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APPEALS CHAMBER
CHAMBRE D'APPEL
The Hague, 29 July 2004
CT/P.I.S./ 875-e

APPEALS CHAMBER JUDGEMENT IN THE CASE *THE PROSECUTOR v. TIHOMIR BLAŠKIĆ*

- **TIHOMIR BLAŠKIĆ SENTENCED TO NINE YEARS' IMPRISONMENT**

Please find below the summary of the Judgement delivered by the Appeals Chamber, composed of Judges Pocar (Presiding), Schomburg, Mumba, Güney and Weinberg de Roca, as read out by the Presiding Judge.

Summary of Judgement

The Appeals Chamber is here today to deliver its judgement on appeal in the case of the Prosecutor against Tihomir Blaškić. The trial in this case commenced on 24 June 1997, and Trial Chamber I of this Tribunal delivered its Judgement on 3 March 2000. The Appellant Tihomir Blaškić appealed on 17 March 2000.

This case relates to crimes that were perpetrated during the conflict between the Croatian Defense Council and the Bosnian Muslim Army in the Lašva Valley region of Central Bosnia from May 1992 until January 1994. The Appellant, Tihomir Blaškić, was the Commander of the HVO Armed Forces in Central Bosnia at the time the crimes at issue were committed.

The Trial Chamber convicted the Appellant on the basis of nineteen counts set forth in the Second Amended Indictment, for crimes that occurred in the Vitez, Busovača, and Kiseljak municipalities. These counts encompassed violations of Articles 2, 3, and 5 of the Statute of the International Tribunal. The Appellant was convicted on the basis of Article 7(1) of the Statute for ordering the crimes. The Trial Chamber also stated in the disposition of the judgement that "in any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished." Therefore, the Trial Chamber also convicted the Appellant under Article 7(3) of the Statute. The Trial Chamber imposed a single sentence of 45 years' imprisonment.

Following the practice of the Tribunal, I will not read out the text of the Appeal Judgement except for the disposition. Before doing that, I will first summarise the issues on appeal and the reasoning and findings of the Appeals Chamber so that you, Tihomir Blaškić, together with the public, will know the reasons for the Appeals Chamber's decision. I emphasise, however, that this is only a summary, and that it does not in any way form part of the Judgement of the Appeals Chamber. The only authoritative account of the findings of the Appeals Chamber is in the written Judgement which will be available today at the end of these proceedings.

Because of the complexity of this Appeal, the summary of the Judgement which I will now read is longer than our customary practice.

The Additional Evidence Issue

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This appeal has been characterized by the filing of an enormous amount of additional evidence. This was due *inter alia* to the lack of co-operation on the part of the Republic of Croatia at that time, and to the delay in the opening of the Republic of Croatia's archives, which only occurred following the death of former president Franjo Tuđjman on 10 December 1999, thus preventing the parties to this case from availing themselves of these materials at the trial. During the appeal proceedings, the Appellant filed four motions pursuant to Rule 115 of the Rules of the International Tribunal. In these motions, he sought to admit over 8,000 pages of material as additional evidence. The first of these additional evidence motions was filed on 19 January 2001, and the last, on 12 May 2003.

Following the filing of the fourth and final Rule 115 motion by the Appellant, and rebuttal material by the Prosecution in relation to this motion, the Appeals Chamber rendered its decisions on additional evidence on 31 October 2003. It found that in the circumstances of this case, a re-trial was not warranted. It decided to admit a total of 108 items, and as a consequence, several witnesses were heard in the evidentiary portion of the hearing on appeal, which took place from 8-11 December 2003, which was followed by final arguments on 16-17 December 2003.

The Appeals Chamber has duly considered the evidence before it, including evidence on the trial record, additional evidence submitted by the Appellant, and rebuttal material presented by the Prosecution.

Grounds of Appeal

The Appellant Blaškić has brought several grounds of appeal in this case. In relation to the applicable law, he alleges errors of law concerning Articles 2, 5, and 7 of the Statute. He also alleges a denial of due process of law, by virtue of the Second Amended Indictment and Rule 68 violations. In relation to the factual findings of the Trial Chamber, he alleges errors concerning his responsibility for crimes committed in Ahmići, parts of the Vitez Municipality other than Ahmići, the Busovača Municipality, and the Kiseljak Municipality. He also alleges factual errors concerning his responsibility for detention-related crimes. The Appellant also appeals against his sentence.

Standard of Review

The Appeals Chamber may consider appeals on grounds of an error of law invalidating the decision of a Trial Chamber, or an error of fact occasioning a miscarriage of justice. In this case, the Appeals Chamber has had cause to consider the standard of review on appeal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal.

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

As to errors of fact, the standard applied by the Appeals Chamber has been that of reasonableness, namely, whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached. The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber's finding was reasonable, it will not lightly disturb findings of fact by a Trial Chamber.

