, 25, stating that Salih Rahmanović, a certain 'Papelja', Juso Cvrk, Ahmo Mehmedović and a certain 'Beli' were members of the Srebrenica military police.

<sup>1389</sup> See para. 312 *supra*.



examine whether these criteria allow for a conclusion that the Accused effectively controlled the Srebrenica military police either between 24 September and 16 October 1992, when the first group of Serb detainees was held at the Srebrenica Police Station, or between 15 December 1992 and 20 March 1993, when the second group of Serb detainees was confined both at the Srebrenica Police Station and at the Building.

(i) Prior to 14 October 1992

499. When on 1 July 1992, the Srebrenica military police was established, Mirzet Halilović was appointed its commander.<sup>1390</sup> It was the Srebrenica TO Staff that established the Srebrenica military police.<sup>1391</sup>

500. Bećir Bogilović gave evidence that prior to 14 October 1992, Mirzet Halilović formally answered to “the army”.<sup>1392</sup> This seems to be confirmed by the Accused, who in his Interview indicated that Mirzet Halilović would have been under the authority of Ramiz Bećirović and Hamed Salihović,<sup>1393</sup> both of whom were members of the Srebrenica Armed Forces Staff as of mid-September 1992.<sup>1394</sup> On the same occasion, the Accused stated that, after he had learned that a detainee was killed in October 1992, he met with Ramiz Bećirović and Hamed Salihović, and it was agreed that such incidents should not reoccur.<sup>1395</sup>

501. There is evidence that, at the same point in time, Mirzet Halilović started behaving erratically, developed a propensity for violence, and became difficult to control.<sup>1396</sup> His personality and his conduct in office caused him to be placed under civilian supervision and, eventually, led to his replacement.<sup>1397</sup>

502. Slavoljub Žikić, who was detained at the Srebrenica Police Station between 5 October and 16 October 1992, gave evidence that the beatings ceased and that there was a “deadly silence” every time an individual he presumed to be the Accused entered the Srebrenica Police Station.<sup>1398</sup>

503. However, there is no evidence as to how, if at all, the Srebrenica Armed Forces Staff exercised authority over the Srebrenica military police prior to 14 October 1992. With the exception

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<sup>1390</sup> See para. 182 *supra*.

<sup>1391</sup> See para. 181 *supra*.

<sup>1392</sup> Bećir Bogilović, T. 6259.

<sup>1393</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 4, tape 17, pp. 1-2, 5.

<sup>1394</sup> Ex. P255/D203, “Decision to leave the Srebrenica Armed Forces Staff” of 21 December 1992.

<sup>1395</sup> Ex. P329, “Interview” of the Accused, tape 18, p. 7.

<sup>1396</sup> Mensud Omerović, T. 8460; [uhra \ilović, T. 15387-15388; Bećir Bogilović, T. 6247-6249, 6258-6259, 6438; ex. P329, “Interview” of the Accused, tape 3, p. 4.

<sup>1397</sup> See ii., “The Reorganisation of the Srebrenica Military Police in October and November 1992”.

of Bećir Bogilović, none of the witnesses were able to provide specific information about the relationship between these two bodies regarding this time period. The documentary evidence does not provide any valuable clarification either. Regarding the possible presence of the Accused at the Srebrenica Police Station and any effect it might have had on the perpetrators, although one plausible inference could be that of an indication of effective control, there are other plausible deductions, and the evidence of Slavoljub Žikić alone is not persuasive enough to conclude that the Accused in fact exercised effective control over the Srebrenica military police. Moreover, taking into account the chaotic circumstances prevailing during the early months of the Srebrenica siege, and the erratic behaviour of Mirzet Halilović, the Trial Chamber simply cannot come to the conclusion that the Srebrenica Armed Forces Staff had effective control over the Srebrenica military police on the sole basis of its involvement in establishing that body in July 1992.

504. Therefore, the Trial Chamber is not satisfied beyond reasonable doubt that the Accused, as commander of the Srebrenica Armed Forces Staff, exercised effective control over the Srebrenica military police between 24 September and 16 October 1992, when murder and cruel treatment were committed at the Srebrenica Police Station.

(ii) The Reorganisation of the Srebrenica Military Police in October and November 1992

505. On 14 October 1992, at a joint meeting of the Srebrenica Operations Staff, the ‘Civilian Protection’ and the Srebrenica War Presidency, a decision was made to place Mirzet Halilović under the authority of the overall chief of police, Bećir Bogilović,<sup>1399</sup> who reported to the War Presidency.<sup>1400</sup> This measure was apparently prompted by complaints that had been made regarding Mirzet Halilović’s behaviour.<sup>1401</sup> Bećir Bogilović gave evidence that it was only Mirzet Halilović, as opposed to the entire Srebrenica military police force, who was placed under his command.<sup>1402</sup>

506. At a meeting of the Srebrenica Armed Forces Staff held on 22 November 1992, Mirzet Halilović was removed as commander of the Srebrenica military police and replaced with Atif Krdžić,<sup>1403</sup> a policeman from Osmače and a member of the Srebrenica Armed Forces Staff.<sup>1404</sup> At

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<sup>1398</sup> Slavoljub Žikić, T. 3216.

<sup>1399</sup> Bećir Bogilović, T. 6257; ex. 84, “Memo Pad”, p. 8.

<sup>1400</sup> Bećir Bogilović, T. 6237, 6430.

<sup>1401</sup> Bećir Bogilović, T. 6249, 6319, 6327.

<sup>1402</sup> Bećir Bogilović, T. 6257, 6315.

<sup>1403</sup> Bećir Bogilović, T. 6328-6329, 6431; ex. P84, “Memo Pad”, meeting of Srebrenica Armed Forces Staff of 22 November 1992, p. 28, stating that Mirzet Halilović resigned from his post. However, Bećir Bogilović clarified that Halilović was dismissed in his absence: T. 6438-6439. The Trial Chamber is not persuaded by evidence that the Srebrenica War Presidency appointed Atif Krdžić, rather than the Srebrenica Armed Forces Staff: *see* para. 182 and fn. 505 *supra*; *but see* [uhra Djilović, T. 15235.

the same time, Bećir Bogilović's authority over Mirzet Halilović came to an end.<sup>1405</sup> On 27 November 1992, the Srebrenica Armed Forces Staff decided to re-organise the Srebrenica military police and to deploy units from Srebrenica town to field locations.<sup>1406</sup>

507. The events mentioned in the previous two paragraphs, however, ought to be evaluated in light of what transpires from minutes of the joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992,<sup>1407</sup> those of the meeting of the Srebrenica Armed Forces Staff of 10 November 1992,<sup>1408</sup> and finally, those of the Srebrenica Armed Forces Staff of 22 November 1992,<sup>1409</sup> when Mirzet Halilović was replaced by Atif Krdžić.

508. On 9 November 1992, Mirzet Halilović had already been under the authority of Bećir Bogilović for almost a month, but it is obvious from the minutes of the 9 November 1992 joint meeting that there was general consensus that the military police was not functioning well due to the prevailing lawlessness and the non-existence of a functioning military court. At no time is there an indication that any of the members present believed or maintained that the Srebrenica military police fell under the jurisdiction of the Srebrenica War Presidency or the civilian authorities. The head of the civilian police, Bećir Bogilović, is reported as stating that the civilian police do not have the right to intervene in cases of crimes being committed by members of the military, while Zulfo Tursunović reminds everyone present that the military police belong to the armed forces, and not to the Srebrenica War Presidency.<sup>1410</sup>

509. What emerges from the minutes of the 10 November 1992 meeting is that problems with the Srebrenica military police persisted despite Mirzet Halilović's placement under the authority of Bećir Bogilović. Although the general cooperation with the military police was assessed as being good, it was noted that "[t]here are surely people in the police for whom order is not convenient".<sup>1411</sup>

510. One of the decisions taken at the meeting of 22 November 1992 was to replace Mirzet Halilović with Atif Krdžić. There appears to have been a request for his dismissal as well as one for

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<sup>1404</sup> Ex. P75, "Decision" of 26 May 1992; Bećir Bogilović, T. 6219; Hakija Mehuljić, T. 6765; ex. P95, "ABiH Chronicle Guide", p. 3.

<sup>1405</sup> Bećir Bogilović, T. 6315, 6330-6331.

<sup>1406</sup> Bećir Bogilović, T. 6330; ex. P11, "Decision" of 27 November 1992.

<sup>1407</sup> See ex. P84, "Memo Pad", joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, pp. 19-23.

<sup>1408</sup> See ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 10 November, pp. 23-26.

<sup>1409</sup> See ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 22 November 1992, pp. 26-29.

<sup>1410</sup> Ex. P84, "Memo Pad", joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, p. 21.

<sup>1411</sup> Ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 10 November 1992, p. 25.

resignation by Mirzet Halilović. The minutes state that his resignation was “unanimously accepted”.<sup>1412</sup>

511. All of the above indicates that, even when Mirzet Halilović was personally under the authority of Bećir Bogilović, the Srebrenica Armed Forces Staff never relinquished its authority over the Srebrenica military police. Rather, it appears that the Srebrenica Armed Forces Staff attempted to secure the proper and efficient functioning of the military police through better cooperation with the civilian authorities, as well as by re-organising the Srebrenica military police to increase their efficiency. While the Srebrenica War Presidency, the body responsible for the administration of town, had a vital interest in a better functioning military police<sup>1413</sup> and may have taken certain action in furtherance of this aim,<sup>1414</sup> this does not entail that the War Presidency had jurisdiction over the Srebrenica military police.

(iii) After 27 November 1992

512. Subsequent to the attempts to reorganise the Srebrenica military police undertaken in October and November 1992, the Srebrenica Armed Forces Staff allowed the new commander, Atif Krdžić, a certain margin of discretion in his decision-making.<sup>1415</sup> Documents issued on behalf of the Srebrenica military police between 27 November 1992 and early February 1993 regularly invoke the authority of the Srebrenica Armed Forces.<sup>1416</sup> Moreover, a number of decisions and orders concerning the Srebrenica military police were issued by Osman Osmanović, Chief of Staff of the Srebrenica Armed Forces.<sup>1417</sup> As of mid-September 1992, orders directed to the Srebrenica military police were also issued by Ramiz Bećirović<sup>1418</sup> and Hamed Salihović<sup>1419</sup> of the Srebrenica Armed

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<sup>1412</sup> Ex. P84, “Memo Pad”, meeting of Srebrenica Armed Forces Staff of 22 November 1992, p. 28.

<sup>1413</sup> The Srebrenica Armed Forces Staff seems to have accepted the Srebrenica War Presidency’s role in this respect: ex. P84, “Memo Pad”, meeting of Srebrenica Armed Forces Staff of 22 November 1992, p. 28.

<sup>1414</sup> Ex. P84, “Memo Pad”, meeting of Srebrenica Armed Forces Staff of 3 October 1992, p. 6, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 9, meeting of Srebrenica Armed Forces Operations Staff of 14 October 1992, p. 10; [uhra \ilović, T. 15196-15197, 15216.

<sup>1415</sup> See ex. P12, “Decision” of 6 December 1992, signed by Osman Osmanović, the Chief of Staff of the Srebrenica Armed Forces, stating: “Military Police Commander Atif Krdžić is hereby authorised to independently make decisions on admitting persons to the Military Police in Srebrenica and dismissing them. The above-named must inform the Srebrenica [Armed Forces] Staff of any changes in the Srebrenica Military Police platoon in terms of possible admission or dismissal of employees – Military Police members and the reasons thereof.” See also Bećir Bogilović, T. 6331, 6333.

<sup>1416</sup> Ex. P183, “Official Record” of 11 February 1993; ex. P333, “Patrol Order” of 28 February 1993; ex. P15, “Military Police Report” of various dates in 1992/1993; ex. P332, “Military Police Report” of 28 February 1993; ex. P458/P561, “Military Police Log” from various dates between 3 December 1992 and 18 January 1993.

<sup>1417</sup> See ex. P12, “Decision” of 6 December 1992; ex. P204, “Order” of 18 January 1993; ex. P11, “Decision” of 27 November 1992. On 11 January 1993, Osman Osmanović instructed the ‘Secretariat for Economy and Public Services’ to provide food for female and minor detainees accommodated at a private home: ex. P189, “Request” of 11 January 1993.

<sup>1418</sup> Ex. P191, “Order” of 28 February 1993.

<sup>1419</sup> Ex. P190, “Request for Food Rations” of 21 January 1993.

Forces Staff. It follows that the Srebrenica Armed Forces Staff became more involved in issuing orders and instructions to the Srebrenica military police after 27 November 1992.

513. For the purposes of further establishing whether the Accused effectively controlled the Srebrenica military police, the Trial Chamber needs to examine in some detail the roles played by those individuals within the Srebrenica Armed Forces who were directly involved with the Srebrenica military police or the Serb detainees after 27 November 1992, *i.e.*, Hamed Salihović, Osman Osmanović, Ramiz Bećirović and Zulfo Tursunović.

a. The Role of Hamed Salihović

514. In his Interview, the Accused told Prosecution investigators that “Hamed Salihović was the one who was mainly concerned with the prisoners [...]”<sup>1420</sup>

515. Before the conflict, Hamed Salihović was the Srebrenica chief of police.<sup>1421</sup> On 14 October 1992, the Srebrenica War Presidency appointed him as Chief of Security and Intelligence of the Srebrenica Armed Forces.<sup>1422</sup> This position had not existed until then. His immediate superior was the Chief of Staff of the Srebrenica Armed Forces,<sup>1423</sup> who until 5 February 1993 was Osman Osmanović and thereafter was Ramiz Bećirović.<sup>1424</sup>

516. On 21 December 1992, Hamed Salihović, Ramiz Bećirović and three other individuals submitted their resignation from the Srebrenica Armed Forces Staff,<sup>1425</sup> but there is evidence that all of them may have continued to perform their functions within this body up until April 1993.<sup>1426</sup> In particular, Hamed Salihović continued to attend meetings of the Srebrenica Armed Forces Staff<sup>1427</sup> until he was relieved from his duties in April 1993.<sup>1428</sup>

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<sup>1420</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 21. The Accused mentions Hamed Salihović several times and the Trial Chamber has no doubt that he is referring to the entire time period in which Serbs were detained.

<sup>1421</sup> Sidik Ademović, T. 12955.

<sup>1422</sup> Ex. P221, “Decision” of 14 October 1992; ex. P95, “ABiH Chronicle Guide”, p. 3.

<sup>1423</sup> Ex. P221, “Decision” of 14 October 1992; Bećir Bogilović, T. 6460-6461.

<sup>1424</sup> See paras 518-520 *infra*.

<sup>1425</sup> Ex. P255/D203, “Decision to Leave the Srebrenica Armed Forces Staff” of 21 December 1992; Suad Smajlović, T. 14676.

<sup>1426</sup> Nedret Mujkanović, T. 5162.

<sup>1427</sup> Ex. P84, “Memo Pad”, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, pp. 43-44, meeting of Srebrenica Armed Forces Staff of 10 January 1993, pp. 49-50, meeting of 18 April 1993, meeting of Srebrenica Armed Forces Staff, pp. 55-57.

<sup>1428</sup> Ex. P200, “Order” of 16 April 1993.

517. In the winter of 1992/1993, Hamed Salihović was the driving force behind the efforts to unify Bosnian Muslim forces in Eastern Bosnia, as described earlier in this Judgement.<sup>1429</sup> At the same time, evidence indicates that he was the key person overseeing interrogations of Serb prisoners in January and February 1993, as is apparent from interrogation notes on behalf of the ‘Srebrenica Court Martial’, signed by him, which are addressed to what is called the ‘Commission for Mediation with the Enemy’.<sup>1430</sup> In addition, the Accused in his Interview stated that Hamed Salihović was interrogating detainees already in the initial period when the first group of them was confined.<sup>1431</sup>

b. The Role of Osman Osmanović

518. When he assumed the function of Chief of Staff of the Srebrenica Armed Forces in early September 1992,<sup>1432</sup> Osman Osmanović was at the same time Chief of the Operations Staff of the Srebrenica Armed Forces.<sup>1433</sup> In his capacity as Chief of Staff, Osman Osmanović reported directly to the Accused as Commander of the Srebrenica Armed Forces.<sup>1434</sup> He regularly attended and frequently chaired meetings of the Srebrenica Armed Forces Staff, and played a very active role in discussions regarding all aspects of the organisation of the armed forces, including the civil and

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<sup>1429</sup> See IV.B.2.b.i., “The Establishment and Development of the Sub-region”.

<sup>1430</sup> Ex. P491, “Interrogation Notes” of Anda Radović and Ivanka Mitrović of 6 February 1993; ex. P46, “Interrogation Notes” of Kostadin Popović of 30 January 1993; ex. P69, “Interrogation Notes” of Ratko Nikolić of 30 January 1993; ex. P101, “Interrogation Notes” of Branko Sekulić of 31 January 1993; ex. P48, “Interrogation Notes” of Milisav Milovanović of 31 January 1993; ex. P56, “Interrogation Notes” of Mile Trifunović of 2 February 1993; ex. P190, “Request for Food Rations” of 21 January 1993, concerning detained “minors and their mothers”; ex. P470, “Note” concerning detained minors of 28 February 1993. See also ex. P329, “Interview” of the Accused, tape 17, p. 20, tape 18, p. 2. Contrary to the evidence given by Suad Smajlović, T. 14676-14677, the Trial Chamber is not persuaded that Hamed Salihović’s activities pertaining to the sub-region necessarily excluded concurrent involvement with Serb detainees.

<sup>1431</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 21, tape 18, pp. 6, 7.

<sup>1432</sup> Ex. P176, “Decision” of 3 September 1992 (Srebrenica Armed Forces Staff); ex. P8, “Decision” of 14 October 1992 (Srebrenica War Presidency). Nedret Mujkanović clarified that although Osman Osmanović *de jure* was appointed Chief of Staff only on 14 October 1992, he *de facto* assumed that position already in September 1992: T. 5299-5300. See also ex. P79, “Proposal” of 19 September 1992; ex. P95, “Supplement to the ABiH Chronicle” of 7 February 1994, p. 3.

<sup>1433</sup> Ex. P79, “Proposal” of 19 September 1992.

<sup>1434</sup> Ex. P8, “Decision” of 14 October 1992.

military police.<sup>1435</sup> Osman Osmanović carried out these functions until 5 February 1993,<sup>1436</sup> after which date Ramiz Bećirović was appointed Chief of Staff.<sup>1437</sup>

c. The Role of Ramiz Bećirović

519. Between September 1992 and February 1993, Ramiz Bećirović held various functions within the Srebrenica Armed Forces Staff.<sup>1438</sup> He was, *inter alia*, responsible for operations and training within the Srebrenica Operations Staff.<sup>1439</sup> He regularly attended meetings of the Srebrenica Armed Forces Staff, in which he played a very active role in discussing all aspects of the organisation of the armed forces, including the civil and military police.<sup>1440</sup>

520. As previously established, Ramiz Bećirović submitted his resignation from the Srebrenica Armed Forces Staff on 21 December 1992,<sup>1441</sup> but there is evidence that he continued to perform his prior functions<sup>1442</sup> and attend meetings in his former capacity.<sup>1443</sup> On 5 February 1993, he took over the position of Chief of Staff of the Srebrenica Armed Forces from Osman Osmanović,<sup>1444</sup> which he occupied beyond demilitarisation.<sup>1445</sup> As of December 1992, Ramiz Bećirović deputised for the Accused<sup>1446</sup> and presided over meetings of the Srebrenica Armed Forces Staff.<sup>1447</sup> There is evidence

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<sup>1435</sup> Ex. P84, "Memo Pad", meeting of Operations Staff, date unspecified, p. 2, meeting of Srebrenica Armed Forces Staff of 3 October 1992, p. 4-5, meeting of Srebrenica Armed Forces Staff of 7 October 1992, p. 7, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 8-10, meeting of the Srebrenica Armed Forces Operations Staff of 15 October 1992, p. 12, meeting of the Srebrenica Armed Forces Operations Staff of 23 October 1992, p. 12, meeting of Srebrenica Armed Forces Staff of 30 October 1992, p. 15, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, 20-22, meeting of Srebrenica Armed Forces Staff of 22 November 1992, pp. 24, 28-29, meeting of Srebrenica Armed Forces Staff of 8 December 1992, p. 35-37.

<sup>1436</sup> Ex. P104, "Order" of 5 February 1993; Nedret Mujkanović, T. 5089-5090, 5330-5331.

<sup>1437</sup> See para. 520 *infra*.

<sup>1438</sup> Ex. P95, "Supplement to the ABiH Chronicle" of 7 February 1994, p. 3.

<sup>1439</sup> Nedret Mujkanović, T. 5090; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Operations Staff of 14 October 1992, p. 10, *see also* p. 2.

<sup>1440</sup> Ex. P84, "Memo Pad", meeting of Operations Staff, date unspecified, p. 2, meeting of Srebrenica Armed Forces Staff of 7 October 1992, p. 7, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 8, meeting of the Srebrenica Armed Forces Operations Staff of 14 October 1992, p. 10, meeting of the Srebrenica Armed Forces Staff of 30 October 1992, pp. 14-17, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, pp. 21-22, meeting of the Srebrenica Armed Forces Staff of 22 November 1992, pp. 24, 26-27, meeting of Srebrenica Operations Staff of 27 November 1992, pp. 29-32, meeting of Srebrenica Operations Staff of 4 December 1992, pp. 32-33, meeting of Srebrenica Armed Forces Staff of 10 December 1992, p. 37, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 29 December 1992, pp. 45-47, meeting of Srebrenica Armed Forces Staff of 13 January 1993, p. 51, meeting of Srebrenica Armed Forces Staff of 5 March 1993, p. 54, meeting of Srebrenica Armed Forces Staff of 17 May 1993, p. 57.

<sup>1441</sup> See para. 516 *supra*.

<sup>1442</sup> Nedret Mujkanović, T. 5162.

<sup>1443</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, pp. 43-44.

<sup>1444</sup> Ex. P104, "Order" of 5 February 1993; Nedret Mujkanović, T. 5089-5090, 5330-5331.

<sup>1445</sup> Ex. D859, "Interview" of Sead Delić, published 17 March 2000, p. 2; ex. P34, "Request" of 22 December 1993.

<sup>1446</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 44.

that as of December 1992, Ramiz Bećirović was a member of a commission dealing with the exchange of Serb detainees, together with Ibrahim Mandžić, Hamdija Fejzić and Hamed Salihović.<sup>1448</sup>

d. The Role of Zulfo Tursunović

521. As described earlier, Zulfo Tursunović was the leader of a group of fighters from Sućeska. He was a member of the initial Srebrenica TO Staff, and later of the Srebrenica Armed Forces Staff.<sup>1449</sup> In his Interview, the Accused stated that Zulfo Tursunović was appointed member of the ‘Summary Court-Martial’ in Srebrenica.<sup>1450</sup> Although the Prosecution submits that the Accused had stated in his Interview that Zulfo Tursunović had been placed in charge of the Serb detainees, this is not borne by the evidence.<sup>1451</sup>

522. Apart from evidence of Zulfo Tursunović’s presence in the field during Bosnian Muslim actions,<sup>1452</sup> there is ample evidence of Zulfo Tursunović visiting the detainees at the Srebrenica Police Station and at the Building, both in September and October 1992, as well as between January and March 1993. During his frequent and regular visits,<sup>1453</sup> Zulfo Tursunović often enquired about the well-being of the detainees.<sup>1454</sup>

523. There is no indication in what capacity Zulfo Tursunović conducted these visits, whether they resulted from his own initiative, or whether he had been instructed by higher authority to look after the Serb detainees. While Zulfo Tursunović participated in discussions at meetings of the Srebrenica Armed Forces Staff dealing with the military police and/or the ‘Summary Court-Martial’,<sup>1455</sup> there is no evidence that he reported to anyone on his visits to the detention facilities, or that he ever raised the issue at the said meetings.

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<sup>1447</sup> Hakija Mehuljić, T. 6892; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 13 January 1993, p. 51.

<sup>1448</sup> Ex. P84, “Memo Pad”, joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 45; ex. P329, “Interview” of the Accused, tape 18, pp. 3-4.

<sup>1449</sup> See para. 165 *supra*.

<sup>1450</sup> Ex. P328, “Interview” of the Accused, tape 13, pp. 7-8; ex. P329, “Interview” of the Accused, tape 3, p. 5.

<sup>1451</sup> Prosecution Response to Defence Final Brief, para. 91, fn. 180 referring to ex. P328, “Interview” of the Accused, tape 13, pp. 7-8, where he stated that Zulfo Tursunović was “some kind of military judge”, but not being in charge of detainees.

<sup>1452</sup> See paras 421, 452 *supra*.

<sup>1453</sup> See para. 454 *supra*.

<sup>1454</sup> See para. 453 *supra*; Stana Stamenić, T. 6616-6617.

<sup>1455</sup> Ex. P84, “Memo Pad”, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, pp. 8-9, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, p. 20. The Trial Chamber has no doubt that ‘Zulfo’ on p. 20 refers to Zulfo Tursunović.



e. Analysis

i. Whether Hamed Salihović, Osman Osmanović, Ramiz Bećirović and Zulfo Tursunović Exercised Effective Control Over the Srebrenica Military Police

524. The Trial Chamber is satisfied that, at least from 27 November 1992, Hamed Salihović was tasked by the Srebrenica Armed Forces Staff to conduct and oversee interrogations of the Serb prisoners then held at the Srebrenica Police Station and at the Building. This entailed the authority to give instructions about the manner in which an individual detainee should be treated,<sup>1456</sup> to make preliminary findings as to the alleged criminal responsibility of Serb detainees<sup>1457</sup> and even to recommend or instruct that a detainee be released from custody for a prisoner exchange.<sup>1458</sup> This necessarily put him in a position to give instructions to, and liaise with, the Srebrenica military police in the performance of his duties. The only evidence there is that Hamed Salihović was in charge of interrogating detainees even before 27 November 1992 emerges from the Interview of the Accused.<sup>1459</sup> What is not clear is to whom he was subordinate before 14 October 1992, or who may have instructed him to conduct interrogations of Serb detainees.

525. Although it appears that Hamed Salihović, Osman Osmanović, Ramiz Bećirović and Zulfo Tursunović discussed matters concerning the Srebrenica military police during meetings of the Srebrenica Armed Forces Staff in a non-hierarchical manner,<sup>1460</sup> in light of the above, the Trial Chamber finds that Hamed Salihović was subordinate and reported to the Chief of Staff of the Srebrenica Armed Forces, a position occupied by Osman Osmanović and Ramiz Bećirović before and after 5 February 1993, respectively.<sup>1461</sup>

526. While there is no evidence to indicate that Osman Osmanović and Ramiz Bećirović were directly involved in the interrogation of, and decision-taking process regarding Serb prisoners, they

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<sup>1456</sup> See ex. P56, "Interrogation Notes" of Mile Trifunović of 2 February 1993: "He is not an interesting subject for operative processing and it is recommended that he be released from detention"; ex. P48, "Interrogation Notes" of Milisav Milovanović of 31 January 1993: "He is a person of interest to security but has been exploited enough [...]."

<sup>1457</sup> See ex. P101, "Interrogation Notes" of Branko Sekulić of 31 January 1993: "[H]e bears full criminal responsibility as a member of the enemy army [...]."; ex. P69, "Interrogation Notes" of Ratko Nikolić of 30 January 1993: "I declare with responsibility that he is not a person lacking mental responsibility but a cunning and well trained and prepared 'Serbian soldier.'"

<sup>1458</sup> Ex. P470, "Note" concerning detained minors of 28 February 1993; ex. P491, "Interrogation Notes" of Anđa Radović and Ivanka Mitrović of 6 February 1993.

<sup>1459</sup> See para. 514 *supra*.

<sup>1460</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 8, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 9 November 1992, pp. 20-21, meeting of the Srebrenica Armed Forces Staff of 10 November 1992, p. 24-25, meeting of Srebrenica Armed Forces Staff, p. 28, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 44. The Trial Chamber has no doubt that 'Zulfo' on p. 20 refers to Zulfo Tursunović.

<sup>1461</sup> See paras 518-520 *supra*.

both issued orders and decisions directly to the Srebrenica military police. For instance, Osman Osmanović ordered the re-organisation of the Srebrenica military police on 27 November 1992,<sup>1462</sup> and on 6 December 1992, he authorised its commander, Atif Krdžić, to reach independent decisions regarding staffing of the Srebrenica military police.<sup>1463</sup> On 28 February 1993, Ramiz Bećirović, signing as ‘Chief of the Srebrenica Armed Forces’, ordered the detention of a local resident by the Srebrenica military police and his transfer to the headquarters of the Srebrenica Armed Forces for questioning.<sup>1464</sup>

527. In sum, the Trial Chamber is satisfied that subsequent to 27 November 1992, Osman Osmanović and Ramiz Bećirović exercised effective control over the Srebrenica military police and indirectly involved themselves in matters relating to the detention of Serb detainees through the role assigned to Hamed Salihović. The Trial Chamber is not satisfied that Zulfo Tursunović had effective control over the Srebrenica military police. However, considering his role in the ‘Summary Court-Martial’ and his frequent visits to the detainees, Zulfo Tursunović was without doubt a person involved with the Serb detainees to the extent that on several occasions, he enquired about their condition.<sup>1465</sup> Nonetheless, beatings continued.<sup>1466</sup> This on its own, however, is not sufficient to prove effective control over the Srebrenica military police on his part.

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<sup>1462</sup> Ex. P11, “Decision” of 27 November 1992.

<sup>1463</sup> Ex. P12, “Decision” of 6 December 1992. There is corroborating evidence that these decisions by Osman Osmanović were complied with: Bećir Bogilović, T. 6331, 6333.

<sup>1464</sup> Ex. P191, “Order” of 28 February 1993.

<sup>1465</sup> See fn. 1454 *supra*.

<sup>1466</sup> See B.4., “Cruel Treatment” in general.

ii. Whether the Accused Exercised Effective Control Over Osman

Osmanović and Ramiz Bećirović

528. It has already been established that, by virtue of his election as commander of the Srebrenica TO Staff in May 1992, the Accused *de jure* was the Commander of the Srebrenica Armed Forces, but that his *de facto* command did not, or only to a minor degree, extend to Bosnian Muslim groups of fighters beyond Srebrenica and Potočari.<sup>1467</sup> However, whereas his authority may not have been unreservedly accepted by individual Srebrenica fighters such as Hakija Meholfjić,<sup>1468</sup> evidently, the Srebrenica Armed Forces Staff was a collegiate body comprised of several leaders of local fighting groups, which provided co-ordination and logistical support for combat action.<sup>1469</sup> The Accused, as its commander, asserted authority over the Srebrenica Armed Forces Staff, as is apparent from the minutes of meetings of that Staff.<sup>1470</sup>

529. Osman Osmanović, in his capacity as Chief of Staff of the Srebrenica Armed Forces, frequently chaired the meetings of that body and called the participants to order,<sup>1471</sup> just as Ramiz Bećirović did after 5 February 1993.<sup>1472</sup> It appears that Osman Osmanović was also entrusted with a certain amount of independence in taking relevant military decisions on behalf of the Commander.<sup>1473</sup> The relationship between a chief of staff and a commander is such that the former reports to the latter, takes orders from him and implements them. In this way, a commander exercises effective control over the chief of staff. There is no evidence that would indicate that the situation was different in the case of Osman Osmanović and Ramiz Bećirović. The Trial Chamber

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<sup>1467</sup> See paras 162, 206 *supra*.

<sup>1468</sup> See para. 167 *supra*.

<sup>1469</sup> Ex. P84, "Memo Pad", meeting Srebrenica Armed Forces Staff of 3 October 1992, pp. 4-6, regarding preparations for the action on Fakovići; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 10 December 1992, pp. 36-39, regarding preparations for the action on Bjelovac. The Srebrenica Armed Forces Staff also attended to other matters of military interest: see ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 30 October 1992, pp. 14-15, regarding a planned sabotage action to sever communication lines to Serbia; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 10 January 1993, p. 50: "The female prisoner should be /?fed/."

<sup>1470</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and Srebrenica Armed Forces Staff of 14 October 1992, p. 8, quoting the Accused: "Come to your senses. Let's organise, dig in and save ourselves. [...] If we want to be an army, we must learn order and have a command." At the same meeting, his position as Commander of the Srebrenica Armed Forces Staff was re-affirmed. See also ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 44, quoting the Accused: "My commanders do not obey me sufficiently and I must /?resolve this/ with them."; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 7 November 1992, p. 18, meeting of Srebrenica Armed Forces Staff of 22 November 1992, p. 27, meeting of Srebrenica Armed Forces Staff of 8 December 1992, p. 35, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 43.

<sup>1471</sup> Ex. P84, "Memo Pad", meeting of Operations Staff, date unspecified, p. 2, meeting of Srebrenica Armed Forces Staff of 3 October 1992, p. 4, joint meeting of the War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 7; Hakija Meholfjić, T. 6970.

<sup>1472</sup> Ex. P84, "Memo Pad", meeting of Srebrenica Armed Forces Staff of 13 January 1993, p. 51, meeting of Srebrenica Armed Forces Staff of 17 May 1993, p. 58, meeting of Srebrenica Armed Forces Staff of 8 July 1993, p. 61.

<sup>1473</sup> Hakija Meholfjić, T. 6811-6812, 6970.

thus finds that, during their respective tenure, they reported directly to the Accused,<sup>1474</sup> and that the Accused exercised effective control over them.

iii. Other Considerations Regarding a Superior-Subordinate Relationship With the Accused

530. As already stated, the identity of the guards and of the individuals who entered the Srebrenica Police Station and the Building to beat detainees is not such as to relate them directly to the Accused, especially since there is no evidence that any of them were members of the Srebrenica military police. There is evidence, however, that not only the presence of the Accused at the Srebrenica Police Station, but also his name, instilled apprehension, if not also fear, amongst the guards.<sup>1475</sup> This in itself is indicative that both from the guards' and the prisoners' perspective, the Accused could influence the events at the Srebrenica Police Station, and this is because obviously, he was respected and feared as Commander.

531. The above is pointed out for its own merit as it may become relevant to other considerations and not because, in the particular circumstances of this case, it is required that there was, or must have been, a direct superior-subordinate relationship between the Accused and the direct perpetrators of murder and cruel treatment. In the present case, the chain of superior-subordinate relationship for the purposes of responsibility pursuant to Article 7(3) descends from the Accused to the Srebrenica military police that was responsible for the safety and proper treatment of the Serb detainees via the chain of command explained above.<sup>1476</sup>

(d) Conclusion as to the Existence of a Superior-Subordinate Relationship

532. Based on the foregoing, the Trial Chamber is not satisfied beyond reasonable doubt that between 24 September 1992 and 16 October 1992, a superior-subordinate relationship for the purposes of Article 7(3) of the Statute existed between the Accused and the Srebrenica military police. However, the Trial Chamber is satisfied beyond reasonable doubt that subsequent to 27 November 1992, a superior-subordinate relationship for the purposes of Article 7(3) of the Statute existed between the Accused and the Srebrenica military police.

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<sup>1474</sup> Nedret Mujkanović, T. 5013, 5053; Bećir Bogilović, T. 6308.

<sup>1475</sup> Slavoljub Žikić, T. 3216; *see also* Ilija Ivanović, T. 4051.

<sup>1476</sup> *See* paras 305, 496 *supra*.

## 2. Actual or Imputed Knowledge

533. Having established that subsequent to 27 November 1992, a superior-subordinate relationship existed between the Accused and the head of the Srebrenica military police ultimately responsible for murder and cruel treatment,<sup>1477</sup> the Trial Chamber must now examine to what extent, if any, the Accused had knowledge or should have been aware of the occurrence of murder and cruel treatment at the Srebrenica Police Station and the Building between December 1992 and March 1993.

### (a) Submissions

534. The Prosecution submits that the Accused knew of the crimes committed at the Srebrenica Police Station and at the Building as witnesses confirmed that he visited the Serb detainees in both locations and that he could not have failed to notice their injuries. It is alleged that the Accused also knew about the death of Dragutin Kukić. Moreover, the Accused's involvement in exchanges of Serb prisoners would have put him on notice about their condition.<sup>1478</sup>

535. The Defence submits that the identification of the Accused by any of the witnesses is meagre, contradictory and unreliable. In particular, the Defence submits that poor observation conditions were prevailing at the Srebrenica Police Station and at the Building, rendering any identification of the Accused unreliable.<sup>1479</sup> Further, the relevant witnesses had only few and short encounters with the person who they identified to be the Accused<sup>1480</sup> over twelve years before they gave this evidence<sup>1481</sup>. There is also a risk of suggestion due to the fact that images of the Accused have been reproduced in the media since then.<sup>1482</sup> Accordingly, there is also a risk of misidentification since others in Srebrenica copied the appearance of the Accused.<sup>1483</sup> Moreover, none of these witnesses identified the Accused in a photograph parade or another identification procedure.<sup>1484</sup> Finally, the Defence submits that there are demonstrable errors in witnesses' description of the Accused at trial, and that their accounts contradict each other.<sup>1485</sup>

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<sup>1477</sup> See para. 496 *supra*.

<sup>1478</sup> Prosecution Final Brief, paras 388-398; Prosecution Response to Defence Final Brief, paras 69-75, 89-92.

<sup>1479</sup> Defence Final Brief, paras 379-385.

<sup>1480</sup> Defence Final Brief, paras 389-395.

<sup>1481</sup> Defence Final Brief, paras 404-405.

<sup>1482</sup> Defence Final Brief, paras 406-414.

<sup>1483</sup> Defence Final Brief, paras 396-403.

<sup>1484</sup> Defence Final Brief, paras 415-416.

<sup>1485</sup> Defence Final Brief, paras 417-465, asserting that these errors include, but are not limited to, the height of the Accused, his age, his eye-colour and whether he was bearded.

(b) Actual or Imputed Knowledge of Murder and Cruel Treatment at the Srebrenica Police Station in September and October 1992<sup>1486</sup>

536. In his Interview, the Accused acknowledged that he visited the Serb detainees at the Srebrenica Police Station on two occasions.<sup>1487</sup>

537. Nedeljko Radić, who was detained at the Srebrenica Police Station between 24 September 1992 and 16 October 1992, gave evidence that the detainees were visited on three occasions by a man who introduced himself as Naser Orić. This individual, wearing a camouflage uniform, came to the cell for the first time several days after 24 September 1992, and asked the detainees whether they had been beaten. He also enquired about the fate of Dragutin Kukić.<sup>1488</sup> Out of fear, one of the detainees replied that no one was beating them and that Kukić had suffered a stroke.<sup>1489</sup> On another occasion, the man purporting to be Naser Orić brought meat for the detainees to their cell.<sup>1490</sup> Nedeljko Radić saw that man for the last time on 15 October 1992, the night before his exchange. Nedeljko Radić and the four other detainees were lined up in the reception room, in the presence of the purported Naser Orić, as well as Kemo and Mrki.<sup>1491</sup>

538. Slavoljub Žikić, who was detained at the Srebrenica Police Station between 5 October 1992 and 16 October 1992, also gave evidence that the detainees were visited on multiple occasions by a man who introduced himself as Naser Orić. Two or three days after 5 October 1992, this individual, who was wearing a camouflage uniform, came to the cell and asked Slavoljub Žikić about the fate of other Bosnian Serbs from the area of Fakovići.<sup>1492</sup> On another occasion, the same man came to the cell and, apparently not being pleased with their condition, asked the detainees why they were covered in blood. Again, they felt that they dare not complain about their treatment.<sup>1493</sup> The last time when Slavoljub Žikić saw this man, he had a pistol and claimed that it was Arkan's weapon

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<sup>1486</sup> Although the Trial Chamber has found that no superior-subordinate relationship existed between the Accused and the Srebrenica military police prior to 27 November 1992 – *see* para. 532 *supra* –, the Accused's awareness of murder and cruel treatment taking place prior to that date becomes relevant for the purpose of establishing his actual or imputed knowledge of these crimes between January and March 1993.

<sup>1487</sup> Ex. P329, "Interview" of the Accused, tape 3, p. 15. However, the Accused initially only admitted one such visit.

<sup>1488</sup> Dragutin Kukić was killed on 25 September 1992; *see* paras 380-381 *supra*.

<sup>1489</sup> Nedeljko Radić, T. 3544-3546.

<sup>1490</sup> Nedeljko Radić, T. 3546; Slavoljub Žikić, T. 3224.

<sup>1491</sup> Nedeljko Radić, T. 3546-3548, 3586.

<sup>1492</sup> Slavoljub Žikić, T. 3223-3224.

<sup>1493</sup> Slavoljub Žikić, T. 3226-3227. The Trial Chamber, when referring to the detainees' reluctance out of fear to admit being beaten, is not imputing that they had fear of the Accused, but only that they did so out of general fear and self-protection.

and that Zvornik had fallen to the Bosnian Muslims.<sup>1494</sup> Slavoljub Žikić gave evidence that the beatings would stop whenever this individual entered the Srebrenica Police Station.<sup>1495</sup>

539. According to a written statement given by Veselin Šarac to Bosnian Serb investigators in 1994, the Accused was present during interrogations of Serb detainees at the Srebrenica Police Station and even participated in his own maltreatment.<sup>1496</sup>

540. An intercepted conversation of an unknown date between Rade Bjelanović, a Bosnian Serb military man, a man called ‘Cakura’ and an individual purporting to be the Accused regarding the exchange of Serb prisoners would confirm at least the Accused’s knowledge that Serb detainees were being held in Srebrenica.<sup>1497</sup>

541. The Trial Chamber has weighed all the relevant evidence, especially in light of the submissions of the Defence regarding the identification of the Accused. Still, it is satisfied beyond reasonable doubt that the Accused, between 24 September 1992 and 16 October 1992, visited on more than one occasion the cell where the Serb detainees were held at the Srebrenica Police Station. This finding is based on the credible testimony of Nedeljko Radić and Slavoljub Žikić, neither of whom had met the Accused before they were detained at the Srebrenica Police Station, yet both gave evidence that the individual in question introduced himself as Naser Orić. In addition, Nedeljko Radić was able to identify the Accused with the help of co-detainee Veselin Šarac, who had known the Accused from before the outbreak of the conflict.<sup>1498</sup> This finding is further supported by what the Accused stated during his Interview regarding Veselin Šarac.<sup>1499</sup>

542. Against this backdrop, the Trial Chamber is satisfied beyond reasonable doubt that the Accused had actual knowledge of the cruel treatment of Nedeljko Radić, Slavoljub Žikić, Zoran Branković, Nevenko Bubanj and Veselin Šarac.<sup>1500</sup> This finding is based on the credible testimony of Nedeljko Radić and Slavoljub Žikić, who both gave evidence that the Accused on various

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<sup>1494</sup> Slavoljub Žikić, T. 3225.