The Appeals Chamber concurs with the *Kupreškić* Appeal Judgement's finding that:

> …where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was "wholly erroneous", it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.

The Appeals Chamber considers that there are no reasons to depart from the standard set out above, in relation to grounds of appeal alleging pure errors of fact and when no additional evidence has been admitted on appeal. That standard shall be applied where appropriate in the present Judgement.

When factual errors are alleged on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules provides that the Appeals Chamber shall pronounce judgement "on the basis of the record on appeal together with such additional evidence as has been presented to it."

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

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

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

However, if in a given case, the outcome were that a reasonable trier of fact could reach a conclusion of guilt beyond reasonable doubt, the Appeals Chamber considers that, when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal. The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt.

In sum, when the Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and additional evidence has been admitted on appeal, there are two steps involved:

(i) The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.

(ii) If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence assessed together with the additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt.

This standard of review supplements the standard of review employed by the Appeals Chamber in the *Kupreškić* case.

I will now set out in some detail the Appeals Chamber's findings in respect of each ground of appeal.

1. Alleged errors of law concerning Article 7 of the Statute

a) Article 7(1)

The Appellant challenges the standards set forth in the Trial Judgement concerning the forms of criminal participation in Article 7(1) of the Statute.

The Appellant was not convicted for planning or instigating crimes. The issue before the Appeals Chamber is whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute.

In the present case, the Trial Chamber in paragraph 474 of the Trial Judgement articulated the following standard and I quote:

> Any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) Ś*le dol éventuel* in the original French textĆ so as to incur responsibility for having ordered, planned or incited the commitment of the crimes.

Although the Trial Chamber indicated that this standard in paragraph 474 had already been explained earlier in the Trial Judgement, an examination of previous paragraphs pertaining to the legal elements of Article 7 demonstrates that the Trial Chamber did not actually do so. Other paragraphs in the Trial Judgement articulated the standard set out in paragraph 474 using different expressions.

Having examined the approaches of national systems as well as the International Tribunal precedents, the Appeals Chamber considers that the Trial Chamber's articulations of the *mens rea* for ordering under Article 7(1) of the Statute are incorrect. 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. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur.

The Appeals Chamber finds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.

The Appellant also challenges the Trial Chamber's findings in relation to the *actus reus* and *mens rea* requirements for aiding and abetting. In this case, the Trial Chamber correctly followed the standard set out in the *Furundžija* Trial Judgement in respect of the *actus reus* of aiding and abetting.

In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct. As stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation. In this respect, the Trial Chamber erred.

The Appeals Chamber therefore finds that the Trial Chamber was correct in part and erred in part in setting out the legal requirements of aiding and abetting. However, the Trial Chamber did not hold the Appellant responsible for aiding and abetting the crimes at issue. In addition, the Appeals Chamber considers that this form of participation was insufficiently litigated on appeal, and not fairly encompassed by the Second Amended Indictment and the Appeals Chamber declines to consider this form of participation any further.

b) Article 7(3)

The Appellant submits that the Trial Chamber erred in its interpretation of the knowledge requirement under Article 7(3). In respect of this requirement for commanders, the Trial Chamber "holds…that their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose."

The Appeals Chamber considers that the *Čelebići* Appeal Judgement has settled this issue, and that a superior will be criminally responsible under the principle of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. However, neglect of a duty to acquire such knowledge is not a separate offence under Article 7(3). A superior will not therefore be liable for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and is corrected accordingly.

The Appellant was charged in the Indictment under both Article 7(1) and Article 7(3) of the Statute. From the conclusions drawn by the Trial Chamber in relation to certain events and in view of the Disposition, it is clear that the Trial Chamber considered the merits of the case in terms of both Article 7(1) and Article 7(3) in relation to those events.

But the Appeals Chamber has to express concern at the Disposition of the Trial Judgement wherein the Trial Chamber, having found the Appellant guilty for *ordering* persecutions and for *having committed* other offences on the basis of the same factual findings, further finds that in any event, as a commander, he failed to take the necessary and reasonable measures which would have prevented these crimes or led to the perpetrators thereof to being punished. This statement, which refers to Article 7(3) responsibility, reveals a case of concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute, in contradiction with the correct view expressed in paragraph 337 of the Trial Judgement which reads:

> It would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, as submitted by the Prosecution, the failure to punish past crimes , which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes.

The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. It is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute in relation to a particular count. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber 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.

The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard. Furthermore, where the Trial Chamber did not make any factual findings on the basis of Article 7(3) of the Statute, the Appeals Chamber has not considered this mode of responsibility, notwithstanding the sweeping statement concerning Article 7(3) responsibility contained in the Disposition of the Trial Judgement.

2. Alleged errors of law concerning Article 5 of the Statute

The Appellant submits that the Trial Chamber erred in several significant respects in construing and applying the legal requirements of Article 5, crimes against humanity. This ground of appeal has several elements.