<sup>1495</sup> Slavoljub Žikić, T. 3216.

<sup>1496</sup> Ex. P83, “Record of Witness Interview” of Veselin [arac of 25 August 1994, p. 3.

<sup>1497</sup> Ex. P97, “Intercept”. *See also* Prosecution Final Brief, paras 394-398, alleging that the Accused “must have noticed the poor condition of Veselin [arac”, who takes part in the intercepted conversation. *But see* Defence Response to Prosecution Final Brief, paras 33-35.

<sup>1498</sup> Nedeljko Radić, T. 3544, 3586; Slavoljub Žikić, T. 3224.

<sup>1499</sup> Ex. P329, tape 3, p. 22: “[T]hen they brought this one, this Rade Šarac. [...] I asked him what he knew about my old good friends from the secondary school. Also, some people whom I got to know in that village immediately before the war through my police work. That was it.” The Trial Chamber understands that the person referred to as Rade [arac is in fact Veselin [arac.

<sup>1500</sup> However, even if one were to assume *arguendo* that the Accused did not have actual knowledge of cruel treatment, the conclusion would still be that from the moment he became aware of the killing of Dragutin Kukić – *see* fn. 1507 *infra* –, he was put on notice that the other detainees could be exposed to maltreatment.

occasions visited the cell of the Srebrenica Police Station,<sup>1501</sup> the last time on the night prior to the exchange of the group of detainees.<sup>1502</sup> On one occasion, the Accused even asked Slavoljub Žikić why he was bleeding.<sup>1503</sup> It has already established that all five detainees were subjected to severe beatings and other abuse, amounting to cruel treatment within the meaning of the Indictment.<sup>1504</sup> According to Slavoljub Žikić, the condition in which the detainees found themselves deteriorated by the day.<sup>1505</sup> As a consequence, the Accused could not but have noticed the condition in which the Serb detainees were in and thus, it is of secondary importance whether he, in addition, was aware of their condition when he allegedly negotiated their exchange. The Trial Chamber upholds this conclusion notwithstanding the Defence submission that the conditions for observations at the Srebrenica Police Station were poor.

543. The Trial Chamber is further satisfied beyond reasonable doubt that the Accused had actual knowledge of the murder of Dragutin Kukić. This finding is based on the credible testimony of Nedeljko Radić, who gave evidence that the Accused enquired with the other detainees about the fate of Kukić shortly after his death.<sup>1506</sup> In his Interview, the Accused stated that at one point in the fall of 1992, he learned that Mirzet Halilović had killed a Serb detainee at the Srebrenica Police Station.<sup>1507</sup> Also in light of any doubts which may arise as to the identity of the perpetrator or the victim,<sup>1508</sup> the Trial Chamber finds that actual knowledge thereof is of secondary importance.

(c) Murder and Cruel Treatment at the Srebrenica Police Station and at the Building Behind the Municipal Building Between December 1992 and March 1993

(i) Actual Knowledge

544. Ilija Ivanović, who was detained at the Srebrenica Police Station and at the Building between 16 January 1993 and the end of February 1993, gave evidence that about halfway through his time in detention, he was taken out of the male cell in the Building to the reception room for

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<sup>1501</sup> Nedeljko Radić, T. 3544; Slavoljub Žikić, T. 3225.

<sup>1502</sup> Nedeljko Radić, T. 3546-3548, 3586.

<sup>1503</sup> Slavoljub Žikić, T. 3226-3227.

<sup>1504</sup> See B.4., "Cruel Treatment".

<sup>1505</sup> Slavoljub Žikić, T. 3227.

<sup>1506</sup> Nedeljko Radić, T. 3544-3546.

<sup>1507</sup> Ex. P329, "Interview" of the Accused, tape 3, p. 2: "I later found out Mirzet Halilović made a statement in which he said that one of the prisoners have [sic] died", tape 3, p. 3: "Mirzet said that one of the prisoners had died. [...] He died and then nothing, he was buried", tape 3, p. 4: "[t]here was suspicion that the prisoner who had died had not simply died, [...] that [Mirzet Halilović] had gone into the prison cell and beaten this prisoner and after this he had, after the beating he had succumbed to his injuries", tape 3, p. 21: "[Question] Do you know the name of the person who was deceased? [Answer] No."

<sup>1508</sup> See para. 56 *supra*.



interrogation.<sup>1509</sup> In that room, he saw an individual who he described to be “very dark. He had a beard. A good looking man, rather young”.<sup>1510</sup> After the interrogation, the guards asked Ilija Ivanović: “Did you see our ‘delija’, Naser?”<sup>1511</sup> Subsequently, after he had seen images of Naser Orić in the media, Ilija Ivanović concluded that the person he saw in the Building was indeed the Accused.<sup>1512</sup>

545. Stana Stamenić, who was detained at the Building for three weeks following 19 January 1993, gave evidence that a man who introduced himself as the commander Naser Orić, and who she had never seen before, came to the female cell in the Building and asked the detainees whether they received any food.<sup>1513</sup> This man also enquired specifically about her well-being as she was lying on a stretcher.<sup>1514</sup>

546. The Prosecution led evidence intending to prove that the Accused was present at the release of an emaciated Serb detainee on 21 March 1993. On that day, Rado Pejić was handed over to UNPROFOR personnel who took him in an APC and ultimately released him to the Bosnian Serbs at the Yellow Bridge.<sup>1515</sup> However, several witnesses called by the Defence who were present during this incident, although corroborating that the release of Rado Pejić indeed took place, could not confirm that the Accused was present on that occasion.<sup>1516</sup>

547. The Trial Chamber considers it unsafe to rely on the evidence given by Ilija Ivanović and Stana Stamenić that the man they saw at the Building was in fact the Accused. Neither of them knew the Accused previously. While Ilija Ivanović based the identification of the Accused on images which he saw in the media subsequent to his release, the evidence given by Stana Stamenić in this regard is too vague to be of sufficient probative value. Therefore, there is insufficient evidence that, between December 1992 and March 1993, the Accused visited either the Srebrenica Police Station or the Building.

548. The evidence demonstrates that Zulfo Tursunović regularly visited the male Serbs detained at the Srebrenica Police Station and the Building.<sup>1517</sup> He was clearly aware that the detainees were

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<sup>1509</sup> Ilija Ivanović, T. 4044.

<sup>1510</sup> Ilija Ivanović, T. 4051, 4054.

<sup>1511</sup> Ilija Ivanović, T. 4051. The Trial Chamber understands ‘delija’ to mean ‘hero’.

<sup>1512</sup> Ilija Ivanović, T. 4055-4057, 4173.

<sup>1513</sup> Stana Stamenić, T. 6618, 6629, 6672.

<sup>1514</sup> Stana Stamenić, T. 6619.

<sup>1515</sup> Pyers Tucker, T. 5921-5924. *See paras 461-462 supra.*

<sup>1516</sup> Ejub Gušter, T. 15465-15466; Anthony Birtley, T. 15125; ex. D1010, “Video”.

<sup>1517</sup> Ratko Nikolić, T. 2597; Ilija Ivanović, T. 4052-4053.

being maltreated when he enquired about their condition.<sup>1518</sup> However, there is no evidence that he ever shared such knowledge with the Accused. Therefore, there is no direct evidence that the Accused obtained information about the condition of the Serb detainees during this period.

549. There is also no evidence that Osman Osmanović, Ramiz Bećirović, Hamed Salihović or anybody else ever kept the Accused informed of the state of the detained Serbs. Nor is there evidence that the Accused enquired or sought reports on this matter from anyone. In his Interview, the Accused confirmed that he did not enquire about matters relating to the detention of Serbs in Srebrenica.<sup>1519</sup>

(ii) Imputed Knowledge

550. The Trial Chamber has already established that the Accused, at the time when Mirzet Halilović was removed as commander of the Srebrenica military police in November 1992, had actual knowledge not only of the murder of Dragutin Kukić, but also of the cruel treatment of the other detainees kept at the time.<sup>1520</sup> His knowledge about this killing incident, as well as of the cruel treatment of the other detainees, put him on notice that the security and the well-being of all Serbs detained henceforth in Srebrenica was at risk, and that this issue needed to be adequately addressed and monitored. Although prior to 16 October 1992, as already stated, it was not entirely clear to whom the Srebrenica military police reported,<sup>1521</sup> the Accused appears to have had no doubt that the killing of a detainee was a matter that concerned him as he discussed it with Hamed Salihović and Ramiz Bećirović with a view to prevent reoccurrence.<sup>1522</sup> The Accused was also instrumental in promoting an investigation of this incident, which ultimately resulted in the removal of Mirzet Halilović, a decision in which the Accused took an active part.<sup>1523</sup> There is no indication that the cruel treatment of detainees, as distinct from the killing of a detainee, was ever investigated, or at least raised, during any of the meetings, joint or otherwise, of the Srebrenica Armed Forces Staff.

551. After the above-described intervention, there is no further evidence of the Accused taking action with regard to the Serb detainees. After November 1992, their security and well-being appears to have disappeared from the Accused's agenda.<sup>1524</sup> Instead, he retained as his top and only

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<sup>1518</sup> Ratko Nikolić, T. 2627-2628; Anđa Radović, T. 4816; Milosava Nikolić, T. 7174.

<sup>1519</sup> Ex. P329, "Interview" of the Accused, tape 3, p. 21, tape 10, p. 3, tape 17, pp. 10-11.

<sup>1520</sup> See paras 542-453 *supra*.

<sup>1521</sup> See paras 503-506 *supra*.

<sup>1522</sup> Ex. P329, "Interview" of the Accused, tape 18, p. 7.

<sup>1523</sup> Ex. P329, "Interview" of the Accused, tape 3, pp. 4-6 and tape 17, p. 2.

<sup>1524</sup> Ex. P329, "Interview" of the Accused, tape 18, p. 2: "[I]t was much more important for me to be on the frontlines protecting the frontlines than to worry what was happening there."

priority his paramount role as Commander of the Srebrenica Armed Forces to defend the Srebrenica area.

552. Several reasons may explain this phenomenon. While the Accused was intensively involved in military activity and thus rarely present in Srebrenica town,<sup>1525</sup> others ran day-to-day affairs there. According to the Accused, Ramiz Bećirović and Hamed Salihović were responsible for the Serb detainees, the latter also for interrogating them.<sup>1526</sup> The Accused was aware that, responding to problems with the Srebrenica military police, Mirzet Halilović had been replaced by Atif Krdžić as its commander. The Accused could not but know that Zulfo Tursunović, his deputy,<sup>1527</sup> who had been appointed member of the 'Summary Court-Martial', was visiting the Serb detainees at the Srebrenica Police Station and at the Building.

553. Throughout his Interview, the Accused maintained that he was not aware that Serb detainees were confined at the Building and that he never set foot into this building at the time.<sup>1528</sup> Although he acknowledged that Serbs were taken prisoner after the attack on Kravica in early January 1993, the Accused denied that he was aware that they had been maltreated or that some of them were killed.<sup>1529</sup>

554. The Trial Chamber does not find credible the Accused's affirmation that he was unaware that Serbs were being detained at the Building. Zulfo Tursunović, his deputy, frequently visited the detainees there.<sup>1530</sup> Moreover, even fighters returning from the frontlines knew of the Serb detainees because they entered the Building to maltreat them.<sup>1531</sup> In addition, the use of the Building as a detention facility was discussed on 23 December 1992, at a joint meeting of the Srebrenica Armed Forces Staff and the War Presidency, which the Accused opened.<sup>1532</sup> During the same meeting, it was decided to establish the 'Commission for the Exchange of Prisoners'.<sup>1533</sup>

555. Even if, for argument's sake, the Trial Chamber were to lend credit to the Accused's contention that he was unaware that the Building was used as a detention facility before demilitarisation, there is evidence that he was at least aware of Serbs being captured and detained

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<sup>1525</sup> Ex. P329, "Interview" of the Accused, tape 17, p. 6.

<sup>1526</sup> Ex. P329, "Interview" of the Accused, tape 3, pp. 13, 21, tape 17, p. 20, tape 18, pp. 2-4.

<sup>1527</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 14 October 1992, p. 8.

<sup>1528</sup> Ex. P329, "Interview" of the Accused, tape 16, pp. 22, 28, tape 17, p. 8.

<sup>1529</sup> Ex. P329, "Interview" of the Accused, tape 17, pp. 20-26, tape 18, pp. 1-5.

<sup>1530</sup> See para. 454 *supra*.

<sup>1531</sup> See para. 446 *supra*.

<sup>1532</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 44.

after October 1992.<sup>1534</sup> Whether the Accused knew of detainees kept at the Building, therefore, is of secondary importance.

556. The Trial Chamber acknowledges the circumstances in which the Accused found himself at the time, and that he was burdened with immense responsibilities at a young age. His concerns for the defence of the Srebrenica area and the safety of its inhabitants in view of the advancing and militarily superior Serb forces, in particular the escalation of the enemy offensive, are understood.<sup>1535</sup> What is not understood is how he could decide to eliminate completely from his agenda matters concerning the detained Serbs, when he had sufficient knowledge that on 21 December 1992, both Hamed Salihović and Ramiz Bećirović submitted a letter of resignation denouncing the unacceptable manner in which affairs were being managed.<sup>1536</sup> Yet, the Accused argues that he did not have to be concerned with the matter of detention of Serb prisoners because Hamed Salihović and Ramiz Bećirović were in charge of it.<sup>1537</sup>

557. Most importantly, as of September or October 1992, the Accused had been on notice that the Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed. It cannot therefore be understood how, notwithstanding the predicament he faced on a daily basis, the Accused could from that time onward safely assume that such incidents would not reoccur and that there was not even the need to, at least, seek to verify whether detainees were maltreated again. It is striking that the Accused appears not to have taken any action regarding Serb detainees after Atif Krdžić assumed command over the Srebrenica military police on 22 November 1992. Rather, the Accused repeated that, because of the deteriorating military situation, the detention of prisoners was not on his mind, as there were others responsible for it.<sup>1538</sup>

558. The reality of the situation is that more Serb detainees were killed and cruelly treated after Atif Krdžić was appointed commander of the Srebrenica military police than before. In addition, this occurred at a time when the Srebrenica military police was assigned a new commander, and was undergoing structural changes, supposedly to resolve previous problems. Zulfo Tursunović

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<sup>1533</sup> Ex. P84, "Memo Pad", joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 45.

<sup>1534</sup> Ex. P329, "Interview" of the Accused, tape 18, p. 2.

<sup>1535</sup> Defence Final Brief, paras 19, 20. *See also* 4 July Decision, pp. 3, 4.

<sup>1536</sup> Ex. P255, "Decision to Leave the Srebrenica Armed Forces Staff" of 21 December 1992. *But see* Nedret Mujkanović, T. 5162, suggesting that both Hamed Salihović and Ramiz Bećirović may have continued to perform their functions within the Srebrenica Armed Forces Staff until April 1993. The Trial Chamber however has no reason to conclude that, as the overall situation in Srebrenica deteriorated, the complaints raised in ex. P255 were resolved or that these two individuals were able to operate in better conditions afterwards.

<sup>1537</sup> Ex. P329, "Interview" of the Accused, tape 3, p. 13, tape 17, p. 5.

<sup>1538</sup> Ex. P329, "Interview" of the Accused, tape 3, p. 13, tape 17, pp. 6, tape 18, p. 2.

regularly visited the places of detention and took an interest in the well-being of the detainees.<sup>1539</sup> Against the backdrop of the Accused's prior notice, it appears that the Accused did not deem it necessary to verify if further Serb detainees were killed or cruelly treated and acted on that assumption.

559. It is the Trial Chamber's considered opinion that, as a general rule, the treatment of prisoners in armed conflict, including their physical and mental integrity, cannot be relegated to a position of importance inferior to other considerations, military or otherwise, however important they may be. This general rule is, of course, predicated on the assumption that at all times, the person entrusted with this responsibility, is in a position to fulfil this obligation. It does not, and cannot, apply when, for instance, there is the impossibility to act, or when it would be utterly unreasonable to expect one to act, as in the case of a life-threatening situation. The Trial Chamber is here dealing with the responsibility of a commander, who, more often than not, can discharge such responsibilities by delegating part of them to a subordinate and enquiring from time to time, and in the absence of reports, by at least requiring them in whatever format. The said general rule, therefore, is applicable when all this is possible. What is unacceptable for the Trial Chamber is that commanders, who like the Accused, positively know that detainees have been exposed to murder and cruel treatment, are discharged from their said obligations under international law to protect prisoners, by merely delegating the responsibilities in that regard to subordinates without further enquiries, as explained. In the present case, the evidence is unequivocal: the Accused never enquired about the fate of the Serb prisoners kept at the two detention facilities in Srebrenica from the day Atif Krdžić was appointed commander of the Srebrenica military police *in lieu* of Mirzet Halilović. In addition, he expressed and explained his lack of further involvement on the basis of his military commitments elsewhere. The Accused must have been aware that severe malnutrition and the psychological effects of being under siege were causing the people of Srebrenica to behave erratically, an additional reason for the Accused to take appropriate measures not to expose the Serb detainees to crimes which would exacerbate their vulnerability.

(d) Conclusion as to Actual or Imputed Knowledge

560. In sum, the Trial Chamber concludes that the Accused had knowledge of the murder of Dragutin Kukić and of the cruel treatment of Nedeljko Radić, Slavoljub Žikić, Zoran Branković, Nevenko Bubanj and Veselin Šarac at the Srebrenica Police Station in September and October

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<sup>1539</sup> Milosava Nikolić, T. 7174.

1992.<sup>1540</sup> The Trial Chamber is likewise satisfied beyond reasonable doubt that Accused had reason to know of the murder of Dragan Ilić, Milisav Milovanović, Kostadin Popović, Branko Sekulić, and the cruel treatment of Ilija Ivanović, Ratko Nikolić, Rado Pejić, Stanko Mitrović and Mile Trifunović at the Srebrenica Police Station and at the Building between December 1992 and March 1993.

### 3. Failure to Prevent or Punish

#### (a) Submissions

561. While the Prosecution alleges that the Accused failed to prevent and punish the murder and cruel treatment of the Serb detainees, it is not specifically submitted which measures he could have taken to prevent these crimes. Regarding the Accused's failure to punish, the Prosecution contends that he had numerous avenues available to institute proceedings and ensure that his subordinates were punished. According to the Prosecution, there is evidence that on different occasions, the Accused exercised his authority and took action against certain subordinates, yet, he did not avail himself of such measures regarding the Srebrenica military police.<sup>1541</sup>

562. As a preliminary point, the Defence submits that any measures to prevent or punish the Accused was required to take, need to be viewed in the light of the specific circumstances prevailing in Srebrenica at the time. Specifically, the Defence contends that it was impossible for the Accused to disseminate the relevant rules of international humanitarian law, and that these regulations only became available after the fall of Srebrenica. This lack of information resulted in a divergence between the *de facto* situation in Srebrenica and what was prescribed by the rules. Furthermore, the Defence submits that there were no trained personnel in Srebrenica authorised to conduct investigations or criminal proceedings and no mechanism was in place enabling a commander to learn about crimes and suspected perpetrators. Finally, the Defence claims that the Prosecution failed to prove that no investigations in the crimes of murder and cruel treatment were carried out.<sup>1542</sup>

#### (b) Preliminary Findings

563. The Trial Chamber considers the Defence submission that the relevant rules of international humanitarian law were unavailable to have no merit. Although such rules may not have been available in Srebrenica, the unlawfulness of acts of murder and cruel treatment of prisoners of war

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<sup>1540</sup> See fn. 1486 *supra* regarding the limited purpose of this finding.

<sup>1541</sup> Prosecution Final Brief, paras 946-958; Prosecution Response to Defence Final Brief, paras 94-100.

is not only commonly known, it is also firmly settled in customary international law and thus independent of knowledge of specific provisions prohibiting such conduct. The physical and moral integrity of prisoners is too fundamental to be made contingent on evidence of knowledge of such rules, let alone their availability on paper. Also the Accused seems to have been aware of this. In his Interview, when he learned that a Serb detainee had been killed, the Accused met with Hamed Salihović and Ramiz Bećirović, and stated that “naturally, we drew the conclusion that this has to be prevented and this thing would not be allowed to happen again.”<sup>1543</sup>

564. The Defence submission that investigations and criminal proceedings could not be conducted in Srebrenica due to the lack of qualified personnel is obviously a specious argument. It may have been difficult, or even impossible, to apply the procedures and mechanisms envisaged by the relevant laws, likewise, there may have been very restricted means of sending and receiving reports compared to normal circumstances, but even in Srebrenica at the time, one did not require sophisticated structures and well-trained personnel to establish that prisoners were killed and maltreated. The Accused could have established this himself, personally or through one of his subordinates, had he intended to. Perhaps the best proof of this is that when it became necessary to investigate the alleged killing of a prisoner by Mirzet Halilović, an investigating team was set up, precisely to deal with that matter with the means possible at the time.<sup>1544</sup>

(c) Failure to Prevent

565. The Trial Chamber recalls that according to the case-law of the Tribunal, it is not necessary to prove that the crimes of subordinates would not have been committed without the superior's failure to prevent.<sup>1545</sup> The principle that a superior cannot be required to do more to prevent these crimes than what is in his power, and what is appropriate under the given circumstances, is also firmly enshrined in the jurisprudence.<sup>1546</sup> The kind and extent of measures ultimately to be taken depend on the degree of effective control over subordinates when a superior is expected to act. In addition, a superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the crimes.

566. The Trial Chamber acknowledges that generally, chaos and lawlessness prevailed in Srebrenica, and that despite several efforts, all the institutions were far from functioning efficiently. The Srebrenica military police had insufficient means and human resources; some of its best

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<sup>1542</sup> Defence Final Brief, paras 1413-1478.

<sup>1543</sup> Ex. P329, “Interview” of the Accused, tape 18, p. 7.

<sup>1544</sup> Ex. P329, “Interview” of the Accused, tape 3, pp. 4-5, 23.

<sup>1545</sup> See para. 338 *supra*.

fighters were needed for combat. There can be no doubt that the Accused was operating under most adverse circumstances, and not in a properly structured army with adequate means of communication between superiors and subordinates. At times, he had difficulties in securing uniform execution of his orders by local leaders.<sup>1547</sup> More than on formal authority, the command of the Accused was based on the trust that the Bosnian Muslim population, the local leaders and the authorities in Srebrenica had in him.

567. Still, this authority was an effective one in many respects. There is evidence to show that when the Accused visited the Srebrenica Police Station, he instantly instilled respect and fear amongst the guards. No maltreatment took place while he was present in that building, nor when Zulfo Tursunović visited.<sup>1548</sup>

568. Despite the obvious predicaments of the Srebrenica military police at the time, the Accused during his Interview, referred to the guards at the Srebrenica Police Station saying that “this was not a brigade of people, this was a small number of policemen who could have been controlled”.<sup>1549</sup> It can be added that such control would have been facilitated by the number of prisoners and the size of the buildings in which they were detained. The Trial Chamber simply does not see how it could have been impossible for the guards and/or the commander of the Srebrenica military police to prevent crimes such as murder and cruel treatment from occurring, had adequate control been exercised.

569. However, with the exception of the Accused’s involvement in the replacement of Mirzet Halilović by Atif Krdžić, the evidence shows a total absence of any further action on his part to prevent cruel treatment or killing of prisoners, despite being on notice of such occurrences.

570. The Trial Chamber is convinced that, had the Accused at least made an effort to ensure that he was kept informed of the fate of the captured prisoners during their detention in Srebrenica, he would have been able to at least redistribute the available resources to provide the required amount and quality of guards, if necessary also from his own fighters. The Trial Chamber reiterates that even in a desperate situation as the one in which the Accused was operating, the protection of prisoners is of such fundamental importance that it cannot be allowed to become a secondary priority. Given the circumstances, it was possible for the Accused to address it, and one could reasonably expect him to address it. In the present case, the obligation of the Accused to prevent

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<sup>1546</sup> See paras 329, 331 *supra*.

<sup>1547</sup> Ex. P84, “Memo Pad”, joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 44.

<sup>1548</sup> See paras 453, 530 *supra*.



extended over a considerable period of time, namely from the appointment of Atif Kržić on 22 November 1992 to 20 March 1993, during which time he was not always on the front-line and found time to attend meetings in Srebrenica, at least until the Serb winter offensive started in late January or early February 1993. The conclusion that the Trial Chamber arrives at is that it was not impossibility that stood in the way of the Accused in preventing the maltreatment of prisoners, nor was it because he was all the time in a situation where one could not reasonably expect him to address such problems; it was his preference not to give the matter any further attention throughout the entire period, and not only when he was engaged in military activity.

571. During the meeting of 22 November 1992, when Atif Krdžić replaced Mirzet Halilović as commander of the Srebrenica military police, it was pointed out that “[e]very chief of department to do his job. The commander also his part of the work. Reports to be submitted.”<sup>1550</sup> According to the minutes of this meeting, the Accused stated that “[i]t is my fault that I do not come and work in the office. I will do that from now on.”<sup>1551</sup> There is evidence to show that after this meeting, and until 10 January 1993, he was present in Srebrenica town to attend meetings of the Srebrenica Armed Forces Staff and joint meetings with the Srebrenica War Presidency.<sup>1552</sup> However, the evidence reveals a conspicuous absence of any mention or reference to Serb detainees, during any of these meetings by anyone, with the exception of one statement.<sup>1553</sup>

572. The Trial Chamber thus concludes that the Prosecution has proved beyond reasonable doubt that the Accused failed to take necessary and reasonable measures to prevent the occurrence of the crimes at the Srebrenica Police Station and the Building between December 1992 and March 1993.

(d) Failure to Punish

573. The duty to punish arises after crimes by subordinates have been committed. However, the obligation to prevent these crimes has primacy.<sup>1554</sup> Essentially, the same criteria governing the duty to prevent are applicable for the duty to punish. A superior is required to establish the facts by way of investigation in order to ensure that perpetrators under his effective control are brought to justice. The superior need not conduct the investigation or dispense the punishment in person, but he must

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<sup>1549</sup> Ex. P329, “Interview” of the Accused, tape 3, p. 27.

<sup>1550</sup> Ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 22 November 1992, p. 27.

<sup>1551</sup> *Ibid.*

<sup>1552</sup> Ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 4 December 1992, p. 31, meeting of the Srebrenica Armed Forces Staff of 22 December 1992, p. 41, joint meeting of the Srebrenica Armed Forces Staff and the Srebrenica War Presidency of 23 December 1992, p. 43, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, p. 49.

<sup>1553</sup> Ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, p. 50: “The female prisoner should be /?fed/.”

ensure that the matter is not let to rest. If necessary, he needs to transmit a request to the competent authorities for further investigation. It is also recognised that a superior's lack of legal competence does not relieve him from punishing within the means available to him. His responsibility may also arise from his deliberate failure to create or sustain, amongst the persons under his control, an environment of discipline and respect for the law.<sup>1555</sup> Finally, no proof is required of a causal link between the offences committed by a subordinate and the subsequent failure of a superior to punish the perpetrators thereof.<sup>1556</sup>

574. However, to arrive at the conclusion that the Accused was under a duty to punish, it must first be established that he had knowledge or reason to know of the commission of the relevant crimes and second, that he was in command of subordinates both at the time of the commission of the crimes and when he failed to punish them.<sup>1557</sup> In this context, a distinction must first be drawn between the crimes committed at the Srebrenica Police Station between 24 September and 16 October 1992, and the subsequent ones that occurred in that same building and at the Building from 27 December 1992 until 20 March 1993.

575. For the period between 24 September and 16 October 1992, the Trial Chamber has already found that there is insufficient evidence of a superior-subordinate relationship between the Accused and the Srebrenica military police. Therefore, the Accused cannot be held criminally responsible for having failed to take necessary and reasonable measures to punish the crimes committed between 24 September and 16 October 1992 at the Srebrenica Police Station.

576. As regards the crimes committed between 27 December 1992 and 20 March 1993, the first requirement that the Prosecution needs to prove is that the Accused, at the time and thereafter until August 1995, knew or had reason to know that the relevant crimes had been committed.

577. Whereas for the duty to prevent, it suffices that the Accused was put on notice that crimes may possibly occur or reoccur, the duty to punish presupposes that crimes have in fact been committed and that a superior was aware of sufficient indications to assume their occurrence.<sup>1558</sup> The Trial Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the Accused, at any time between their occurrence and up to August 1995, had actual knowledge that murder and cruel treatment had been committed between 27 December 1992 and 20 March

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<sup>1554</sup> See para. 326 *supra*.

<sup>1555</sup> See para. 336 *supra*.

<sup>1556</sup> See para. 338 *supra*.

<sup>1557</sup> See para. 335 *supra*.

<sup>1558</sup> See paras 334-335 *supra*.

1993.<sup>1559</sup> In addition, there is also insufficient evidence that he had been put on notice that these specific crimes had been committed. There is also no evidence that the Accused, due to his lack of attention to the fate of the Serb detainees, had any information which would have prompted him to verify whether such crimes had been committed. For these reasons, the submissions of the Parties regarding the availability of means to punish, as well as whether the evidence establishes that the Accused failed to institute any proceedings, including an investigation, need not be addressed in this Judgement.

#### 4. Conclusion as to Responsibility of the Accused

578. The conclusion reached by the Trial Chamber is that the Accused failed to take necessary and reasonable measures to prevent the occurrence of murder and cruel treatment from 27 December 1992 to 20 March 1993. The Accused, however, cannot be held criminally responsible for having failed to take the necessary and reasonable measures to punish his subordinates for the commission of these crimes.

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<sup>1559</sup> The Trial Chamber has already decided that the evidence given by Ilija Ivanović and Stana Stamenić regarding the Accused's presence in the Building is insufficient: *see* para. 547 *supra*. Likewise, the Trial Chamber does not find that the Prosecution has proved the Accused's presence when Rado Pejić was brought out of the said building and handed over for exchange.

## **VIII. CHARGES AND FINDINGS WITH REGARD TO WANTON DESTRUCTION OF CITIES, TOWNS OR VILLAGES NOT JUSTIFIED BY MILITARY NECESSITY (COUNTS 3 AND 5)**

579. The Prosecution charges the Accused with two counts of ‘wanton destruction of cities, towns or villages, not justified by military necessity’ pursuant to Article 3(b) of the Statute. In Count 3, it is alleged that the Accused is criminally responsible as a commander pursuant to Article 7(3) of the Statute for all incidents of destruction contained in the Indictment. In Count 5, the Prosecution also charges the Accused with individual criminal responsibility pursuant to Article 7(1) of the Statute, namely for instigating and aiding and abetting the wanton destruction that occurred during the attacks on Fakovići, Bjelovac and Kravica/Ježeštica, in which the Accused is alleged to have participated in person.<sup>1560</sup>

### **A. The Law**

#### **1. Legal Basis**

580. Article 3 of the Statute is entitled ‘Violations of the laws or customs of war’. In subparagraph (b), this Article specifically prohibits

wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>1561</sup>

This provision is based on the 1907 Hague Regulations, which prohibit the destruction (and seizure) of enemy property, unless “imperatively demanded by the necessities of war”.<sup>1562</sup> It was restated in Article 6(b) of the Nuremberg Charter and in Principle 6 of the Nuremberg Principles.<sup>1563</sup> There is no doubt that the crime described in Article 3(b) of the Statute, which narrows the scope of previous

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<sup>1560</sup> Indictment, paras 27-37. See paras 8-10 *supra*.

<sup>1561</sup> While it leaves open whether ‘destruction’ and ‘devastation’ connote two different crimes, the Trial Chamber agrees that there is no material distinction in law between these terms: *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, (“*Strugar* Trial Judgement”), para. 291. The Trial Chamber further understands that “not justified by military necessity” applies to ‘destruction’ and ‘devastation’ alike. As the Prosecution has charged the Accused with ‘destruction’ only, the Trial Chamber will henceforth only refer to that term.

<sup>1562</sup> 1907 Hague Regulations, Article 23(g): “[I]t is especially forbidden [...] to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

<sup>1563</sup> Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, unanimously adopted by the International Law Commission, 1950, UNGAOR, 5<sup>th</sup> Session, Supp. No. 12, UN Doc. A/1316.

codifications, and thus, sets an even higher threshold, by requiring the destruction of *cities, towns or villages*, formed part of customary international law at the time it was allegedly committed.<sup>1564</sup>

## 2. Elements of the Crime

581. The following elements of the crime of ‘wanton destruction of cities, towns or villages, not justified by military necessity’ are adopted:

- (i) The destruction of property<sup>1565</sup> occurred on a large scale;
- (ii) The destruction was not justified by military necessity; and
- (iii) The perpetrator acted with the intent to destroy the property in question.<sup>1566</sup>

582. The protection afforded under Article 3(b) of the Statute includes all property in the territory involved in the conflict, including that located in enemy territory and in territory not under effective occupation.<sup>1567</sup> Earlier in this Judgement, it was established that the provisions of Article 3(b) of the Statute apply to international and internal conflicts alike.<sup>1568</sup>

## 3. Destruction on a Large Scale

583. In order to constitute a violation of the laws or customs of war, the destruction must be both ‘serious’ in relation to an individual object and cover a substantial range of a particular city, town or village. The requirement that the destruction be serious is therefore not met if, for instance, only the windows of a house were shattered. The sporadic or isolated destruction of a few houses of a settlement is equally insufficient to fulfil the qualifications of the crime in question.<sup>1569</sup>

584. Regarding the extent of the destruction, the Prosecution contends that the crime of wanton destruction is perpetrated with even the *partial* destruction of cities, towns or villages. It maintains that there is no requirement in international humanitarian law that any one of these settlements must

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<sup>1564</sup> *Kordić* Appeal Judgement, paras 74-76, referring to the Report of the Secretary-General, para. 35; *Hadžihasanović* Jurisdiction Appeal Decision, para. 26.

<sup>1565</sup> Whereas Article 2(d) of the Statute covers both immovable and movable property, Article 3 of the Statute distinguishes between destruction of cities, towns and villages (Article 3(b)) and plunder of public or private property (Article 3(e)). This indicates that for Article 3(b) not every destruction of property is covered but only that relating to immovable property.

<sup>1566</sup> *Kordić* Appeal Judgement, para. 76.

<sup>1567</sup> *Kordić* Appeal Judgement, para. 74; *Kordić* Trial Judgement, para. 347, referring to ICRC Commentary, Geneva Convention IV, p. 615; *see also* *Naletilić* Trial Judgement, para. 580; *Brdanin* Trial Judgement, para. 592.

<sup>1568</sup> *See* para. 252 *supra*.

<sup>1569</sup> Rule 98bis Decision, 8 June 2005, T. 9009; *Strugar* Trial Judgement, 31 January 2005, para. 294.

be destroyed in its *entirety*.<sup>1570</sup> The Defence opposes this interpretation of Article 3(b) of the Statute, emphasising that the provision makes no reference to partial destruction. It submits that a provision should be read literally unless doing so would lead to absurdity or repugnance.<sup>1571</sup>

585. The Trial Chamber agrees with the Prosecution's submission in so far as it would amount to an overtly narrow reading of the prohibition of wanton destruction to require proof of *total* destruction of a city, town or village.<sup>1572</sup> It will therefore consider, on a case by case basis, whether the extent of any proven destruction of a particular city, town or village can be regarded as substantial enough.

#### 4. Destruction not Justified by Military Necessity

586. The Prosecution submits that the destruction of property was not justified by military necessity, and that none of the destroyed objects were legitimate targets. Rather, it occurred as the result of deliberate attack directed at civilian objects.<sup>1573</sup> The Defence disagrees and states that the attacks referred to in the Indictment constituted legitimate actions against military or otherwise strategic targets, with some of the destruction that may have been caused constituting 'collateral damage'.<sup>1574</sup> It is for the Prosecution to prove beyond reasonable doubt that the destruction occurred without military necessity for it.<sup>1575</sup>

587. Article 52 of Additional Protocol I defines what constitutes a military objective:

Attacks shall be strictly limited to military objectives. 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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>1576</sup>

The Trial Chamber agrees with the *Galić* Trial Chamber that an object shall not be attacked when it would be unreasonable to believe, in the circumstances of the person contemplating the attack, including the information available to that person, that the object is being used to make an effective contribution to military action.<sup>1577</sup>

588. The Trial Chamber finds that 'collateral damage' may occur in the course of combat, when, as a result of the destruction of objects which make an effective contribution to military action,

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<sup>1570</sup> Prosecution Pre-Trial Brief, para. 68.

<sup>1571</sup> Defence Pre-Trial Brief, para. 39.

<sup>1572</sup> *Strugar* Trial Judgement, para. 294.

<sup>1573</sup> Prosecution Pre-Trial Brief, para. 72.

<sup>1574</sup> Defence Pre-Trial Brief, para. 44.

<sup>1575</sup> *Kordić* Appeal Judgement, para. 495.

<sup>1576</sup> Additional Protocol I, Article 52(2). *See also Strugar* Trial Judgement, para. 295; *Galić* Trial Judgement, para. 51.

other objects, such as adjacent buildings, are destroyed that do not fulfil this criterion.<sup>1578</sup> However, after the fighting has ceased, destruction can in principle no longer be justified by claiming ‘military necessity’.<sup>1579</sup> A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be the case that, after such a settlement has been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, to return and resume the attacks. A submission that such destruction is covered by ‘military necessity’ will be entertained on a case-by-case basis. Except for the rare occasions in which such preventive destruction could arguably fall within the scope of ‘military necessity’,<sup>1580</sup> the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.<sup>1581</sup>

## 5. Mens Rea

589. The Trial Chamber finds that the mental state required for an accused to be convicted of the crime under Article 3(b) of the Statute is intent to destroy the property in question, including a situation in which the perpetrator foresaw as more likely than not that the destruction could occur as a consequence of his conduct, and that he nevertheless accepted the risk by performing the act.<sup>1582</sup>

## **B. The Facts and Findings**<sup>1583</sup>

### 1. Introduction

590. The Indictment alleges that, in the course of attacks in eastern Bosnia between 10 June 1992 and 8 January 1993, units under the command and control of the Accused unlawfully destroyed

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<sup>1577</sup> *Galić* Trial Judgement, para. 51.

<sup>1578</sup> *Kordić* Trial Judgement, para. 391.

<sup>1579</sup> See, e.g., the *Peleus* trial, Law Reports of Trials of War Criminals, Vol. I, 1949, p. 1 *et seq.*, in which the court rejected the claim of Heinz Eck, a German submarine commander, that the killing of surviving crew members of a sunk military vessel was justified by ‘military necessity’ to save his own life and that of the submarine crew.

<sup>1580</sup> The Hostages case, trial of *Wilhelm List and Others*, Law Reports of Trials of War Criminals, Vol. VIII, 1949, pp. 66-69: “There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. [...] Private homes and churches even may be destroyed if necessary for military operations.”

<sup>1581</sup> *Kordić* Appeal Judgement, paras 419, 426. A policy of “scorched earth”, *i.e.*, the destruction of any facilities that might be useful to the enemy while withdrawing from an area, was not recognised at the Nuremberg Tribunal to be justified by military necessity: see the case against Alfred Jodl in Law Reports of Trials of Major War Criminals, Vol. XXII, 1949, p. 517.

<sup>1582</sup> See paras 279, 288 *supra*.

<sup>1583</sup> Evidence was heard of many Bosnian Serb civilians killed during Bosnian Muslim attacks on their villages: Miladin Simić, T. 855-856; Milo Ranković, T. 1091-1093, 1097-1110; Milenko Stevanović, T. 1640; Slavoljub Rankić, T. 2317-2318; Dragomir Miladinović, T. 2995, 3011-3013, 3052; Branislav Gligić, T. 4287-4290; Milosava Nikolić, T. 7127; ex. P395, “Newspaper article”. The casualties are not included in the Indictment, and are therefore beyond the scope of this case.

property in a total of five locations encompassing several predominantly Bosnian Serb villages and their surrounding hamlets.<sup>1584</sup>

591. Both Prosecution and Defence witnesses, who gave evidence with respect to the Bosnian Muslim attacks on the Bosnian Serb villages, distinguished between two categories of participants, using terms which reflect their own perception of the events. As such, participants in the first category were characterised as ‘soldiers’,<sup>1585</sup> ‘citizen soldiers who take up arms’,<sup>1586</sup> ‘armed people’<sup>1587</sup> and ‘fighters’.<sup>1588</sup> Participants in the second category were characterised as ‘civilians’,<sup>1589</sup> ‘refugees’,<sup>1590</sup> and ‘*torbari*’.<sup>1591</sup> Notwithstanding the different terms used, the Trial Chamber will adopt the term ‘fighters’ to describe the first category and ‘civilians’ when referring to the second category.