As to the requirement of a widespread or systematic attack, the Appeals Chamber has considered the Trial Chamber's articulation of this element of crimes against humanity and concludes that the Trial Chamber was correct in its analysis of this element.

As to the requirement that the attack be directed against a civilian population, the relevant requirement was set out in the *Kunarac* Appeal Judgement: both the status of the victim as a civilian, and the scale on which the attack is committed or the level of organization involved, characterize a crime against humanity.

In determining the scope of the term "civilian population," the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic. The Trial Chamber was correct in this regard. However, the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 when it stated that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian. The victim's specific situation at the time the crimes are committed may not determine his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

The Appeals Chamber further considers that, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of

soldiers, as well as whether they are on leave, must be examined, and that the Trial Chamber erred when it stated that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population

As to the requirement that the acts of the accused and the attack itself must have been committed in pursuance to a pre-existing criminal policy or plan, the Appeals Chamber reiterates what was stated in *Kunarac*, that a plan or policy is not a legal element of a crime against humanity, though it may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic. The Trial Judgement was not clear on this point of law.

As to the requirement that the accused has knowledge that his acts formed part of the broader criminal attack, the Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offense(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack. As set out in the Appeals Judgement, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity.

As to the a*ctus reus* element of Persecutions as a Crime against Humanity

The Appeals Chamber considers that persecutions as a crime against humanity has already been defined in the case-law of the International Tribunal. The Trial Judgement, however, set forth a definition of persecutions that characterizes the *actus reus* as encompassing infringements upon fundamental human rights. This analysis constituted a failure to assess whether the underlying acts amount to persecutions as a crime against humanity in international customary law. The Trial Chamber erred in this regard.

As set out in the Appeals Judgement, the Appeals Chamber considered each of the types of conduct considered by the Trial Chamber. They were: Killing (or Murder) and Causing Serious Injury; Destruction and Plunder of Property; Deportation, Forcible Transfer, and Forcible Displacement; Inhumane Treatment of Civilians; and Attacks on Cities, Towns, and Villages.

In conclusion, the Appeals Chamber considers that it is evident from the Trial Chamber's analysis of the applicable law on persecutions that it did not consider the requirement that acts of persecutions must be of an equal gravity or severity as the other acts enumerated under Article 5 of the Statute. The Appeals Chamber notes that it is not enough that the underlying acts be perpetrated with a discriminatory intent, and the Trial Chamber erred in this regard.

As to the *mens rea* element of Persecutions as a Crime against Humanity

The Appeals Chamber stresses that there is no requirement in law that the actor possess a "persecutory intent" over and above a discriminatory intent for persecution. The Appeals Chamber also emphasises that the *mens rea* of the perpetrator carrying out acts of persecutions requires evidence of a specific intent to discriminate on political, racial, or religious grounds. The Trial Chamber was correct when it held that the *mens rea* for persecutions "is the specific intent to cause injury to a human being because he belongs to a particular community or group."

Second, the Appeals Chamber is aware that in making its factual findings relating to the ordering of crimes under Article 7(1) of the Statute, the Trial Chamber frequently employed language such as "took the risk" or "deliberately ran the risk." The Appeals Chamber has articulated above, the *mens rea* applicable to ordering a crime in the absence of direct intent. Thus, an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the execution of the order, may be liable under Article 7(1) for the crime of persecutions. Ordering with such awareness has to be regarded as accepting that crime.

3. Alleged errors of law in application of Article 2 of the Statute

The offences covered by Article 2 of the Statute must be committed against persons or property protected under the provisions of the Geneva Conventions. Article 4(1) of Geneva Convention IV defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals." The *Tadić* Appeals Chamber concluded that this provision is directed to the protection of civilians to the maximum extent possible, and that even if in

the circumstances of that case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.

Applying the same principles in the context of the conflict between the Bosnian Croats and the Bosnian Muslims, the Appeals Chamber in *Aleksovski* reasoned that since the conflict was international by reason of Croatia's participation, it would follow that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV was applicable. The Appeals Chamber in *Čelebići* reaffirmed and elaborated upon these principles when considering their implications for Bosnian Serbs held by Bosnian Muslims.

The Appeals Chamber finds that there is no merit in the Appellant's assertion that, under the "allegiance test," Bosnian Croats would not qualify as "protected" *vis-à-vis* Bosnian Muslim captors. The Appeals Chamber finds that there is no merit in the Appellant's assertion that the present case can be distinguished from the *Tadić* and *Čelebići* cases on the basis that the Bosnian Serbs, unlike the Bosnian Croats, were attempting to secede from Bosnia-Herzegovina.