592. Throughout this Chapter the Trial Chamber refers to certain exhibits, including ex. P94, ex. P95 and ex. P566, which it has accepted as authentic, and at times relies on some of their contents. When it does not rely on them, it is because it considers other available evidence on the same matter as more reliable and convincing.

## 2. Attacks on the Village of Ratkovići and its Surrounding Hamlets of Gornji Ratkovići, Dučići and Brađevina on 21 and 27 June 1992

593. The Indictment alleges that on 21 and 27 June 1992, the village of Ratkovići, including the surrounding hamlets of Gornji Ratkovići, Dučići and Brađevina, was attacked by Bosnian Muslim units under the command and control of the Accused, and that in the course of these attacks, Bosnian Serb property including buildings and dwellings was destroyed.<sup>1592</sup> The Indictment further alleges that the Srebrenica TO, Osmače TO, Kragljivoda TO, Skenderovići TO and Biljeg TO participated in these attacks.<sup>1593</sup>

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<sup>1584</sup> Indictment, paras 27-35.

<sup>1585</sup> Staniša Stevanović, T. 1481, 1493-1494; Milenko Stevanović, T. 1624-1625, 1648-1649; Ratko Nikolić, T. 2706; Nikola Popović, T. 2833, 2835; Mira Stojanović, T. 3834.

<sup>1586</sup> Rex Dudley, T. 14901-14902.

<sup>1587</sup> Ratko Nikolić, T. 2710; Bećir Bogilović, T. 6403.

<sup>1588</sup> Sead Bekrić, T. 9543; Kada Hotić, T. 9828, 9832; Hamed Tiro, T. 10360-10361, 10547; Ibro Alić, T. 12707.

<sup>1589</sup> Hamed Tiro, T. 10360-10361, 10547; Nesib Burić, T. 10680, 10734; Ibro Alić, T. 12709-12710.

<sup>1590</sup> Sead Bekrić, T. 9594, 9596. *See also* fn. 231 *supra*.

<sup>1591</sup> Sead Bekrić, T. 9543-9544; Kada Hotić, T. 9699, 9717; Sabra Kolenović, T. 10089-10090. *See* para. 112 *supra*.

<sup>1592</sup> Indictment, paras 30, 35.

<sup>1593</sup> Indictment, para. 30.



594. The area of Ratkovići consists of various hamlets in the vicinity of the village of Ratkovići, including Gornji Ratkovići, Brađevina, Dučići, Dvorište and Polimći.<sup>1594</sup> Ratkovići formed part of the municipality of Srebrenica.<sup>1595</sup> The village of Ratkovići is situated approximately 11 kilometres southeast of Srebrenica town, and approximately five kilometres west of Fakovići and the Drina River.<sup>1596</sup> Whereas Ratkovići, Gornji Ratkovići and Dučići are located on one side of the Grabovička Rijeka valley, Brađevina is located at a distance of two or three kilometres on the other side.<sup>1597</sup> At the relevant time, the inhabitants of Ratkovići, Gornji Ratkovići, Brađevina and Dučići were exclusively Bosnian Serb.<sup>1598</sup> The nearest Bosnian Muslim settlements, all located within two to four kilometres from Ratkovići were Močevići, Poznanovići, and Podkorjen.<sup>1599</sup>

595. The Indictment alleges that the area of Ratkovići was attacked twice.<sup>1600</sup> The first attack, directed against Ratkovići, Gornji Ratkovići and Dučići, allegedly took place on 21 June 1992. The second attack, directed against Brađevina, allegedly took place on 27 June 1992.<sup>1601</sup> The Trial Chamber will examine the two attacks separately.

(a) Attack of 21 June 1992 on Ratkovići, Gornji Ratkovići and Dučići

(i) Factual Findings

596. Based primarily on the evidence given by witnesses Staniša Stevanović, Milenko Stevanović, Branislav Gligić, Omer Ramić and Hamed Tiro, as well as on documentary evidence, the Trial Chamber reaches the following findings.

597. Between April and June 1992, Bosnian Serbs and Bosnian Muslims engaged in mutual fighting in the Ratkovići area.<sup>1602</sup> Evidence was heard that Bosnian Serbs attacked numerous Bosnian Muslim villages from the direction of Ratkovići,<sup>1603</sup> Dučići,<sup>1604</sup> Fakovići<sup>1605</sup> and

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<sup>1594</sup> Staniša Stevanović, T. 1536-1537. Ratkovići, Dučići and Brađevina were viewed from the air by the Trial Chamber and the Parties during a site visit in June 2005.

<sup>1595</sup> Staniša Stevanović, T. 1525.

<sup>1596</sup> Ex. C1, "Map".

<sup>1597</sup> Ex. P407, "Map".

<sup>1598</sup> Milenko Stevanović, T. 1608, 1610-1613.

<sup>1599</sup> Milenko Stevanović, T. 1613; ex. C1, "Map". The Trial Chamber and the Parties visited Poznanovići during a site visit in June 2005.

<sup>1600</sup> Indictment, para. 30.

<sup>1601</sup> See paras 597, 610 *infra*

<sup>1602</sup> Omer Ramić, T. 9904-9907, 9909-9911, 9990-9991, 9994-9998, 10002-10003.

<sup>1603</sup> Omer Ramić, T. 9890, 9909-9911, 9915-9917, 9990-9992; Hamed Tiro, T. 10302-10303; *see also* Hakija Mehholjić, T. 6908.

<sup>1604</sup> Nesib Burić, T. 10644-10646.

<sup>1605</sup> Omer Ramić, T. 9909-9911; Nesib Burić, T. 10644-10645.

Brađevina.<sup>1606</sup> Consequently, the inhabitants of these villages fled to the woods.<sup>1607</sup> On the morning of 21 June 1992, Bosnian Muslims attacked Ratkovići, Gornji Ratkovići and Dučići.<sup>1608</sup>

598. While part of the documentary evidence indicates that the attack was carried out by groups of Bosnian Muslim fighters from Osmače, Kragljivoda, Skenderovići and Biljeg, as well as other Bosnian Muslim fighters from Srebrenica,<sup>1609</sup> witness evidence does not go beyond confirming that the Bosnian Muslim fighters came from the nearby Bosnian Muslim villages of Poznanovići and Podkorjen.<sup>1610</sup> According to Omer Ramić, these fighters were led by Dževad Malkić.<sup>1611</sup> The Bosnian Muslim fighters who attacked Ratkovići were followed by a crowd of Bosnian Muslim civilians who were mostly refugees from Bosnian Muslim villages near Ratkovići.<sup>1612</sup>

599. At the time of the attack on Ratkovići, Gornji Ratkovići and Dučići, a number of Bosnian Serb village guards<sup>1613</sup> and civilians were present.<sup>1614</sup> There is conflicting evidence as to the degree to which these guards were militarised. On the one hand, there is evidence that the village guards did not form part of the VRS and that they had only light weapons at their disposal.<sup>1615</sup> On the other hand, evidence which is more convincing suggests that at least some of the village guards underwent special military training and were relatively well-armed.<sup>1616</sup>

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<sup>1606</sup> Hamed Tiro, T. 10302-10303.

<sup>1607</sup> Omer Ramić, T. 9912-9916, 10003.

<sup>1608</sup> Staniša Stevanović, T. 1477-1478; Milenko Stevanović, T. 1617; Omer Ramić, T. 9916.

<sup>1609</sup> Ex. P94, "Supplement to the ABiH chronicle" of 7 March 1994, pp. 4, 5, 7, mentioning that the Independent Battalion Skenderovići, Skenderovići TO, Independent Battalion Biljeg, Biljeg TO, and Company Stari Grad from the Independent Battalion Srebrenica, participated in combat activities in the region of Ratkovići on 21 June 1992; ex. P95, "Supplement to the ABiH chronicle" of 7 February 1994, pp. 2, 12, 14, first mentioning the participation of the Staff of the Territorial Defence Srebrenica in the attack on Ratkovići on 21 June 1992, and further specifying that the attack was carried out by Brigade "3 Maj" Kragljivoda, the Kragljivoda TO, the Skenderovići TO, the Biljeg TO, the Osmače TO, the Independent Battalion Osmače, and the Srebrenica TO; ex. P595, "Proposal for Decorations" of 9 December 1994, p. 4, stating that Akif Ustić's unit participated in the attack on Ratkovići between 23 and 27 June 1992; ex. P566, "Srebrenica: Aggression-Resistance-Treason-Genocide" by Nijaz Mašić, p. 5, stating that "soldiers from Osmače, Kragljivoda, Skenderovići, Biljeg and Srebrenica Stari Grad helped in the destruction of Chetnik strongholds in Ratkovići".

<sup>1610</sup> Omer Ramić, T. 9891-9893, 9916, 9996; Nesib Burić, T. 10646, giving evidence that Bosnian Muslims from Poznanovići and Podkorjen attacked Ratkovići to repel a Bosnian Serb attack from this direction; Nesib Burić, T. 10648, denying the participation of Bosnian Muslims from Osmače and Kragljivoda in this attack; Omer Ramić, T. 9978-9980, stating that he was not aware of the participation of Bosnian Muslim fighters from Osmače, Kragljivoda, Skenderovići, Biljeg and Srebrenica Stari Grad in the attack, but not ruling out the possibility that refugees from these places went to Ratkovići in search for food.

<sup>1611</sup> Omer Ramić, T. 9892-9893, 9996.

<sup>1612</sup> Omer Ramić, T. 9916-9917, 9974, 10004.

<sup>1613</sup> Staniša Stevanović, T. 1469-1470. It is uncertain whether Dučići had its own guard: Staniša Stevanović, T. 1474-1475. The guards protected the village and the property of its inhabitants: *see para. 96 supra*.

<sup>1614</sup> Staniša Stevanović, T. 1469; Branislav Gligić, T. 4288, 4428-4431.

<sup>1615</sup> Staniša Stevanović, T. 1475-1476.

<sup>1616</sup> Omer Ramić, T. 9870-9874, 9917-9918, 10008; Hamed Tiro, T. 10246-10250, 10266-10268, 10272-10273, 10275-10283, 10298; Nesib Burić, T. 10644. *See also* Hakija Mehuljić, T. 6908; Izet Redžić, T. 9232; ex. D45, "List", stating that at least some inhabitants of Ratkovići joined the VRS; Omer Ramić, T. 9891, giving evidence that there was

600. The attack was of short duration.<sup>1617</sup> While there is no evidence that Bosnian Muslim fighters faced opposition in Ratkovići and Dučići, they did meet with resistance in Gornji Ratkovići.<sup>1618</sup> Prior to withdrawal, Bosnian Serbs fired on the attacking Bosnian Muslims from houses, barns and stables.<sup>1619</sup> With the exception of one barn, Gornji Ratkovići had not caught fire.<sup>1620</sup> Following the attack, Gornji Ratkovići, Polimići and part of Dvorište were ablaze and smoke was seen in Ratkovići.<sup>1621</sup> After taking cattle out of the stables, Bosnian Muslim fighters and civilians set fire to all barns and outbuildings in the fields near Polimići,<sup>1622</sup> which is approximately one kilometre southeast of Ratkovići.<sup>1623</sup> Bosnian Muslim fighters then withdrew in anticipation of a counter-attack, whereas civilians stayed behind looking for food.<sup>1624</sup>

601. In the afternoon of 21 June 1992, Bosnian Serbs counter-attacked Ratkovići, Gornji Ratkovići and Dučići.<sup>1625</sup> Artillery coming from Magudovići<sup>1626</sup> and Fakovići destroyed some of the houses.<sup>1627</sup>

602. By the end of that day, all the buildings in the village of Ratkovići were burned to the ground.<sup>1628</sup> In Gornji Ratkovići, Polimići and Dvorište, “there were no roofs left [and] [t]here was [one] hundred per cent damage.”<sup>1629</sup>

#### (ii) Legal Findings

603. In light of the above findings, the Trial Chamber is satisfied that property was destroyed on a large scale in Ratkovići, including Gornji Ratkovići on 21 June 1992.<sup>1630</sup> In regard to Dučići,

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movement of Serb soldiers from Fakovići to Ratkovići; *but see* Milenko Stevanović, T. 1621-1622, stating that Serb military forces were not operating in that area.

<sup>1617</sup> Staniša Stevanović, T. 1484.

<sup>1618</sup> Omer Ramić, T. 9917-9918, 10010-10012.

<sup>1619</sup> Omer Ramić, T. 9917-9918, 10010-10012.

<sup>1620</sup> Omer Ramić, T. 10012.

<sup>1621</sup> Staniša Stevanović, T. 1479-1481; Milenko Stevanović, T. 1618-1619.

<sup>1622</sup> Staniša Stevanović, T. 1479-1482, 1540; *see also* Milenko Stevanović, T. 1618-1619. *But see* Omer Ramić, T. 9934-9935, 10016, stating that Bosnian Muslims did not burn down Ratkovići.

<sup>1623</sup> Ex. C1, “Map”.

<sup>1624</sup> Omer Ramić, T. 9922, 10016, 10020.

<sup>1625</sup> Omer Ramić, T. 9922.

<sup>1626</sup> Magudovići is approximately two kilometres from Ratkovići: ex. C1, “Map”.

<sup>1627</sup> Omer Ramić, T. 9922, 9927-9928, 10018, 10021-10022. The Trial Chamber notes evidence that the area of Ratkovići was further attacked and destroyed by Bosnian Serbs during the end of 1992: Omer Ramić, T. 9935-9936, 9939. *See also* ex. D724, “Combat Report” of 1 April 1993; ex. D51, “Fighting Order” of 9 April 1993. However, this evidence does not invalidate its earlier finding.

<sup>1628</sup> Branislav Gligić, T. 4287, 4290, 4425, 4427-4428. *But see* Omer Ramić, T. 9934-9936, stating that houses in Ratkovići were not burned down prior to September 1992, and that he saw shells landing on houses in Ratkovići between September 1992 and April 1993.

<sup>1629</sup> Staniša Stevanović, T. 1478, 1484-1485. *See also* ex. P566, “Srebrenica: Aggression-Resistance-Treason-Genocide” by Nijaz Mašić, referring to the “destruction of the Chetnik strongholds in Ratkovići (hamlets: Polimići, Dučići, Dvorište and Brđani).”

<sup>1630</sup> *See paras 600-602 supra.*

however, there is no sufficient evidence to sustain the charge that destruction occurred on a large scale there.<sup>1631</sup>

604. The Trial Chamber recalls that Bosnian Muslim fighters and civilians set fire to all barns and outbuildings in the fields near Polimći. Furthermore, some of the Bosnian Muslim civilians who stayed behind in the Ratkovići area after the Bosnian Muslim fighters' withdrawal, may have set houses on fire.<sup>1632</sup> Bosnian Serbs conducting counter-attacks on Ratkovići using artillery could also have caused some destruction. Nonetheless, the possibility of further destruction caused by counter-attacks does not invalidate the finding that the substantial destruction of Ratkovići and Gornji Ratkovići was caused by Bosnian Muslims who set property on fire.<sup>1633</sup>

605. The Trial Chamber is satisfied that Bosnian Muslims who destroyed property in Ratkovići and Gornji Ratkovići acted with intent to destroy. The intent to destroy is evident from the Trial Chamber's finding that the destruction of property by Bosnian Muslims was not a result of fighting,<sup>1634</sup> but of deliberate torching of property after the fighting had ceased.<sup>1635</sup>

606. Ratkovići, including Gornji Ratkovići, was an exclusively residential area at the outset of the conflict and, at the time of the attack, civilian inhabitants were present.<sup>1636</sup> Prior to the Bosnian Muslim attack, the inhabitants of Ratkovići, including village guards, received at least some military support, and attacks were launched from Ratkovići on nearby Bosnian Muslim villages.<sup>1637</sup> In light of this evidence, the Trial Chamber does not exclude that a military justification for attacking Ratkovići is conceivable. However, as explained hereunder, such justification cannot extend to wanton destruction of civilian property, such as houses, as well as barns and outbuildings.

607. The Trial Chamber finds that at the time of the attack, the property destroyed in Ratkovići was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. In Gornji Ratkovići, although there was an exchange of fire between Bosnian Muslims and Bosnian Serbs, most of the destruction occurred after the Bosnian Serbs had withdrawn.<sup>1638</sup> As a consequence, the destruction of property in

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<sup>1631</sup> *Ibid.* On balance, the Trial Chamber does not find ex. P566, "Srebrenica: Aggression-Resistance- Treason-Genocide" by Nijaz Mašić and ex. P406, "Statement of Staniša Stevanović" of 20 December 1994, as sufficiently reliable evidence to establish that destruction on a large scale occurred in Dučići on 21 June 1992.

<sup>1632</sup> *See* para. 600 *supra*.

<sup>1633</sup> *See* para. 585 *supra*.

<sup>1634</sup> *See* para. 600 *supra*.

<sup>1635</sup> *Ibid.*

<sup>1636</sup> *See* para. 599 *supra*.

<sup>1637</sup> *See* para. 597, 599 *supra*.

<sup>1638</sup> *See* paras 587-588, 600 *supra*.

Ratkovići, including Gornji Ratkovići, was not required for the attainment of a military objective. Therefore, it was “not justified by military necessity”.

608. In conclusion, the Trial Chamber finds that the destruction of property on a large scale in Ratkovići and Gornji Ratkovići on 21 June 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages not justified by military necessity.

(b) Attack of 27 June 1992 on Brađevina

(i) Factual Findings

609. Based primarily on the evidence given by Staniša Stevanović, Milenko Stevanović and Hamed Tiro, as well as on documentary evidence, the Trial Chamber reaches the following findings.

610. As previously noted, prior to the Bosnian Muslim attack, Bosnian Serbs and Bosnian Muslims had engaged in mutual fighting in the Ratkovići area, and Bosnian Muslims had suffered from Bosnian Serb attacks that were launched from the direction of Brađevina.<sup>1639</sup> At noon on 27 June 1992, Bosnian Muslims attacked Brađevina.<sup>1640</sup>

611. While the documentary evidence indicates that the attack was carried out by groups of Bosnian Muslim fighters from Srebrenica Stari Grad and Skenderovići,<sup>1641</sup> none of the witnesses heard at trial confirmed this evidence. Witnesses stated that some of the Bosnian Muslim fighters were locals from the surrounding Bosnian Muslim villages<sup>1642</sup> and that they were led by Vekaz Husić from Močevići.<sup>1643</sup> As to the other Bosnian Muslim fighters who participated in the attack, the Trial Chamber finds no sufficient and clear evidence that enable it to establish their identity. The Bosnian Muslim fighters who attacked Brađevina were followed by a crowd of Bosnian Muslim civilians.<sup>1644</sup>

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<sup>1639</sup> See para. 597 *supra*.

<sup>1640</sup> Staniša Stevanović, T. 1484, 1488; Milenko Stevanović, T. 1623.

<sup>1641</sup> Ex. P94, "Supplement to the ABiH chronicle" of 7 March 1994, pp. 4, 7, mentioning that the Independent Battalion Skenderovići, Skenderovići TO and Company Stari Grad from the Independent Battalion Srebrenica conducted combat activities in Brađevina on 27 June 1992.

<sup>1642</sup> Staniša Stevanović, T. 1492; Milenko Stevanović, T. 1640.

<sup>1643</sup> Staniša Stevanović, T. 1498-1499; Hamed Tiro, T. 10309-10310, 10485-10491; see also Sead Bekrić; T. 9526; para. 168 *supra*. Evidence also suggests that Akif Ustić and Šefik Mandžić were involved in the attack: ex. P329, "Interview" of the Accused", tape 21, p. 16; see also Milenko Stevanović, T. 1669-1670.

<sup>1644</sup> Hamed Tiro, T. 10309-10310, 10488-10492. See also Staniša Stevanović, T. 1492-1493; Milenko Stevanović, T. 1628, 1732.

612. When the Bosnian Muslims attacked Brađevina, the majority of its inhabitants had already left the hamlet in the wake of the attack of 21 June 1992.<sup>1645</sup> Only 12 village guards had stayed behind.<sup>1646</sup> There is conflicting evidence as to the degree to which these guards were militarised. Again, the Trial Chamber heard evidence that these guards did not form part of the VRS or JNA and that they only had light weapons at their disposal.<sup>1647</sup> However, more convincing evidence suggests that at least some of the village guards underwent special military training and were relatively well-armed.<sup>1648</sup>

613. The attack on Brađevina was launched from the direction of Kaludra.<sup>1649</sup> The attackers entered Brađevina from its lower part, and surrounded it.<sup>1650</sup> They met with no resistance.<sup>1651</sup> The attack came in two waves, the first by fighters approaching the houses of Brađevina firing from the prone position, and the second by fighters following behind.<sup>1652</sup> Witnesses heard detonations and saw burning of haystacks and sheds.<sup>1653</sup> In the course of the attack, Bosnian Muslim fighters torched houses after taking out goods.<sup>1654</sup> Bosnian Muslim civilians joined fighters in torching stables and burning livestock in the meadows between Brađevina and Magudovići.<sup>1655</sup> Eventually, all the buildings of Brađevina,<sup>1656</sup> except those used for storing grain and food, were set on fire.<sup>1657</sup>

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<sup>1645</sup> Staniša Stevanović, T. 1469; Milenko Stevanović, T. 1619-1620.

<sup>1646</sup> Staniša Stevanović, T. 1469-1470; Milenko Stevanović, T. 1620-1621.

<sup>1647</sup> Staniša Stevanović, T. 1469-1472, 1475, 1524-1525, 1556, 1582 (private session), 1590; Milenko Stevanović, T. 1620-1622.

<sup>1648</sup> Hamed Tiro, T. 10245-10250, 10266-10273, 10275-10277, 10280-10283, 10298; Omer Ramić, T. 9873-9874, 9917-9918, 10008. *See also* Hakija Meholjić, T. 6908; Izet Redžić, T. 9232. The Trial Chamber further notes that while ex. D45, "List" indicates that some inhabitants of the Ratkovići area were mobilised in the Bratunac Brigade, witnesses heard at trial denied the alleged mobilisation of village guards into this brigade as well as any other military presence in the area of Ratkovići: Staniša Stevanović, T. 1582 (private session); Milenko Stevanović, T. 1712, 1718, 1722, 1729; Staniša Stevanović, T. 1582-1583, stating that names of victims were incorporated into lists of deceased soldiers to receive social benefits.

<sup>1649</sup> Milenko Stevanović, T. 1630-1631. Kaludra is approximately two kilometres southeast of Brađevina: ex, P407, "Map". *See also* Staniša Stevanović, T. 1493.

<sup>1650</sup> Staniša Stevanović, T. 1489-1490, 1493; Milenko Stevanović, T. 1630.

<sup>1651</sup> Staniša Stevanović, T. 1557; Milenko Stevanović, T. 1631.

<sup>1652</sup> The fighters were followed by civilians: Milenko Stevanović, T. 1623-1624, 1732. *See also* Staniša Stevanović, T. 1489-1490, 1492-1493.

<sup>1653</sup> Milenko Stevanović, T. 1623-1624, 1631-1633; Staniša Stevanović, T. 1489-1490.

<sup>1654</sup> Staniša Stevanović, T. 1490-1494. *See also* Milenko Stevanović, T. 1627. Bosnian Muslims civilians helped the fighters carry goods out of houses: Staniša Stevanović, T. 1494.

<sup>1655</sup> Milenko Stevanović, T. 1632-1633. Magudovići is approximately one kilometre west of Brađevina: ex. P407, "Map".

<sup>1656</sup> In early 1992, there were approximately 12 households in Brađevina: Staniša Stevanović, T. 1464. *See also* Milenko Stevanović, T. 1608.

<sup>1657</sup> Staniša Stevanović, T. 1492. *But see* Hamed Tiro, T. 10311-10312, stating that at least up to August 1992, only two houses in Brađevina were burned down.

Bosnian Muslim civilians remained in the area after the attack, searching for food and other goods.<sup>1658</sup>

(ii) Legal Findings

614. Based on the above findings, the Trial Chamber finds that property was destroyed on a large scale in Brađevina on 27 June 1992.

615. The Trial Chamber recalls that Bosnian Muslim fighters and civilians set fire to property in Brađevina on 27 June 1992.<sup>1659</sup> Furthermore, some of the Bosnian Muslim civilians, who stayed behind in Brađevina after the Bosnian Muslim fighters' withdrawal, may have set houses on fire.<sup>1660</sup> Nonetheless, the Trial Chamber finds that the possibility of further destruction after the attack does not invalidate the above finding.<sup>1661</sup>

616. The Trial Chamber is satisfied that Bosnian Muslims who destroyed property in Brađevina acted with intent to destroy. The intent to destroy is evident from the finding that the destruction of property by Bosnian Muslims was not a result of fighting,<sup>1662</sup> but of deliberate torching of property after the fighting had ended.<sup>1663</sup>

617. At the outset of the conflict, Brađevina was an exclusively residential area. The Trial Chamber recalls that prior to the Bosnian Muslim attack, the inhabitants of Brađevina, including village guards, received at least some military support. Moreover, attacks were launched from Brađevina on nearby Bosnian Muslim villages.<sup>1664</sup> In light of this evidence, the Trial Chamber does not exclude that a military justification to attack Brađevina is conceivable. However, as explained hereunder, such justification cannot extend to wanton destruction of civilian property, such as houses, stables, sheds and haystacks.

618. The Trial Chamber finds that at the time of the attack, the property destroyed in Brađevina was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. Consequently, the destruction of property

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<sup>1658</sup> Hamed Tiro, T. 10311. The Trial Chamber notes the evidence given by Hamed Tiro, T. 10312-10316, that during July and August 1992, Brađevina was shelled daily by Serbs from the direction of Ratkovići, Fakovići and Serbia and that some of the shells hit houses. This evidence, however, does not invalidate its previous finding.

<sup>1659</sup> See para. 613 *supra*.

<sup>1660</sup> *Ibid.*

<sup>1661</sup> See para. 585 *supra*.

<sup>1662</sup> See para. 613 *supra*.

<sup>1663</sup> See para. 613 *supra*.

<sup>1664</sup> See paras 597, 612 *supra*.

in Brađevina was not required for the attainment of a military objective.<sup>1665</sup> Therefore, it was “not justified by military necessity”.

619. As a consequence, the destruction of property on a large scale in Brađevina on 27 June 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages not justified by military necessity.

### 3. Attack on the Village of Ježestica on 8 August 1992

620. The Indictment alleges that on 8 August 1992, the village of Ježestica was attacked by units under the command and control of the Accused, and that in the course of this attack, Bosnian Serb property, including buildings and dwellings, was destroyed. The Indictment further alleges that the Potočari TO, Sućeska TO, Skenderovici TO and Osmače TO participated in this attack.<sup>1666</sup>

621. The main part of the village of Ježestica is located in a valley.<sup>1667</sup> It is surrounded on the hillsides by the hamlets of Tanići, Đermani, Ječmišta, Kijevići, Rankovići, Vresinje, Radukići and Potkonjice.<sup>1668</sup> At the relevant time, Ježestica was part of the municipality of Bratunac.<sup>1669</sup> Ježestica is located approximately 12 kilometres northwest of Srebrenica,<sup>1670</sup> four kilometres southeast of Kravica,<sup>1671</sup> and four kilometres southwest of Glogova.<sup>1672</sup> At the time, the inhabitants of Ježestica were almost exclusively Bosnian Serb.<sup>1673</sup> The closest predominantly Bosnian Muslim villages were ^izmići, Blječeva, Pale, Jaglići and Šušnjari, which are all located within a range of three to four kilometres of Ježestica. Konjević Polje, another village that at the time was predominantly Bosnian Muslim, lies approximately 11 kilometres northwest of Ježestica.<sup>1674</sup>

#### (a) Factual Findings

622. Based primarily on the evidence given by witnesses Dragan Đurić, Miladin Simić, Milo Ranković, Dragomir Miladinović, Sead Bekrić, Safet Golić and Sidik Ademović, as well as on documentary evidence the Trial Chamber finds as follows.

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<sup>1665</sup> See paras 587-588 *supra*.

<sup>1666</sup> Indictment, paras 31, 35.

<sup>1667</sup> Miladin Simić, T. 802; Dragomir Miladinović, T. 2947. The Trial Chamber and the Parties visited Ježestica during a site visit in June 2005.

<sup>1668</sup> Miladin Simić, T. 801-803; Dragomir Miladinović, T. 2947-2950.

<sup>1669</sup> Dragan Đurić, T. 708; Milo Ranković, T. 1070.

<sup>1670</sup> Ex. C1, “Map”.

<sup>1671</sup> Ex. C1, “Map”.

<sup>1672</sup> Ex. C1, “Map”. The Trial Chamber and the Parties viewed the area of Glogova during a site visit in June 2005.

<sup>1673</sup> Dragan Đurić, T. 708; Miladin Simić, T. 801; Milo Ranković, T. 1071; Dragomir Miladinović, T. 2950.

<sup>1674</sup> Ex. C1, “Map”; ex. P394, “Map”; ex. D797, “Map”. The Trial Chamber and the Parties drove through Konjević Polje during a site visit in June 2005.



623. As early as 1991, there were tensions between Bosnian Muslims and Bosnian Serbs in the area.<sup>1675</sup> As of April 1992, Bosnian Muslim villages, such as Glogova and ^izmići, were attacked by Bosnian Serbs, including locals from Kravica and Ježestica.<sup>1676</sup> Thereafter, Bosnian Muslims fled mainly to the nearby woods.<sup>1677</sup> Bosnian Serb attacks on the Bosnian Muslim population continued throughout the summer of 1992 from different directions, including from the direction of Kravica and Ježestica.<sup>1678</sup> Around noon on 8 August 1992, Bosnian Muslims attacked Ježestica.<sup>1679</sup>

624. While part of the documentary evidence indicates that the attack on Ježestica was carried out by groups of Bosnian Muslim fighters from Potočari, Blječeva, Pale<sup>1680</sup> and Sućeska,<sup>1681</sup> the witnesses heard at trial stated that the attackers came from the villages of Šušnjari,<sup>1682</sup> Jagličići and Glogova.<sup>1683</sup> The Bosnian Muslim fighters from Šušnjari were led by Sidik Ademović,<sup>1684</sup> while those from Glogova were led by Ejub Golić.<sup>1685</sup> Furthermore, the 16<sup>th</sup> Muslim Brigade from Tuzla, led by Nurif Rizvanović, participated in the attack.<sup>1686</sup> In contrast with other fighters who were poorly armed and mainly wearing civilian clothes, Nurif Rizvanović's men were well-armed and

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<sup>1675</sup> Dragan Đurić, T. 710; Safet Golić, T. 11758.

<sup>1676</sup> Safet Golić, T. 11760-11765 (partly in private session), 11794-11801; Sidik Ademović, T. 12968-12969.

<sup>1677</sup> Nesib Burić, T. 10708.

<sup>1678</sup> Safet Golić, T. 11810-11815, 11817-11819; Sidik Ademović, T. 12976-12978, 13013, 13016, 13020, 13033-13034; ex. D799, "Report" of 22 July 1992; *see also* ex. D75, "Directive" of August 1992; ex. D800, "Order" of 4 August 1992; *but see* Dragan Đurić, T. 744-746, 752-753; Miladin Simić, T. 938-939, 942-943.

<sup>1679</sup> Dragan Đurić, T. 711; Milo Ranković, T.1084-1086; Dragomir Miladinović, T. 2952; ex. P328, "Interview" of the Accused, tape 10, p. 19-20, where the Accused stated that this attack aimed at Glogova and was coordinated with the attack on Zala`je in which he participated.

<sup>1680</sup> Prosecution Final Brief, para. 585, submitting that the Blječeva and Pale Companies were units within the Potočari TO. As to the Trial Chamber finding with respect to the relations between the fighting group of Potočari and other fighting groups in the area, *see* para. 162 *supra*.

<sup>1681</sup> Ex. P95, "Supplement to the ABiH chronicle" of 7 February 1994, pp. 2, 6, 10, first mentioning the participation of the Staff of the Territorial Defence Srebrenica in the attack on Ježestica on 8 August 1992, and further specifying that the attack was carried out by the Potočari TO and the Sućeska TO; ex. P597, "War Path of Potočari Brigade", p. 2; ex. P598, "Military Diary", p. 11, mentioning that the Company Blječeva participated in an attack on Ježestica, at an unspecified date; ex. P328, "Interview" of the Accused, tape 10, pp. 19-20; ex. P329, "Interview" of the Accused, tape 20, p. 16, stating that Bosnian Muslim fighters from Blječeva, Čizmići and Pale participated in the attack. However, the Trial Chamber notes the evidence given by Safet Golić, T. 11847-11850, that Bosnian Muslim fighters from Potočari, Pale, Sućeska and Osmače did not participate in the attack and evidence given by Sidik Ademović, T. 13043, that Bosnian Muslim fighters from Pale and Sućeska did not participate in the attack. The Trial Chamber is not satisfied that ex. P598, "Military Diary" contains evidence that Company Pale participated in the attack on Ježestica: Prosecution Final Brief, para. 585.

<sup>1682</sup> Prosecution Final Brief, para. 585, submitting that the [ušnjari Company was a unit within the Potočari TO. As to the Trial Chamber's finding with respect to the relations between the Potočari and the [ušnjari fighting groups, *see* para. 162 *supra*.

<sup>1683</sup> Dragan Đurić, T. 712; Safet Golić, T. 11842; Sidik Ademović, T. 13228, 13041-13043; ex. P328: "Interview" of the Accused, tape 10, pp. 19-20; ex. P329, "Interview" of the Accused, tape 20, p. 16.

<sup>1684</sup> Sidik Ademović, T. 13228. *See also* Smajlović, T. 14663; para. 168 *supra*.

<sup>1685</sup> Sead Bekrić, T. 9546-9547; Safet Golić, T. 11820, 11823 (private session); Sidik Ademović, T. 13041-13043; ex. P328, "Interview" of the Accused, tape 10, pp. 20-21; ex. P329, "Interview" of the Accused, tape 20, p. 15. *See also* Chapter IV, para. 169 *supra*.

<sup>1686</sup> Safet Golić, T. 11825-11826, 11833-11839, 11848, 12001; Sidik Ademović, T. 13040-13048; D005, T. 14112-14113, 14133; ex. P433, "Video", 54.39; ex. D801, "Photographs".

wore uniforms with insignia.<sup>1687</sup> The Bosnian Muslim fighters who attacked Ježestica were followed by a crowd of Bosnian Muslim civilians, in all likelihood refugees from nearby Bosnian Muslim villages.<sup>1688</sup>

625. At the time of the attack, a number of Bosnian Serb village guards and some civilians were present in Ježestica.<sup>1689</sup> There is conflicting evidence as to the degree to which the village guards were militarised. Whereas some evidence was presented that they were neither trained nor armed by the VRS or JNA<sup>1690</sup> and that they had only relatively light weapons at their disposal,<sup>1691</sup> other evidence, which is more convincing, suggests that the village guards were supported by the VRS.<sup>1692</sup> In addition to the village guards, there is evidence of a Serbian and Bosnian Serb military presence in the area.<sup>1693</sup>

626. The Bosnian Muslim attack on Ježestica lasted approximately two to three hours.<sup>1694</sup> The Bosnian Muslim fighters entered Ježestica firing on houses.<sup>1695</sup> Although, the Bosnian Serbs initially resisted,<sup>1696</sup> they eventually withdrew.<sup>1697</sup> Witnesses heard detonations and shooting from the direction of Đermani and Kijevići,<sup>1698</sup> as well as artillery from the direction of Ježestica, Glogova and the hills separating Čizmići and Kravica.<sup>1699</sup> At least one house was damaged by shelling.<sup>1700</sup> A number of Bosnian Muslims, some in uniforms,<sup>1701</sup> set fire to houses.<sup>1702</sup> Ježestica and the surrounding hamlets were engulfed in smoke<sup>1703</sup> and numerous houses were burning.<sup>1704</sup>

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<sup>1687</sup> Safet Golić, T. 11820-11821, 11826, 11828, 11836-11837, 11848; ex. D801, "Photographs".

<sup>1688</sup> Miladin Simić, T. 831-833; Sead Bekrić, T. 9548. *See also* Milo Ranković, T. 1153; Safet Golić, T. 11793-11794.

<sup>1689</sup> Dragan Đurić, T. 710-711; Miladin Simić, T. 805, 808, 835, 900, 908, 918; Milo Ranković, T. 1080-1083, 1160, 1148; Dragomir Miladinović, T. 2957; *but see* Sidik Ademović, T. 12956, stating that only Bosnian Serbs fit for military service and several women stayed behind.

<sup>1690</sup> Dragan Đurić, T. 789-790; Miladin Simić, T. 809, 902, 924-925; Milo Ranković, T.1081-1083; Dragomir Miladinović, T. 2955-2957.

<sup>1691</sup> Dragan Đurić, T. 711; Milo Ranković, T. 1081.

<sup>1692</sup> Sidik Ademović, T. 13009-13011, 13013, 13217-13218; ex. D15 "Article". *See also* Sidik Ademović, T. 13008-13011; ex. D3, "List of Salaries" of July 1992; ex. D6, "List of Conscripts"; ex. D17, "List of Payments" of August 1992; ex. D18, "List of Salaries" of August 1992"; ex. D34, "List of Salaries" of July 1992; ex. D45, "List", indicating that at the time some of the inhabitants of Ježestica were mobilised into a local TO or became soldiers of the VRS.

<sup>1693</sup> Sidik Ademović, T. 12999-13001, 13006, 13217-13218; D005, T. 13842; ex. D798, "List of Wounded and Killed"; ex. D32, "Record of Death" of 29 September 1993; ex. D799, "Operations Report" of 27 July 1992. *See also* Sead Bekrić, T. 9548; ex. D7, "List of Conscripts"; ex. D22, "Lists of Killed"; ex. D846 "Information" of 1 July 1992. *But see* Dragan Đurić, T. 721, 751-752; Miladin Simić, T. 823, stating that there was no Serb or Bosnian Serb military presence in Ježestica itself prior to 8 August 1992.

<sup>1694</sup> Dragan Đurić, T. 715-719; Dragomir Miladinović, T. 2952. *But see* Sidik Ademović, T. 13040, stating that in certain parts of Ježestica, the fighting continued until late afternoon.

<sup>1695</sup> Dragan Đurić, T. 712-715. *See also* Miladin Simić, T. 823.

<sup>1696</sup> Milo Ranković, T. 1148, 1153.

<sup>1697</sup> Dragan Đurić, T. 715; Milo Ranković, T.1084, 1087, 1148, 1153; Dragomir Miladinović, T. 2952, 2960, 3025, 3031.

<sup>1698</sup> Milo Ranković, T. 1084, 1086. *See also* Dragan Đurić, T. 715.

<sup>1699</sup> Sead Bekrić, T. 9546.

<sup>1700</sup> Dragan Đurić, T. 712, 774-775.

<sup>1701</sup> Dragan Đurić, T. 718; Miladin Simić, T. 830-831, 950-951.

627. Later on the same day, Bosnian Serbs launched a counter-attack, causing the Bosnian Muslims to withdraw.<sup>1705</sup> By the end of the day, approximately half of the houses in Ježestica had been burned down.<sup>1706</sup>

(b) Legal Findings

628. In light of the above findings, the Trial Chamber finds that property was destroyed on a large scale in Ježestica on 8 August 1992.<sup>1707</sup>

629. The Trial Chamber recalls that Bosnian Muslims, some in uniform, set houses on fire. Bosnian Serbs conducted a counter-attack on Ježestica using artillery which may have caused some destruction. Nevertheless, the possibility of further destruction caused by this counter-attack does not invalidate the finding that the substantial destruction of Ježestica was caused by Bosnian Muslims who set fire to property.<sup>1708</sup>

630. The Trial Chamber is satisfied that the Bosnian Muslims who destroyed property in Ježestica acted with intent to destroy. The intent to destroy is evident from its finding that the destruction of property by Bosnian Muslims was not a result of fighting, but rather due to the deliberate burning of property.<sup>1709</sup>

631. Ježestica was a solely residential area at the outset of the conflict. Civilian inhabitants of Ježestica were present in the village during the attack.<sup>1710</sup> The Trial Chamber is satisfied that, prior to the Bosnian Muslim attack, the inhabitants of Ježestica, including village guards, received military support from the VRS. Moreover, prior to and during August 1992, attacks were launched from Ježestica on nearby Bosnian Muslim villages.<sup>1711</sup> In light of this evidence, the Trial Chamber does not exclude that a military justification to attack Ježestica is conceivable. However, as explained hereunder, such justification cannot extend to wanton destruction of houses.

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<sup>1702</sup> Dragan Đurić, T. 718-719; Miladin Simić, T. 825, 833, 951. *See also* Milo Ranković, T. 1088.

<sup>1703</sup> Dragan Đurić, T. 719; Miladin Simić, T. 830; Sidik Ademović, T. 13037.

<sup>1704</sup> Miladin Simić, T. 826, 830; Dragomir Miladinović, T. 2960, 3030-3031; *see also* Dragan Đurić, T. 715, 720; Milo Ranković, T. 1088.

<sup>1705</sup> Sidik Ademović, T. 13036-13038. *But see* Dragomir Miladinović, T. 3035, stating that Bosnian Serbs did not fire artillery on Ježestica.

<sup>1706</sup> Dragan Đurić, T. 718-720; Milo Ranković, T. 1070-1071, 1084-1086, 1090, 1150-1152; Dragomir Miladinović, T. 2948, 2964, 2982, 2999, 3032. *See also* Miladin Simić, T. 834, 836. The Trial Chamber notes evidence given by Dragomir Miladinović, T. 3035-3036, that a few houses were also destroyed before or after 8 August 1992.

<sup>1707</sup> *See paras* 626, 627 *supra*.

<sup>1708</sup> *See paras* 585, 627 *supra*.

<sup>1709</sup> *See para.* 626 *supra*.

<sup>1710</sup> *See para.* 626 *supra*.

<sup>1711</sup> *See para.* 625 *supra*.

632. The Trial Chamber finds that at the time of the attack, the property destroyed in Ježestica was neither of a military nature, nor was it used to make an effective contribution to the military action of the Bosnian Serbs. Although there was an exchange of fire between Bosnian Muslims and Bosnian Serbs, most of the destruction occurred after the Bosnian Serbs had withdrawn.<sup>1712</sup> As a consequence, the destruction of property in Ježestica was not required for the attainment of a military objective. Therefore, it was “not justified by military necessity”.

633. Consequently, the destruction of property on a large scale in Ježestica on 8 August 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages not justified by military necessity.

#### 4. Attack on the Village of Fakovići and the Hamlet of Divovići on 5 October 1992

634. The Indictment alleges that on 5 October 1992, the village of Fakovići and the hamlet of Divovići were attacked by Bosnian Muslim units under the command and control of the Accused,<sup>1713</sup> and that in the course of this attack, Bosnian Serb property, including buildings and dwellings, was destroyed.<sup>1714</sup> The Indictment further alleges that these units were the Potočari TO, Osmače TO, Sućeska TO, Company Stari Grad, Skenderovići TO and Kragljivoda TO.<sup>1715</sup> Furthermore, the Indictment alleges that the Accused participated in and commanded the attack.<sup>1716</sup>

635. Fakovići is situated on the west bank of the Drina River,<sup>1717</sup> approximately 15 kilometres east of Srebrenica.<sup>1718</sup> The area of Fakovići consists of various hamlets in the vicinity of the village of Fakovići and includes Divovići and Radijevići, located two to three kilometres southeast of Fakovići.<sup>1719</sup> At the relevant time, Fakovići area formed part of the municipality of Bratunac,<sup>1720</sup> and the inhabitants of Fakovići, Divovići and Radijevići were Bosnian Serb.<sup>1721</sup> The closest predominantly Bosnian Muslim villages were @anjevo,<sup>1722</sup> Abdulići,<sup>1723</sup> Jagodnja and Joševa, all located within a range of two to four kilometres of Fakovići.<sup>1724</sup>

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<sup>1712</sup> See paras 587-588, 626 *supra*.

<sup>1713</sup> Indictment, paras 32, 35.

<sup>1714</sup> Indictment, para. 35.

<sup>1715</sup> Indictment, para. 32.

<sup>1716</sup> Indictment, para. 32.

<sup>1717</sup> Ex. C1, “Map”; ex. D842, “Map”.

<sup>1718</sup> Ex. D842, “Map”.

<sup>1719</sup> Ex. C1, “Map”. The Trial Chamber and the Parties visited Fakovići, and drove through Divovići and Radijevići during a site visit in June 2005.

<sup>1720</sup> Novka Bo`ić, T. 1280-1281.

<sup>1721</sup> Savka \okić, T. 1380-1381; Staniša Stevanović, T. 1586; Slavoljub Žikić, T. 3164-3165. See also Ibro Alić, T. 12495-12498; Novka Bo`ić, T. 1307, mentioning that Bosnian Muslims who resided in Fakovići area prior to the war had to leave the area when tension between Bosnian Serbs and Bosnian Muslims escalated.

<sup>1722</sup> Novka Bo`ić, T.1283; Nesib Burić, T. 10664.

(a) Factual Findings

636. Based primarily on the evidence given by Savka \okić, Slavoljub Žikić, Hakija Meholfjić and Nesib Burić, as well as on documentary evidence, the Trial Chamber reaches the following findings.

637. As early as 1991, there were tensions between Bosnian Muslims and Bosnian Serbs in the area.<sup>1725</sup> The tensions intensified in the spring of 1992, and as of May 1992, Bosnian Serbs were launching artillery and infantry attacks on nearby Bosnian Muslim villages, such as @anjevo, Jagodnja, Joševa and Osmaće,<sup>1726</sup> from the direction of Fakovići, among other places.<sup>1727</sup> Consequently, the inhabitants of these villages fled to the nearby woods or other Bosnian Muslim villages.<sup>1728</sup> On 4 October 1992, Bosnian Serbs attacked Jagodnja and Joševa, and thereafter met with resistance from Bosnian Muslim fighters.<sup>1729</sup> On 5 October, there was shooting and shelling by the Bosnian Serbs from the direction of Fakovići,<sup>1730</sup> which was followed by an attack of Bosnian Muslim fighters on Fakovići and Divovići at noon.<sup>1731</sup>

638. The decision to attack Fakovići was taken by the Srebrenica Armed Forces Staff and leaders of fighting groups.<sup>1732</sup> The attack was planned in a meeting of the Srebrenica Armed Forces Staff<sup>1733</sup> Evidence given by witnesses corroborated what the Accused stated during the Interview, namely that both he and Zulfo Tursunović participated in the attack on Fakovići.<sup>1734</sup> The Accused,

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<sup>1723</sup> Novka Bo`ić, T. 1304, Slavoljub Žikić, T. 3166; Nesib Burić, T. 10667, stating that @anjevo and Abdulici are in fact one village. The Trial Chamber and the Parties visited @anjevo and Abdulici during a site visit in June 2005.

<sup>1724</sup> Ex. C1, "Map".

<sup>1725</sup> Slaviša Erić, T. 3166. *See also* Savka \okić, T. 1411.

<sup>1726</sup> Nesib Burić, T. 10596, 10600, 10613; Ibro Alić, T. 12503-12504, 12522. *See also* Bećir Bogilović, T. 6369-6370; Omer Ramić, T. 9891-9892, 9908-9911, 10003.

<sup>1727</sup> Omer Ramić, T. 9909-9911; Nesib Burić, T. 10644-10645; Ibro Alić, T. 12529-12531, 12545-12548, 12552, 12612-12613. *See also* ex. D748, "Report" of 4 October 1992.

<sup>1728</sup> Hamed Tiro, T. 10291; Nesib Burić, T. 10600. *See also* Mustafa Šaćirović, T. 13272, 13275.

<sup>1729</sup> Nesib Burić, T. 10652, 10659-10665.

<sup>1730</sup> Nesib Burić, T. 10652, 10662, 10664, 10902-10906; *see also* Ibro Alić, T. 12612-12613.

<sup>1731</sup> Savka Đokic, T. 1383-1386; Slavoljub Žikić, T. 3185.

<sup>1732</sup> Hakija Meholfjić, T. 6810; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 3 October 1992, pp. 4-6; *see also* ex. P329, "Interview" of the Accused, tape 5, p. 4.

<sup>1733</sup> Hakija Meholfjić, T. 6809-6812. *See also* ex. P329, "Interview" of the Accused, tape 5, pp. 1-2, 4-5; *but see* Nesib Burić, T. 10659-10660, 10665-10668, 10903-10904, giving evidence that several Bosnian Muslim groups of fighters joined the attack voluntarily and without prior planning. This does not, however, invalidate the Trial Chamber's finding that the attack was planned ahead.

<sup>1734</sup> Slavoljub @ikić, T. 3191-3193, 3195; Nedret Mujkanović, T. 5117, 5122-5123, 5275; Hakija Meholfjić, T. 6813-6815, stating that both the Accused and Zulfo Tursunović participated in the attack, but that it is unclear who was in command; *see also* ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 7 October 1992, p. 6; ex. P328, "Interview" of the Accused, tape 10, p. 24; ex. P329, "Interview" of the Accused, tape 5, pp. 2, 10. The Accused stated in his Interview that he did not enter Fakovići but that his role in the attack was to set an ambush in the area of Žljebac: ex. P329, "Interview" of the Accused, tape 5, pp. 7-8. Further, the Trial Chamber is not persuaded by evidence given by Omer Ramić that in light of the distance between Sućeska and Fakovići, Zulfo Tursunović could not have participated in the attack: T. 10031-10032.

during the Interview, further stated that Akif Ustić also participated in the attack.<sup>1735</sup> According to documentary evidence, Mirzet Halilović and “his military policemen” also took part in the attack.<sup>1736</sup> As to which groups of Bosnian Muslim fighters participated in the attack, some documentary evidence indicates that they were from Srebrenica town, Potočari, Biljeg and Skenderovići.<sup>1737</sup> However, none of the witnesses heard at trial specifically confirmed this evidence. Rather, they stated that the attackers came from the villages of Osmače,<sup>1738</sup> Sućeska,<sup>1739</sup> Kragljivoda,<sup>1740</sup> @anjevo,<sup>1741</sup> Jagodnja,<sup>1742</sup> Joševa<sup>1743</sup> and Tokoljaki.<sup>1744</sup> Šefik Mandžić led the group of fighters from Kragljivoda during the attack.<sup>1745</sup> The Bosnian Muslim fighters were followed by thousands of civilians, who were looking for food.<sup>1746</sup>

639. At the time of the attack, there were a number of Bosnian Serb village guards<sup>1747</sup> and civilians in Fakovići and Divovići.<sup>1748</sup> The village guards were armed.<sup>1749</sup> However, there is

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<sup>1735</sup> Ex. P328, “Interview” of the Accused, tape 5, p. 2; *see also* ex. P595, “Proposal for Decorations” of 9 December 1994, p. 18.

<sup>1736</sup> Ex. P595, “Proposal for Decorations” of 9 December 1994, p. 18, mentioning that the military police took part in an attack on Fakovići, at an unspecified date. *See also* ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 7 October 1992, p. 7.

<sup>1737</sup> Ex. P94, “Supplement to the ABiH chronicle” of 7 March 1994, pp. 5, 7, mentioning that on 5 October 1992, the Independent Battalion Skenderovici and the Skenderovici TO participated in combat activities in G. Rijeka, and that Company Stari Grad from the Independent Battalion Srebrenica participated in combat activities in G. Rijeka and Fakovići; *see also* Ibro Alić, T. 12499; Hamed Tiro, T. 10295, stating that G. Rijeka refers to Grabovička Rijeka, an area close to Fakovići; ex. P95, “Supplement to the ABiH Chronicle” of 7 February 1994, pp. 2, 6, first mentioning the participation of the Staff of the Territorial Defence Srebrenica in the attack of 5 October 1992 on Fakovići, and further specifying that the attack was carried out by the Potočari TO, the Osmače TO and the Independent Battalion Osmače; ex. P595, “Proposal for Decorations” of 9 December 1994, pp. 6, 14, 55; ex. P597, “War Path of Potočari Brigade”, p. 3; ex. P329, “Interview” of the Accused, tape 5, pp. 2, 10, stating that the Kragljivoda TO, Sućeska TO, Potočari TO, Biljeg TO, as well as Akif Ustić’s men, participated in the attack. The Trial Chamber does not accept the Prosecution’s submission that ex. P598, “Military Diary”, pp. 5-10, provides evidence that Company Pale and Company Gostilj participated in the attack on Kravica, as opposed to any other group of fighters mentioned there: Prosecution Final Brief, para. 613.

<sup>1738</sup> Nesib Burić, T. 10565, 10665-10669.

<sup>1739</sup> Nedret Mujkanović, T. 5122-5123; ex. P329, “Interview” of the Accused, tape 5, pp. 2, 10; ex. P168 “Report”. *See also* Hakija Meholfjić, T. 6815, 6829. The Trial Chamber is not persuaded that given the distance between Sućeska and Fakovići, the group of fighters from Sućeska could not participate in the attack: Omer Ramić, T. 10031-10032.

<sup>1740</sup> Nesib Burić, T. 10651-10652, 10661; Ibro Alić, T. 12616, 12839-12843; ex. P329, “Interview” of the Accused, tape 5, pp. 2, 10.

<sup>1741</sup> Savka \okić, T. 1401, 1410; *see also* Ibro Alić, T. 12843.

<sup>1742</sup> Nesib Burić, T. 10668-10669; Ibro Alić, T. 12842-12843.

<sup>1743</sup> Nesib Burić, T. 10668-10669; Ibro Alić, T. 12842.

<sup>1744</sup> Nesib Burić, T. 10669; ex. P199, “Order” of 21 January 1993.

<sup>1745</sup> Ex. P329, “Interview” of the Accused, tape 5, p. 10; Nesib Burić, T. 10665, stating that [efik Mand’ić died during the attack when he stepped on a land mine. *See also* Omer Ramić, T. 9989; ex. P595, “Proposal for Decorations” of 9 December 1994, p. 11.

<sup>1746</sup> Slavoljub @ikić, T. 3338; Kada Hotić, T. 9695-9699, 9809-9810; Sabra Kolenović, T. 10091-10092; Nesib Burić, T. 10679-10680, 10694-10695, 10910; Hakija Meholfjić, T. 7090-7091. *See also* Ibro Alić, T. 12640, 12653; ex. P329, “Interview” of the Accused, tape 5, pp. 2-3.

<sup>1747</sup> Savka \okić, T. 1387, 1407, 1412-1415; Slavoljub @ikić, T. 3167-3169; *but see* ex. P329, “Interview” of the Accused, tape 5, p. 9, stating that there were no village guards in Fakovići.

<sup>1748</sup> Savka \okić, T. 1385; Slavoljub Žikić, T. 3164; ex. P329, “Interview” of the Accused, tape 5, p. 9.

<sup>1749</sup> Savka \okić, T. 1412-1415; Slavoljub @ikić, T. 3168, 3180-3183; Nesib Burić, T. 10669-10670, 10682-10683; Ibro Alić, T. 12647; ex. P257, “Report” of 15 October 1992.

conflicting evidence as to the degree to which they were militarised. Whereas some evidence suggests that they were not supported by any Serb military,<sup>1750</sup> and that there was no regular military presence in Fakovići and Divovići,<sup>1751</sup> other convincing evidence suggests that the village guards in Fakovići were well armed.<sup>1752</sup> Weapons and ammunition were stored in and around houses in Fakovići.<sup>1753</sup> The area around Fakovići was mined.<sup>1754</sup> Moreover, there is evidence of Serb and Bosnian Serb military presence in Fakovići apart from the village guards.<sup>1755</sup>

640. The Bosnian Muslim attack on Fakovići and Divovići met with some resistance.<sup>1756</sup> During the exchange of fire between the Bosnian Muslims and the Bosnian Serbs,<sup>1757</sup> the latter were shooting from houses, as well as from the guardhouse of Fakovići.<sup>1758</sup> One witness gave evidence that the guardhouse was eventually destroyed by a rocket-launcher.<sup>1759</sup> Several houses in Fakovići began to burn.<sup>1760</sup> According to another witness, there were bullet-holes on the walls of her house, and damage which may have been caused by an explosion.<sup>1761</sup> Eventually, the Bosnian Serbs fled Fakovići and Divovići.<sup>1762</sup>

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<sup>1750</sup> Slavoljub @ikić, T. 3168.

<sup>1751</sup> Savka \okić, T. 1383; Slavoljub Žikić, T. 3180-3184.

<sup>1752</sup> Omer Ramić, T. 9943; Hamed Tiro, T. 10357; Nesib Burić, T. 10669-10672, 10683; Ibro Alić, T. 12647-12648. *See* ex. D831, "Personal income" of August 1992; ex. D837, "Payment of salary" of 14 November 1992; ex. D838, "Payment of salary" of 14 November 1992, providing evidence that some of the inhabitants of Fakovići were mobilised in the local TO.

<sup>1753</sup> Omer Ramić, T. 9942-9943; Nesib Burić, T. 10671; ex. P329, "Interview" of the Accused, tape 5, p. 2; ex. D740, "Order" of 6 October 1992; *see also* Slavoljub Žikić, T. 3179-3181, stating that the post office and the warehouse of an old school building were the primary storage facilities of ammunition.

<sup>1754</sup> Slavoljub Žikić, T. 3267; Nesib Burić, T. 10667; Ibro Alić, T. 12618-12619.

<sup>1755</sup> Omer Ramić, T. 9940; Nesib Burić, T. 10650-10651, 10683, 10875, stating that the military presence included a JNA Battalion as well as volunteers from Serbia; Azir Malagić, T. 11331-11332, stating that a battalion of the Bratunac Brigade was stationed in Fakovići; Ibro Alić, T. 12646-12647; ex. D740, "Order" of 6 October 1992; ex. D42, "Recommendation for Award" of 10 September 1996; ex. D43, "Recommendation for Award" of 10 September 1996; ex. D87, "List"; ex. D834, "Request for finance" of 29 October 1992; ex. D835, "Payment" for August; ex. D836, "Payment" for September; para. 637 *supra*. *See also* Slavoljub @ikić, T. 3335-3336, stating that the 'soldiers' that were present in Fakovići in October 1992 were not part of an army, in its common meaning.

<sup>1756</sup> Savka \okić, T. 1387, 1393, 1417, 1421; Slavoljub Žikić, T. 3187, 3332; Nesib Burić, T. 10669, 10682, 10906; Kada Hotić, T. 9704. *See also* ex. P329, "Interview" the Accused, tape 5, p. 2.

<sup>1757</sup> Savka \okić, T. 1387, 1416-1417; Slavoljub Žikić, T. 3186-3187, 3332, 3338. *See also* Sabra Kolenović, T. 10092; ex. P329, "Interview" of the Accused, tape 5, p. 2.

<sup>1758</sup> Savka \okić, T. 1387, 1417, 1419; Slavoljub Žikić, T. 3186-3187; Ibro Alić, T. 12634; *see also* Kada Hotić, T. 9704-9705, 10094.

<sup>1759</sup> Slavoljub @ikić, T. 3352-3353.

<sup>1760</sup> Slavoljub @ikić, T. 3187-3189, 3253-3256; *but see* Kada Hotić, T. 9707; Nesib Burić, T. 10692; Hamed Tiro, T. 10355, stating that they did not see fires or burned houses in Fakovići on 5 and 6 October 1992.

<sup>1761</sup> Savka \okić, T. 1398, 1417.

<sup>1762</sup> Savka \okić, T. 1394-1395; Slavoljub Žikić, T. 3187, 3190-3191; Nesib Burić, T. 10682-10683. *See also* ex. P329, "Interview" of the Accused, tape 5, pp. 2, 6, clarifying that the Bosnian Muslims deliberately left the Bosnian Serbs one escape route.

641. On the afternoon of 5 October, a Serb counter-attack was launched, which included the shelling of Fakovići from Serbia proper.<sup>1763</sup> A Serb field plane also dropped a container with explosives on Fakovići.<sup>1764</sup> Following the counter-attack, the Bosnian Muslim fighters and some of the Bosnian Muslim civilians withdrew,<sup>1765</sup> whereas other Bosnian Muslim civilians stayed behind to look for food and building materials.<sup>1766</sup>

642. By 6 October 1992, at least 16 of the 30-plus houses of Fakovići were burned.<sup>1767</sup> In Divovići, there is evidence that two to four houses out of the 11 houses of the hamlet, as well as a storage facility and two barns, were destroyed.<sup>1768</sup>

(b) Legal Findings

643. Based on the evidence presented, the Trial Chamber is not satisfied that property was destroyed on a large scale in Divovići on 5 October 1992. However, the Trial Chamber finds that property was destroyed on a large scale in Fakovići on 5 October 1992.<sup>1769</sup>

644. In Fakovići, there was an exchange of fire between Bosnian Muslims and Bosnian Serbs. Bosnian Serbs were firing on the attacking Bosnian Muslims from houses, and Bosnian Serb weaponry was positioned in and around these houses.<sup>1770</sup> While there is evidence of houses which were damaged by the exchange of fire, no witness could confirm that it was Bosnian Muslims that set the burning houses on fire. Furthermore, there is ample evidence to suggest that on 5 October 1992, Serbs shelled the area of Fakovići.<sup>1771</sup> Consequently, it is likely that the damage caused to many of the houses in Fakovići resulted from the exchange of fire and subsequent Serb shelling and cannot be attributed solely to the Bosnian Muslims.

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<sup>1763</sup> Nesib Burić, T. 10684-10685, 10689-10691; Ibro Alić, T. 12638-12640, 12645-12646; *see also* Slavoljub Žikić, T. 3342; Kada Hotić, T. 9700-9701, 9707; Sabra Kolenović, T. 10092; ex. P329, "Interview" of the Accused, tape 5, p. 3; ex. P168, "Report" of October 1992; ex. P141, "Report" of 6 October 1992.

<sup>1764</sup> Ibro Alić, T. 12646.

<sup>1765</sup> Nesib Burić, T. 10688-10689; ex. P329, "Interview" of the Accused, tape 5, p. 3.

<sup>1766</sup> Hamed Tiro, T. 10355; Nesib Burić, T. 10919; Ibro Alić, T. 12653; *see also* ex. P329, "Interview" of the Accused, tape 5, p. 3.

<sup>1767</sup> Slavoljub Žikić, T. 3164, 3255-3256; Staniša Stevanović, T. 1509, 1511-1516. *See also* ex. P257 "Report" of 15 October 1992; ex. D52, "Census" of May 1991; *but see* Kada Hotić, T. 9707-9709, stating that during the time she stayed in Fakovići, she did not see signs of burned houses. The Trial Chamber finds that ex. P405, "Map and Photographs", which includes nine photographs of damaged structures in Fakovići that were taken at a significant later stage than the actual attack, cannot therefore be accepted as an accurate representation of the degree of destruction that occurred in Fakovići on 5 October 1992: Dragan Janković, T. 4728-4729, 4672, 4694, 4698-4699.

<sup>1768</sup> Savka \okić, T. 1382, 1397-1398, 1424-1425, 1436.

<sup>1769</sup> *See* paras 640, 642 *supra*.

<sup>1770</sup> *See* para. 640 *supra*.

<sup>1771</sup> *See* paras 640-641 *supra*.



645. Accordingly, the destruction of property in Fakovići and Divovići on 5 August 1992 does not fulfil the elements of wanton destruction of cities, towns or villages not justified by military necessity.

5. Attack on the Village of Bjelovac and the Adjoining Hamlet of Sikirić Between 14 and 19 December 1992

646. The Indictment alleges that between 14 and 19 December 1992, the village of Bjelovac and the adjoining hamlet of Sikirić were attacked by Bosnian Muslim units under the command and control of the Accused,<sup>1772</sup> and that in the course of the attack, Bosnian Serb property, including buildings and dwellings, was destroyed.<sup>1773</sup> The Indictment also alleges that the Staff of the Joint Armed Forces of the Sub-Region Srebrenica, Company Stari Grad, Company Srebrenica from Independent Battalion Srebrenica, Brigade Potočari, Brigade Sućeska, Brigade '3 Maj' Kragljivoda, Independent Battalion Osmače, Company Pusuljići of the Srebrenica Independent Battalion, Independent Battalion Skenderovići, 114<sup>th</sup> East Bosnian Brigade, Independent Battalion Voljavica, Independent Battalion Biljeg, 1<sup>st</sup> Cerani Detachment, Company Kazani from Independent Battalion Srebrenica and Independent Battalion '5 Juli' Tokoljaci participated in the attack.<sup>1774</sup> It is further alleged that the Accused participated in and commanded the attack.<sup>1775</sup>

647. Bjelovac is situated on the left bank of the Drina River, at the foot of a stretch of mountainous hills.<sup>1776</sup> It encompasses hamlets such as Kunjerac, which is 500 to 700 meters uphill,<sup>1777</sup> Ložnicka Rijeka, which borders Bjelovac from the south,<sup>1778</sup> and Sikirić, which is located approximately two kilometres south of Bjelovac.<sup>1779</sup> In December 1992, Bjelovac formed part of the municipality of Bratunac,<sup>1780</sup> and its inhabitants were exclusively Bosnian Serb.<sup>1781</sup> Predominantly

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<sup>1772</sup> Indictment, paras 33, 35.

<sup>1773</sup> Indictment, para. 35.

<sup>1774</sup> Indictment, para. 33.

<sup>1775</sup> *Ibid.*

<sup>1776</sup> Ex. P518 "Map"; Slavoljub Rankić, T. 2286.

<sup>1777</sup> Suad Smajlović, T. 14561; ex. D964 "Map".

<sup>1778</sup> Ex. C1, "Map"; Suad Smajlović, T. 14546.

<sup>1779</sup> Ex. C1, "Map". The Trial Chamber understands Jovanovići to be part of the hamlet of Sikirić. The Trial Chamber and the Parties visited Bjelovac, Ložnicka Rijeka and Sikirić during a site visit in June 2005.

<sup>1780</sup> Slavka Matić, T. 2186; Slavoljub Rankić, T. 2286.

<sup>1781</sup> Prior to May 1992, the population of Bjelovac and Sikirić was comprised of Bosnian Serbs and Bosnian Muslims, and in May 1992, when tensions between the two groups escalated, the Bosnian Muslims left Bjelovac and Sikirić: Slavka Matić, T. 2187, 2224-2227; Slavoljub Rankić, T. 2290, 2334-2338, 2344; ex. P329, "Interview" of the Accused, tape 7, p. 3. *See also* ex. D82, "Population Statistics" of 1991.

Bosnian Muslim villages in the vicinity were Zalužje, Biljača and Voljevica,<sup>1782</sup> all within a range of two to three kilometres of Bjelovac.<sup>1783</sup>

(a) Factual Findings

648. Based primarily on the evidence given by Slavka Matić, Slavoljub Rankić, Hakija Mehuljić, Miloš Okanović, Nedret Mujkanović and Suad Smajlović, as well as on documentary evidence, the Trial Chamber reaches the following findings.

649. Tensions between Bosnian Muslims and Bosnian Serbs in the area began to mount as early as 1991.<sup>1784</sup> During May and June 1992, Bosnian Serbs, including inhabitants of Bjelovac, attacked Bosnian Muslim villages in the vicinity of Bjelovac, such as Zalužje and Voljevica, as well as Bosnian Muslim neighbourhoods in ethnically-mixed villages. As a result, Bosnian Muslims fled their homes.<sup>1785</sup> Bosnian Serb attacks on the dispersed Bosnian Muslim population from the direction of Bjelovac, Ložnicka Rijeka, Kunjerac, Sikirić and Zalužje took place between mid-October and the beginning of December 1992.<sup>1786</sup> On the early morning of 14 December 1992, Bosnian Muslims attacked Bjelovac and Sikirić.<sup>1787</sup>

650. The attack on Bjelovac was planned by members of the Srebrenica Armed Forces Staff,<sup>1788</sup> including Zulfo Tursunović and the Accused.<sup>1789</sup> While part of the documentary evidence indicates that the attack was carried out by groups of Bosnian Muslim fighters from Kragljivoda, Pustumulići, Skenderovići, Biljeg, Tokoljaći, Osmaće, Glogova and Srebrenica, and that the military police were

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<sup>1782</sup> The Trial Chamber and the Parties drove by Voljevica and Zalužje during a site visit in June 2005.

<sup>1783</sup> Ex. C1, "Map".

<sup>1784</sup> Sead Bekrić, T. 9502, 9504-9506; *see also* paras 79, 91-99 *supra*.

<sup>1785</sup> Nikola Petrović, T. 7323-7324; Sead Bekrić, T. 9506-9507; [uhra Sinanović, T. 11163; Azir Malagić, T. 11267-11268, 11279-11280; Mustafa Šaćirović, T. 13271-13274; ex. D751 "Satan's Sons" by Sejo Omeragić, pp. 57, 167; ex. D759, "Salary" for June 1992.

<sup>1786</sup> Azir Malagić, T. 11320-11322, 111346-11348; Suad Smajlović, T. 14536, 14544-14546; ex. D765, "Report" of 13 November 1992; ex. D770, "Report" of 11 December 1992; *See also* Nedret Mujkanović, T. 5128.

<sup>1787</sup> Slavka Matić, T. 2187, 2189, 2202; Slavoljub Rankić, T. 2307; Slavoljub Filipović, T. 2423-2424; Nikola Petrović, T. 7276; Miloš Okanović, T. 7910. *See* ex. P329, "Interview" of the Accused, tape 7, pp. 9-15, stating that the attack on Bjelovac and Sikirić was part of a larger attack on territories held by Bosnian Serbs, such as Sase, Andrići and Voljevica, and was coordinated with different Bosnian Muslim fighting groups, among which were the groups from Glogova led by Ejub Golić and Pale led by Senad Golubović, which opened another front to force the Serbs to divide their forces.

<sup>1788</sup> Hakija Mehuljić, T. 6836-6840; *see also* ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 10 December 1992, pp. 37-38.

<sup>1789</sup> Nedret Mujkanović, T. 5459-5460; ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 10 December 1992, p. 37; *see also* ex. P329, "Interview" of the Accused, tape 7, pp. 4-5, 20-21, stating that the decision to attack was taken by "[b]oth the War Presidency and the military command", and that Hamed Salihović and Ramiz Bećirović were tasked with planning the details of the attack with the help of locals. These details were later discussed among local leaders: ex. P329, "Interview" of the Accused, tape 7, pp. 6-8.

involved in its execution as well,<sup>1790</sup> witnesses heard at trial stated that the Bosnian Muslim attackers came from Voljevica,<sup>1791</sup> Biljača,<sup>1792</sup> Potočari,<sup>1793</sup> Kazani,<sup>1794</sup> Luljaska,<sup>1795</sup> Sućeska,<sup>1796</sup> Pale,<sup>1797</sup> Likari<sup>1798</sup> and Srebrenica Stari Grad.<sup>1799</sup> The fighters from Kazani were led by Suad Smajlović,<sup>1800</sup> and the fighters from Luljaska were led by Midhat Salihović.<sup>1801</sup> The Bosnian Muslim fighters were armed, some wearing uniforms or civilian clothes.<sup>1802</sup> Further, some fighters were also wearing a coloured bandana around their heads.<sup>1803</sup> According to the Accused in his Interview, he, Hamed Salihović and Ejub Golić participated in the attack.<sup>1804</sup> There is also evidence

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<sup>1790</sup> Ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 22 December 1992, p. 42, mentioning that fighters from Kragljivoda participated in the attack; ex. P94, “Supplement to the ABiH chronicle” of 7 March 1994, pp. 5-8, stating that the Independent Battalion Skenderovići, the Skenderovići TO, the Independent Battalion Biljeg, the Biljeg TO, the Company Srebrenica from the Independent Battalion Srebrenica and the Independent Battalion Voljevica participated in combat activities in the area of Bjelovac; ex. P95, “Supplement to the ABiH chronicle” of 7 February 1994, pp. 2, 13-14, 15, first mentioning the participation of the Staff of the Territorial Defence Srebrenica in the attack on the area of Bjelovac during time period relevant to the Indictment, and further specifying that the attack was carried out by the Brigade “3 Maj” Kragljivoda, the Kragljivoda TO, the Company Pasmulići within the Territorial Defence Srebrenica – Independent Battalion Srebrenica, the Independent Battalion “5 juli” Tokoljaći, the Osmače TO and the Independent Battalion Osmače; ex. P595, “Proposal for Decorations” of 9 December 1994, pp. 14, 18, mentioning that Midhat Salihović of the Biljeg TO participated in the attack on Bjelovac between 14 and 17 December 1992, and that Mirzet Halilović and members of the military police participated in an attack on Bjelovac at an unspecified date; ex. P329, “Interview” of the Accused, tape 7 pp. 6, 14-15, stating that several fighting groups participated in the attack, including the group from Biljeg; *see also* ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 22 December 1992, indicating that Ahmo also had a role in the attack, pp. 41-42. The Trial Chamber holds that in all likelihood, the person referred to as ‘Ahmo’ is Ahmo Tihić; Prosecution Final Brief, fn. 1564, clarifying that the 114<sup>th</sup> East Bosnian Brigade and the 1<sup>st</sup> Cerani Detachment, which are mentioned in the Indictment, did not participate in the attack.

<sup>1791</sup> The group was known as ‘Zaka’s men’: Nedret Mujkanović, T. 5128-5129; Suad Smajlović, T. 14568, 14571. *See also* Sead Bekrić, T. 9567.

<sup>1792</sup> Sead Bekrić, T. 9567; ex. P329, “Interview” of the Accused, tape 7, p. 6.

<sup>1793</sup> Nedret Mujkanović, T. 5130.

<sup>1794</sup> Suad Smajlović, T. 14558-14559.

<sup>1795</sup> Suad Smajlović, T. 14553-14555.

<sup>1796</sup> Nedret Mujkanović, T. 5129. The Trial Chamber also notes the evidence given by Mira Stojanović, T. 3859-3861, that Zulfo Tursunović, the leader of a fighting group from Sućeska, was present in a village in the area of Bjelovac on 15 December 1992.

<sup>1797</sup> Nedret Mujkanović, T. 5130; *see also* ex. P329, “Interview” of the Accused, tape 7, pp. 6, 14-15.

<sup>1798</sup> Nedret Mujkanović, T. 5130.

<sup>1799</sup> Nedret Mujkanović, T. 5129. During the time of the attack, Hakija Meholfjić’s men from Srebrenica, ambushed Bosnian Serbs on a road near Bratunac in order to block them from providing assistance to the Bosnian Serbs in Bjelovac: Hakija Meholfjić, T. 6837-6841. *See also* Nedret Mujkanović, T. 5282; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 10 December 1992, p. 41.

<sup>1800</sup> Suad Smajlović, T. 14552, 14571; ex. P84 “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 10 December 1992, p. 41; ex. P614, “List”, p. 1.

<sup>1801</sup> Suad Smajlović, T. 14553, 14570-14571.

<sup>1802</sup> Slavoljub Rankić, T. 2310; Slavoljub Filipović, T. 2429; Mira Stojanović, T. 3823, 3832, 3939; Nikola Petrović, T. 7277-7278.

<sup>1803</sup> Slavka Matić, T. 2193-2195; Slavoljub Rankić, T. 2310; Slavoljub Filipović, T. 2429; Mira Stojanović, T. 3823, 3832, 3939.

<sup>1804</sup> Ex. P329, “Interview” of the Accused, tape 7, pp. 9-10, 13, 15, 18, 22-23, stating that Hamed Salihović, who was in @alazje, led the overall attack and communicated with the different fighting groups but that at a certain point on the second day of the attack, the Accused sent a message to the other fighting groups that he was taking command of the attack, and clarifying that Ejub Golić arrived only on the second day of the attack. The Trial Chamber notes the evidence given by Suad Smajlović, T. 14569-14570 and Sead Bekrić, T. 9621 that they did not see the Accused during the attack, but does not rely upon this evidence.

that Akif Ustić participated in the attack.<sup>1805</sup> The Bosnian Muslim fighters who attacked the area of Bjelovac were followed by thousands of civilians.<sup>1806</sup>

651. At the time of the attack, village guards and Bosnian Serb civilians were present in Bjelovac and Sikirić.<sup>1807</sup> Some evidence suggests that prior to 14 December 1992, the village guards did not receive weapons or training from the Serb military.<sup>1808</sup> More convincing evidence, however, indicates that the village guards did receive weapons and ammunition from the Bratunac Brigade of the VRS,<sup>1809</sup> and that there was a Serb and Bosnian Serb military presence in the area.<sup>1810</sup> Weapons and ammunition were stored in Bjelovac,<sup>1811</sup> and positioned in between houses in Ložnicka Rijeka and Kunjerac.<sup>1812</sup> The school building of Bjelovac was used as a kitchen to feed passing Bosnian Serb fighters.<sup>1813</sup>

652. The attack on Bjelovac began when Bosnian Muslims entered the village shooting.<sup>1814</sup> Although the attack caught the Bosnian Serbs by surprise,<sup>1815</sup> some were able to mount a defence, firing back on the attackers from their houses.<sup>1816</sup> Others looked for shelter or tried to escape.<sup>1817</sup> At around 9:30 a.m., and subsequently at different times during the day, while shooting continued,<sup>1818</sup>

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<sup>1805</sup> Nedret Mujkanović, T. 5129.

<sup>1806</sup> Nedret Mujkanović, T. 5129, 5312-5314; Sead Bekrić, T. 9549, 9553; Suad Smajlović, T. 14556. *See also* [uhra Sinanović, T. 11145-11146, 11187, 11209; D005, T. 13975, 13967, 13981.

<sup>1807</sup> Slavka Matić, T. 2187, 2191; Slavoljub Rankić, T. 2298-2299; Slavoljub Filipović, T. 2424, 2427; Mira Stojanović, T. 3820.

<sup>1808</sup> Slavoljub Filipović, T. 2421-2423, 2447. *See also* Slavka Matić, T. 2188-2189.

<sup>1809</sup> Mira Stojanović, T. 3821, 3927. *See also* Slavoljub Rankić, T. 2387; Slavoljub Filipović, T. 2507; Nikola Petrović, T. 7242, 7350-7360; Hamed Tiro, T. 10370-10373; ex. D83, "List" of June 1992; ex. D86, "List"; ex. D88, "List"; ex. D91, "List"; ex. D92, "List"; ex. D254, "List" of July 1992; ex. D507, "List", referring to, at least some of, the inhabitants of Bjelovac being mobilised into the Bjelovac Company which was organised by the Bratunac TO.

<sup>1810</sup> Azir Malagić, T. 11309-11310, 11331-11332, 11346-11347, 11349-11350, 11370-11371; Suad Smajlović, T. 14533-14542, 14562-14566, stating that paramilitaries such as the 'Mungos', the 'Kokaras' and the Red Berets, as well as volunteers from Serbia were present in the area of Bjelovac, and that the Bratunac Brigade had a battalion in Bjelovac; Nikola Petrović, T. 7355-7356, 7364-7365, 7368; ex. P329, "Interview" of the Accused, tape 7, p. 5; ex. D86, "List"; ex. D255, "Information on crime trends" of 13 October 1994; ex. D762, "Order" of 14 August 1992; ex. D922, "Reply" of September 1992. *See also* Sead Bekrić, T. 9502-9503; Hamed Tiro, T. 10367-10368; ex. D45, "List"; ex. D87, "List"; ex. D507, "List"; ex. D763, "Order" of 11 October 1992; ex. D974, "Information" of 29 July 1994; ex. D761, "Order" of 12 October 1992; para. 649 *supra*. The Trial Chamber notes evidence that the Serb military presence in the Bjelovac area was concentrated mostly in Kunjerac: Nikola Petrović, T. 7362; ex. D922, "Reply" of September 1992; and that during the Bosnian Muslim attack, there was no permanent military presence in Bjelovac itself: Slavoljub Rankić, T. 2303-2304, 2392; *see also* Mira Stojanović, T. 3820.

<sup>1811</sup> Slavoljub Rankić, T. 2386-2387; Nikola Petrović, T. 7335. *See also* Suad Smajlović, T. 14561-14562.

<sup>1812</sup> Suad Smajlović, T. 14560, 14568-14569.

<sup>1813</sup> Slavka Matić, T. 2233-2234; Slavoljub Rankić, T. 2385-2386, stating that it was also used to feed Bosnian Serb refugees.

<sup>1814</sup> Slavoljub Rankić, T. 2307-2308; *see also* Nikola Petrović, T. 7277.

<sup>1815</sup> Slavoljub Rankić, T. 2307, 2310.

<sup>1816</sup> Slavka Matić, T. 2240-2242; Slavoljub Filipović, T. 2430, 2516-2517, 2550; Mira Stojanović, T. 3944; Nikola Petrović, T. 7335; Sabra Kolenović, T. 10098.

<sup>1817</sup> Slavoljub Rankić, T. 2315-2316, stating that Bosnian Serbs in Bjelovac tried to call for military assistance; ex. P329, "Interview" of the Accused, tape 7, p. 12.

<sup>1818</sup> Miloš Okanović, T. 7911; *see also* Mira Stojanović, T. 3837-3838; Hamed Tiro, T. 10365.

two planes flying from the direction of Bratunac circled the area dropping bombs. The concentration of bombing occurred over the area of Sikirić and Ložnicka Rijeka.<sup>1819</sup>

653. During the attack, several houses in the vicinity of Bjelovac and Sikirić began to burn.<sup>1820</sup> One witness heard a Bosnian Muslim fighter in camouflage uniform telling others to “set the house on fire immediately”.<sup>1821</sup> Another witness saw smoke coming out of houses that Bosnian Muslims in uniforms and civilian clothes had come out from.<sup>1822</sup>

654. On the evening of 14 December 1992, the Bosnian Muslims withdrew<sup>1823</sup> and Serb fighters entered the village.<sup>1824</sup> Over the course of the next few days, armed occupation of the Bjelovac area changed hands several times as fighting continued, resulting in the destruction of several houses.<sup>1825</sup> According to one witness, by 18 December 1992, Bosnian Muslims had entered Bjelovac and burned down the remaining houses.<sup>1826</sup> In February 1993, Bosnian Serbs recaptured Bjelovac.<sup>1827</sup>

655. On 14 December 1992, at least 15 houses in Bjelovac and 15 houses in Sikirić were burned.<sup>1828</sup> The majority of houses had been burned by 18 December 1992.<sup>1829</sup>

(b) Legal Findings

656. In light of the evidence detailed above, the Trial Chamber finds that property was destroyed on a large scale in Bjelovac and Sikirić between 14 to 19 December 1992.<sup>1830</sup>

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<sup>1819</sup> Miloš Okanović, T. 7910-7919, 7938, 7980-7981; Sead Bekrić, T. 9568-9569; Hamed Tiro, T. 10363-10365. *See also* Slavoljub Filipović, T. 2548; Mira Stojanović, T. 3837; [uhra Sinanović, T. 11146-11148, 11190-11192; Suad Smajlović, T. 14559, 14569; ex. D111, “Video” 00:04-02:10, 05:20-06:09, 8:00-08:14, 08:23-10:00; ex. P316, “Video”, 26:16-27:09, 27:44-28:34, 33:20-33:27, 47:22-48:13; ex. P329, “Interview” of the Accused, tape 7, p. 11.