Arguments that the victims should be excluded from the status of "protected persons" according to a strict construction of the language of Article 4 of Geneva Convention IV, have already been rejected by the Appeals Chamber. The Appeals Chamber is satisfied, therefore, that the principle of legality has not been violated in this case. The Appeals Chamber sees no error in the Trial Chamber's determination in this respect.

The Appellant further submits that the "protected persons" requirement is based upon Article 4(2) of Geneva Convention IV, which provides that "nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

The Appeals Chamber considers that it is evident, both from the text of Article 4(2) of Geneva Convention IV and the accompanying Commentary, that for Article 4(2) to be relevant, it must be demonstrated, first, that the States were allies and second, that they enjoyed *effective* and *satisfactory* diplomatic representation with each other. The States of Croatia and Bosnia-Herzegovina were engaged in a conflict against each other. This, in itself, establishes that they were not co-belligerents within the meaning Article 4(2). This ground of appeal therefore fails.

4. Alleged errors concerning denial of due process of law

The Appellant claims that he was unfairly denied his right to a fair trial under Article 21 of the Statute of the International Tribunal in two principal ways: (i) he was tried and convicted on the basis of a "fatally vague" indictment; and (ii) the Prosecution failed to meet its disclosure obligations with respect to exculpatory evidence under Rule 68 of the Rules. The Appellant contends that this deprived him of the due process of law, and materially prejudiced his ability to prepare and present his defence.

a) Vagueness of the Indictment

On 21 November 1996, the first indictment was amended to charge the Appellant with 19 counts. On 4 April 1997, the Trial Chamber granted the Appellant's motion objecting to the amended indictment, and ordered the Prosecution to further amend the indictment. The Prosecution filed a Second Amended Indictment on 25 April 1997. The Appellant again challenged the Second Amended Indictment, and the Trial Chamber issued a second decision on 10 June 1997 whereby it ruled that the Second Amended indictment was defective; however, it decided to begin the trial without instructing the Prosecution to amend the Second Amended Indictment.

Having raised the issue twice before the Trial Chamber, and having received from the Trial Chamber a specific assurance that the Trial Chamber would *not fail* to draw all the legal consequences at trial of the possible total or partial failure to satisfy the obligations incumbent upon the Prosecution, insofar as that failure *inter alia* might not have permitted the accused to prepare his defence, the Appeals Chamber considers that the Appellant was entitled to assume that the Trial Chamber would adhere to its prior commitment, and concludes that the Appellant has not waived his right to raise the issue of the vagueness of the indictment on appeal.

Having analysed the Second Amended Indictment in accordance with the principles of pleading set out in this Judgement, the Appeals Chamber finds that the Second Amended Indictment failed to plead the material facts with sufficient particularity, and concludes that the Second Amended Indictment does not comply with the principles of pleading set out in the present Judgement.

The Appeals Chamber's review of the trial record however suggests that the Prosecution did clearly present the necessary information to put the Appellant on notice of the nature of its case against him during the trial. The Appeals Chamber concludes that defects in the Second Amended Indictment did not hamper the Appellant's ability to prepare his defence and thus render his trial unfair. As a result, the Appeals Chamber dismisses this aspect of the ground of appeal.

b) Alleged violations of Rule 68 of the Rules

The Appellant alleges that the Prosecution violated Rule 68 of the Rules by failing to disclose Exhibits 2, 16, and 25 to the Second Rule 115 Motion, and Exhibit H1.

The Appeals Chamber concludes as to Exhibit 2, the Prosecution did not violate Rule 68. With respect to Exhibits 16 and 25, the Appeals Chamber concludes that the Appellant has not suffered material prejudice. With respect to Exhibit H1, the Appeals Chamber considers the Prosecution's failure to disclose this exhibit constitutes a breach of its obligations under Rule 68. However, in light of the fact that the Appellant was able to call Witness Watkins to testify during the hearing on appeal, the Appeals Chamber concludes that the prejudice caused to the Appellant has been remedied.

Consequently, even though the Appeals Chamber considers that the Prosecution did violate Rule 68, in light of the absence of material prejudice to the Appellant in this case, dismisses this aspect of the appeal.

5. Alleged errors concerning the Appellant's responsibility for crimes committed in the Ahmići area

Appellant's Responsibility under Article 7(1)

The Trial Chamber convicted the Appellant pursuant to Article 7(1) for crimes that targeted the Muslim civilian population and were perpetrated as a result of his *ordering* the Viteška Brigade, the Nikola Šubić Zrinski Brigade, the 4th Military Police Battalion, the Džokeri (Jokers), the Vitezovi and the Domobrani to offensively attack Ahmići and neighbouring villages. The Appeals Chamber considers that the Appellant's conviction under Article 7(1) is based upon the following findings reached by the Trial Chamber: (i) that the attack was organised, planned at the highest level of the military hierarchy and targeted the Muslim civilian population in Ahmići; (ii) that the Military Police, the Jokers, the Domobrani, and regular HVO (including the Viteška Brigade) took part in the fighting, and no military objective justified the attacks; and (iii) that the Appellant had "command authority" over the Viteška Brigade, the Domobrani, the 4th MP Battalion, and the Jokers during the period in question.