<sup>1820</sup> Slavka Matić, T. 2202-2209; Slavoljub Rankić, T. 2308, 2310-2311, 2332; Slavoljub Filipović, T. 2427-2428; Mira Stojanović, T. 3834, 3836; Nikola Petrović, T. 7277, 7281-7282; Miloš Okanović, T. 7910; ex. D111, “Video” 04:20-04:50, 06:50-07:44, 10:00-10:02, 11:02-11:50; ex. P316, “Video”, 29:26-29:20, 31:36-31:44, 32:08-32:35, 35:00-35:25, 32:50-33:00, 38:10-40:30, 41:42-41:43, 44:55-45:09, 48:45-49:00, 50:10-51:34.

<sup>1821</sup> Mira Stojanović, T. 3834.

<sup>1822</sup> Nikola Petrović, T. 7277. *See also* Slavka Matić, T. 2245.

<sup>1823</sup> Nikola Petrović, T. 7289; ex. P329, “Interview” of the Accused, tape 7, p. 5.

<sup>1824</sup> Slavoljub Rankić, T. 2315; Slavoljub Filipović, T. 2433; Nikola Petrović, T. 7289.

<sup>1825</sup> Sead Bekrić, T. 9561-9564; Šuhra Sinanović, T. 11147-11148, 11164-11166; Azir Malagić, T. 11364-11365; ex. P329, “Interview” of the Accused, tape 7, pp. 12, 17-18, tape 8, pp. 1-2.

<sup>1826</sup> Nikola Petrović, T. 7293. *See also* Slavoljub Rankić, T. 2323-2325, 2331-2332; ex. P432.1, “Video”.

<sup>1827</sup> Slavoljub Filipović, T. 2544; ex. D881, “Report” of 5 February 1993. *See also* Suad Smajlović, T. 14579-14580; ex. D976, “Order” of 4 February 1993; ex. D977, “Order” of 7 February 1993; ex. D979, “Combat Order” of 14 February 1993.

<sup>1828</sup> Slavka Matić, T. 2203-2204, 2208-2212, 2245-2247. *See also* Mira Stojanović, T. 3840. *But see* [uhra Sinanović, T. 11169-11172, stating that two of the houses previously identified by Slavka Matić as having been destroyed on 14 December 1992 were still undamaged when she saw them on 21 December 1992.

<sup>1829</sup> Mira Stojanović, T. 3866, 3867-3869, stating that on 18 December 1992, from the window of a car passing through Bjelovac on the way to Srebrenica, she could see that most of the houses of Bjelovac had been burned.

<sup>1830</sup> *See* para. 655 *supra*.

657. In Bjelovac and its surroundings, there was ongoing fighting between Bosnian Muslims and Bosnian Serbs from 14 to 19 December 1992.<sup>1831</sup> This fighting involved the conflicting parties alternately controlling and defending Bjelovac and Sikirić, resulting in exposing property to destruction.<sup>1832</sup> The damage caused to houses in Bjelovac and Sikirić likely resulted from all these circumstances. Undoubtedly, there is evidence that Bosnian Muslims burned down houses both in Bjelovac and Sikirić.<sup>1833</sup> However, the evidence is such that the Trial Chamber is not in a position to know how many houses were destroyed by Bosnian Muslims in this manner. Since there is also evidence of destruction resulting from other causes,<sup>1834</sup> there is doubt as to whether the amount of houses destroyed by the Bosnian Muslims fulfils the large scale requirement for the crime of wanton destruction. This doubt must be resolved in favour of the Accused.

658. Accordingly, the Trial Chamber concludes that the destruction of property in Bjelovac and Sikirić between 14 and 19 December 1992 does not fulfil the elements of wanton destruction of cities, towns or villages not justified by military necessity.

#### 6. Attack on the Villages of Kravica, Šiljkovići and Ježestica on 7 and 8 January 1993

659. The Indictment alleges that on 7 and 8 January 1993, the villages of Kravica, Šiljkovići and Ježestica were attacked by Bosnian Muslim units under the command and control of the Accused,<sup>1835</sup> and that in the course of the attack, Bosnian Serb property including buildings and dwellings was destroyed.<sup>1836</sup> The Indictment also alleges that the Company Stari Grad, Brigade Potočari, Brigade Sućeska, Brigade “3 Maj” Kragljivoda, Independent Battalion Osmače, Company Pasmulići of the Srebrenica Independent Battalion, 6<sup>th</sup> Detachment Kamenica, 114<sup>th</sup> East Bosnian Brigade, Independent Battalion Voljavica, Independent Battalion Biljeg and 1<sup>st</sup> Cerani Detachment participated in the attack.<sup>1837</sup> Furthermore, the Indictment alleges that the Accused participated in and commanded the attack.<sup>1838</sup>

660. The main part of the village of Kravica is situated in a valley,<sup>1839</sup> and surrounded at various elevations by several hamlets, including Mandići, Popovići, ^olakovići, Martinići and Kajići.<sup>1840</sup> It

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<sup>1831</sup> See paras 652-654 *supra*.

<sup>1832</sup> See para. 654 *supra*.

<sup>1833</sup> See paras 652-654 *supra*.

<sup>1834</sup> See paras 652, 654 *supra*.

<sup>1835</sup> Indictment, paras 34-35.

<sup>1836</sup> Indictment, para. 35.

<sup>1837</sup> Indictment, para. 34.

<sup>1838</sup> Indictment, para. 34.

<sup>1839</sup> Ratko Nikolić, T. 2577; Kada Hotić, T. 9757; ex. P453, “Map”. The Trial Chamber and the Parties, during a site visit in June 2005, visited Kravica and Ježestica, and viewed [iljkovići.

<sup>1840</sup> Ex. C1, “Map”; ex. D797, “Map”.

is located approximately five kilometres west of Glogova, and 15 kilometres northwest of Srebrenica.<sup>1841</sup> The geographical setting of Ježestica, which is situated approximately four kilometres southeast of Kravica, has been described earlier.<sup>1842</sup> The village of Šiljkovići is situated on a hill,<sup>1843</sup> 500 meters southeast of Kravica.<sup>1844</sup> At the relevant time, Kravica, Ježestica and Šiljkovići formed part of the municipality of Bratunac,<sup>1845</sup> and the inhabitants of these villages were almost exclusively Bosnian Serb.<sup>1846</sup> At the time, predominantly Bosnian Muslim villages in the vicinity included Ćizmići, Blječevo, Pale, Jagličići, Šušnjari, Konjević Polje and Brezova Njiva, which are all located within a range of ten kilometres from Kravica.<sup>1847</sup>

(a) Factual Findings

661. Based primarily on the evidence given by witnesses Miladin Simić, Milo Ranković, Nikola Popović, Dragomir Miladinović, Milosava Nikolić, Sead Bekrić, Sabra Kolenović, Nesib Burić, Safet Golić, Ibro Alić and Sidik Ademović, as well as on documentary evidence, the Trial Chamber reaches the following findings.

662. Throughout the summer of 1992, Bosnian Serbs and Bosnian Muslims engaged in mutual fighting in the area of Kravica and Ježestica.<sup>1848</sup> The fighting intensified in December 1992 and the beginning of January 1993,<sup>1849</sup> when Bosnian Muslims were attacked by Bosnian Serbs primarily from the direction of Kravica and Ježestica.<sup>1850</sup> In the early morning of the 7 January 1993, Orthodox Christmas day, Bosnian Muslims attacked Kravica, Ježestica and Šiljkovići.<sup>1851</sup>

663. The details of the attack were planned by Hamed Salihović and Ramiz Bećirović.<sup>1852</sup> Some documentary evidence indicates that the Bosnian Muslim fighters that participated in the attack

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<sup>1841</sup> Ex. C1, "Map".

<sup>1842</sup> See para. 621 *supra*.

<sup>1843</sup> Miladin Simić, T. 854; Ratko Nikolić, T. 2577; Nikola Popović, T. 2796.

<sup>1844</sup> Ex. C1, "Map".

<sup>1845</sup> Dragan Đurić, T. 708; Milo Ranković, T. 1070.

<sup>1846</sup> Dragan Đurić, T. 708; Miladin Simić, T. 801; Slaviša Erić, T. 1167-1168.

<sup>1847</sup> Ex. C1, "Map"; ex. P394, "Map"; ex. D797, "Map"; Safet Golić, T. 11750-11756, 11758.

<sup>1848</sup> See para. 623 *supra*; ex. D764, "Telegram" of 11 October 1992.

<sup>1849</sup> Slaviša Erić, T. 1205; Safet Golić, T. 11861-11871, 11880-11881, 12116; Ejub Dedić, T. 12263; ex. D26, "Lists of Wounded", of 5 January 1993; ex. D806, "Report" of 24 December 1992; ex. D807, "Report" of 28 December 1992; ex. D811, "Report" of 26 April 1993; ex. D813, "Report" of 25 December 1992; see also ex. D805, "Report" of 21 December 1992; ex. D808, "Report" of 31 December 1992; ex. D809, "Report" of 4 January 1993.

<sup>1850</sup> Nesib Burić, T. 10714-10716, 10719; Safet Golić, T. 11870, 11873, 11877-11878; ex. D22, "Lists of Wounded"; ex. D25, "Report" of 4 January 1993; ex. D743, "Report" of 10 December 1992; ex. D744 "Report" of 13 December 1992.

<sup>1851</sup> Dragan Đurić, T. 722; Miladin Simić, T. 844; Ratko Nikolić, T. 2582-2583; Nikola Popović, T. 2789-2790, 2795; Dragomir Miladinović, T. 2978-2980; Sidik Ademović, T. 13086-13088; Ibro Alić, T. 12709; ex. P329, "Interview" of the Accused, tape 9, p. 33.

<sup>1852</sup> Ex. P329, "Interview" of the Accused, tape 7, p. 21, tape 8, pp. 23-26, tape 20, p. 24, stating that pursuant to the decision to launch the attack, Hamed Salihović and Ramiz Bećirović were tasked with planning the attack, and

were from Blječeva,<sup>1853</sup> Srebrenica Stari Grad, Kragljivoda, Pasmulići, Kamenica, 114<sup>th</sup> East Bosnia, Voljevica and Cerani,<sup>1854</sup> and that Mirzet Halilović and members of the military police also took part in the attack.<sup>1855</sup> However, none of the witnesses heard at trial specifically confirmed this evidence.<sup>1856</sup> Rather, they stated that the attackers came from the villages of Sućeska<sup>1857</sup> (led by Zulfo Tursunović), Glogova (led by Ejub Golić),<sup>1858</sup> Biljeg, Mošići and Delići (led by a certain ‘Zis’ from @anjevo),<sup>1859</sup> Cerska and Skugrići (led by Šemso Salihović),<sup>1860</sup> Jagličići, Šušnjari and

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describing the plan of the attack, as follows: “[H]e [Ejub Golić] would go with his people from Glogov[a] together with the Pale Territorial Defence, that they would attack from this flank, and Konjević Polje [...] they would deploy their forces so that they could attack from the other flank [...] The Potočari Territorial Defence and the Kragljivoda Territorial Defence and the Sućeska Territorial Defence would carry out /illegible/... Territorial Defence would set aside their available manpower and would act from the direction of [ušnjari [...] Pale [...] and Jagličići [...] we took a number of soldiers then from Voljevica [...] they went to a village [...] between Magašići and Kajčići [...] From this point they could cover the whole area from wh[ic]h the soldiers from Potočari, Sućeska, and Kragljivoda were to be attacking [...] And [...] we considered that we had to cut off the Chetnik corridor towards Vlasenica [...] that we should find a good place...to set up the ambush, which was later confirmed during the course of the action...that the Chetniks tried to come around behind us [...] but they fell into our ambush and we repelled them.” The Trial Chamber notes evidence that the attack was not thoroughly planned: ex. P329, “Interview” of the Accused, tape 20, p. 23; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, p. 49. *But see* Safet Golić, T. 11883, 12071-12073, 12080-12085; Sidik Ademović, T. 13085, 13236, stating that the attack on the Kravica area was not planned.

<sup>1853</sup> Prosecution Final Brief, para. 873, submitting that Company Blječeva was a unit within the Potočari Brigade. As to the Trial Chamber’s finding with respect to the relations between the fighting group of Potočari and other fighting groups in that area, *see* para. 162 *supra*.

<sup>1854</sup> Ex. P88 “Report” of 29 May 1997, stating that the 1<sup>st</sup> Cerani Detachment and the Kamenica Detachment participated in an attack on Kravica, [iljkovići and Kajčići on 7 January 1993; ex. P93, “Continuation from the second supplement to the ABiH chronicle” of 7 March 1994, pp. 1-3, mentioning that the 1<sup>st</sup> Cerani Detachment, 6<sup>th</sup> Detachment Kamenica and the 114<sup>th</sup> East Bosnia Brigade participated in combat activity in Kravica on 7 January 1993; ex. P94, “Supplement to the ABiH chronicle” of 7 March 1994, pp. 6-7, mentioning that the Independent Battalion Biljeg, the Biljeg TO, the Independent Battalion Voljevica and the Company Stari Grad from the Independent Battalion Srebrenica participated in combat activities in the region of Kravica; ex. P95, “Supplement to the ABiH chronicle” of 7 February 1994, pp. 2, 10, 13-15, first mentioning the participation of the Staff of the Territorial Defence Srebrenica in the attack of 7 January 1993 on the area of Kravica, and further specifying that the attack was carried out by the Sućeska TO, Brigade “3 Maj” Kragljivoda and Kragljivoda TO, Company Pasmulići within the Territorial Defence Srebrenica – Independent Battalion Srebrenica, as well as the Osmaće TO and the Independent Battalion Osmaće; ex. P595, “Proposal for Decorations” of 9 December 1994, pp. 14, 34-35, 42, 45, 53, 57-58, stating, *inter alia*, that Čizmići Company, participated in the attack of 7 January 1993 on Kravica; ex. P598, “Diary”, p. 12, stating that Company Blječeva participated in an attack on Kravica at an unspecified date. The Trial Chamber does not accept the Prosecution’s submission that ex. P598, “Military Diary”, provides evidence that Company Pale and Gostilj Battalion participated in the attack on Kravica: Prosecution Final Brief, para. 790. Further, the Trial Chamber does not consider the mentioning by the Accused during the Interview that it had been envisaged that the Pale Territorial Defence, Voljevica fighting group, as well as other fighting groups, would participate in the attack (ex. P329, “Interview” of the Accused, tape 8, pp. 24-25, 31) as evidence of the actual participation of these group of fighters in the attack.

<sup>1855</sup> Ex. P595, “Proposal for Decorations” of 9 December 1994, p. 18, stating that Mirzet Halilović and members of the military police took part in taking over Kravica on 7 January 1993.

<sup>1856</sup> Nedret Mujkanović, T. 5128-5129, 5132, stating that a person called Safet Omerović, a native of Voljevica, participated in the attack. However, there is no clear and sufficient evidence to establish which group of fighters he belonged to: Nedret Mujkanović, T. 5363; *see also* Mira Stojanović, T. 3877-3878, 3889; D005, T. 13849. *See also*, Nedret Mujkanović, T. 5131-5132, giving evidence regarding several fighting groups that participated in the attack but clarifying that he did not remember the names of all these fighting groups; Hakića Mehlojić, T. 6843, stating that he did not “know anybody who didn’t go except for [his] men.”

<sup>1857</sup> Hakića Mehlojić, T. 6843-6844, stating that Zulfo Tursunović’s men participated in the attack, but that he does not know whether Zulfo Tursunović himself participated in the attack as well; *see also* Nedret Mujkanović, T. 5131.

<sup>1858</sup> Sead Bekrić, T. 9583; Nesib Burić, T. 10708; Nedret Mujkanović, T. 5131; ex. P329, “Interview” of the Accused, tape 8, p. 24. *See* para. 169 *supra*.

<sup>1859</sup> Nesib Burić, T. 10718, 10898-10899, 10926, stating that the group of fighters from Biljeg was also known as the group of fighters from Miholjevine.



Brezova Njiva (led by Sidik Ademović),<sup>1861</sup> Osmaće,<sup>1862</sup> Konjević Polje,<sup>1863</sup> Jagodnja<sup>1864</sup> and Joševa,<sup>1865</sup> and included also unidentified fighters from Srebrenica.<sup>1866</sup> Furthermore, the Accused stated during the Interview that he and members of his group of fighters,<sup>1867</sup> as well as Hamed Salihović, participated in the attack.<sup>1868</sup> The Bosnian Muslim fighters who participated in the attack were preceded and followed by several thousand Bosnian Muslim civilians, who were mostly refugees.<sup>1869</sup>

664. At the time of the attack, a number of village guards<sup>1870</sup> and some Bosnian Serb civilians were present in Kravica, Šiljkovići and Ježestica.<sup>1871</sup> There is conflicting evidence as to the degree to which these village guards were militarised. Whereas some evidence suggests that they were not supported by the VRS and had few weapons at their disposal,<sup>1872</sup> other convincing evidence suggests that the village guards were backed by the VRS, and following the fighting in the summer of 1992, they received military support, including weapons and training.<sup>1873</sup> A considerable amount of weapons and ammunition was kept in Kravica and Šiljkovići.<sup>1874</sup> Moreover, there is evidence that besides the village guards, there was Serb and Bosnian Serb military presence in the area.<sup>1875</sup>

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<sup>1860</sup> Ejub Dedić, T. 12224, 12264-12268, 12399-12401. *See also* ex. P329, “Interview” of the Accused”, tape 8, p. 26; Nedret Mujkanović, T. 5124.

<sup>1861</sup> Sidik Ademović, T. 13084-13086. *See* ex. P598, “Military Diary”, pp. 12, 24, 27, according to which Company [ušnjari participated in the attack of 7 January 1993 on Kravica; para. 168 *supra*; Prosecution Final Brief, para. 873, submitting that the Company [ušnjari was a unit within the Potočari TO. As to the Trial Chamber finding with respect to the relations between the fighting group of Potočari and other fighting groups in that area, *see* paras 162, 168, *supra*.

<sup>1862</sup> Nesib Burić, T. 10708-10709, 10718, 10898-10899.

<sup>1863</sup> Nedret Mujkanović, T. 5131; Hakija Meholfjić, T. 6843-6844; ex. P329, “Interview” of the Accused, tape 8, p. 24.

<sup>1864</sup> Nesib Burić, T. 10718, 10898-10899; Ibro Alić, T. 12489, 12705-12709, 12710-12711.

<sup>1865</sup> Nesib Burić, T. 10718, 10898-10899.

<sup>1866</sup> Nedret Mujkanović, T. 5131, stating that groups of fighters from the area of Srebrenica participated in the attack. The Trial Chamber notes that there is no further evidence to establish the identity of these groups of fighters.

<sup>1867</sup> That is a group of fighters from Potočari: *see* para. 162 *supra*.

<sup>1868</sup> Ex. P329, “Interview” of the Accused, tape 8, pp. 26-27, 32, tape 20, pp. 26-29, stating that prior to the attack, he was tasked with neutralising two machine-gun nests in the area of Jagličići, which is two to three kilometres south of Ježestica (ex. C1, “Map”), and that afterwards, he took part in the attack on Kajičići, which is northwest of Ježestica (ex. D797, “Map”), and the attack on Kravica. *But see* Sead Bekrić T. 9621, stating that he did not see the Accused in Kravica during the attack. The Trial Chamber does not rely upon this evidence.

<sup>1869</sup> Hakija Meholfjić, T. 6842-6843; Sead Bekrić, T. 9570-9571, 9574; Ibro Alić, T. 12709-12710, 12712; ex. P329, “Interview” of the Accused, tape 8, pp. 26, 29, 32-33, tape 9, p. 8.

<sup>1870</sup> Miladin Simić, T. 823; Ratko Nikolić, T. 2579; Nikola Popović, T. 2874-2878.

<sup>1871</sup> Miladin Simić, T. 844-846; Milo Ranković, T. 1152; Nikola Popović, T. 2877-2878; ex. P329, “Interview” of the Accused, tape 20, p. 19. *But see* D005, T. 13965, stating that there were no civilians in Kravica during the attack.

<sup>1872</sup> Miladin Simić, T. 844; Nikola Popović, T. 2756.

<sup>1873</sup> Nikola Popović, T. 2754, 2759, 2859, 2879; Miladin Simić, T. 969-973; ex. D26, “Lists”; *see also* ex. D8, “List”: at least some of the village guards were members of the Bratunac Brigade; fn. 1692 *supra*.

<sup>1874</sup> Nikola Popović, T. 2859; Sead Bekrić, T. 9545, 9580-9581; Nesib Burić, T. 10724-10725, 10728-10729; D005, T. 13975, 13980-13981; ex. P329, “Interview” of the Accused, tape 8, p. 30, tape 9, pp. 27-29; ex. D469, “Report” of 9 January 1993.

<sup>1875</sup> Safet Golić, T. 11880-11886; Azir Malagić, T. 11331-11332, stating that a battalion of the Bratunac Brigade was stationed in Kravica; Milo Ranković, T. 1152-1153; Slaviša Erić, T. 3139; ex. D15 “War History of Bratunac”; ex. D27, “List”; *see also* Nikola Popović, T. 2797, 2859-2860; Dragomir Miladinović, T. 3010; Ejub Dedić, T. 12263; D005, T. 13846-13847; ex. D2, “List”; ex. D45, “List”; ex. D107, “Report”; ex. D129, “Record Sheet” of 13 September

665. Prior to the attack, Bosnian Muslims had surrounded the entire area,<sup>1876</sup> leaving the Bosnian Serbs with only one escape route to the north.<sup>1877</sup> Bosnian Serbs resisted, firing artillery on the attacking Bosnian Muslims.<sup>1878</sup> Explosions, shelling and shooting followed.<sup>1879</sup> There is evidence that in Kravica and Ježestica, Bosnian Serbs fired artillery from houses and other buildings,<sup>1880</sup> which led to house-to-house fighting in Kravica.<sup>1881</sup> Moreover, Bosnian Serbs located on hills north and northeast of Kravica fired artillery in the direction of Kravica and Ježestica.<sup>1882</sup> A witness observed shells landing on houses, causing fire.<sup>1883</sup> The Bosnian Serbs eventually withdrew.<sup>1884</sup> Kravica, Šiljkovići and Ježestica fell to the Bosnian Muslims on the same day.<sup>1885</sup>

666. Houses in the entire area of Kravica, Šiljkovići and Ježestica, as well as cowsheds and barns in Ježestica, were burning on 7 January 1993.<sup>1886</sup> In both Ježestica and Kravica, Bosnian Muslim fighters and civilians entered houses, searching for food and other items.<sup>1887</sup> In Ježestica, one witness saw smoke coming out of houses that had been searched by Bosnian Muslim fighters and civilians.<sup>1888</sup> According to another witness, a minimum of 16 houses were burned in Ježestica by Bosnian Muslims in uniforms, using an inflammable liquid.<sup>1889</sup> In Kravica, witnesses saw Bosnian

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1993; ex. D743 “Report” of 10 December 1992; ex. D744, “Report” of 13 December 1992; ex. D811 “Report” of 26 April 1993; para. 662 *supra*.

<sup>1876</sup> Miladin Simić, T. 847.

<sup>1877</sup> Dragomir Miladinović, T. 2980. *See also* Dragan Đurić, T. 724; Milosava Nikolić, T. 7124, 7129; Milo Ranković, T. 1100, 1106; ex. P329, “Interview” of the Accused, tape 8, p. 28, tape 20, p. 21, mentioning that some of the Bosnian Serbs fled the area immediately when it was attacked.

<sup>1878</sup> Sead Bekrić, T. 9572-9573, 9576, 9581-9582; Ejub Dedić, T. 12267; Ibro Alić, T. 12711-12712, 12714-12715; Sidik Ademović, T. 13086, 13088, 13135; ex. P329, “Interview” of the Accused, tape 8, pp. 28-29, tape 9, pp. 25-26. *See also* Nesib Burić, T. 10719-10720; Nikola Popović, T. 2791, 2890.

<sup>1879</sup> Miladin Simić, T. 846; Ratko Nikolić, T. 2583-2584, 2736, 2704; Nikola Popović, T. 2796, 2890-2891; Sead Bekrić, T. 9576; ex. P329, “Interview” of the Accused, tape 8, p. 29. *See also* Dragan Đurić, T. 724.

<sup>1880</sup> Sead Bekrić, T. 9572-9576, 9582; Nesib Burić, T. 10725; D005, T. 13972-13974; Ibro Alić, T. 12711-12712; Sidik Ademović, T. 13088; ex. P329, “Interview” of the Accused, tape 8, pp. 28-29, tape 9, pp. 25-26; ex. D938, “Bloody Christmas” by Boro Miljanović, p. 112. *See also* Nikola Popović, T. 2885-2886.

<sup>1881</sup> Sead Bekrić, T. 9581-9582. *See also* ex. P329, “Interview” of the Accused, tape 9, p. 8.

<sup>1882</sup> Sead Bekrić, T. 9574-9576. *See also* Ibro Alić, T. 12714-12717; Ejub Dedić, T. 12267; D005, T. 13980-13982.

<sup>1883</sup> Sead Bekrić, T. 9578, 9580. *See also* Milo Ranković, T. 1156; Hamed Tiro, T. 10393.

<sup>1884</sup> Sead Bekrić, T. 9582; Nikola Popović, T. 2794; Nesib Burić, T. 10719-10721, 10723-10724, 10728-10730, 10935-10937; Ibro Alić, T. 12712; Ejub Dedić, T. 12268-12270, stating that weapons the Bosnian Serbs could not take with them upon withdrawal were either destroyed or set with mines; *see also* ex. D469 “Report” of 9 January 1993.

<sup>1885</sup> Kada Hotić, T. 9737; Nesib Burić, T. 10721, 10733; Ibro Alić, T. 12709-12710, 12712-12716.

<sup>1886</sup> Dragan Đurić, T. 724-727; Miladin Simić, T. 849-854; Milo Ranković, T. 1100, 1108; Dragomir Miladinović, T. 2980-2984; Milosava Nikolić, T. 7123-7125. *See also* Slaviša Erić, T. 1211; Ratko Nikolić, T. 2583-2584, 2586, 2703-2704, 2736; Nikola Popović, T. 2792, 2794, 2886-2887, 2903; Milosava Nikolić, T. 7123-7124, 7128-7129, 7184-7185. *But see* Nesib Burić, T. 10735; D005, T. 13982; Ejub Dedić, T. 12268, stating that there was no fire in Kravica and Ježestica on 7 January 1993.

<sup>1887</sup> Milo Ranković, T. 1100-1101, 1155; Sead Bekrić, T. 9581-9582; Nesib Burić, T. 10727-10728; Ejub Dedić, T. 12269-12271; Ibro Alić, T. 12712, 12714-12715; ex. P329, “Interview” of the Accused, tape 8, pp. 28-32, tape 9, pp. 25-26. *See also* Dragan Đurić, T. 726.

<sup>1888</sup> Dragan Đurić, T. 724-727.

<sup>1889</sup> Dragomir Miladinović, T. 2982-2984, 2986-2989, 2990-2993.

Muslim civilians setting fire to houses<sup>1890</sup> and haystacks.<sup>1891</sup> Šiljkovići and Kravica were engulfed in smoke.<sup>1892</sup>

667. The attack ended on 7 January 1993 and at least some of the Bosnian Muslim fighters, including the Accused,<sup>1893</sup> withdrew that same day.<sup>1894</sup> However, armed Bosnian Muslims remained in the vicinity of Kravica between 8 and 12 January 1993.<sup>1895</sup> On 8 January 1993, Bosnian Muslims attacked the hamlets of Popovići and Čolakovići,<sup>1896</sup> driving away the cattle and burning houses.<sup>1897</sup>

668. Between January and March 1993, the area of Kravica and Ježestica remained under Bosnian Muslim control.<sup>1898</sup> Thousands of Bosnian Muslim civilians continued to flood in and out of this area,<sup>1899</sup> searching for food and building material.<sup>1900</sup> Some of them set fire to houses and haystacks.<sup>1901</sup> Bosnian Serbs continued to shell the area from the direction of Bratunac.<sup>1902</sup> In mid-March 1993, they recaptured the area.<sup>1903</sup>

669. As to the extent of destruction caused to Ježestica, Kravica and Šiljkovići, the Trial Chamber finds the following. In Ježestica, on 7 January 1993, more than 60 houses<sup>1904</sup> were burned.<sup>1905</sup> In Kajici, a hamlet of Kravica, six houses out of 15 were burned on 7 January 1993.<sup>1906</sup>

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<sup>1890</sup> Sead Bekrić, T. 9577-9578, 9606-9609 (partly in private session).

<sup>1891</sup> Kada Hotić, T. 9740-9741, 9743-9745.

<sup>1892</sup> Ratko Nikolić, T. 2583-2584, 2586, 2703-2705, 2736.

<sup>1893</sup> Ex. P329, "Interview" of the Accused, tape 9, pp. 9, 28.

<sup>1894</sup> Nesib Burić, T. 10725, 10727; ex. P329, "Interview" of the Accused, tape 9, p. 22, tape 20, p. 26.

<sup>1895</sup> Ratko Nikolić, T. 2592, 2595; Milosava Nikolić, T. 7141, 7192-7193.

<sup>1896</sup> Milosava Nikolić, T. 7121, 7125-7126, 7135. Popovići and Čolakovići are situated less than five kilometres north of Kravica: ex. C1, "Map"; ex. D797, "Map"; *but see* D005, T. 13984, stating that Popovići and Čolakovići were not attacked on 8 January 1993.

<sup>1897</sup> Milosava Nikolić, T. 7121, 7125-7129, 7135, 7186.

<sup>1898</sup> Miladin Simić, T. 855, 975; Slaviša Erić, T. 1222, 1260.

<sup>1899</sup> Ejub Dedić, T. 12269; Sabra Kolenović, T. 10099-10100; Ibro Alić, T. 12712; Sidik Ademović, T. 13088-13089; Hamed Tiro, T. 10393. *But see* Milosava Nikolić, T. 7192-7193, stating that while she was passing through Kravica on 8 January 1993, she did not see any Bosnian Muslim civilians there. The Trial Chamber finds that this evidence does not invalidate its finding that there were Bosnian Muslim civilians in Kravica area on the morning of 8 January 1993.

<sup>1900</sup> Hamed Tiro, T. 10393; Ejub Dedić, T. 12270; Ibro Alić, T. 12712-12714; *see also* Ratko Nikolić, T. 2593-2594.

<sup>1901</sup> Sead Bekrić, T. 9577 (private session), 9582-9583 (private session); Sabra Kolenović, T. 10104-10106 (private session), 10110-10111 (private session). *But see* Ibro Alić, T. 12714.

<sup>1902</sup> Sabra Kolenović, T. 10102, 10111-10113, stating that shells were falling on "the part of Kravica towards Jagličići", Jagličići being approximately two kilometres south of Ježestica: ex. C1 "Map"; Hamed Tiro, T. 10394; Sidik Ademović, T. 13088-13089. *See also* ex. D41, "Combat Order" of 14 March 1993; ex. D942, "Analysis"; ex. D978, "Order" of 7 February 1993"; ex. D979, "Order" of 13 February 1993.

<sup>1903</sup> Slaviša Erić, T. 1260. *See also* Miladin Simić, T. 855, 975; D28, "Report" of 11 February 1993; para. 107 *supra*.

<sup>1904</sup> The Trial Chamber notes that there were approximately 120 houses in Ježestica. During the first Bosnian Muslim attack on Ježestica, on 8 August 1992, approximately 50 houses were burned down. 60 of the remaining houses were burned during the second attack on Ježestica: Dragomir Miladinović, T. 2982, 2999.

<sup>1905</sup> Milo Ranković, T. 1102, 1110-1116. This estimation seems to include six houses that were burned in Polja: Miladin Simić, T. 852, 854. The Trial Chamber notes that photos taken in August 1994 reveal that most of the houses of Ježestica were burned down: ex. P365, "Map and photos"; Milo Ranković, T. 111-1116; Miladin Simić, T. 857-871; Dragomir Miladinović, T. 2999-3007; Dragan Janković, T. 4728-4729, 4672, 4694, 4698-4699. However, they cannot be perceived as an accurate representation of the degree of destruction that occurred on 7 and 8 January 1993.

<sup>1906</sup> Miladin Simić, T. 853.

By 8 January 1993, an indeterminate number of houses in Kravica were burned.<sup>1907</sup> According to one witness, on 12 January 1993, the extent of destruction in Kravica was “roughly about 50 per cent.”<sup>1908</sup> Witnesses arriving in the Kravica area by mid-March 1993 found most of the houses and out-buildings burned down.<sup>1909</sup> There was no evidence presented with respect to the extent of destruction caused to Šiljkovići.

(b) Legal Findings

670. Based on the evidence presented, the Trial Chamber is satisfied that property was destroyed on a large scale in Kravica and Ježestica on 7 and 8 January 1993. However, in regard to Šiljkovići there is no sufficient evidence to establish that destruction on a large scale occurred there.<sup>1910</sup>

671. Regarding Kravica, while there is evidence that large scale destruction occurred on 7 and 8 January 1993, the Trial Chamber is not satisfied that it can be attributed solely to Bosnian Muslims. The evidence is unclear as to the number of houses destroyed by Bosnian Muslims as opposed to those destroyed by Bosnian Serbs.<sup>1911</sup> In light of this uncertainty, the Trial Chamber concludes that the destruction of property in Kravica between 7 and 8 December 1992 does not fulfil the elements of wanton destruction of cities, towns or villages not justified by military necessity.

672. Regarding Ježestica, it is recalled that Bosnian Muslims, fighters or civilians, set fire to property.<sup>1912</sup> Furthermore, some of the Bosnian Muslim civilians, who traversed in and out of Ježestica after the Bosnian Muslim fighters’ withdrawal, may have set property on fire. Likewise, subsequent Bosnian Serb attacks on Ježestica could have caused destruction. Nonetheless, the

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<sup>1907</sup> Milosava Nikolić, T. 7129, 7142, 7185-7187, 7191-7193. The Trial Chamber is not persuaded by evidence given by Hamed Tiro, T. 10392-10393, that on 8 January 1993, only two houses in Kravica were burned down, while others were damaged from shooting and shelling, and, by Sabra Kolenović, T. 10110, that on 11 or 12 January 1993 only 3 to 4 houses in Kravica were burned down.

<sup>1908</sup> Ratko Nikolić, T. 2593-2594. *See also* ex. P448, “Video” of 23 January 1993; Slaviša Erić, T. 3094, 3096-3098, 3100-3107, stating that an undetermined number of houses in Kravica were damaged by fire.

<sup>1909</sup> Miladin Simić, T. 853-855, 859-864, 868-870; Slaviša Erić, T. 1213-1214, 1259, 3113; Dragomir Miladinović, T. 2990-2992, 2999-3007, 3052-3053. *See also* Nikola Popović, T. 2903. *But see* Slaviša Erić, T. 1215-1221, 3107, stating that between January and March 1993, “some houses were destroyed a little more [...] but it was more or less in this state” and that the destruction depicted in the visual evidence shown to him was an accurate representation of events as they occurred on 7 and 8 January 1993. The Trial Chamber further notes that this visual evidence showing destruction in Kravica was taken at a significantly later stage than the actual attack, and therefore cannot be perceived as an accurate representation of the degree of destruction that occurred on 7 and 8 January 1993: ex. P365.2, “Photographs”; ex. P400, “Photograph”; ex. P463, “Photograph”; Dragan Janković, T. 4728-4729, 4672, 4694, 4698-4699. *See also* ex. P488, “Map showing facilities torched and destroyed in war activities between 1992 and 1993” of September 1994; Nikola Popović, T. 2829-2830; Sabra Kolenović, T. 10109, stating that ex. P400, “Photograph” does not reflect the condition of the school building in Kravica as it was on 8 January 1993.

<sup>1910</sup> *See* paras 665-667, 669 *supra*.

<sup>1911</sup> *See* paras 665-667 *supra*.

<sup>1912</sup> *See* paras 666-667 *supra*.

possibility of further destruction caused by these attacks does not invalidate the finding that the substantial destruction of Ježestica was caused by Bosnian Muslims who set property on fire.<sup>1913</sup>

673. The Trial Chamber is satisfied that the Bosnian Muslims who destroyed property in Ježestica acted with intent to destroy. This intent is evident from the finding that the substantial destruction of property by Bosnian Muslims was not a result of fighting, but rather a result of deliberate burning of property.<sup>1914</sup>

674. Ježestica was a residential area at the outset of the conflict, and at the time of attack civilian inhabitants were present. Prior to the Bosnian Muslim attack, the inhabitants of Ježestica, including village guards, received some military support.<sup>1915</sup> From Ježestica, attacks were launched on nearby Bosnian Muslim villages.<sup>1916</sup> In light of this evidence, the Trial Chamber does not exclude that a military justification to attack Ježestica is conceivable. However, as explained hereunder, such justification cannot extend to the wanton destruction of civilian property, such as houses, barns and cowsheds.

675. Although there was an exchange of fire between Bosnian Muslims and Bosnian Serbs, most of the destruction in Ježestica occurred on 7 and 8 January 1993, after the Bosnian Serbs had withdrawn. With the possible exception of houses destroyed during the actual fighting, the Trial Chamber determines that at the time of the attack, most of the property destroyed in Ježestica was neither of a military nature, nor used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs.<sup>1917</sup> Therefore, the destruction was “not justified by military necessity”.

676. The Trial Chamber concludes that the destruction of property on a large scale in Ježestica on 7 and 8 January 1993 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages not justified by military necessity.

### **C. Individual Criminal Responsibility of the Accused**

#### **1. Responsibility Under Article 7(1)**

677. The Indictment alleges that the Accused instigated, as well as aided and abetted, through acts and omissions, the commission of the crimes of wanton destruction of cities, towns or villages

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<sup>1913</sup> See paras 585, 665, 668 *supra*.

<sup>1914</sup> See paras 666-667 *supra*.

<sup>1915</sup> See para. 664 *supra*.

<sup>1916</sup> See para. 662 *supra*.

not justified by military necessity during the attacks on Fakovići (5 October 1992), Bjelovac (14 to 19 December 1992) and Kravica and Ježestica (7 and 8 January 1993).<sup>1918</sup>

678. The Trial Chamber recalls its previous finding that out of these attacks, the elements of wanton destruction of cities, towns or villages not justified by military necessity are fulfilled only in respect of the one on Ježestica (7 and 8 January 1993).<sup>1919</sup>

679. The Prosecution submits that the Accused not only participated in the attack on Kravica and Ježestica, but also commanded it.<sup>1920</sup> It further submits that throughout the period relevant to the Indictment, the destruction of Bosnian Serb property was committed by Bosnian Muslim fighters and civilians, following a pattern of conduct.<sup>1921</sup> The fighters and civilians co-operated because this was crucial for the attack's success.<sup>1922</sup> The Accused knew that wanton destruction was being committed by Bosnian Muslims.<sup>1923</sup> However, he failed to issue any or sufficient orders to prevent such wanton destruction or to address the issue of wanton destruction at the operations briefings.<sup>1924</sup>

680. The Defence argues that it was Bosnian Muslim civilians, and not fighters, who burned houses,<sup>1925</sup> and that there is no evidence that the Accused aided and abetted their acts<sup>1926</sup> or was otherwise responsible for them.<sup>1927</sup> The Accused opposed the destruction of property,<sup>1928</sup> but there was nothing that he could have done to prevent it. The Defence's submission is that he only had control over his own group of fighters<sup>1929</sup> and thus the law does not impose on him to do the impossible.<sup>1930</sup> The Defence further challenges the Prosecution assertion that it has adduced sufficient evidence to establish the Accused's participation in the attack of 7 and 8 January 1993 on the Kravica area, including Ježestica.<sup>1931</sup>

681. The Trial Chamber recalls that instigating requires influencing the direct perpetrator by way of inciting, soliciting or otherwise inducing him or her, through acts or culpable omissions, to

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<sup>1917</sup> See paras 587-588, 666 *supra*.

<sup>1918</sup> Indictment, para. 37.

<sup>1919</sup> See paras 645, 658, 670-671, 767 *supra*.

<sup>1920</sup> Indictment, para. 34; Prosecution Final Brief, para. 870; Prosecution Response to Defence Final Brief, para. 62.

<sup>1921</sup> Prosecution Final Brief, paras 929-945; Prosecution Closing Argument, T. 16214-16216. *See also* Indictment, para. 37.

<sup>1922</sup> Prosecution Closing Argument, T. 16216.

<sup>1923</sup> Prosecution Final Brief, paras 935, 954; Prosecution Response to Defence Final Brief, paras 60-64.

<sup>1924</sup> Indictment, para. 37.

<sup>1925</sup> Defence Closing Argument, T. 16321-16323; Defence Response to Prosecution Final Brief, para. 10.

<sup>1926</sup> Defence Closing Argument, T. 16323, 16584.

<sup>1927</sup> Defence Final Brief, para. 49; Defence Closing Argument, T. 16323.

<sup>1928</sup> Defence Closing Argument, T. 16324.

<sup>1929</sup> Defence Closing Argument, T. 16344-16345.

<sup>1930</sup> Defence Closing Argument, T. 16324-16326.

<sup>1931</sup> Defence Final Brief, paras 1408-1410.

commit the crime in question. The instigation must substantially contribute to the perpetration of the crime, and the instigator must intend not only his or her conduct, but also the ultimate crime.<sup>1932</sup> Aiding and abetting may be constituted by an accused's contribution, through acts or culpable omissions, to the planning, preparation or execution of a completed crime, provided that the contribution is substantial enough to make the commission of the crime possible or at least easier. The aider and abettor must act with an intent to further the contribution, as well as to effect the completion of the crime by the direct perpetrator.<sup>1933</sup> In both modes of liability the contribution can be indirect, as well as removed in time and place from the actual commission of the crime.<sup>1934</sup>

682. The Trial Chamber finds that the burning of Bosnian Serb houses following attacks on their villages was a matter of common knowledge and a topic of controversy in Srebrenica during 1992 and 1993.<sup>1935</sup> The issue was discussed during meetings of the Srebrenica Armed Forces Staff.<sup>1936</sup> The Accused was aware that Bosnian Muslims, primarily civilians who followed the Bosnian Muslim fighters during attacks, destroyed Bosnian Serb property.<sup>1937</sup> Nedret Mujkanović gave evidence that the Accused opposed this conduct,<sup>1938</sup> but maintained that there was nothing he could have done to prevent it.<sup>1939</sup> The Accused during the Interview stated that “[b]oth the military and the civilian authorities considered that this was a problem. And it was on the basis [...] of these discussions that we issued the order which I signed [...] that it was forbidden to destroy other people’s property, it was forbidden to burn down houses”. Furthermore, he stated that “I don’t know if I gave such an order [...] but I always said to my soldiers that they should not behave like

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<sup>1932</sup> See paras 271- 279 *supra*.

<sup>1933</sup> See paras 280-288 *supra*.

<sup>1934</sup> See paras 276, 282-283, 285 *supra*.

<sup>1935</sup> Nedret Mujkanović, T. 5135-5138, 5384, 5451. The Trial Chamber notes the evidence given by this witness that some Bosnian Muslims supported the burning of Bosnian Serb houses. See also Omer Ramić, T. 10016.

<sup>1936</sup> Nedret Mujkanović, T. 5135-5136; ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 3 October 1992, p. 4, meeting of the Srebrenica Armed Forces Staff of 10 December 1992, p. 37, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, pp. 49-50. But see ex. P329, “Interview” of the Accused, tape 9, pp. 11-12. As to the Defence position regarding the minutes of the meetings of 3 October 1992 and 10 December 1992, see Defence Response to Prosecution Final Brief, paras 142-144. See also ex. P161, “Report” of 29 December 1992.

<sup>1937</sup> Nedret Mujkanović, T. 5136-5137; ex. P329, “Interview” of the Accused, tape 4, pp. 18-20, 23-25, tape 9, pp. 9, 11-12, 16.

<sup>1938</sup> Nedret Mujkanović, T. 5137.

<sup>1939</sup> Nedret Mujkanović, T. 5133, 5136-5137, 5381, 5387-5388, 5395-5399, 5406-5407, 5449-5453, 5471, 5495-5496, stating that no means were available to prevent the destruction of property, although the Accused should have tried harder to stop the destruction of property during attacks, rather than choosing the easy way out in order not to annoy the population and thus lose respect.

Chetniks [...].<sup>1940</sup> The Accused added that in any case, he did not have the means to control civilians or prevent them from following fighters.<sup>1941</sup>

683. Although the Accused is charged with instigating wanton destruction, there is no reliable evidence that he ever did so. As regards the Prosecution's submission that he aided and abetted wanton destruction through his failure to issue any or sufficient orders to prevent wanton destruction or address this matter appropriately, the Trial Chamber finds that undoubtedly the Accused, by virtue of his authority as leader of a group of fighters, had the responsibility to prevent the commission of wanton destruction by his subordinates.<sup>1942</sup> This duty extended to preventing wanton destruction by other fighters and civilians if the Accused knew that such wanton destruction was being or about to be committed in the course of attacks in which his subordinates participated. As a minimum, if the main cause of the wanton destruction resided with the civilians, he had a duty to prevent civilians from being present during such attacks.<sup>1943</sup> Failure to fulfil this duty, when he could have done so, may amount to aiding and abetting the commission of the crime of wanton destruction.

684. Although it has been established beyond reasonable doubt that the Accused took part in the preparation and execution of attacks on Bosnian Serb villages, including the attack on Kravica and Ježestica,<sup>1944</sup> it has not been established that the Accused could have prevented wanton destruction by civilians. There is abundant evidence that the crowd of civilians present before, during and after attacks was massive and beyond control.<sup>1945</sup>

685. With respect to fighters, the Trial Chamber is not convinced that in the particular circumstances of the attack on Ježestica on 7 and 8 January 1993, the Accused could have prevented those unidentified fighters who participated in wanton destruction from committing or

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<sup>1940</sup> Ex. P329, "Interview" of the Accused, tape 4, p. 19, tape 9, p. 11. The Trial Chamber notes that no such order was presented at trial. The Accused stated during the Interview that it was a person called Nijaz Mašić who told him that this was the first order that he had signed, and that he signed many things that he did not read.

<sup>1941</sup> Ex. P329, "Interview" of the Accused, tape 9, p. 28, tape 20, pp. 20-21.

<sup>1942</sup> See para. 283 *supra*.

<sup>1943</sup> By playing a substantial role in launching such attacks, the Accused participated in the creation of a dangerous situation. As a commander, he had a duty to avert or minimise this danger, and consequently had a duty to take measures to prevent the anticipated destruction of Bosnian Serb property. See para. 283 *supra*.

<sup>1944</sup> See fn. 1679, paras 638, 650, 663 *supra*.

<sup>1945</sup> The only evidence of attempts to control the civilians was adduced by the Defence and demonstrated how Bosnian Muslim fighters did not have control over civilians: Sabra Kolenović, T. 10101-10102; Suad Smajlović, T. 14570. See also Hamed Tiro, T. 10362; Nesib Burić, T. 10733-10734; Ejub Dedić, T. 12266-12267; Ibro Alić, T. 12712; ex. P329, "Interview" of the Accused, tape 4, p. 19, tape 8, p. 28, tape 9, p. 31, tape 20, p. 21; paras 638, 650, 663 *supra*. Furthermore, fighters informed family members of forthcoming attacks, and consequently such rumours spread among the civilian population: Kada Hotić, T. 9828-9830, 9832. *But see* Nedret Mujkanović, T. 5118-5119, stating that plans of attacks were intended to be confidential; ex. P329, "Interview" of the Accused, tape 8, p. 27, tape 9, pp. 18-19, 21, clarifying that attacks were not organised together with civilians and that fighters did not rely on them.



aiding and abetting civilians to commit such destruction.<sup>1946</sup> The Accused and his group were only one of several fighting groups involved in fierce combat in the Kravica area, including Ježestica.<sup>1947</sup> During the attack, the Accused had no communications with at least several of the fighting groups,<sup>1948</sup> and there is no evidence that he had control over any fighting group besides his own.<sup>1949</sup> As regards his own fighting group, there is no evidence that it had any involvement in the wanton destruction that occurred during the attack.

686. Regarding the Prosecution submission that the Accused aided and abetted the commission of the wanton destruction by virtue of his encouraging presence during the attacks, the Trial Chamber concludes that although the Accused participated in the attack,<sup>1950</sup> there is no evidence to establish that he was the kind of ‘approving spectator’ required to be held responsible for active participation under Article 7(1) of the Statute.<sup>1951</sup>

687. Of course, it could be argued that in order to prevent wanton destruction, the Accused should have simply not embarked on these attacks at all. This argument might have some validity if the Accused could have been fairly expected to forgo the attacks. However, given the circumstances in which the Bosnian Muslim population of Srebrenica found itself at the time, the Accused could not be fairly expected to refrain from taking action.

688. In light of the above, the Trial Chamber concludes that the Prosecution failed to establish that the Accused instigated or aided and abetted, pursuant to Article 7(1) of the Statute, the commission of wanton destruction not justified by military necessity in Ježestica on 7 and 8 January 1993.

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<sup>1946</sup> The Trial Chamber rejects the proposition expressed by the Accused in the Interview that he was no longer responsible for what happened once the front line had been taken. However, in the absence of any evidence to the contrary, it accepts that there was nothing he could have done to prevent destruction during attacks: ex. P329, “Interview” of the Accused, tape 4, pp. 20-21. *See also* ex. P329, “Interview” of the Accused, tape 8, p. 28.

<sup>1947</sup> *See* para. 663 *supra*.

<sup>1948</sup> Ex. P329, “Interview” of the Accused, tape 8, p. 26, tape 20, p. 27. *See also* ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, p. 49.

<sup>1949</sup> Ejub Dedić, T. 12264-12266; Sidik Ademović, T. 13084-13085, 13091-13093; para. 161-169 *supra*. The Trial Chamber notes that the Accused during the Interview mentioned two occasions in which he was addressed as ‘commander’ and asked to establish peace between Bosnian Muslim fighting groups who struggled among themselves over goods. However, there is no indication that the Accused had any control over these fighting groups. Furthermore, according to the Accused, after a certain point, on that day, he could not even distinguish between civilians and fighters, and his orders were not obeyed: ex. P329, “Interview” of the Accused, tape 8, pp. 30-32.

<sup>1950</sup> *See* para. 663 *supra*. More specifically, the Accused, during the Interview, stated that he was in the area of Jagličići, Kajičići and Kravica: ex. P329, “Interview” of the Accused, tape 8, pp. 26-29.

<sup>1951</sup> *See* para. 283 *supra*; ex. P329, “Interview” of the Accused, tape 9, pp. 5, 28, tape 20, pp. 26-27, stating that he left the Kravica area on 7 January 1993, after the attack had concluded and that until his departure, he did not see any destruction which he could identify as wanton as opposed to damage caused as a result of combat.

## 2. Responsibility Under Article 7(3)

### (a) Superior-Subordinate Relationship

689. What remains from the charges in Count 3 of the Indictment are the acts of wanton destruction during the attacks of 21 and 27 June 1992 on Ratkovići, Gornji Ratkovići and Brađevina, as well as during the attacks of 8 August 1992 and of 7 and 8 January 1993 on Ježestica, which the Prosecution alleges were caused by Bosnian Muslim armed units under the command and control of the Accused.<sup>1952</sup> In addition, the Prosecution contends that Bosnian Muslim fighters aided and abetted Bosnian Muslim civilians in destroying property and that the civilians “knew what to do at the attack sites”.<sup>1953</sup> The Prosecution argues that the Accused exercised effective control over Bosnian Muslim fighters who committed the acts of wanton destruction and aided and abetted civilians to commit these crimes.<sup>1954</sup>

690. The Defence submits that the Prosecution failed to prove the identity of the direct perpetrators, much less that they were subordinates of the Accused.<sup>1955</sup> Furthermore, Bosnian Muslim fighters tried without success to prevent Bosnian Muslim civilians from entering the attacked villages, and it was not possible to distinguish between them during the attacks.<sup>1956</sup> In addition, the Accused as a superior could not be held responsible for acts and omissions of his subordinates aiding and abetting civilians to commit wanton destruction.<sup>1957</sup>

691. As regards the latter submission, the Trial Chamber refers to its earlier finding concerning the law on superior criminal responsibility, which does not presuppose that the direct perpetrators of a crime punishable under the Statute be identical to the subordinates of a superior. It is only required that the relevant subordinates, by their own acts or omissions, be criminally responsible for the acts and omissions of the direct perpetrators.<sup>1958</sup> Identification of the direct perpetrators is not required as long as it is established that the subordinates ultimately responsible for wanton destruction by acts and omissions were within a unit or a group under the control of the superior.<sup>1959</sup>

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<sup>1952</sup> Indictment, paras 30, 31, 34; Prosecution Pre-Trial Brief, para. 82; Prosecution Final Brief, paras 502, 571, 584-585, 600, 860, 902.

<sup>1953</sup> Prosecution Closing Argument, T. 16216-16218, citing as an example Kada Hotić’s evidence that “everyone was aware that they had to be quiet so that they would not be noticed”, T. 9810.

<sup>1954</sup> Prosecution Closing Argument, T. 16213-16215, 16218.

<sup>1955</sup> Defence Final Brief, paras 882-893, 896, 991-1000, 1377-1383.

<sup>1956</sup> Defence Final Brief, paras 72-76, 1420-1423. *See also* Defence Closing Argument, T. 16321, arguing that uniforms were not a reliable guide to identify a person as a fighter, that fighters and civilians were intermingled during the attacks, and that in any event, civilians committed all acts of wanton destruction.

<sup>1957</sup> Defence Closing Argument, T. 16323-16324, 16428-16431, 16439.

<sup>1958</sup> *See* VI.B.2., “Scope of the ‘Principal Crime’”.

<sup>1959</sup> *See* para. 311 *supra*.

(i) Identification of Subordinates and Direct Perpetrators

a. Attack on Ratkovići and Gornji Ratkovići on 21 June 1992

692. On 21 June 1992, Ratkovići and Gornji Ratkovići were attacked by groups of Bosnian Muslim fighters led by Dževad Malkić from the neighbouring villages of Poznanovići and Podkorjen. These fighters were followed by a crowd of Bosnian Muslim civilians.<sup>1960</sup> The Trial Chamber heard only vague evidence with regard to the identity of the perpetrators of wanton destruction. Such perpetrators have only been identified in general terms as Bosnian Muslim fighters and civilians.<sup>1961</sup>

b. Attack on Brađevina on 27 June 1992

693. Although one witness stated that he heard that the Accused was responsible for the attack on Brađevina as commander of the ‘Srebrenica Muslim army’ and that the Bosnian Muslim fighters were commanded by Akif Ustić during the attack,<sup>1962</sup> this evidence is not corroborated. Rather, there is sufficient evidence that on 27 June 1992, Brađevina was attacked by groups of Bosnian Muslim fighters, amongst whom were locals from the surrounding Bosnian Muslim villages led by Vekaz Husić.<sup>1963</sup> These fighters were followed by a crowd of Bosnian Muslim civilians.<sup>1964</sup> There is only unclear evidence with regard to the identity of the perpetrators of wanton destruction. In Brađevina, both Bosnian Muslim fighters and Bosnian Muslim civilians committed acts of wanton destruction.<sup>1965</sup>

c. Attack on Ježestica on 8 August 1992

694. On 8 August 1992, Ježestica was attacked by groups of Bosnian Muslim fighters from the villages of Jagličići, Šušnjari (led by Sidik Ademović), Glogova (led by Ejub Golić), and the 16<sup>th</sup> Muslim Brigade from Tuzla (led by Nurif Rizvanović).<sup>1966</sup> They were followed by a crowd of Bosnian Muslim civilians.<sup>1967</sup> The evidence relating to the identity of the perpetrators of wanton

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<sup>1960</sup> See para. 598 *supra*.

<sup>1961</sup> See para. 600 *supra*.

<sup>1962</sup> Milenko Stevanović, T. 1651, 1668-1670, 1672, 1721. The Trial Chamber holds that in all likelihood, the person referred to by this witness as Akif is Akif Ustić.

<sup>1963</sup> See para. 611 *supra*.

<sup>1964</sup> *Ibid.*

<sup>1965</sup> See para. 613 *supra*.

<sup>1966</sup> See para. 624 *supra*.

<sup>1967</sup> *Ibid.*

destruction is uncertain and only indicates that a number of Bosnian Muslims, some in uniforms, set fire to houses.<sup>1968</sup>

d. Attack on Ježestica on 7 and 8 January 1993

695. On 7 and 8 January 1993, Kravica, Šiljkovići and Ježestica were attacked by groups of Bosnian Muslim fighters from Biljeg, Brezova Njiva, Cerska, Delići, Glogova, Jagličići, Jagodnja, Joševa, Konjević Polje, Mošići, Osmaće, Potočari, Skugrići, Sućeska and Šušnjari,<sup>1969</sup> as well as by unidentified fighters from Srebrenica<sup>1970</sup> The evidence is unclear as to which groups attacked which village. These Bosnian Muslim fighters were followed by several thousands of Bosnian Muslim civilians.<sup>1971</sup> The only specific evidence that the Trial Chamber heard regarding the identity of the perpetrators of wanton destruction was given by a witness according to whom Bosnian Muslim in uniforms burned the houses.<sup>1972</sup> More generally, another witness gave evidence that smoke came out of the houses which Bosnian Muslim fighters and civilians had searched.<sup>1973</sup>

(ii) The Accused's Effective Control Over the Perpetrators

a. General Findings

696. One essential element of superior-subordinate relationship is the existence of effective control. It can be based on a *de jure*, as well as on a *de facto* position of authority. The superior-subordinate relationship may be direct as well as indirect. Hence, the nature and extent of any effective control that the Accused may have had over his subordinates responsible for wanton destruction needs to be examined against this background.<sup>1974</sup> As regards the Accused's *de jure* position as commander, the Trial Chamber recalls the aforementioned narration of events. His *de jure* position originates from his election as overall commander of the Srebrenica TO Staff upon its formation on 20 May 1992.<sup>1975</sup>

697. At the time of the attacks on Ratkovići and Gornji Ratkovići on 21 June 1992 and Brajevina on 27 June 1992, his position remained unchanged. However, on 27 June 1992, the same day

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<sup>1968</sup> See para. 626 *supra*; see also Dragan Đurić, T. 718-719, 773; Milo Ranković, T. 1086-1087; Dragomir Miladinović, T. 2958-2963.

<sup>1969</sup> See para. 663 *supra*.

<sup>1970</sup> However, there is no evidence which group of fighters from the Srebrenica area participated in the attack: see fn. 1866 *supra*.

<sup>1971</sup> *Ibid.*

<sup>1972</sup> See para. 666 *supra*.

<sup>1973</sup> *Ibid.*

<sup>1974</sup> See paras 309-310 *supra*.

Brajevina was attacked, his position as Commander of the Srebrenica TO Staff was confirmed by Sefer Halilović, the Chief of the Supreme Command Staff of ABiH. On 8 August 1992, when the first attack on Ježestica took place, his position was reconfirmed by no less than Alija Izetbegović, the BiH President.<sup>1976</sup> The only change in his *de jure* authority by 7 and 8 January 1993, when the second attack on Ježestica occurred, was his appointment as Commander of the Sub-Region which was proclaimed on 4 November 1992.<sup>1977</sup>

698. On a *de jure* basis, therefore, the Accused was considered as superior to all those Bosnian Muslim armed groups operating in the Srebrenica area during the time period relevant to Count 3 of the Indictment.

699. Still, it needs to be decided if, in this *de jure* position, the Accused had effective control over the various groups participating in the relevant attacks directly or through the local leaders.<sup>1978</sup> The existence of such effective control, or its absence, has to be based on the totality of evidence surrounding his activity during the relevant time of the Indictment.

700. The Accused maintained in his Interview that his position as commander was one in name only and of moral significance in that he inspired hope and courage among the fighters.<sup>1979</sup> However, in regard to the Potočari group, there can be no doubt that he was a commander of substance: he had the material ability to exercise effective control over his group.<sup>1980</sup> As regards other groups of fighters, as Commander of the Srebrenica Armed Forces Staff, he issued orders, including appointments of leaders of local groups, and charged specific persons with a specific task.<sup>1981</sup>

701. There is also convincing evidence that the major attacks were planned and successfully carried out.<sup>1982</sup> This would not have been possible without a certain degree of co-ordination among

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<sup>1975</sup> See para. 143 *supra*.

<sup>1976</sup> See para. 144 *supra*.

<sup>1977</sup> See para. 150 *supra*.

<sup>1978</sup> See para. 312 *supra*, explaining that the *de jure* position of commander without exercise effective control does not suffice to establish criminal responsibility.

<sup>1979</sup> Ex. P329, "Interview" of the Accused, tape 8, pp. 29, tape 13, pp. 13-15, 19-20, tape 17, p. 13.

<sup>1980</sup> Several witnesses gave evidence that the Accused only commanded, in the real sense, the Potočari group: Bećir Bogilović, T. 6490-6491; Hakija Mehuljić, T. 7084; Azir Malagić, T. 11501; Mustafa [ačirović, T. 13333-13334.

<sup>1981</sup> Ex. P4, "Order" of 15 June 1992; ex. P75, "Decision on Appointment to Srebrenica TO Staff" of 26 May 1992.

<sup>1982</sup> Ex. P84, "Memo Pad", meeting of the Srebrenica Armed Forces Staff of 3 October 1992, pp. 4-6; ex. P329, "Interview" of the Accused, tape 5, pp. 4-8 (Fakovići); ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and Srebrenica Armed Forces Staff of 14 October 1992, p. 14 (a demolition raid), meetings of the Srebrenica Armed Forces Staff of 7 10 and 22 November 1992, pp. 17, 23, 26 (Bedem), meeting of the Srebrenica Armed Forces Staff of 27 November 1992, p. 31 (Kunjerac -Bjelovac), meeting of the Srebrenica Armed Forces Staff of 10 December 1992, pp. 36-37 (Voljevica), meetings of the Srebrenica Armed Forces Staff of 22 December 1992 and 10 January 1993, pp. 42, 49 (Glogova), meeting of the Srebrenica Armed Forces Staff of 13 January 1992, p. 49

local Bosnian Muslim fighting groups participating in the attacks. In addition, some communication existed between the Accused and the local groups of fighters.<sup>1983</sup> During his Interview, to the question as to how he could know what was going on in the area if he was not receiving reports and how he would know where to go next, the Accused replied that he “was speaking to the people in the field.”<sup>1984</sup> He also explained how he would travel to areas where he could guess fighting was going on from the sound of shelling, either to engage in fighting or, if he arrived late, at least to encourage the fighters.<sup>1985</sup>

702. Also significant for his *de facto* control is the evidence of some witnesses who described his sphere of command, the respect he enjoyed and his widely acknowledged leadership.<sup>1986</sup> There is also no doubt that he participated in the attacks on Fakovići and the Kravica area.<sup>1987</sup> These were the personal qualities that prompted other local group leaders to elect him as commander at Bajramovići in the first place. They never diminished in the course of the period relevant to this Count and served as a basis for his exercise of effective control.

703. The degree of the Accused’s effective control as Commander of the Srebrenica Armed Forces Staff is patent from the encounters he had with General Morillon when he was one of the main interlocutors<sup>1988</sup> and from his communications with Sefer Halilović.<sup>1989</sup> His interventions in the meetings of the Srebrenica Armed Forces Staff and those held jointly between the Srebrenica Armed Forces Staff and the Srebrenica War Presidency further indicate not only his involvement,<sup>1990</sup> but also expectations that his increased presence in Srebrenica could prove beneficial.<sup>1991</sup>

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(Jezero), p. 51 (second attack on Bedem); ex. P328, “Interview” of the Accused, tape 8, pp. 17-30, tape 9, pp. 1-20, tape 10, pp. 1-10 (Zala’je); ex. P329, “Interview” of the Accused, tape 20, pp. 23-24 (Kravica).

<sup>1983</sup> See e.g., fn. 1804.

<sup>1984</sup> Ex. P329, “Interview” of the Accused, tape 18, p. 8.

<sup>1985</sup> *Ibid.*

<sup>1986</sup> Nedret Mujkanović, T. 5452; Pyers Tucker, T. 6136-6139; Sead Delić, T. 8626, 8629; Eric Dachy, T. 9465-9473, 9475-9483; Sidik Ademović, T. 13145.

<sup>1987</sup> See paras 639, 663 *supra*.

<sup>1988</sup> Ex. P329, “Interview” of the Accused, tape 12, p. 4; Pyers Tucker, T. 5824-5827, 5832.

<sup>1989</sup> See fn. 550 *supra*.

<sup>1990</sup> Ex. P84, “Memo Pad”, meeting of the Operations Staff, date unknown, p. 4, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff, 14 October 1992, pp. 8-9, meeting of the Srebrenica Armed Forces Staff of 30 October 1992, pp. 14-16, meeting of the Srebrenica Armed Forces Staff of 22 November 1992, pp. 26-27, meeting of the Srebrenica Armed Forces Staff of 22 December 1992, pp. 41-42, joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, pp. 43-44, meeting of the Srebrenica Armed Forces Staff of 10 January 1993, pp. 48-50.

<sup>1991</sup> Ex. P84, “Memo Pad”, meeting of the Srebrenica Armed Forces Staff of 22 November 1992, p. 27.

704. Finally, his speech on the occasion of the second anniversary of the Bajramović Decision<sup>1992</sup> as well as the description of himself and his role in his book<sup>1993</sup> supports the conclusion that he was significantly more than the commander of the Potočari group only.

705. All of these factors, however, including a certain pattern of destruction and burning of property,<sup>1994</sup> do not necessarily lead to the conclusion that the Accused exercised effective control over the various participating groups of fighters, not to speak of the civilians, who followed the fighters.

706. The evidence on the possible influence of the Accused on the local fighting groups and their respective leaders demonstrates that there may have been some instances where some groups and/or leaders were more amenable than others to put themselves under control and command of the Accused.<sup>1995</sup> Generally speaking, however, until 8 January 1993, in spite of efforts to bring them together under an effective sole command,<sup>1996</sup> the local groups remained relatively independent and voluntary.<sup>1997</sup> The conduct of such leaders as Hakija Meholić, Akif Ustić, Ejub Golić and Nurif Rizvanović explains how unrealistic and unworkable it was for the Accused to exercise effective control over their respective groups.<sup>1998</sup> The Trial Chamber finds the Accused credible when he stated during his Interview that although he was elected commander, fighters were primarily loyal to their respective commanders, and he was thus unable to command all of the fighting groups in the field,<sup>1999</sup> especially since he was not always present during all the attacks.

707. The picture that emerges from the evidence is not one of an organised army with a fully functioning command structure, but one of pockets of desperate men willing to fight, mainly to defend themselves, that grouped together around trusted leaders, who could provide them with a

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<sup>1992</sup> Ex. P431, "Video", 04:26-08:48.

<sup>1993</sup> Ex. P90, "Srebrenica Testifies and Accuses", by Naser Orić, pp. 86, 93.

<sup>1994</sup> See para. VIII.B., "The Facts and Findings".

<sup>1995</sup> Ex. P328, "Interview" of the Accused, tape 8, p. 29; Sead Delić, T. 8764; ex. D300, "Session of the BiH Presidency" of 11 August 1995.

<sup>1996</sup> See IV.B., "The Bosnian Muslim Forces in the Srebrenica Area".

<sup>1997</sup> 'Independent' is used here to explain that the local groups could decide not to participate in an attack and that no sanction was available to force them to participate. 'Voluntary' is used to explain that fighters were not formally mobilised and that their participation depended on their own decision, although they may have been under a moral duty to fight: see para. 138 *supra*.

<sup>1998</sup> See paras 154-160, 164, 167, 169 *supra*.

<sup>1999</sup> Ex. P328, "Interview" of the Accused, tape 3, pp. 12-13, tape 8, p. 18; ex. P329, "Interview" of the Accused, tape 3, pp. 18-19, tape 13, pp. 12-14, tape 17, p. 2; ex. P84, "Memo Pad", joint meeting of the Srebrenica War Presidency and the Srebrenica Armed Forces Staff of 23 December 1992, p. 44, with 'Naser' stating: "My commanders do not obey me sufficiently and I must/?resolve this/with them". The Trial Chamber holds that in all likelihood, the person referred to as 'Naser' is the Accused. See also Hakija Meholić, T. 6947-6951, 6972, stating that Zulfo Tursunović and Akif Ustić engaged in combat on their own initiatives and that the witness himself was responsible for his actions.

better chance of survival.<sup>2000</sup> There are indications that effective control was at times absent even within the various groups themselves.<sup>2001</sup> Furthermore, most of the destruction was caused by the civilians who followed the fighters and who no one was able to control.

708. The general scenario described in the preceding paragraphs, however, may have varied from attack to attack reflecting fluctuations in, and general lack of, effective control. It is against this background that responsibility of the Accused under Article 7(3) of the Statute must be examined.

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<sup>2000</sup> Nedret Mujkanović, T. 5067; Bečir Bogilović, T. 6451; Hakija Meholjić, T. 6959-6960; Ibrahim Bećirović, T. 7469, 7625-7626; Nesib Burić, T. 10783-10784, 10874; Ejub Dedić, T. 12224; Sidik Ademović, T. 12970, 12974, 13168-13169, 13178-13179; Mustafa Šaćirović, T. 13336; Suad Smajlović, T. 14740-14742.

<sup>2001</sup> Sidik Ademović, T. 12967-12968, 13159.



b. Attack on Ratkovići and Gornji Ratkovići on 21 June 1992

709. There is no evidence that the Accused exercised effective control over the groups of Bosnian Muslim fighters from Poznanovići and Podkorjen.<sup>2002</sup> To the contrary, the only evidence on this point indicates that these groups acted independently of any superior command.<sup>2003</sup> For this attack, there are no indicia of effective control by the Accused. In addition, according to the Accused in his Interview, it was not until sometime after 21 June 1992 that he even became aware of the attack on Ratkovići and Gornji Ratkovići.<sup>2004</sup>

c. Attack on Brađevina on 27 June 1992

710. There is no evidence that the Accused exercised effective control over the groups of unidentified Bosnian Muslim fighters and those from Brađevina's surrounding villages which were led by Vekaz Husić from Močeviški. <sup>2005</sup> During summer 1992, these groups pursued activities independent of the Srebrenica Armed Forces. <sup>2006</sup>

d. Attack on Ježestica on 8 August 1992

711. There is no evidence that the Accused exercised effective control over the groups of Bosnian Muslim fighters from Jagličići, Šušnjari, Glogova, as well as the 16<sup>th</sup> Muslim Brigade from Tuzla. In reaching this conclusion, the Trial Chamber has given weight to the evidence that Ejub Golić, Nurif Rizvanović and Sidik Ademović acted independently at the time of the attack. <sup>2007</sup>

e. Attack on Ježestica on 7 and 8 January 1993

712. The only indication of the Accused's participation in the attack emerges from what he stated during his Interview. <sup>2008</sup> Based on its general findings with respect to the Accused's effective control, the Trial Chamber is not satisfied beyond reasonable doubt that his mere presence during

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<sup>2002</sup> See VIII.B.2.a.i., "Factual Findings".

<sup>2003</sup> See para. 168 *supra*.

<sup>2004</sup> Ex. P329, "Interview" of the Accused, tape 21, pp. 16-17.

<sup>2005</sup> See VIII.B.2.b.i., "Factual Findings".

<sup>2006</sup> See para. 168 *supra*.

<sup>2007</sup> Ejub Golić was the leader of fighting groups from the area of Glogova since April 1992 and behaved independently thereafter: see para. 169 *supra*. Nurif Rizvanović carried out military activity in the area with other groups of Bosnian Muslim fighters including those led by Ejub Golić, but nonetheless pretended to act independently of superior authority and tried to assert his command in the area: see paras 157, 159-160 *supra*. The [ušnjari fighting group, of which Sidik Ademović was the leader, was independent of any other higher authority at the time of the attack and was not part of the Potočari TO: Sidik Ademović, T. 13089-13193.

the attack is indicative of effective control in the attack: there is no evidence that he was coordinating the attack or issuing orders.

713. As regards the fighting group from Potočari, although the Trial Chamber recalls that the Accused had effective control over this group, there is no evidence that the fighters of this group had any involvement in the wanton destruction of Ježestica.

714. Amongst the participating groups of Bosnian Muslim fighters, Ejub Golić played a critical role in the attack, during which he called for assistance from other Bosnian Muslim fighters.<sup>2009</sup> The Accused in his Interview stated that he himself received a message from Ejub Golić not to withdraw from his position under any circumstance.<sup>2010</sup>

715. Groups of Bosnian Muslim fighters from Brezova Njiva, Jagličići, Šušnjari, Osmaće, Cerska and Skugrići decided to join the attack on a voluntary basis and were independent of any other higher military authority during the attack.<sup>2011</sup> There is no evidence as to whether the Accused exercised effective control over groups of Bosnian Muslim fighters from Delići, Biljeg, Mošići, Konjević Polje and Sućeska, as well as over the unidentified fighters from Srebrenica.<sup>2012</sup>

(b) Conclusion as to the Responsibility of the Accused

716. For the various reasons explained above, in relation to each of the attacks dealt with in Count 3 of the Indictment, the Trial Chamber comes to the conclusion that the Accused cannot be held criminally responsible under Article 7(3) of the Statute for wanton destruction of cities, towns or villages not justified by military necessity.

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<sup>2008</sup> Ex. P329, “Interview” of the Accused, tape 8, pp. 26-27, tape 20, pp. 26-27.

<sup>2009</sup> Nesib Burić, T. 10708-10709, 10718, 10898-10899, stating that upon Ejub Golić’s request that his group be assisted, Bosnian Muslim fighters from Osmaće joined the attack; Ibro Alić, T. 12706-12707, 12854-12856, 12861-12863, stating that upon Ejub Golić’s request that his group be assisted in Glogova, Bosnian Muslim fighters from Jagodnja and Joševa were gathered. However, such call for assistance did not entail that the responding fighting groups answered to any kind of higher authority: Ejub Dedić, T. 12263-12265. *See* para. 695 *supra*.

<sup>2010</sup> Ex. P329, “Interview” of the Accused, tape 8, p. 15. At the time of the attack, Ejub Golić, despite his appointment as the commander of the Glogova Independent Battalion by the Accused on 24 December 1992, tended to act independently: *see* para. 169 *supra*.

<sup>2011</sup> Ejub Dedić, T. 12264-12266; Sidik Ademović, T. 13084-13085, 13091-13093; Nesib Burić, T. 10708-10709, 10718, 10898-10899.

<sup>2012</sup> *See* paras 165-166, 168, 663, fn. 1859 *supra*.

## IX. SENTENCING

### A. Applicable Law: Sentencing Factors and Sentencing Purposes

717. Article 24(2) of the Statute and Rule 101(B) of the Rules set out the factors to be taken into account in determining the sentence for an accused. A Trial Chamber is obliged to take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.<sup>2013</sup> Aggravating and mitigating circumstances and the general practice regarding prison sentences in the courts of the former Yugoslavia must also be taken into account.<sup>2014</sup> This list, however, is not exhaustive, and thus, the Trial Chamber is vested with broad discretion in the determination of sentence.<sup>2015</sup>

718. When determining the sentence of an accused, Trial Chambers have also considered the main aims of punishment (*i.e.*, sentencing purposes). The case-law of the Tribunal has indicated that retribution and deterrence are the main sentencing purposes.<sup>2016</sup>

719. According to the jurisprudence of the Tribunal, retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.<sup>2017</sup> It is meant to reflect a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be proportionate to the wrongdoing; in other words, the punishment must fit the crime. This principle is reflected in the requirement in the Statute that the Trial Chambers, in imposing sentences, must take into account the gravity of the offence.<sup>2018</sup>

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<sup>2013</sup> Article 24(2) of the Statute provides: “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.”

<sup>2014</sup> Rule 101 (B) of the Rules provides: “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 cooperation 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?...”

<sup>2015</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, (“*Momir Nikolić* Appeal Sentencing Judgement”), para. 106: “Sentencing decisions are discretionary and turn on the particular circumstances of each case.”

<sup>2016</sup> *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806; *see also Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001 (“*Todorović* Sentencing Judgement”), paras 28-29.

<sup>2017</sup> *Aleksovski* Appeal Judgement, para. 185; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003, (“*Dragan Nikolić* Sentencing Judgement”), para. 140, stating that retribution should solely be seen as: “an objective, reasoned and measured determination of an appropriate punishment which properly reflects the...culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offenders conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more”, *R. v. M. (C.A.)* (1996) 1 S.C.R. 500, para. 80 (emphasis in original).

<sup>2018</sup> *Todorović* Sentencing Judgement, para. 29.

720. As to deterrence, it has been held that the penalties imposed by the Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.<sup>2019</sup> In the context of international criminal justice, it has been stated that one of the main purposes of a sentence is to “influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.”<sup>2020</sup>

721. The other three widely recognised sentencing purposes, namely, rehabilitation, social defence and restoration,<sup>2021</sup> have not yet achieved the same dominance as retribution and deterrence in the sentencing history of this Tribunal. The Trial Chamber firmly believes in their importance for the purpose of achieving the goals of this Tribunal. Such factors have tended to be dealt with as mitigating or aggravating factors in domestic legal systems, with social defence intermingling with the understanding that this Tribunal, has the aim of deterrence.<sup>2022</sup> The Trial Chamber, however, is mindful that in the jurisprudence of this Tribunal only relative weight has been attached to them.<sup>2023</sup>

722. The Statute reflects the sentencing goals of retribution and deterrence in requiring Trial Chambers, when imposing sentences, to take into account the gravity of the offence.<sup>2024</sup>

## **B. Determination of the Sentence**

723. The Trial Chamber will examine each of the arguments raised by the Parties in their Final Briefs and Closing Arguments, as well as any other factors it deems appropriate to take into consideration.

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<sup>2019</sup> *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A/IT-94-1-*Abis*, Judgement in Sentencing Appeals, 26 January 2000 (“*Tadić* Appeal Sentencing Judgement”), para. 48; *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 803; *Todorović* Sentencing Judgement, para. 30.

<sup>2020</sup> *Dragan Nikolić* Sentencing Judgement, para. 139.

<sup>2021</sup> *Stakić* Trial Judgement, para. 899; *Had`ihasanović* Trial Judgement, para. 2073; *Brđanin* Trial Judgement, para. 1092, citing *Čelebići* Appeal Judgement, para. 806.

<sup>2022</sup> In addition, with regard to rehabilitation in the context of serious violations of international criminal law, the Appeals Chamber has stated the following: “Although rehabilitation (in accordance with international human rights) should be considered as a relevant factor, it is not one which should be given undue weight”, *Čelebići* Appeal Judgement, para. 806.

<sup>2023</sup> *Čelebići* Appeal Judgement, paras 800-801, 806; *Tadić* Appeal Sentencing Judgement, para. 48; *Had`ihasanović* Trial Judgement, para. 2072.

<sup>2024</sup> *Todorović* Sentencing Judgement, para. 29.

1. Determination of a Sentence for a Person Convicted on the Sole Basis of Article 7(3) of the Statute

724. The Trial Chamber agrees with what was recently stated in the *Hadžihasanović* case, namely, that under Article 7(3) of the Statute, an individual is not convicted for the crimes committed by his subordinates, but for the failure to prevent or punish the said crimes. On that basis, the Trial Chamber held that the *sui generis* nature of superior responsibility pursuant to Article 7(3) of the Statute<sup>2025</sup> allowed for an even greater flexibility in the determination of sentence.<sup>2026</sup>

2. Gravity of the Offence

725. With regard to Count 1 and Count 2, the Prosecution submits that the loss of life and physical suffering, as well as the recurrence of the conduct and the fact that nothing was done to prevent further reoccurrence, renders the crimes of murder and cruel treatment particularly grave. The Prosecution also emphasises the physical and psychological harm suffered by the victims and their families.<sup>2027</sup>

726. The gravity of the crime has consistently been viewed by the Tribunal as “the primary consideration in imposing sentence.”<sup>2028</sup>

727. In cases of Article 7(3) criminal responsibility, there are two types of crimes to be considered for the purpose of establishing the gravity of the crime of which an accused is found guilty. On the one hand, there are the crimes of the subordinates of the accused that he/she failed to prevent or punish, while on the other hand there is his/her failure to prevent or punish, which in itself is the only crime for which he/she is to be sentenced.<sup>2029</sup>

728. Accordingly, in determining the gravity of the crime of which the Accused has been found guilty, the Trial Chamber has considered the following. First, it has taken into account that the crimes of murder and cruel treatment in a war-crime context are inherently grievous. Second, that failure to prevent the occurrence of such heinous crimes is necessarily also intrinsically grievous.

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<sup>2025</sup> See para. 293 *supra*.

<sup>2026</sup> *Hadžihasanović* Trial Judgement, paras 2075-2076.

<sup>2027</sup> Prosecution Final Brief, paras 987-988.

<sup>2028</sup> *Čelebići* Appeal Judgement, para. 731, which agreed with the Trial Chamber in the *Kupreškić* Trial Judgement, para. 852, that “?tǵhe sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.” See also *Aleksovski* Appeal Judgement, para. 182, *Stakić* Appeal Judgement, para. 380.

<sup>2029</sup> See VI.B., “Responsibility Under Article 7(3) of the Statute”.

Third, that the extent of the responsibility of the Accused for the purpose of the sentence to be imposed upon him, and hence, the gravity of his offence, depends on various factors. The principal factors include the gravity of the subordinates' crimes, the Accused's imputed knowledge, as distinct from actual knowledge, and the foreseeability of the imminence of the occurrence of the said crimes, given the circumstances of this case. Other factors, such as aggravating and mitigating circumstances, will also be considered.

729. In determining the gravity of the subordinates' crimes, the Trial Chamber has reached the conclusion that the legal nature of these offences, their scale and brutality, their impact upon the victims and their families<sup>2030</sup> and the extent of the long-term physical, psychological, and emotional suffering of the survivors<sup>2031</sup> are to be considered as factors subsumed in the notion of gravity itself. In this exercise, the Trial Chamber has been mindful that factors taken into account as aspects of the gravity of the crime cannot additionally be considered as separate aggravating circumstances and vice versa.<sup>2032</sup>

730. The established principle in the jurisprudence of the Tribunal that violations of the law or customs of war are not inherently less serious than crimes against humanity has also been kept in mind.<sup>2033</sup>

### 3. Aggravating Circumstances

731. The weight to be given to aggravating circumstances lies within the discretion of the Trial Chamber.<sup>2034</sup> The Appeals Chamber has held that "only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account as aggravating factors."<sup>2035</sup> In addition, only circumstances directly related to the commission of the offence charged may be seen as aggravating.<sup>2036</sup> The Trial Chamber further notes that if a particular circumstance is included as an element of the offence under consideration, it will not also be regarded as an aggravating factor.

#### (a) Submissions of the Parties

##### (i) Vulnerability of the Victims: Age and Custody

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<sup>2030</sup> *Stakić* Appeal Judgement, para. 380.

<sup>2031</sup> *Krnjelac* Trial Judgement, para. 512.

<sup>2032</sup> *Momir Nikolić* Appeal Sentencing Judgement, para. 58.

<sup>2033</sup> *Furundija* Appeal Judgement, para. 247; *Tadić* Appeal Sentencing Judgement, para. 69.

<sup>2034</sup> *Čelebići* Appeal Judgement, para. 780.

<sup>2035</sup> *Čelebići* Appeal Judgement, para. 763.

<sup>2036</sup> *Stakić* Trial Judgement, para. 911.