In support of the Appellant's conviction pursuant to Article 7(1) of the Statute, the Trial Chamber found that exhibit D269 was "very clearly" an order to attack, addressed to the Viteška Brigade, the 4th MP Battalion, the forces of the Nikola Šubić Zrinski Brigade and the forces of the civilian police which the Trial Chamber stated were recognised on the ground as being those which had carried out the attack.

The Appeals Chamber considers that the Trial Chamber's assessment of Exhibit D269 as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review. The Appeals Chamber considers that the Trial Chamber's assessment was wholly erroneous.

The Appeals Chamber considers that the trial evidence does not support the Trial Chamber's conclusion that the ABiH forces were not preparing for combat in the Ahmići area. In addition, the Appeals Chamber notes that additional evidence admitted on appeal, shows that there was a Muslim military presence in Ahmići, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmići -Santići -Dubravica axis. Consequently, the Appeals Chamber considers that there was a military justification for the Appellant to issue D269.

In light of the analysis of the Trial Chamber's interpretation of D269 and on the basis of the relevant evidence before the Trial Chamber, the Appeals Chamber concludes that no reasonable trier of fact could have reached the conclusion that D269 was issued "with the clear intention that the massacre would be committed," or that it gave rise to the crimes committed in Ahmići on 16 April 1993.

The Trial Chamber found that in addition to the Military Police, and the Jokers, regular HVO units, in particular the Viteška Brigade, took part in the fighting in the Ahmići area on 16 April 1993, and concluded that the crimes committed were not the work of the Military Police alone but were also ascribable to the regular HVO units, in particular, the Viteška Brigade and the Domobrani.

The Appeals Chamber considers that the finding that the Viteška Brigade and the Domobrani took part in the commission of crimes during the attack on Ahmići and neighbouring villages, on the basis of the trial record, was a tenuous finding. The Appeals Chamber stresses that the additional evidence admitted on appeal fatally undermines the said finding and suggests that the crimes committed in the Ahmići area on 16 April 1993 were perpetrated by the Jokers and the 4th MP Battalion. For the foregoing reasons, the Appeals Chamber considers that the Trial Chamber's finding that the crimes committed in Ahmići "were also ascribable to the regular HVO units, in particular, the *Viteška* Brigade and the Domobrani," cannot be sustained on appeal.

The Appeals Chamber considers that some documents admitted as additional evidence on appeal, support the assertion that the 4th MP Battalion and the Jokers committed the crimes in the Ahmići area on 16 April 1993, and identify others as those responsible for planning and ordering the massacre.

The Trial Chamber concluded that since the Appellant knew that some of the troops engaged in the attack on Ahmići had previously participated in criminal acts against the Muslim population of Bosnia or had criminals within their ranks, when ordering those troops to launch an attack on the village of Ahmići pursuant to D269, the Appellant deliberately took the risk that crimes would be committed against the Muslim civilian population in Ahmići and their property.

The Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. The Trial Chamber did not apply this standard in relation to the Appellant's conviction under Article 7(1).

The analysis of the evidence relied upon by the Trial Chamber supports the conclusion that concrete measures had been taken to deter the occurrence of criminal activities, and for the removal of criminal elements once they had been identified. The Appeals Chamber considers that the orders and reports relied upon by the Trial Chamber do not constitute sufficient evidence to meet the legal standard articulated by the Appeals Chamber.

Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence, assessed together with the additional evidence admitted on appeal prove beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in Ahmići and neighbouring villages on 16 April 1993.

Appellant's Responsibility under Article 7(3)

The Appeals Chamber considers that besides finding the Appellant guilty under Article 7(1), the Trial Chamber also entered a conviction against the Appellant for his superior criminal responsibility under Article 7(3) of the Statute.

The Appeals Chamber concludes that on the basis of the relevant evidence before the Trial Chamber, and in particular the Appellant's admission that troops from the Military Police could be attached to him for *ad hoc* missions pursuant to specific requests, a reasonable trier of fact could have concluded, as the Trial Chamber did, that the Appellant had "command authority" over the Military Police.

The Appeals Chamber determined whether in light of the trial evidence assessed together with the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to whether the Appellant had effective control over the Military Police.

The Appeals Chamber considers that evidence admitted on appeal shows that: (a) members of the Military Police were involved in criminal activities; (b) suggests that the Military Police enjoyed the protection of, and often acted on orders of others; and (c) bolsters the conclusion that the Appellant's authority was not recognized by the members of the Military Police, and that his orders were not carried out. The Appeals Chamber also heard evidence on appeal which reveals that the Military Police units, including the Jokers, were not *de facto* commanded by the Appellant.

The Appeals Chamber finds that the Trial Chamber erred in its interpretation of the mental element "had reason to know." Its analysis of the evidence underlying the Trial Chamber's finding that the Appellant knew that crimes had been or were about to be committed, reveals no evidence that the Appellant *had information* which put him on notice that crimes had been committed by his subordinates in the Ahmići area on 16 April 1993. Further, the additional evidence admitted on appeal lends support to the Appellant's argument that he had no reason to believe that crimes had been committed in light of the military conflict taking place at that time between the HVO and the ABiH.

The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmići be carried out, that the investigation was taken over by SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.

For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmići area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied. The Appeals Chamber is therefore not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal, proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in the Ahmići area on 16 April 1993 or to punish the perpetrators.

6. Alleged errors concerning the Appellant's responsibility for crimes committed in other parts of the Vitez Municipality

The main argument of the Appellant is that the Trial Chamber erred by attributing crimes associated with military action in the Vitez Municipality to the Appellant as a superior officer of the HVO in the area. On the other hand, the Appellant never disputes that he had *de jure* authority to command regular HVO troops in Central Bosnia, generally, or that he ordered certain military actions in the Vitez Municipality in 1993.

A finding that the Appellant is guilty for ordering certain crimes, for failing to prevent the crimes or to punish the perpetrators after the commission of the crimes , cannot stand on the sole ground that he was the *de jure* commander of the perpetrators, as the Trial Chamber found. Second, the Appeals Chamber considers that in the context of this armed conflict which had been in the making for some time, involving both sides, the issue as to which side *initiated* the conflict is irrelevant for the purposes of determining the nature of its actions during the conflict. What concerns the International Tribunal is whether crimes were committed during the conflict and by whom.

a) The Appellant's responsibility under Article 7(1) of the Statute

In respect of the attacks on the town of Vitez on 16 April 1993, the Appeals Chamber accepts that a reasonable trier of fact could have reached the finding of the Trial Chamber that the attack against units of the ABiH army who were present in the town of Vitez was unlawful.

However, in the light of additional evidence, the Appeals Chamber does not consider it to be proved beyond reasonable doubt that the attack was directed at a civilian target, or that the attack targeted the civilian population of the town of Vitez, and it considers that the Trial Chamber's finding regarding civilian casualty figures in connection with the 16 April 1993 attack cannot be relied on in determining the nature of that attack.

Furthermore, no reasonable trier of fact could have found, on the basis of the trial evidence, that the Appellant knew of the risk that crimes might be committed during that attack. *A fortiori*, the trial evidence cannot satisfy beyond reasonable doubt the correct standard pronounced by the Appeals Chamber in this Judgement.

As to the lorry bombing of 18 April 1993, the Appeals Chamber accepts the finding of the Trial Chamber that the bombing of the lorry was a terrorist operation and a crime against humanity. However, no evidence was cited by the Trial Chamber that the Appellant ordered the bombing.

The Appeals Chamber has carefully considered trial and additional evidence and rebuttal material relevant to this argument, and is satisfied beyond reasonable doubt that the explosion was caused by explosives. This part of the finding of the Trial Chamber stands. However, the Appeals Chamber considers that the trial and additional evidence does not satisfy it beyond reasonable doubt that the explosives used could not be secured without the authorization of the Appellant.

As to the 18 July 1993 attack on Stari Vitez, the Appeals Chamber considers that the Appellant has not shown that no reasonable trier of fact could have reached the conclusion of the Trial Chamber that the Appellant ordered the attack on Stari Vitez on 18 July 1993. However, the nature of the attack of 18 July 1993 cannot be categorically defined as that of a criminal act, in that there was still the presence of a considerable number of ABiH soldiers in Stari Vitez at that time.

On the basis of the trial and additional evidence, the Appeals Chamber is not satisfied beyond reasonable doubt either that the attack of 18 July 1993 resulted in heavy casualties among Muslim civilians as a result of the "baby bombs", or that the attack was directed at the Muslim civilian population or civilian property in Stari Vitez.

The Appeals Chamber concludes that the trial and additional evidence does not prove beyond reasonable doubt that the Appellant ordered the attack with the awareness of a substantial likelihood that "baby bombs" would be used against the Muslim civilian population or their property during the attack. The finding that the Appellant ordered the attack as a crime against humanity is therefore reversed.

As to the crimes committed in April and September 1993 in the villages of Donja Večeriska, Gačice, and Grbavica, the Trial Chamber found that the villages attacked could have represented a military interest such as to justify their being the target of an attack, and that the Trial Chamber also found the Appellant guilty of crimes, including destruction, pillage, and forcible transfer of civilians, because he ordered the attacks which "he could only reasonably have anticipated would lead to crimes". The Appeals Chamber has now applied the correct standard in this regard , and considers that trial evidence does not prove beyond reasonable doubt that the Appellant ordered the attacks on the villages with the awareness of a substantial likelihood that crimes would be committed during the attack.