732. The Prosecution submits that the young age of two of the alleged victims of murder in this case, namely Dragan Ilić and Jakov \okić, respectively 17 and 20 years old, should be considered as an aggravating circumstance when determining the sentence imposed on the Accused.<sup>2037</sup> The Prosecution further contends that the detention of the victims, such that they were under constant guard, denied any contact with the outside world and, at times, prevented from talking among themselves, amounts to an aggravating circumstance.<sup>2038</sup>

733. The Trial Chamber accepts that the vulnerability of the victims can be considered as an aggravating circumstance.<sup>2039</sup>

734. The Trial Chamber recalls its finding that the murder of Jakov \okić has not been sufficiently proven. The Prosecution's submission as to the tender age of the victims, therefore, is limited to Dragan Ilić.

735. The Trial Chamber agrees that Dragan Ilić's tender age made him vulnerable.

736. The Trial Chamber further agrees that the fact that all the victims in this case were kept in detention and denied any contact with the outside world increased their vulnerability. In addition, the guards, instead of providing cover from cruel treatment, failed to prevent the prisoners from being beaten by outsiders, and as such increased their vulnerability. The submission of the Prosecution that the prisoners were prevented from talking among themselves is not supported by sufficient evidence and in any case would not be considered by the Trial Chamber as rendering the prisoners vulnerable.

737. The Trial Chamber is therefore satisfied of the plight of the victims in the present case, their position of inferiority and thus, their vulnerability, and it agrees with the submission of the Prosecution that this amounts to an aggravating factor.

(ii) Duration of the Criminal Conduct

738. The Prosecution further alleges that the duration of the criminal conduct, which lasted over a period of several months, should also be considered by the Trial Chamber as an aggravating circumstance.<sup>2040</sup>

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<sup>2037</sup> Prosecution Final Brief, para. 998.

<sup>2038</sup> Prosecution Final Brief, para. 1009.

<sup>2039</sup> The Trial Chamber is considering this factor under this section only and has not taken it into account under the heading "Gravity of the Offence".

<sup>2040</sup> Prosecution Final Brief, para. 999.

739. The Trial Chamber recalls that the detention of prisoners in this case is limited to two relatively short periods, only the last of which is relevant for the purpose of the responsibility of the Accused. During the period that lasted from 27 December 1992 to 20 March 1993, the number of detainees varied and, for some time, Milisav Milovanović was the only detainee. The Trial Chamber, therefore does not agree with the Prosecution that there is any significant duration of criminal conduct, either in relation to the subordinates' crimes, or to that of the Accused, to be taken account of as an aggravating factor.

(iii) Willingness of the Accused's Participation

740. The Prosecution submits that "Ftǵhe willingness exhibited on behalf of the Accused to commit and/or enable to be committed the cruel treatment and murder of Serb detainees should Fbeǵ considered by the Chamber as an aggravating factor in determining sentence."<sup>2041</sup>

741. The Trial Chamber agrees with the jurisprudence of this Tribunal that a crime is aggravated if it was committed with premeditation or zeal.<sup>2042</sup>

742. The Trial Chamber finds this submission of the Prosecution unsupported by any acceptable evidence.

(iv) Superior Position of the Accused

743. The Prosecution contends that the Accused's position as that of "a superior member of the Srebrenica branch of the ABiH" and "a regional hero" also amounts to an aggravating circumstance.<sup>2043</sup>

744. The Trial Chamber accepts that under certain circumstances, a high-ranking position of leadership held by an accused may be taken into account as an aggravating factor.<sup>2044</sup> However, in the present case, as amply explained above, the circumstances in Srebrenica during the relevant period in 1992 and 1993 were such that the position of authority of the Accused as commander as described on paper did not reflect the real situation on the ground. In addition, there is no evidence of active abuse of authority on the part of the Accused.

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<sup>2041</sup> Prosecution Final Brief, para. 1000.

<sup>2042</sup> *Krstić* Trial Judgement, paras 711-712; *Blaškić* Trial Judgement, para. 784; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-Tbis-R117, Sentencing Judgement, 11 November 1999 ("*Tadić* Sentencing Judgement"), para. 20.

<sup>2043</sup> Prosecution Final Brief, paras 1006-1008.

<sup>2044</sup> *Krstić* Trial Judgement, para. 708; *Kupreškić* Appeal Judgement, para 451; *Galić* Trial Judgement, para 765; *Momir Nikolić* Appeal Sentencing Judgement, para. 135; *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004, ("*Miodrag Jokić* Sentencing Judgement"), p.61.



745. The Trial Chamber, therefore, rejects the Prosecution's submission that there is a superior position of the Accused that can be taken as an aggravating factor.

(b) Conclusions

746. In light of the above, the Trial Chamber finds that the vulnerability of the victims is the only aggravating circumstance to which appropriate weight has been attached when determining the sentence.

4. Mitigating Circumstances

747. A number of mitigating factors have been considered and acknowledged in other cases by this Tribunal.<sup>2045</sup> Mitigating circumstances need only be proved on a balance of probabilities.<sup>2046</sup> In addition, mitigating circumstances need not directly relate to the offence.<sup>2047</sup> The Trial Chamber emphasises that a finding of mitigating circumstances relates to the assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.<sup>2048</sup>

(a) Submissions of the Parties

(i) Co-operation

748. In response to the Prosecution's contention that the Accused's co-operation throughout the proceedings had been non-existent,<sup>2049</sup> the Defence submits that to the contrary, the Accused has readily co-operated with the Prosecution at least in three instances: when giving a lengthy interview to the Prosecution and providing samples of his signatures in that context, when volunteering to surrender if indicted, and when conceding to 43 agreed facts.<sup>2050</sup>

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<sup>2045</sup> The Trial Chamber uses the term 'mitigating circumstances' to include extenuating circumstances. This reflects the jurisprudence of the Tribunal. In previous cases, Trial Chambers have found the following factors to be mitigating: voluntary surrender, guilty plea, co-operation with the Prosecution, youth, expression of remorse, good character with no prior criminal conviction, family circumstances, acts of assistance to victims, diminished mental capacity, and duress.

<sup>2046</sup> *Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolund`ija*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 ("*Sikirica* Sentencing Judgement"), para. 110; *Kunarac* Trial Judgement, para. 847; *Simić* Trial Judgement, para. 1065.

<sup>2047</sup> *Stakić* Trial Judgement, para. 920.

<sup>2048</sup> In this respect, the Trial Chamber endorses the reasoning of the *Erdemović* Sentencing Judgement and the *Hostage* Case cited therein: "It must be observed however that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence", *Prosecutor v. Dra`en Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996, ("*Erdemović* Sentencing Judgement"), para. 46.

<sup>2049</sup> Prosecution Final Brief, para. 1012; Prosecution Closing Argument, T. 16507.

<sup>2050</sup> Defence Response to Prosecution's Final Brief, para. 158; Defence Closing Argument, T. 16471, 16599, in which the Defence also mentions the agreement to the evidence of Prosecution investigators, Steve Tedder and Barney Kelly, enabling forensic examination of the sample signatures to be conducted.

749. The jurisprudence of this Tribunal holds that the Prosecution is in a position to accurately assess the co-operation of an accused. However, the evaluation of the extent and nature of an accused's co-operation and therefore the weight, if any, to be given to this mitigating factor, is within the discretion of the Trial Chamber.<sup>2051</sup> But, if a Trial Chamber disagrees with the Prosecution's assessment of the Accused's cooperation, it has the duty to provide sufficient reasons for not following that assessment.<sup>2052</sup>

750. The Trial Chamber does not agree with the Prosecution that the Accused's co-operation throughout the proceedings has been non-existent. The instances indicated by the Defence are in themselves evidence of some co-operation and have been given due consideration as mitigating circumstances.

(ii) Expressions of Remorse

751. The Prosecution further contends that that the Accused has shown no sign of remorse for the losses of life or for the damage caused to persons.<sup>2053</sup> Conversely, the Defence stresses that it has shown compassion for victims who appeared as witnesses in these trial proceedings and for their loss and suffering.<sup>2054</sup>

752. The Trial Chamber recalls that expressions of remorse have been recognised as a mitigating factor by this Tribunal if the remorse is real and sincere.<sup>2055</sup> In addition, the Appeals Chamber has held that an accused can express sincere regrets without admitting his participation in a crime, and that this is a factor which may be taken into account.<sup>2056</sup> This can be done without an accused having to give evidence or being cross-examined by the Prosecution.<sup>2057</sup> In this case, the Accused has made no such statement, but throughout the trial, there were a few instances when Defence counsel on his behalf expressed compassion to witnesses for their loss and suffering. The Trial Chamber does not doubt the sincerity of the Accused in expressing empathy with the victims for their loss and suffering, and has taken this sincerity into consideration as a mitigating factor.

(iii) Voluntary Surrender

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<sup>2051</sup> *Momir Nikolić* Appeal Sentencing Judgement, paras 91-93, citing *Dragan Nikolić* Appeal Sentencing Judgement, paras 61, 63; *Jelisić* Appeal Judgement, para. 126.

<sup>2052</sup> *Momir Nikolić* Appeal Sentencing Judgement, paras 92, 93.

<sup>2053</sup> Prosecution Final Brief, para. 1012; Prosecution Closing Argument, T. 16507-16508.

<sup>2054</sup> Defence Response to Prosecution Final Brief, paras 156-157; Defence Closing Argument, T. 16600-16602.

<sup>2055</sup> *Momir Nikolić* Appeal Sentencing Judgement, para. 117; *see also* the case-law referred to therein.

<sup>2056</sup> *Vasiljević* Appeal Judgement, para. 177; *Sikirica* Sentencing Judgement, paras 152, 194, 230; *Todorović* Sentencing Judgement, paras 89-92; *Prosecutor v. Dra' en Erdemović*, Case No. IT-92-22-Tbis, Sentencing Judgement, 5 March 1998, ("Erdemović 1998 Sentencing Judgement"), para. 16(iii).

<sup>2057</sup> Rule 84bis(A) of the Rules.

753. The Prosecution submits that the Accused did not surrender to the Tribunal and argues that this in itself amounts to non-cooperation and should be considered as an aggravating factor.<sup>2058</sup> The Trial Chamber, in conformity with the jurisprudence of this Tribunal, reaches the conclusion that the fact that the Accused did not surrender to the Tribunal cannot be given any weight either as a mitigating or an aggravating factor, since the Indictment relating to the Accused remained confidential until the day of his arrest. Consequently, he did not have any opportunity to surrender, even if he had wanted to do so.<sup>2059</sup> However, the Trial Chamber has taken into account as a mitigating factor the testimony of John Fenzel that the Accused expressed his readiness to surrender to the Tribunal if and when requested to do so.<sup>2060</sup>

(b) Additional Factors Considered by the Trial Chamber

754. The Trial Chamber has further considered the following factors for the purpose of establishing the sentence.

(i) Young Age

755. Although not raised by the Defence, the Prosecution submits that the young age of the Accused, who was 25 years old in 1992, should not be considered as a mitigating circumstance, given his extensive experience in protective and military services.<sup>2061</sup>

756. The young age of the accused was taken into consideration as a mitigating factor in *Furundžija*,<sup>2062</sup> where the age of the accused at the time of the commission of the crimes was 23. However, cases like *Jelisić* caution against giving too much weight to an accused's age.<sup>2063</sup>

757. The Trial Chamber will not give too much weight to the Accused's young age but cannot fail to take into consideration the enormous burden that was cast upon him at the age of 25 while the situation in Srebrenica was desperate. The Trial Chamber does not agree with the Prosecution that the Accused's extensive experience in protective and military services should offset the young age factor the way it suggests. Rather, his experience is viewed as a factor that only served to single

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<sup>2058</sup> Prosecution Final Brief, para. 1012; Prosecution Closing Argument, T. 16507.

<sup>2059</sup> *Vasiljević* Trial Judgement, para. 298. For the significance of voluntary surrender as a mitigating factor, see *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60-2-S, Sentencing Judgement, 10 December 2003, para. 136: "since the Trial Chamber would have to speculate in order to determine whether Dragan Obrenovic *would* in fact have voluntarily surrendered if given the opportunity, the Trial Chamber attached little weight to this factor" (emphasis in the original).

<sup>2060</sup> Defence Closing Argument, T. 16471; John Fenzel, T15846-15847.

<sup>2061</sup> Prosecution Final Brief, paras 1010-1011.

<sup>2062</sup> *Furundžija* Trial Judgement, para. 284.

<sup>2063</sup> *Jelisić* Trial Judgement, para. 124. See also *Furundžija* Trial Judgement, para. 284; *Prosecutor v. Predrag Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement"), paras 74-75.

him out from others, casting on him enormous responsibilities and problems that are usually carried by seasoned military commanders. In addition, even though the Accused undoubtedly had some experience in police and security matters, his military and administrative experience at the time was minimal.

(ii) Family Circumstances

758. The Accused is married with two children. His family status will be considered as a mitigating circumstance,<sup>2064</sup> but the Trial Chamber notes that this Tribunal has generally attached only limited importance to this factor.<sup>2065</sup>

(iii) Lack of Prior Violent Criminal Acts and Criminal History

759. This Tribunal has, on several occasions, acknowledged that the previous good character of the convicted person can at times serve in mitigation.<sup>2066</sup> It must not be ignored, however, that considering the gravity of crimes that this Tribunal deals with, the instances when this possible mitigating factor can carry significant weight are, and ought to be, extremely exceptional.<sup>2067</sup>

760. No specific evidence has been adduced by the Defence on this point.

761. The Trial Chamber is of the view that no weight should be given to this factor in the present case.

(iv) Detention Matters

762. The Trial Chamber is of the view that all accused are expected to behave appropriately while at the UN Detention Unit (“UNDU”). Consequently, it has not given any importance to the Accused’s alleged good conduct while in detention.<sup>2068</sup>

763. The length of the Accused’s detention at the time of his sentencing will be taken into account as credit towards service of the sentence that will be imposed on him, but not as a mitigating factor.

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<sup>2064</sup> In previous cases, Trial Chambers have found the family status to be mitigating: *Kunarac* Appeal Judgement, paras 362, 408; *Tadić* Sentencing Judgement, para. 26; *Erdemović* 1998 Sentencing Judgement, para. 16(i).

<sup>2065</sup> *Furundžija* Trial Judgement, para. 284; *Jelisić* Trial Judgement, para. 124; *Banović* Sentencing Judgement, paras 75-76.

<sup>2066</sup> *Krnojelac* Trial Judgement, para. 519; *Kupreškić* Trial Judgement, para. 478; *Kupreškić* Appeal Judgement, para. 459; *Aleksovski* Trial Judgement, para. 236; *Erdemović* 1998 Sentencing Judgement, para. 16(i); *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, 30 August 2005 (“Judgement on Sentencing Appeal”), paras 101-102.

<sup>2067</sup> *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004 (“*Češić* Sentencing Judgement”), paras 77-85.

<sup>2068</sup> *Momir Nikolić* Sentencing Judgement, para. 168. *See also* *Češić* Sentencing Judgement, para. 86.

(v) Acts of Consideration Toward Former Serb Detainees

764. Both Nedelko Radić and Slavoljub Žikić testified that the Accused visited the Srebrenica Police Station where they were detained and asked them if they had been beaten. He also inquired about the manner in which Dragutin Kukić had died. On one occasion, the Accused brought meat for the detainees to their cell. Slavoljub Žikić also stated that on one occasion, the Accused was evidently not pleased to see them in the bloody condition in which they were.<sup>2069</sup> In addition, the Accused discussed with Hamed Salihović and Ramiz Bećirović the killing of a prisoner, agreeing that this was wrong and should not be allowed to happen. He was also instrumental in promoting an investigation of the Kukić killing, which ultimately resulted in the removal of Mirzet Halilović, a decision in which the Accused also took an active part.<sup>2070</sup>

(vi) Co-operation With SFOR

765. Referring to 1998, John Fenzel gave evidence on various instances when the Accused co-operated with the Stabilisation Force in BiH (“SFOR”), providing information on a regular basis that enabled them to assess potential threats to the security of their forces as well as sections of the population in Bosnia. John Fenzel explained that this information made it possible for him to bring back all of his soldiers alive and in good health and to minimise casualties in his area of operation. This prompted him to testify as a Defence witness as to the Accused’s character. He described the Accused as always honest and forthcoming with him, and as a gentleman.<sup>2071</sup> The Trial Chamber has considered the Accused’s cooperation with SFOR in mitigation for the purpose of sentencing.

(vii) General Attitude Towards the Proceedings

766. The Trial Chamber acknowledges that the Accused has generally been respectful during the course of the proceedings. This will be taken into consideration as a mitigating factor although little weight is being attached to it.

(viii) Circumstances Prevailing in Srebrenica and Those Particular to the Accused and the Crimes Committed

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<sup>2069</sup> See paras 537, 538 *supra*.

<sup>2070</sup> Ex. P329, “Interview” of the Accused, tape 3, pp. 4-6, tape 17, p. 2.

<sup>2071</sup> John Fenzel, T. 15836 (private session), 15847.

767. In the past, Trial Chambers have used the difficult circumstances in which a convicted person had to operate as a mitigating factor.<sup>2072</sup> The Trial Chamber considers this to be the pivotal consideration for the purpose of establishing the sentence that should be meted out to the Accused.

768. Throughout this Judgement, the Trial Chamber has endeavoured to describe the abysmal conditions prevailing in Srebrenica town and in the surrounding area where the Accused operated during the relevant time in 1992 and 1993. It was a situation which became worse by the day. It was the result of a combination of inter-related factors, chief amongst which were the escalating offensive by militarily superior Serb armed forces, the unpreparedness of the Bosnian Muslims, an unmanageable influx of refugees, an increasing isolation of the town and area resulting in critical shortages of food and other essentials, the general chaos and last, but certainly not least, the flight from Srebrenica of all the authorities, civilian and otherwise, soon after the outbreak of hostilities and the take-over of the town by the Serb forces. This resulted in a total breakdown of society in Srebrenica including a collapse of law and order. All this started in early April 1992, on the eighth day of which the Accused, then 25 years of age, found himself appointed chief of the police sub-station in Potočari, a small town which would soon become a focal point in the Serb offensive. On 17 April 1992, he was appointed commander of the newly formed Potočari TO. The day after, Srebrenica, just a few kilometres away, fell to the Serbs and was only re-taken by the Bosnian Muslims on 8 May 1992. It was between these two dates that the Accused earned public esteem as a local hero when he succeeded in setting an ambush and killing a number of soldiers forming part of Arkan's paramilitary group. On 20 May 1992, he was appointed commander of the Srebrenica TO Staff created during the meeting in Bajramovići already dealt with in other parts of this judgement.

769. It is from this time onward that some of those still in Srebrenica tried to re-constitute the basics of authority and government. The evidence demonstrates that the difficulties were enormous, especially since the persons who would have filled in the various positions had fled the town and the general situation was worsening. There was also the predicament of resisting the on-going siege on Srebrenica by the Serb forces without a proper army, without any effective link with the ABiH and the BiH government and in addition, having to depend of a number of voluntary and poorly armed groups of fighters gathered around local leaders, some of whom were reluctant to accept any superior command structure.

770. This was the scenario in which the Accused operated. The evidence shows that he accepted the responsibility that was cast upon him by those who elected him as their commander in

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<sup>2072</sup> *Čelebići* Trial Judgement, para. 1248; *Had`ihasanović* Trial Judgement, para. 2081.

Bajramović and later accepted the more formal responsibility with which he was tasked by the authorities in Srebrenica and beyond. The evidence also shows, however, that he too faced a continuous uphill struggle like the rest of the authorities in Srebrenica, especially since he was expected to defend Srebrenica from the Serb forces with no proper army, no fully effective command structure, few weapons and had to rely on local leaders, some of whom not only chose to act independently but considered him inexperienced and scorned his authority. As time went by, he tried to assert his command but was not always successful. His situation did not improve over time because while more weapons were procured as a result of raids, the impetus of the Serb offensive increased beyond proportion making it a matter of life or death for him and the citizens and refugees of Srebrenica. It is only when demilitarisation came into force in April 1993 that his military engagements officially come to an end.

771. The Trial Chamber comes to the conclusion that there was a short time following the replacement of Mirzet Halilović with Atif Krdžić and the commencement of the Serb winter offensive during which the Accused had the duty to prevent the re-occurrence of murder and cruel treatment of prisoners. During this short time, he was not reasonably impeded from fulfilling this duty, nor was he constrained by impossibility, and yet he preferred to do nothing. This is his only wrongdoing. The Trial Chamber understands that although his predicament at this time was not as bad and perilous as it was during the Serb winter offensive, it still was one which should have a strong mitigating effect in the assessment of the sentence to be imposed on him. The Trial Chamber is finding the Accused guilty and will be sentencing him because he had reason to know that the re-occurrence of murder and cruel treatment of prisoners was possible and because he wilfully decided not to do anything about it, not even to at least try and enquire about the situation of the prisoners. The Trial Chamber has no doubt that the Accused was aware that maltreatment of prisoners would exacerbate their weakness and vulnerability, and even exposed them to murder, especially at a time when inhabitants of Srebrenica were acting erratically.

(c) Conclusions

772. In light of the above, the Trial Chamber finds that the following are relevant mitigating circumstances to which appropriate weight as stated above has been attached when determining the sentence:

- Cooperation
- Expressions of remorse
- The Accused's expressed readiness to surrender to the Tribunal if indicted

- Young age
- Family circumstances
- Acts of consideration towards prisoners
- Co-operation with SFOR
- General attitude towards the proceedings, and
- As the dominant factor, the circumstances prevailing in Srebrenica and those particular to the Accused and to the crimes committed.



5. The General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia and the Tribunal Law

773. The Appeals Chamber has interpreted Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules to mean that while a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion is not curtailed by such practice.<sup>2073</sup> Reference to it serves as an aid in determining the sentence to be imposed. The whole exercise, however, must go beyond merely reciting the relevant code provisions.<sup>2074</sup> The Tribunal can impose a sentence less than or in excess of that which would be applicable under the relevant law of the former Yugoslavia.

774. With regard to the determination of sentence, the Prosecution refers to Article 41(1) of the SFRY Criminal Code, which requires that consideration be given to all the circumstances bearing on the gravity of the punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal responsibility, the motives from which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.<sup>2075</sup>

775. The Trial Chamber notes that prior to the conflict, sentencing in BiH was regulated by the SFRY Criminal Code and by the Criminal Code of the Socialist Republic of Bosnia and Herzegovina of 10 June 1977 (“SRBiH Criminal Code”).<sup>2076</sup>

776. Under the SFRY Criminal Code, the range of penalties existing in 1992 included a fine, confiscation of property, imprisonment, and capital punishment. The maximum term of imprisonment was 15 years, except for offences punishable with the death penalty, committed under “particularly aggravating circumstances,” or causing “especially grave consequences,” in which cases the maximum term of imprisonment was 20 years.<sup>2077</sup>

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<sup>2073</sup> *Tadić* Appeal Sentencing Judgement, paras 20-21; *Kupreškić* Appeal Judgement, para. 418; *Miodrag Jokić* Appeal Judgement, para. 38; *Dragan Nikolić* Sentencing Judgement, para. 138; *Stakić* Appeal Judgement, para. 398.

<sup>2074</sup> *Vasiljević* Trial Judgement, para. 270.

<sup>2075</sup> Article 41(1) of the SFRY Criminal Code: “The Court shall weigh the punishment ?...ğ keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of punishment, and particularly the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object, the circumstances under which the crime was committed, the previous character of the perpetrator, his personal circumstances and conduct after the commission of the crime, and other circumstances relating to the personality of the perpetrator.”

<sup>2076</sup> Ex. P496, “SFRY Criminal Code” of 28 September 1976; ex. P326, “Decree Law on the Adoption of the SFRY Criminal Code” of 11 April 1992; ex. P327, “Decree Law on Amendments to the Decree Law on the Adoption of the SFRY Criminal Code” of 17 July 1992.

<sup>2077</sup> See ex. P496, “SFRY Criminal Code” of 28 September 1976, Article 38. In 1992, punishment for specific offences was regulated by the SRBiH Criminal Code. Murder was punishable with imprisonment of not less than five years, and in aggravated cases, which included ‘murder in a cruel way, carried out violently, by endangering the life of others, or by motive of greed’, with imprisonment of not less than 10 years or the death penalty (Article 36 of the SRBiH

777. With regard to the punishment which could have been imposed by the courts of the former Yugoslavia on the Accused, the Prosecution refers to Article 142 of the SFRY Criminal Code which provides for a minimum sentence of five years imprisonment for “violations of rules of international law effective at the time of war, armed conflict or occupation,” including ordering “illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs” or “that the civilian population be subject to killings, torture, inhumane treatment, [...] immense suffering or violations of bodily integrity or health, dislocation or displacement”.<sup>2078</sup>

778. The Prosecution further invokes Article 144 of the SFRY Criminal Code according to which, persons convicted of a war crime against prisoners of war, such as murder, torture or inhumane treatment, face a prison sentence of no less than five years.<sup>2079</sup> In addition, the Prosecution submits that pursuant to Article 145 of the SFRY Criminal Code, a convicted person can be sentenced to imprisonment from one to ten years.<sup>2080</sup>

## 6. Determination of Sentence

779. The Appeals Chamber has emphasised that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines.<sup>2081</sup> The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator.<sup>2082</sup> In the present case, the Trial Chamber does not agree with the recommended sentence of 18 years imprisonment, first because the Accused is being acquitted on Counts 3 and 5, second due to the limited scope of the principal crimes adduced in Counts 1 and 2, and third because, as explained in this Chapter, this case presents unique features that warrant a sentence of imprisonment which reflects his limited criminal responsibility and no more.

780. For the purposes of determining the appropriate sentence, the Trial Chamber has considered sentences given to other accused before this Tribunal. The jurisprudence of this Tribunal recognises that “*Āg* previous decision on sentence may indeed provide guidance if it relates to the same

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Criminal Code). Grievous bodily injury was punishable with six months to five years of imprisonment, which in aggravated cases could go above the set limit (Article 42 of the SRBiH Criminal Code). If the above crimes were committed in ‘time of war, armed conflict or occupation’, under the SFRY Criminal Code, these offences were qualified as war crimes and were punishable with imprisonment of a minimum of five years or the death penalty: Article 142 (war crimes against the civilian population), Article 143 (war crimes against the wounded and sick) and Article 144 (war crimes against prisoners of war) of the SFRY Criminal Code. However, following the 1977 abolition of capital punishment in some of the republics of the SFRY, other than the SRBiH, the new maximum sentence for the most serious offences was 20 years imprisonment.

<sup>2078</sup> Prosecution Final Brief, para. 994.

<sup>2079</sup> Prosecution Final Brief, para. 994.

<sup>2080</sup> Prosecution Final Brief, para. 995.

<sup>2081</sup> *Krstić* Appeal Judgement, para. 242.

offence and was committed in substantially similar circumstances.”<sup>2083</sup> However, while the Trial Chamber should not overlook the help that may be drawn from previous judgements, it must be acknowledged that this may be limited.<sup>2084</sup> In the present case, the Trial Chamber has found little assistance in previous decisions on sentence. The main reason is that the present case is unique in its particulars and no real comparison can be drawn with other previous cases both in regard to the Accused’s very limited responsibility and the extraordinary circumstances in which he operated. There is no other case in which the Accused was found guilty of having failed to prevent murder and cruel treatment of prisoners in such a limited manner and in such abysmal conditions as in this case. Consequently, the sentence to be imposed needs to reflect this uniquely limited criminal responsibility. However, the Trial Chamber emphasises the fact that the leniency of the sentence which will be imposed on the Accused does not and should not diminish the principle that the Trial Chamber has articulated in this judgement, namely, that for the purpose of Article 7(3) of the Statute, commanders should throughout maintain awareness of the imperativeness required to be given to the protection of prisoners.

781. The Trial Chamber has also ensured that the Accused is not being punished twice for the same offence.

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<sup>2082</sup> *Krstić* Appeal Judgement, para. 241, *Jelesić* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 680.

<sup>2083</sup> *Kupreškić* Appeal Judgement, para. 443; *Furund`ija* Appeal Judgement, para. 250; *Čelebići* Appeal Judgement, para. 720.

<sup>2084</sup> *Čelebići* Appeal Judgement, para. 719: “The Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.”

## X. DISPOSITION

782. Having considered all of the evidence and the arguments of the Parties, the Statute and the Rules, and based upon the factual and legal findings as determined by the Trial Chamber in this Judgement, the Trial Chamber rules as follows:

The Accused **NASER ORIĆ** is found **NOT GUILTY** and therefore acquitted of the following:

- Under **Count 1**: Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder from 24 September 1992 to 16 October 1992 pursuant to Articles 3 and 7(3) of the Statute, and failure to discharge his duty as a superior to take necessary and reasonable measures to punish the occurrence of murder from 24 September 1992 to 16 October 1992 and from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.
- Under **Count 2**: Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment from 24 September 1992 to 16 October 1992 pursuant to Articles 3 and 7(3) of the Statute, and failure to discharge his duty as a superior to take necessary and reasonable measures to punish the occurrence of cruel treatment from 24 September 1992 to 16 October 1992 and from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

The Accused **NASER ORIĆ** is found **GUILTY** of the following:

- Under **Count 1**: Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.
- Under **Count 2**: Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

The Accused **NASER ORIĆ** is found **NOT GUILTY** and therefore acquitted of the following counts:

- **Count 3**: Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent or punish the occurrence of acts of wanton destruction of cities, towns,

or villages, not justified by military necessity, pursuant to Articles 3(b) and 7(3) of the Statute.

- **Count 5:** Wanton destruction of cities, towns, or villages, not justified by military necessity, pursuant to Articles 3(b) and 7(1) of the Statute.

783. The Trial Chamber sentences Naser Orić to **two years** imprisonment.

784. The Accused is entitled to credit for the period of time he has been in custody towards service of the sentence imposed. Naser Orić was arrested on 10 April 2003. Accordingly, he has been in custody for three years, two months, and 21 days. Since the imposed sentence is less than the credit to be applied for the period of time Naser Orić has been in custody, the Trial Chamber

**ORDERS** his release with immediate effect.

Done in English and French, the English text being authoritative.

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Judge Carmel Agius  
Presiding

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Judge Hans Henrik Brydenscholt

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Judge Albin Eser

Dated this thirtieth day of June 2006

At The Hague

The Netherlands

**[Seal of the Tribunal]**

## ANNEX A – GLOSSARY

### A. List of Abbreviations, Acronyms and Short References

ABiH	Army of the Republic of Bosnia and Herzegovina
Accused	Naser Orić
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
aka	Also known as
Amended Indictment	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68, Amended Indictment, 16 July 2003
APC	Armoured Personnel Carrier
Art.	Article
Bajramovići Decision	Decision to establish the Srebrenica TO Staff, taken on 20 May 1992 at Bajramovići
BiH	Republic of Bosnia and Herzegovina
Bratunac Brigade	1 <sup>st</sup> Bratunac Light Infantry Brigade of the VRS
Building	The building behind the municipal building referred to in paragraph 22 of the Indictment.
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
2 <sup>nd</sup> Corps	Second Corps of the ABiH headquartered in Tuzla and established on 18 August 1992
CSB	Security Service Centre (Banja Luka)
Defence	Counsel for the Accused
Defence Final Brief	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, Defence Closing Brief, 17 March 2006



Defence Pre-Trial Brief	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-PT, Pre-Trial Brief of the Defence pursuant to Rule 65ter(E)(i) of the Rules of Procedure and Evidence, 4 March 2003
ex.	Exhibit
ex. D	Defence Exhibit
ex. P	Prosecution Exhibit
fn.	Footnote
1949 Geneva Convention I	Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces in the Field, 12 August 1949, 75 UNTS 31
1949 Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85
1949 Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135
1949 Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 2
Golden Lily	Highest military award of the ABiH
1907 Hague Regulations	Hague Convention (IV), Respecting the Laws and Customs of War on Land, and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907
HDZ	Croatian Democratic Union
ICRC	International Committee of the Red Cross
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





ICTR Statute	Statute of the ICTR, established pursuant to Security Council Resolution 955 (1994) (S/RES/955)
Indictment	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68, Third Amended Indictment, 30 June 2005
Information Centre	Centre for monitoring, informing and alerting in Srebrenica
Initial Indictment	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68, Initial indictment, 13 March 2003
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
16 <sup>th</sup> Muslim Brigade	16 <sup>th</sup> East Bosnian Muslim Brigade from Tuzla
MUP	Ministry of Internal Affairs
NIOD	Netherlands Institute for War Documentation
Nuremberg Charter	London Agreement and Annexed Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, London, 8 August 1945
Nuremberg Principles	Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgements of the Tribunal, unanimously adopted by the U.N. General Assembly in 1950 (UNGAOR, 5 <sup>th</sup> Session, Supp. No. 12, UN Doc. A/1316)
OTP	Office of the Prosecutor
OBS	Republica Sprska Intelligence Service
p.	Page
pp.	Pages
para.	Paragraph
paras	Paragraphs
Parties	Prosecution and Defence in <i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68
Prosecution	Office of the Prosecutor

Prosecution Final Brief	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, Prosecution Final Brief, 21 March 2006 (Public version)
Prosecution Pre-Trial Brief	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-PT, Pre-Trial Brief of the Prosecution pursuant to Rule 65ter(E)(i), 5 December 2003
PTT	Post Office located in Srebrenica
Refugees	Individuals having fled their homes pursuant to attacks on their villages, notwithstanding the definition of that term under international law
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (3 May 1993), UN DOC. S/25704
Rome Statute	Statute of the International Criminal Court, Rome, 17 July 1998
RS	Republika Srpska
Rules	Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (IT/32/Rev. 37)
SDA	Party for Democratic Action
SDB	Public Security Service in BiH
SDS	Serbian Democratic Party
Second Amended Indictment	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68, Second Amended Indictment, 1 October 2004
SFOR	Stabilisation Force in BiH
SFRY	Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Criminal Code of the Socialist Federal Republic of Yugoslavia; published in the SFRY Official Gazette No. 44 of 8 October 1976 (corrections in the SFRY Official Gazette No. 36 of 15 July 1977), entry into force on 1 July 1977
SJB	Public Security Station
8 <sup>th</sup> SOG	8 <sup>th</sup> Srebrenica Operations Group of the ABiH
Sokolac Collection	Series of documents confiscated by the Prosecution from the headquarters of VRS 5 <sup>th</sup>

	Corps
SRBiH	Socialist Republic of Bosnia and Herzegovina (1945-1992)
Srebrenica Armed Forces Staff	Successor of the Srebrenica TO Staff as of 3 September 1992
Srebrenica TO Staff	Group of local leaders from the Srebrenica area, established in Bajramovići on 20 May 1992
Statute	Statute of the International Tribunal for the Former Yugoslavia (last amended by Security Council Resolution 1660 of 28 February 2006)
SUP	Secretariat for Internal Affairs
T.	Transcript page from hearing
TO	Territorial Defence
Tokyo Judgement	Judgement of the International Military Tribunal for the Far East, Tokyo, 12 November 1948
Torbari	Bosnian Muslims carrying bags ( <i>torba</i> ) in search for food in the Srebrenica area
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, established by Security Council Resolution 827 (1993)
UN	United Nations
UNDU	United Nations Detention Unit
UNPROFOR	United Nations Protection Force
VP	Military Police
VRS	Army of the Serbian Republic of Bosnia and Herzegovina, then Republika Srpska, as of 19 May 1992

## **B. List of Cases**

### **1. Tribunal**

#### **ALEKSOVSKI**

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 (“*Aleksovski Trial Judgement*”).

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 (“*Aleksovski Appeal Judgement*”).

#### **BLAGOJEVIĆ AND JOKIĆ**

*Prosecutor v. Blagojević and Dragan Jokić*, IT-02-60, Judgement, 17 January 2005 (“*Blagojević Trial Judgement*”).

#### **BLAŠKIĆ**

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić Trial Judgement*”).

*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”).

#### **BOŠKOSKI AND TARČULOVSKI**

*Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment, 26 May 2006 (“*Boškosi Decision*”).

#### **BANOVIĆ**

*Prosecutor v. Predrag Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 (“*Banović Sentencing Judgement*”).

#### **BRĐANIN**

*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin Trial Judgement*”).

#### **ČELEBIĆI**

*Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”)*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići Trial Judgement*”).

*Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”)*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići Appeal Judgement*”).

#### **ČEŠIĆ**

*Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004 (“*Češić Sentencing Judgement*”).

#### **ERDEMOVIĆ**

*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996, (“*Erdemović Sentencing Judgement*”).

#### **FURUNDŽIJA**

*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija Trial Judgement*”).

*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”).

### **GALIĆ**

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003 (“*Galić* Trial Judgement”).

### **HADŽIHASANOVIĆ ET AL.**

*Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (“*Hadžihasanović* Jurisdiction Trial Decision”).

*Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (“*Hadžihasanović* Jurisdiction Appeal Decision”).

*Le procureur c. Enver Hadžihasanović et Amir Kubura*, Affaire n. IT-01-47-T, Judgement, 15 Mars 2006 (“*Hadžihasanović* Trial Judgement”).

### **HALILOVIĆ**

*Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005 (“*Halilović* Trial Judgement”).

### **JELISIĆ**

*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999 (“*Jelisić* Trial Judgement”).

*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelisić* Appeal Judgement”).

### **JOKIĆ**

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*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 (“*Jokić* Judgement on Sentencing Appeal”).

### **KORDIĆ AND ČERKEZ**

*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”).

*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić* Appeal Judgement”).

### **KRNOJELAC**

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 (“*Krnojelac* Trial Judgement”).

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac* Appeal Judgement”).

### **KRSTIĆ**

*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić* Trial Judgement”).

*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić Appeal Judgement*”).

#### **KUNARAC, KOVAČ AND VUKOVIĆ**

*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000 (“*Kunarac Rule 98bis Decision*”).

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*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac Appeal Judgement*”).

#### **Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND ŠANTIĆ**

*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić (aka “Vlado”)*, Case No. IT-95-16-T, Judgement, 14 January 2000 (“*Kupreškić Trial Judgement*”).

*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić (aka “Vlado”)*, Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić Appeal Judgement*”).

#### **KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRČAĆ**

*Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Trial Judgement, 2 November 2001 (“*Kvočka Trial Judgement*”).

*Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Appeals Judgement, 28 February 2005 (“*Kvočka Appeal Judgement*”).

#### **LIMAJ**

*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 (“*Limaj Trial Judgement*”).

#### **MILUTINOVIĆ, ŠAINOVIĆ AND OJDANIĆ**

*Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (“*Ojdanić Appeal Decision on Motion Challenging Jurisdiction*”).

#### **MILOŠEVIĆ**

*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004 (“*Milošević Rule 98bis Decision*”).

#### **NALETILIĆ AND MARTINOVIĆ**

*Prosecutor v. Mladen Naletilić (aka “Tuta”) and Vinko Martinović (aka “Štela”)*, Case No. IT-98-34-T, Judgement, 31 March 2003 (“*Naletilić Trial Judgement*”).

#### **NIKOLIĆ**

*Prosecutor v. Dragan Nikolić (aka “Jenki”)*, Case No. IT-94-2-R61, Review of the Indictment pursuant to Rule 61 of the Rules, 25 October 1995 (“*Nikolić Rule 61 Decision*”).

*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 (“*Nikolić Sentencing Judgement*”).

#### **NIKOLIĆ (MOMIR)**

*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 (“*Momir Nikolić Appeal Sentencing Judgement*”).

## **OBRENOVIĆ**

*Prosecutor v. Dragan Obrenović*, Case No. IT-02-60-2-S, Sentencing Judgement, 10 December 2003.

## **ORIĆ**

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement of Acquittal Pursuant to Rule 98bis, rendered orally on 8 June 2005, T. 8981-9037, (“Rule 98bis Decision”).

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on First and Second Filings pursuant to Scheduling Order, 4 July 2005 (“4 July Decision”).

*Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 (“Interlocutory Decision on Length of Defence Case”).

*Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005.

## **ŠEŠELJ**

*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003 (“Šešelj Disqualification Decision”).

## **SIKIRICA, DOŠEN AND KOLUNDŽIJA**

*Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija*, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 (“Sikirica Rule 98bis Decision”).

*Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija*, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001, (“Sikirica Sentencing Judgement”).

## **SIMIĆ**

*Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 (“Simić Trial Judgement”).

## **STAKIĆ**

*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 29 October 2003 (“Stakić Trial Judgement”).

*Prosecutor v. Milomir Stakić*, IT-97-24-A, Judgement, 22 March 2006, (“Stakić Appeal Judgement”).

## **STRUGAR**

*Prosecutor v. Pavle Strugar*, IT-01-42, Judgement, 31 January 2005 (“Strugar Trial Judgement”).

## **TADIĆ**

*Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“Tadić Jurisdiction Decision”).

*Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 (“Tadić Decision on Defence Motion on Hearsay”).

*Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997 (“Tadić Trial Judgement”).

*Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-A Decision on Appellant’s Motion for the Extension of Time-Limit and Admission of Additional Evidence, 15 October 1998.

*Prosecutor v. Duško Tadić (aka “Dule”)*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“Tadić Appeal Judgement”).



*Prosecutor v. Duško Tadić*, Case No. IT-94-1-Tbis-R117, Sentencing Judgement, 11 November 1999 (“*Tadić Sentencing Judgement*”)

*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000 (“*Tadić Sentencing Appeal Judgement*”).

### **TODOROVIĆ**

*Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001 (“*Todorović Sentencing Judgement*”).

### **VASILJEVIĆ**

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 (“*Vasiljević Trial Judgement*”).

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević Appeal Judgement*”).

## 2. ICTR

### **AKAYESU**

*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (“*Akayesu Trial Judgement*”).

*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“*Akayesu Appeal Judgement*”).

### **BAGILISHEMA**

*Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 (“*Bagilishema Trial Judgement*”).

*Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 (“*Bagilishema Appeal Judgement*”).

### **BARAYAGWIZA**

*Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 (“*Barayagwiza Decision*”).

### **GACUMBITSI**

*Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004 (“*Gacumbitsi Trial Judgement*”).

### **KAJELIJELI**

*Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 (“*Kajelijeli Trial Judgement*”).

### **KAMBANDA**

*Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement, 4 September 1998 (“*Kambanda Trial Judgement*”).

*Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-A, Judgement, 19 October 2000 (“*Kambanda Appeal Judgement*”).

### **KAMUHANDA**

*Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Judgement, 22 January 2003 (“*Kamuhanda Trial Judgement*”).

*Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda Appeal Judgement*”).

#### **KAYISHEMA AND RUZINDANA**

*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 (“*Kayishema Trial Judgement*”).

*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001 (“*Kayishema Appeal Judgement*”).

#### **MUSEMA**

*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000 (“*Musema Trial Judgement*”).

*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“*Musema Appeal Judgement*”).

#### **NAHIMANA**

*Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement, 3 December 2003 (“*Nahimana Trial Judgement*”).

#### **NDINDABAHIZI**

*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-T, Judgement, 15 July 2004 (“*Ndindabahizi Trial Judgement*”).

#### **NIYITEGEKA**

*Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka Appeal Judgement*”).

*Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003 (“*Niyitegeka Trial Judgement*”).

#### **NTAGERURA**

*Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement, 25 February 2004 (“*Ntagerura Trial Judgement*”).

#### **NTAKIRUTIMANA**

*Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Judgement, 21 February 2003 (“*Ntakirutimana Trial Judgement*”).

#### **RUTAGANDA**

*Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 (“*Rutaganda Trial Judgement*”).

#### **SEMANZA**

*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 (“*Semanza Trial Judgement*”).

*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza Appeal Judgement*”).

#### **SERUSHAGO**

*Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 (“*Serushago Appeal Judgement*”).

### C. Domestic Decisions

*Brigade case* (1949), Entscheidungen des Obersten Gerichtshofs für die britische Zone in Strafsachen, vol. 1.

*Erich Heyer et al.* (1945) (*Essen Lynching case*), Law Reports of Trials of Major War Criminals, vol. 88.

*Heinz Heck et al.* (*Peleus case*) (1949), Law Reports of Trials of Major War Criminals, vol. 1.

*Alfred Jodl* (1949), Law Reports of Trials of Major War Criminals, vol. 22.

*Wilhem List et al.* (*Hostage case*) (1949), Law Reports of Trials of Major War Criminals, vol. 8.

*Synagogue Fire case* (1949), Entscheidungen des Obersten Gerichtshofs für die britische Zone in Strafsachen, vol. 2.

*Taylor, Weaver and Donovan* (1928), 21 Cr. App. R. 20, 21 (United Kingdom).

## ANNEX B – PROCEDURAL BACKGROUND

### D. Pre-Trial Proceedings

#### 1. Indictment, Arrest, Transfer and Initial Appearance

785. On 28 March 2003, Judge Richard May confirmed an initial indictment (“Initial Indictment”) against the Accused, which was kept under seal until 11 April 2003.<sup>2085</sup> On the same day, an arrest warrant, which was also kept under seal, was issued.<sup>2086</sup> The Initial Indictment charged the Accused with responsibility under Articles 7(1) and 7(3) for murder, cruel treatment, plunder of property and wanton destruction of cities, towns and villages, all being violations of the laws or customs of war pursuant to Article 3 of the Statute.<sup>2087</sup>

786. On 10 April 2003, the Accused was arrested in Tuzla, BiH, and transferred to the UNDU in The Hague on the following day.<sup>2088</sup> At his initial appearance before Judge O-Gon Kwon on 15 April 2003, the Accused entered a plea of “not guilty” with respect to all charges against him and was ordered to be detained on remand.<sup>2089</sup>

#### 2. Trial Chamber Composition

787. The case was initially assigned to Trial Chamber III composed of judges Richard May (Presiding), Patrick Robinson and O-Gon Kwon.<sup>2090</sup> Judge O-Gon Kwon was designated pre-trial judge.<sup>2091</sup> On 26 February 2004, Judge Albertus Swart was assigned to Trial Chamber III, replacing Judge Richard May, and Judge Patrick Robinson became presiding judge over the case.<sup>2092</sup> On 1 August 2004, Judge Iain Bonomy replaced Judge Albertus Swart.<sup>2093</sup>

788. On 21 September 2004, prior to the commencement of trial proceedings, the President of the Tribunal ordered the transfer of the case to Trial Chamber II and assigned it to a bench composed of Judges Carmel Agius (Presiding), Hans Henrik Brydensholt and Albin Eser.<sup>2094</sup>

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<sup>2085</sup> ‘Confirmation of Indictment and Order for Non-Disclosure, *ex parte* and *under seal*, 28 March 2003’.

<sup>2086</sup> ‘Warrant of Arrest, *ex parte* and *under seal*’, 28 March 2003.

<sup>2087</sup> Initial Indictment, 13 March 2003.

<sup>2088</sup> See ‘Order of the President Assigning a Case to a Trial Chamber’, 11 April 2003, stating that the Accused was transferred to the Tribunal on 11 April 2003.

<sup>2089</sup> Initial Appearance, 15 April 2003, T. 3-6; ‘Order for Detention on Remand’, 14 April 2003.

<sup>2090</sup> ‘Order of the President Assigning a Case to a Trial Chamber’, 11 April 2003.

<sup>2091</sup> ‘Order Appointing a Pre-Trial Judge’, 28 April 2003.

<sup>2092</sup> ‘Order of the President Assigning a Judge to a Case before a Trial Chamber’, 26 February 2004.

<sup>2093</sup> ‘Order of the President Assigning a Judge to a Case before a Trial Chamber’, 23 July 2004.

<sup>2094</sup> ‘Order of the President Assigning Judges and Transferring a Case to a New Trial Chamber’, 21 September 2004.

### 3. History of Indictments

789. On 22 May 2003, the Defence submitted a motion alleging numerous defects in the form of the Initial Indictment and consequently sought an order to amend it.<sup>2095</sup> The Prosecution opposed the Defence motion and instead sought leave to amend the Initial Indictment.<sup>2096</sup> On 3 July 2003, the Trial Chamber dismissed the Defence motion and granted the amendments proposed by the Prosecution.<sup>2097</sup> The Prosecution issued an amended indictment on 16 July 2003 (“Amended Indictment”).<sup>2098</sup>

790. On 23 September 2004, the Prosecution submitted a motion for leave to further amend the Amended Indictment. The Prosecution sought to withdraw the allegations relating to wanton destruction in one village, and to alter the characterisation of the conflict in BiH from an ‘international armed conflict’ to an ‘armed conflict’.<sup>2099</sup> At the Pre-Trial Conference held on 28 September 2004, the Trial Chamber granted the motion orally.<sup>2100</sup> On 1 October 2004, the Prosecution issued a second amended indictment (“Second Amended Indictment”).<sup>2101</sup>

791. Following the close of the Prosecution case-in-chief, a third amended indictment (“Indictment”) was issued on 30 June 2005<sup>2102</sup> in order to conform to the Trial Chamber’s Rule 98*bis* Decision, rendered orally on 8 June 2005.<sup>2103</sup>

### 4. Assignment of Counsel

792. On 14 April 2003, at the request of the Accused, the Registrar assigned Ms. Vasvija Vidović as temporary counsel for the Accused.<sup>2104</sup> Mr. John Jones was assigned temporary co-counsel for the Accused as of 1 July 2003.<sup>2105</sup> On 27 May 2004, the Registry assigned Ms. Vidović and Mr. Jones as counsel and co-counsel for the Accused, respectively, on a permanent basis.<sup>2106</sup>

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<sup>2095</sup> ‘Preliminary Motion Regarding Defects in the Form of the Indictment’, 22 May 2003.

<sup>2096</sup> Prosecution’s Response to Preliminary Motion Regarding Defects In The Form of The Indictment” filed on 4 June 2003

<sup>2097</sup> ‘Decision on Preliminary Motion Regarding Defects in the Form of the Indictment’, 3 July 2003.

<sup>2098</sup> Amended Indictment, 16 July 2003.

<sup>2099</sup> ‘Prosecution’s Motion for Leave to Amend the Amended Indictment’, 23 September 2004.

<sup>2100</sup> Hearing of 28 September 2004, T. 110 .

<sup>2101</sup> ‘Prosecution Addendum for Further Leave to Amend the Second Amended Indictment’, 1 October 2004; ‘Decision on Submitted Second Amended Indictment’, 4 October 2004; Second Amended Indictment, 1 October 2004.

<sup>2102</sup> Third Amended Indictment, 30 June 2005.

<sup>2103</sup> Rule 98*bis* Decision, rendered orally on 8 June 2005. *See* para. 820 *infra*.

<sup>2104</sup> ‘Decision by the Registrar Regarding Assignment of Defence Counsel’, 24 April 2003.

<sup>2105</sup> ‘Decision by the Registrar Regarding Assignment of Mr. John Jones as Co-Counsel for Naser Orić’, 24 June 2003.

<sup>2106</sup> ‘Decision of the Registry on Assignment of Counsel and the Extent to which the Accused is Able to Remunerate Counsel’, 18 June 2004.

## 5. Provisional Release

793. The Accused filed a motion for provisional release on 21 May 2003.<sup>2107</sup> The motion was denied on 25 July 2003.<sup>2108</sup>

## 6. Disclosure Matters

794. Disclosure by the Prosecution of supporting material accompanying the Indictment, pursuant to Rule 66(A)(i) of the Rules, and of prior statements obtained from the Accused was completed within the prescribed 30 days following his initial appearance.<sup>2109</sup> At the Status Conference held on 29 July 2003, the Trial Chamber ordered the Prosecution to disclose all statements pursuant to Rule 66(A)(ii) of the Rules by 14 November 2003.

795. Concerns regarding disclosure of exculpatory material pursuant to Rule 68 of the Rules were first raised by the Defence at the Status Conference held on 29 July 2003.<sup>2110</sup> The Trial Chamber addressed the issue as one that could be resolved through co-operation between the Parties.<sup>2111</sup> At the following Status Conference, the Trial Chamber assured itself that matters relating to the Rule 68 of the Rules disclosure obligation were adequately dealt with and directed the Prosecution to make the best effort to fulfil this obligation in advance of the Defence Pre-Trial Brief.<sup>2112</sup>

796. On 10 September 2004, the Defence alleged that the Prosecution had failed to disclose material relevant to allegedly falsified documents, statements taken by the Prosecution during its investigation and material that would undermine the credibility of Prosecution witnesses, under Rule 68.<sup>2113</sup> At the Pre-Trial Conference held on 28 September 2004, the Defence complained that there had been a 'systematic failure' by the Prosecution to comply with Rule 68 of the Rules.<sup>2114</sup> In response, the Prosecution held that it had provided a sufficient answer to each of the specific

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<sup>2107</sup> 'Confidential Application for Provisional Release', 21 May 2003.

<sup>2108</sup> 'Decision on Application for Provisional Release', 25 July 2003.

<sup>2109</sup> Initial Appearance, 15 April 2003, T. 6. With the exception of documents for which an application under Rule 69 of the Rules was filed and granted: 'Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure', 28 July 2003.

<sup>2110</sup> Status Conference, 29 July 2003, T. 55-56. The matter was also raised at two following status conferences: 28 November 2003, T. 68-70; 23 March 2004, T. 76-78.

<sup>2111</sup> Status Conference, 29 July 2003, T. 55-56.

<sup>2112</sup> Status Conference, 28 November 2003, T. 68-70.

<sup>2113</sup> 'Confidential Defence Motion to Request an Order for Measures to Ensure that the Prosecution Complies with Rule 68', 10 September 2004, in which the Defence asked the Prosecution to review all of its material and urged the Trial Chamber to issue an appropriate remedy pursuant to Rule 68*bis* of the Rules. The Prosecution, in 'Prosecution Response to Defence Motion to Request an Order for Measures to Ensure That the Prosecution Complies with Rule 68', 24 September 2004, denied any non-compliance. The Defence filed a 'First Supplement to Defence Rule 68 Motion', 17 November 2004, in which it requested the Trial Chamber to take appropriate measures to ensure that instances of non-compliance with Rule 68 do not reoccur. See para. 807 *infra*.

<sup>2114</sup> Pre-Trial Conference, 28 September 2004, T. 113.

examples of Rule 68 violations alleged by the Defence.<sup>2115</sup> The Trial Chamber emphasised the importance it attached to the prosecutorial disclosure obligation and enjoined the Parties to resolve the matter between them before the commencement of trial.<sup>2116</sup>

797. On 19 August 2004, the Prosecution filed a motion, requesting an exemption from its obligations under Rules 66(B) and 68(i) of the Rules to disclose potentially exculpatory material to the Defence.<sup>2117</sup> On 15 December 2004, the Trial Chamber granted the request on grounds of prevailing security concerns.<sup>2118</sup> Issues relating to compliance by the Prosecution with Rule 68 of the Rules remained salient throughout trial.<sup>2119</sup>

#### 7. Pre-Trial Briefs and Agreed Facts

798. Pursuant to Rule 65ter(H) of the Rules, the Defence agreed to certain facts proposed by the Prosecution in its Pre-Trial Brief relating to biographical data of the Accused and to background facts of the case.<sup>2120</sup>

799. The Prosecution's Pre-Trial Brief was filed on 5 December 2003.<sup>2121</sup> The Defence filed its Pre-Trial Brief on 4 March 2004.<sup>2122</sup> On 5 October 2004, the Prosecution provided a written submission in support of several paragraphs of its Pre-Trial Brief.<sup>2123</sup>

#### 8. Pre-Trial Case Management

800. Pre-trial proceedings in this case lasted approximately 18 months. Pursuant to Rule 65bis of the Rules, status conferences were held on 29 July 2003, 28 November 2003, 23 March 2004 and 21 July 2004. A Pre-Trial Conference was held on 28 September 2004 pursuant to Rule 73bis of the Rules.

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<sup>2115</sup> Pre-Trial Conference, 28 September 2004, T. 125.

<sup>2116</sup> Pre-Trial Conference, 28 September 2004, T. 126-129.

<sup>2117</sup> 'Confidential and Ex Parte Prosecution's Motion Pursuant to Rule 66(C) and 68(iv) for Exempting Specific Material From Disclosure', 19 August 2004.

<sup>2118</sup> 'Confidential Decision on Prosecution's Confidential and Ex Parte Motion Pursuant to Rules 66(C) and 68(iv) for Exempting Specific Material From Disclosure', 15 December 2004.

<sup>2119</sup> See paras 806-815 *infra*.

<sup>2120</sup> Ex. P562, "Agreed Facts".

<sup>2121</sup> Prosecutor's Pre-Trial Brief pursuant to Rule 65ter(E)(i), 5 December 2003.

<sup>2122</sup> Defence Pre-Trial Brief, 4 March 2004; 'Order on Confidential Defence Motion for Extension of Time to File its Pre-Trial Brief', 5 February 2004.

<sup>2123</sup> 'Prosecution's Submission Substantiating Selected Disputed Paragraphs of the Prosecution's Pre-Trial Brief', 5 October 2004.

## **E. Trial Proceedings**

### **1. Overview**

801. The Prosecution case-in-chief commenced on 6 October 2004 and ended on 31 May 2005.<sup>2124</sup> The Defence case-in-chief started on 4 July 2005 and lasted until 1 February 2006.<sup>2125</sup> The Trial Chamber sat 196 trial days. The Prosecution called 52 witnesses, of whom 50 testified *viva voce*<sup>2126</sup> and two were witnesses whose evidence was tendered under Rule 92*bis* of the Rules. A total of 625 Prosecution exhibits were admitted.<sup>2127</sup> The Defence produced 29 *viva voce* witnesses and one witness whose evidence was tendered pursuant to Rule 92*bis* of the Rules.<sup>2128</sup> In total, 1024 Defence exhibits were admitted. Rebuttal was requested by the Prosecution but denied.<sup>2129</sup>

802. After the close of the Defence case-in-chief, the Trial Chamber appointed a handwriting expert and subsequently heard his evidence.<sup>2130</sup> On 1 March 2006, the Trial Chamber informed the Parties of its election by majority not to call any other witnesses.<sup>2131</sup> In addition, seven Trial Chamber exhibits were entered into the record over the course of trial.

803. Final Briefs were filed on 17 March 2006 and corresponding Responses to Final Briefs were filed on 24 March 2006.<sup>2132</sup> Closing Arguments were heard from 3 April 2006 to 10 April 2006.

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<sup>2124</sup> On 23 February 2005, the Trial Chamber orally granted a Defence request to suspend proceedings between 24 February and 6 March 2005 due to personal circumstances of lead Defence Counsel: hearing of 23 February 2005, T. 5502-5505 (private session).

<sup>2125</sup> Prior to the commencement of the Defence case-in-chief, two pre-defence conferences were held on 1 July 2005 and on 22 August 2005, pursuant to Rule 73*ter* of the Rules.

<sup>2126</sup> Amongst the Prosecution *viva voce* witnesses, three were expert witnesses and two gave evidence via video-conference link.

<sup>2127</sup> The Trial Chamber disallowed the use of two exhibits, ‘*Confidential Decision on Defence Motion Regarding Authenticity of Documents and Non-compliance With Rule 68*’, 17 March 2005.

<sup>2128</sup> Amongst the Defence *viva voce* witnesses, one was an expert witness. In the course of the Defence case, on 17 November 2005, the Defence filed a motion seeking to add and drop a number of witnesses from the Defence witness list. On 24 November 2005, the Trial Chamber orally granted the motion: hearing of 24 November 2005, T. 13944.

<sup>2129</sup> ‘Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)’, 9 February 2006.

<sup>2130</sup> ‘*Proprio Motu Order to Call a Handwriting Expert*’, 25 January 2006; ‘*Further Proprio Motu Order to Call a Handwriting Expert*’, 3 February 2006; ‘*Amended Further Proprio Motu Order to Call a Handwriting Expert*’, 7 February 2006.

<sup>2131</sup> Hearing of 1 March 2006, T. 16041.

<sup>2132</sup> On 21 March 2006 in its ‘Decision on Prosecution Motion Seeking Leave to File a *Corrigendum* to Prosecution’s Final Brief’ (“21 March Decision”), the Trial Chamber noted that “a document purporting to be the Prosecution’s Final Brief, with the acknowledgement of numerous errors, faulty formatting and absence of indexes, and using the word ‘draft’ on the top of each page without intending the document to be filed as a ‘draft’, was filed confidentially on Friday, 17 March 2006”. Already on 20 March 2006, the Defence had filed an ‘Urgent Motion Regarding Prosecution’s Breach of Scheduling Order for Case Completion’. On the same day, the Prosecution responded and requested leave to file a *corrigendum* to its Final Brief: ‘Prosecution Motion to Request Leave to File a *Corrigendum* to the Prosecution Final Brief’, 20 March 2006. The Trial Chamber held, in its 21 March Decision, that it was in the interests of justice to accept the *corrigendum*, subject to the Prosecution indicating the changes made.



804. The Trial Chamber issued five *subpoenae ad testificandum* to Prosecution witnesses,<sup>2133</sup> three of whom were called to give evidence.

805. On 17 June 2005, pursuant to Rule 65ter(G) of the Rules, the Defence gave notice of its intent to call 73 witnesses.<sup>2134</sup> On 4 July 2005, the Trial Chamber found that it had given

detailed indications to the parties as to various areas of factual evidence which, in its opinion, it did not require any further evidence about, as well as its own assessment of how the number of Defence witnesses could be reduced and the remaining witnesses presented within a specified time-limit without endangering the Accused's right to a fair trial.<sup>2135</sup>

The Trial Chamber thus ordered the Defence to file a new witness list reflecting a maximum of 30 witnesses and to rest its case-in-chief by 30 September 2005 ("Rule 73ter Decision").<sup>2136</sup> On 6 July 2005, following certification by the Trial Chamber, the Defence appealed the Rule 73ter Decision requesting a stay of the proceedings pending appeal.<sup>2137</sup> On 20 July 2005, the Appeals Chamber reversed and remanded the Rule 73ter Decision for further proceedings and to allow the Defence to begin presenting its case-in-chief again, if it so chose.<sup>2138</sup> On 4 August 2005, the Defence filed a new witness list containing 44 *viva voce* witnesses and three Rule 92bis witnesses,<sup>2139</sup> choosing not to recall any Defence witnesses previously heard.<sup>2140</sup> The Defence ultimately called 29 witnesses *viva voce*.

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<sup>2133</sup> 'Confidential - Ex Parte in part Subpoena Ad Testificandum', 21 October 2004; 'Confidential - Ex Parte in part Subpoena Ad Testificandum', 13 December 2004; 'Confidential - Ex Parte in part Subpoena Ad Testificandum', 4 February 2005, 'Confidential - Ex Parte in Part Subpoena Ad Testificandum', 7 March 2005; 'Confidential and Ex Parte in part Subpoena Ad Testificandum', 12 April 2005.

<sup>2134</sup> 'Defence Filing Pursuant to Scheduling Order', 17 June 2005; 'Second Defence Filing Pursuant to Scheduling Order', 28 June 2005.

<sup>2135</sup> 'Decision on First and Second Filings pursuant to Scheduling Order', 4 July 2005, pp. 2-3. The Trial Chamber conditioned its finding in the following way: "Pursuant to Rule 73ter(F) of the Rules, in the course of the Defence case, the Trial Chamber may grant any Defence request for additional time to present evidence if so required by the interests of justice, and in particular if the situation as regards the areas of evidence above, in the opinion of the Trial Chamber, changes in a way as to require further evidence."

<sup>2136</sup> 'Decision on First and Second Filings pursuant to Scheduling Order', 4 July 2005, p. 5.

<sup>2137</sup> 'Urgent Appeal of Trial Chamber's Decision on Length of Defence Case', 6 July 2005.

<sup>2138</sup> 'Interlocutory Decision on Length of Defence Case', 20 July 2005, paras 10-11.

<sup>2139</sup> On 22 August 2005, the Trial Chamber accepted the new Defence witness list, Pre-Defence Conference, 22 August 2005, T. 9639-9640.

<sup>2140</sup> 'Partly Confidential Defence Filing Pursuant to Scheduling Order dated 21 July 2005', 4 August 2005.

## 2. Evidentiary Issues

806. The admission of evidence at trial was regulated on the basis of the Rules and case-law of this Tribunal outlined for the Parties in the guidelines issued by the Trial Chamber at the outset of the proceedings.<sup>2141</sup>

### (i) Access to Confidential Material from Other Proceedings

807. The Defence was granted access to confidential material from the *Brđanin, Milošević* and *Krajišnik* cases.<sup>2142</sup>

### (ii) Disclosure

808. Throughout the trial proceedings, the Defence repeatedly complained that the Prosecution was not complying with its disclosure obligations under Rule 68 of the Rules.<sup>2143</sup>

809. On 17 November 2004, the Defence further notified the Trial Chamber of the Prosecution's ongoing non-compliance with Rule 68 of the Rules.<sup>2144</sup> The Defence complained of the untimely disclosure of a statement to the Prosecution of a high ranking ABiH official.<sup>2145</sup> On 26 November 2004, the Prosecution conceded, that it had failed to comply with its disclosure obligation under Rule 68 of the Rules.<sup>2146</sup> On the same day, the Trial Chamber reserved its rule on the motion, concluding that the existence of the alleged 'systematic failure' could only be addressed at a later stage.<sup>2147</sup>

810. During the hearing of 25 November 2004, the Defence submitted that the Prosecution had failed to disclose the prior written statement of a Prosecution witness before that witness gave evidence.<sup>2148</sup> After the Prosecution's oral response on 26 November 2004, explaining the late

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<sup>2141</sup> 'Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings', 21 October 2004. See para. 12 *supra*.

<sup>2142</sup> *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, 'Ex Parte and Confidential Order to Vary Protective Measures', 29 June 2005; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, 'Confidential Order on Variation of Protective Measures in Response to Naser Orić's Motion for Access to Transcripts of Kraj 628', 20 July 2005; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, 'Confidential Order on Renewed Defence Motion to Vary Protective Measures in Other Proceedings before the Tribunal', 18 August 2005; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, 'Ex parte and Confidential Order to Vary Protective Measures', 7 November 2005.

<sup>2143</sup> See II.C.2, "General Conclusions on Rule 68".

<sup>2144</sup> 'First Supplement to Defence Rule 68 Motion', 17 November 2004.

<sup>2145</sup> 'First Supplement to Defence Rule 68 Motion', 17 November 2004, pp. 1-2.

<sup>2146</sup> Hearing of 26 November 2004, T. 2120-2125. The Prosecution, however, denied the existence of an alleged 'systematic failure' and argued that this was a distinctive incident. The Defence upheld its submission that these failings were indicative of a 'systematic failure': hearing of 26 November 2004, T. 2125-2126. See para. 794 *supra*.

<sup>2147</sup> Hearing of 26 November 2004, T. 2130.

<sup>2148</sup> Hearing of 25 November 2004, T. 2092-2093. On 26 November 2004 the Defence submitted that the statement in question should have been disclosed under Rule 68 of the Rules: hearing of 26 November 2004, T. 2113.

disclosure,<sup>2149</sup> the Trial Chamber concluded that no prejudice had been caused to the Accused, but expressed concerns as to how such incidents of late disclosure caused unnecessary delays.<sup>2150</sup>

811. On 17 December 2004, the Defence alleged a new prosecutorial violation of Rule 68 of the Rules, in that the Prosecution had not disclosed certain documents which would have shed light on the lack of authenticity of other Prosecution exhibits.<sup>2151</sup> The Prosecution filed its response on 14 January 2005.<sup>2152</sup> On 17 March 2005, the Trial Chamber held that violation of Rule 68(i) of the Rules had occurred. While, the Trial Chamber refrained from imposing sanctions on the Prosecution, considering that no prejudice had been caused to the Accused, it enjoined the Prosecution to make every effort to comply with its obligations imposed under to Rule 68 of the Rules.<sup>2153</sup>

812. On 15 September 2005, the Defence complained orally of a further violation of Rule 68 of the Rules in that the Prosecution only disclosed previous statements of a Defence witness on the eve of that witness testimony.<sup>2154</sup> On 29 September 2005, the Trial Chamber held that parts of the statements undoubtedly fell within the *ratio* of Rule 68 of the Rules and should have been disclosed to the Defence as soon as practicable. The Trial Chamber thus admonished the Prosecution and enjoined it to make all efforts in the future to comply with its obligations under Rule 66(B) and 68(i) of the Rules.<sup>2155</sup> However, it decided not to impose any sanctions, due to the lack of malicious intent or bad faith on the Prosecution's side and prejudice suffered by the Accused.<sup>2156</sup>

813. On 17 October 2005, the Defence further alleged that the Prosecution had not complied with its Rule 68 obligation when it failed to disclose an article, written by a Serb volunteer, which touches upon issues of crimes committed by Bosnian Serbs against Bosnian Muslims. The article also refers to the lack of organisation of the Bosnian Muslims.<sup>2157</sup> The Prosecution, in its oral

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<sup>2149</sup> Hearing of 26 November 2004, T. 2103-2111.

<sup>2150</sup> Hearing of 26 November 2004, T. 2115.

<sup>2151</sup> '*Confidential* Motion Regarding Authenticity of Documents and Non-Compliance with Rule 68', 17 December 2004.

<sup>2152</sup> '*Confidential* Prosecution's Response to the Defence Motion Regarding Authenticity of Documents and Non-Compliance with Rule 68', 14 January 2005. The Defence filed a '*Confidential* Reply to Prosecution's Response to the Defence Motion Regarding Authenticity of Documents and Non-Compliance with Rule 68' on 25 January 2005.

<sup>2153</sup> '*Confidential* Decision on Defence Motion regarding Authenticity of Documents and Non-compliance with Rule 68', 17 March 2005.

<sup>2154</sup> Hearing of 15 September 2005, T. 11055-11057. The Trial Chamber recalled that material under Rule 68 of the Rules had to be disclosed to the Defence and not only made accessible: hearing of 6 July 2005, T. 9281.

<sup>2155</sup> 'Decision on Alleged Prosecution Non-Compliance with Disclosure Obligations under Rules 66(B) and 68(i)', 29 September 2005.

<sup>2156</sup> 'Decision on Alleged Prosecution Non-Compliance with Disclosure Obligations under Rules 66(B) and 68(i)', 29 September 2005, p. 3.

<sup>2157</sup> '*Urgent* Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 17 October 2005. *See also* Hearing of 25 October 2005, T. 12890-12901; 26 October 2005, T. 12990-12993.

response conceded that there had been a violation of Rule 68 of the Rules.<sup>2158</sup> On 27 October 2005, the Trial Chamber found that such a violation had occurred and ordered the Prosecution to conduct a search and provide the Trial Chamber with a declaration of compliance followed by disclosure to the Defence of any further Rule 68(i) material in its possession, if necessary.<sup>2159</sup> Furthermore, the Trial Chamber invited the Defence to recall any Prosecution witnesses to remedy any prejudice it may have suffered from the Prosecution's non-disclosure of this material.<sup>2160</sup> The Prosecution filed its declaration of compliance on 11 November 2005.<sup>2161</sup> On 17 November 2005, the Defence argued that the Prosecution did not disclose all the material it requested<sup>2162</sup>; however, it decided not to recall any witnesses and submitted that doing so would amount to a *de facto* re-trial and left it for the Trial Chamber to "understand what the necessary consequences are of this finding."<sup>2163</sup>

814. On 17 November 2005, the Defence alleged a fresh violation of Rule 68 of the Rules which gave rise to further submissions by the Parties.<sup>2164</sup> The Defence complained that the Prosecution had failed to disclose a document which could be relevant in establishing authority over the Srebrenica military police.<sup>2165</sup> On 25 November 2005, the Defence alleged that the Prosecution had failed to disclose a document with contents that appeared to be exculpatory in relation to one of the attacks mentioned in the Indictment.<sup>2166</sup> On 9 December 2005, the Defence alleged that the non-disclosure of a paragraph in a previously disclosed statement constituted yet another Rule 68 violation.<sup>2167</sup>

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<sup>2158</sup> Hearing of 18 October 2005, T. 12578-12594; 19 October 2005, T. 12751-12772; 26 October 2005, T. 12985-12990.

<sup>2159</sup> 'Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 27 October 2005.

<sup>2160</sup> 'Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 27 October 2005, p. 5.

<sup>2161</sup> 'Confidential in part Prosecution Declaration Stating Searches, Location of Searches, and Results of Searches as Ordered by the Trial Chamber on the 27<sup>th</sup> of October 2005', 11 November 2005.

<sup>2162</sup> 'Defence Response to Prosecution Declaration Stating Searches, Location of Searches, and Results of Searches as Ordered by the Trial Chamber on the 27<sup>th</sup> of October 2005', 17 November 2005, para. 2.

<sup>2163</sup> 'Defence Response to Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 17 November 2005, paras 37-38.

<sup>2164</sup> 'Defence Response to Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 17 November 2005, paras 19-36; 'Partly Confidential Prosecution Response to the Defence Motion Providing its Response to Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, and Fresh Violation of Rule 68', 28 November 2005; 'Partly Confidential Corrigendum to the Prosecution Response to the Defence Motion Providing its Response to Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, and Fresh Violation of Rule 68', 2 December 2005. See also hearing of 22 November 2005, T. 13770-13775.

<sup>2165</sup> 'Defence Response to Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68', 17 November 2005, para. 23.

<sup>2166</sup> 'Confidential Further Communication Regarding Non-Compliance with Rule 68', 25 November 2005. See also 'Prosecution Response to the Defence Motion Concerning Further Communication Regarding Non-Compliance With Rule 68', 2 December 2005; 'Reply to Prosecution Response to the Defence Motion Concerning Further Communication Regarding Non-Compliance With Rule 68', 9 December 2005.

<sup>2167</sup> 'Reply to Prosecution Response to the Defence Motion Concerning Further Communication Regarding Non-Compliance With Rule 68', 9 December 2005.

815. On 13 December 2005, the Trial Chamber found it appropriate to address the recurrent complaints of alleged prosecutorial violations of Rule 68 of the Rules in a consolidated decision.<sup>2168</sup> The Trial Chamber examined the history of Rule 68 violations and its previous findings, and recalled that in the practice of this Tribunal, violations of Rule 68 of the Rules were governed less by a system of sanctions than by the Judges' definitive evaluation of the evidence presented by either of the parties, and the possibility which the opposing party would have to contest it.<sup>2169</sup> The Trial Chamber held that the disclosure practice of the Prosecution had not been satisfactory and that as a result the Accused, albeit not to a significant extent, had suffered prejudice. Thus, the Trial Chamber reserved the right to draw reasonable inferences in favour of the Accused with respect to specific evidence which had been the subject of a Rule 68 violation.<sup>2170</sup>

816. In addition, on numerous occasions, allegations of Rule 68 violations were raised and discussed at Trial. The Trial Chamber addressed these matters as they arose, and repeatedly urged the Prosecution to comply with its disclosure obligation under the Rules.<sup>2171</sup>

817. On 3 March 2006, the Defence filed yet another submission alleging that the Prosecution had violated Rule 68 of the Rules,<sup>2172</sup> which gave rise to further submissions by the Parties.<sup>2173</sup> The Trial Chamber decided on this instance earlier in the Judgement.<sup>2174</sup>

(iii) Judicial Notice

818. At the outset of trial, the Defence requested the Trial Chamber to take judicial notice of adjudicated facts in the *Deronjić* case pursuant to Rule 94 of the Rules.<sup>2175</sup> The Trial Chamber dismissed the motion on the grounds that Miroslav Deronjić had entered a plea of guilty and

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<sup>2168</sup> 'Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules', 13 December 2005. *See also* hearing of 9 December 2005, T. 14772-14773.

<sup>2169</sup> 'Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules', 13 December 2005, para. 32.

<sup>2170</sup> 'Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules', 13 December 2005, paras 27, 34, 36. *See also* hearing of 13 December 2005, T. 14856-14859.

<sup>2171</sup> Hearing of 2 December 2004, T. 2410-2412; 27 January 2005, T. 4265; 6 July 2005, T. 9278-9285; 13 December 2005, T. 14844-14859; 14 December 2005, T. 14946-1949, 14962-14964. On one occasion, the Trial Chamber even considered suspending the proceedings until it was ensured that the Defence was provided with all the documents necessary for the proper defence of the Accused, hearing of 6 July 2005, T. 9283-9300.

<sup>2172</sup> 'Urgent Notification of Grievous Violation of Rule 68', 3 March 2006.

<sup>2173</sup> 'Prosecution Response to the Defence's Urgent Notification of Grievous Violation of Rule 68', 21 March 2006; 'Defence Reply to Prosecution Response to the Defence's Urgent Notification of Grievous Violation of Rule 68', 22 March 2006.

<sup>2174</sup> *See* II.C.1, "Non-Disclosure of Documents Relating to Nurif Rizvanović".

<sup>2175</sup> 'Defence Motion for the Trial Chamber to Take Judicial Notice of Adjudicated Facts in the *Deronjić* case', 18 October 2004.

therefore, the facts of this case had not been truly adjudicated and thus remain the subject of reasonable dispute.<sup>2176</sup>

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<sup>2176</sup> ‘Decision on Defence Motion for the Trial Chamber to Take Judicial Notice of Adjudicated Facts in the *Deronjić* case’, 1 November 2004.

(iv) Objections to the Admission of Documentary Evidence

819. The Defence objected to the admission of documentary evidence tendered by the Prosecution on numerous occasions and for various reasons. In particular, challenges were made to authenticity. These objections have been dealt with elsewhere in this Judgement.<sup>2177</sup>

(v) Protective Measures and Matters not Subject to Disclosure

820. The Trial Chamber granted protective measures to one Prosecution witnesses and three Defence witnesses, pursuant to Rule 75 of the Rules.<sup>2178</sup> Furthermore, five Prosecution witnesses and one Defence witness were granted protective measures in court after the Parties submitted oral motions upon commencement of their testimony.<sup>2179</sup>

821. The provision on matters not subject to disclosure set out in Rule 70 of the Rules was applied on two occasions.<sup>2180</sup>

3. Rule 98bis Decision

822. The Trial Chamber in the present case was the first to apply the new oral procedure set out in the amended Rule 98bis of the Rules.<sup>2181</sup> Oral submissions by the Defence and the Prosecution were heard on 2 and 3 June 2005 respectively. On 8 June 2005, the Trial Chamber rendered an oral

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<sup>2177</sup> See II.B.2., “Defence Objections to the Admission of Documents Tendered by the Prosecution”.

<sup>2178</sup> ‘Confidential Decision on Prosecution’s Motions for Protective Measures for Witnesses’, 8 October 2004; ‘Confidential Decision on Prosecution’s Motion for Protective Measures for Witnesses’, 22 October 2004; ‘Confidential Decision on Defence Motion for Protective Measures for Witnesses’, 13 July 2005; ‘Confidential Decision on Defence Motion for Protective Measures for D005 and for Closed Session Testimony of D001’, 23 August 2005; ‘Confidential Decision on Second Defence Motion for Protective Measures for Witness D002’, 19 September 2005; ‘Decision on Urgent Defence Request for Certification of the Trial Chamber’s Confidential Decision on Second Defence Motion for Protective Measures for Witness D002’, 28 September 2005. As to protective measures that were granted at the pre-trial stage, see ‘Decision on Confidential Prosecution Motion for Protective Measures and Non-Disclosure’, 28 July 2003.

<sup>2179</sup> Hearing of 14 October 2004, T. 706-707 (closed session); 28 October 2004, T. 1375-1376 (private session); 1 December 2004, T. 2282; 7 March 2005, T. 5522-5523 (private session); 26 April 2005, T. 7683-7684 (private session); 3 October 2005, T. 11746-11747 (private session).

<sup>2180</sup> ‘Confidential Order Applying Rule 70 to the Testimony of a Defence Witness’, 29 September 2005; ‘Confidential Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government’, 20 January 2006.

<sup>2181</sup> Rule 98bis of the Rules was amended on 8 December 2004. Prior to 8 December 2004, Rule 98bis provided that “(A) a[n] accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor’s case and, in any event, prior to the presentation of evidence by the Defence pursuant to Rule 85 (A) (ii).

(B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges”.

Rule 98bis was amended on 8 December 2004 to read that “[a]t the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction”.

judgement.<sup>2182</sup> The Trial Chamber found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the crime of plunder of public or private property, and thus acquitted the Accused of Count 4 and 6.<sup>2183</sup> The Trial Chamber also found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the murder of Bogdan @ivanović, the cruel treatment of Miloje Obradović and the wanton destruction of cities, towns or villages, not justified by military necessity, with respect to the hamlets of Božići and Radijevići.<sup>2184</sup>

#### 4. Site Visit

823. Between 20 and 24 June 2005, the Trial Chamber conducted an on-site visit to the Srebrenica area, according to a protocol agreed between the Parties and accepted by the Trial Chamber. The Trial Chamber was accompanied by a guide chosen by the Parties, two members of the Trial Chamber's legal support section, as well as by the senior trial attorney for the Prosecution, Mr. Jan Wubben, and co-counsel for the Defence, Mr. John Jones.

824. The Trial Chamber visited locations in the municipalities of Srebrenica and Bratunac. In Kravica, the Trial Chamber observed specific locations such as the warehouse, the elementary school, the medical dispensary and the settlements of Ježestica and Šiljkovići. In Bratunac, the Trial Chamber stopped at the Vuk Karadžić school and visited the health centre. In the surrounding area, the Trial Chamber saw the Sase monastery, the Sase mine, Bjelovac, Ložnicka Rijeka and Sikirići. The Trial Chamber also passed through the areas of Glogova and Magašići, Nova Kasaba, Konjević Polje and Grabovička Rijeka. In Fakovići, the Trial Chamber stopped at the school and the post office. In the surrounding areas, the Trial Chamber visited @anjevo, Abdulići, Radijevići, Divovići, Skelani, Jezero, Vitez, Osmaće and Poznanovići. In Srebrenica, the Trial Chamber visited the municipal building and the building behind it, the pre-war TO headquarters building, the SUP building, the PTT building (and the communication room within) and saw the hospital. The Trial Chamber also drove through Bajramovići and visited Potočari.

825. During a helicopter flight over the area, the following locations were observed: Opravdići, Šiljkovići, Kravica, Božići, Glogova, Magašići, Brajevina, Ratkovići, Dučići, Srebrenica and Bajramovići.

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<sup>2182</sup> Rule 98*bis* Decision, 8 June 2005, T. 8981-9037.

<sup>2183</sup> Rule 98*bis* Decision, 8 June 2005, T. 9028-9032.

<sup>2184</sup> Rule 98*bis* Decision, 8 June 2005, T. 9032-9033.



## 5. Sentencing Procedure

826. Sentencing matters were dealt by the Prosecution in its Final Brief in which it submitted that the Accused should be sentenced to 18 years imprisonment.<sup>2185</sup> The Defence addressed the matter of sentencing in the Response to the Prosecution's Final Brief and in their Closing Arguments. The Defence submitted that the Accused should be acquitted on all counts and that any sentence would be inappropriate.<sup>2186</sup>

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<sup>2185</sup> Prosecution Final Brief, para. 1013.

<sup>2186</sup> Defence Response to Prosecution Final Brief, para. 154; Defence Closing Argument, T. 16602.

**ANNEX C – MAP OF THE PODRINJE AREA (EXHIBIT C1)**

**ANNEX D – AERIAL PHOTO OF SREBRENICA (EXHIBIT P418)**

**ANNEX E – SKETCH OF THE SREBRENICA POLICE STATION  
(EXHIBIT P467)**

**ANNEX F – SKETCH OF THE ‘BUILDING’ (EXHIBIT P474)**