The Appellant's convictions under Article 7(1) of the Statute for the crimes committed in the three villages are all reversed.

b) The Appellant's Responsibility under Article 7(3) of the Statute

The remaining question is whether the Appellant should bear any responsibility under Article 7(3) of the Statute in relation to these attacks.

In relation to the attack of 16 April 1993, and to the lorry bombing of 18 April 1993 the Appeal Chamber considers that there was no finding in the Trial Judgement, and there is no evidence to show, that the Appellant knew or had reason to know before the attack that crimes were about to be committed by the units under his command. The issue of prevention of crimes does not, therefore, arise from these two events.

In respect of the attack on Stari Vitez of 18 July 1993, there was no finding and there is no evidence to show that he knew or had reason to know beforehand that the "baby bombs" would be used in that attack, so the question of preventing the using of those bombs on civilian targets does not arise.

The Appeals Chamber therefore concludes that on the basis of the trial findings and evidence admitted on appeal, the issue of failure to prevent in terms of Article 7(3) of the Statute does not arise in relation to this part of the case.

The Appellant then submits that additional evidence shows that the Vitezovi unit was outside his command and often acted under the direct orders of Kordić and the Ministry of Defence in Mostar.

As to whether the Appellant exercised effective control over the Vitezovi, on the basis of the trial and additional evidence before it, the Appeals Chamber is satisfied beyond reasonable doubt that the Appellant had *de jure* command over that unit. If reporting criminal acts of subordinates to appropriate authorities is evident of the material ability to punish them in the circumstances of a certain case, albeit only to a very limited degree, the Appellant had that limited ability in this case. His command responsibility is, consequently, an issue in this case.

The Trial Chamber did not set out the necessary factual basis for its finding that the Appellant failed to punish, among others, the Vitezovi for their crimes committed in the town of. This lack of analysis of relevant evidence on a critical element of the criminal responsibility of the Appellant alone justifies overturning the relevant convictions of the Appellant under Article 7(3).

However, the Trial Chamber made no assessment of the evidence submitted at trial by the Appellant that he initiated an investigation into the lorry bombing of 18 April 1993 and reported the result of the investigation to his superiors, and that he reported to his superiors the attack of 18 July 1993 by the Vitezovi on Stari Vitez. In relation to the first of these two incidents, no reasonable trier of fact could have reached the conclusion of the Trial Chamber that the Appellant failed to punish in relation to that offence.

As to the report of the attack of 18 July 1993, on the basis of trial and additional evidence, the Appeals Chamber is not satisfied beyond reasonable doubt that the Vitezovi committed an offence by using the "baby bombs". Without the Appellent knowing that his subordinates used "baby bombs" in that attack, the question of his superior responsibility does not arise.

In respect of the attack of 16 April 1993, no reasonable trier of fact could have, in the absence of a proper factual basis, reached the conclusion of the Trial Chamber that the Appellant should be held responsible under Article 7(3) of the Statute for the failure to punish in relation to the crimes that occurred during the attack.

7. Alleged errors concerning the Appellant's responsibility for crimes committed in the Busovača Municipality

The Trial Chamber found the Appellant responsible for the attacks on the villages of Lončari and Oćehnići in April 1993. The Trial Chamber also found that by giving orders to the Military Police in April 1993, the Appellant intentionally took the risk that very violent crimes would result.

The Appellant submitted that he did not issue any orders for an attack on Loncari or Ocehnici, and that the Trial Chamber erred in attributing crimes committed by the Military Police, including the Jokers, to him.

Having examined the findings of the Trial Chamber outlined above, the Appeals Chamber considers that the Trial Chamber made a finding pursuant to Article 7(1) of the Statute. The Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for the crimes in Lončari and Oćehnići.

Given the absence of direct evidence that the Appellant ordered the attacks in Lončari and Oćehnići in April 1993, the Appeals Chamber finds that no reasonable trier of fact could conclude beyond reasonable doubt that the Appellant ordered these attacks. The Appeals Chamber notes that the additional evidence admitted on appeal only bolsters this conclusion. As a result, it is not necessary to examine whether the Appellant was aware of a substantial likelihood that crimes would be committed.

In light of the parties' submissions on the issue, and in order to clarify the point, the Appeals Chamber also deems it necessary to discuss the apparent finding of the Trial Chamber that the Appellant was responsible for implementing — not ordering — attacks in January 1993 in Busovača.

The Appeals Chamber considers that the Trial Chamber did not discuss evidence in relation to or assess the Appellant's responsibility for crimes committed in Busovača in January 1993. As a result, the Appeals Chamber considers that no finding was made pursuant to Article 7(1) of the Statute in relation to the January 1993 attacks in Busovača.

In relation to the Appellant's command responsibility for the crimes committed in Busovača, the Appeals Chamber considers that the Trial Chamber failed to examine and to discuss in an adequate manner the evidence before it, in relation to the legal requirements of Article 7(3) of the Statute. As a result, the Appeals Chamber concludes that no finding was made pursuant to Article 7(3) of the Statute concerning the crimes committed in Lončari and Oćehnići in April 1993, and it declines to consider the issue any further.

In relation to Count 14 of the Indictment, concerning the destruction of religious or educational property, the Appellant submitted that the Trial Judgement was vague and failed to identify the evidence of such destruction in Busovaca. In the Disposition, the Trial Chamber found the Appellant guilty on the basis of Count 14 pursuant to Article 7(1) and 7(3), but in the section of the Trial Judgement concerning Busovača, there is no discussion or analysis pertaining to the charges contained in Count 14, and no specific finding. In light of the foregoing, the Appeals Chamber considers that the conviction under Count 14 of the Indictment in relation to Busovača must be vacated.

8. Alleged errors concerning the Appellant's responsibility for crimes committed in the Kiseljak Municipality

The Appeals Chamber considers that the Trial Chamber did not find that the Appellant ordered the crimes in Kiseljak in April 1993. Instead, the Trial Chamber found that the Appellant "deliberately ran the risk" of making Muslims and their property the main targets of these offensives, and concluded that he "had to have known" that by ordering such attacks, very violent crimes would result. The Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for the crimes which occurred in April 1993 in Kiseljak.

The Appeals Chamber notes that the Trial Chamber found that through the offensives and the military assets employed, the Appellant intended to make these populations flee. In the view of the Appeals Chamber, the Trial Chamber seemed to find that the Appellant intended to effect forcible transfers of civilians through these offensives.

In support of its assertion that the Appellant deliberately ran the risk of making Muslim civilians and their property the primary targets of the offensives launched on 18 April 1993, the Trial Chamber had found that the combat preparation order (D299) and combat order (D300) were categorical and hate-engendering, that the Appellant employed terms in these orders which were not strictly military and had emotional connotations which were such as to incite hatred and vengeance against the Muslim populations. The Trial Chamber had further considered that the Appellant used radical words connoting eradication, and cited the term "mop up" contained in D300 as an example.

The Appeals Chamber considers that the trial evidence illustrates that there were military motivations underlying the issuance of the Appellant's orders. The Appeals Chamber finds that on the basis of the evidence relied upon by the Trial Chamber, no reasonable trier of fact could have come to the conclusion beyond reasonable doubt that the Appellant intended to effect forcible transfers of civilians. The Appeals Chamber further finds that this evidence does not prove beyond reasonable doubt that the Appellant was aware of a substantial likelihood that crimes would be committed in the execution of his orders. For the foregoing reasons, the Appeals Chamber finds that no reasonable trier of fact could conclude that the Appellant was responsible under Article 7(1) of the Statute for the crimes committed in April 1993 in Kiseljak.

Additional evidence heard on appeal confirms that the language contained in D300 does not necessarily connote eradication or forcible transfer.

As to the June 1993 attacks, in Kiseljak, the Appeals Chamber observes that in concluding that the Appellant ordered the attacks, the Trial Chamber did not refer to any evidence which would show that he did so. Indeed, there is no evidence on the record showing that the Appellant ordered these attacks. The Appeals Chamber finds that no reasonable trier of fact could have come to the conclusion beyond reasonable doubt that the Appellant ordered the June 1993 attacks in Kiseljak. As a result, it is

not necessary to examine whether the Appellant was aware of a substantial likelihood that crimes would be committed. The Appeals Chamber therefore finds that no reasonable trier of fact could conclude that the Appellant was responsible under Article 7(1) of the Statute for the crimes committed in Kiseljak in June 1993.

The Appeals Chamber further observes that in the Trial Judgement, there is no discussion pertaining to Article 7(3) responsibility on the part of the Appellant for crimes committed in April 1993 and June 1993. As a result, the Appeals Chamber concludes that no finding was made pursuant to Article 7(3) in relation to the June 1993 attacks in Kiseljak, and it declines to consider the issue any further.

9. Alleged errors concerning the Appellant's responsibility for detention-related crimes

The Trial Judgement addressed Counts 15 to 20 of the Second Amended Indictment in a section entitled "detention related crimes", as they all entail a deprivation of freedom.

a) Counts 15 and 16: Inhuman and cruel treatment

The Trial Chamber found that the Appellant was guilty pursuant to Article 7(3) of the Statute for the crimes committed in various detention facilities, and pursuant to Article 7(1) of the Statute for crimes associated with trench-digging.

The Appeals Chamber considers that the text of the Trial Judgement is insufficiently clear as to how the Trial Chamber justified its conclusion that the Appellant ordered the detentions, it is a conclusion arrived at by extrapolation. As a result, the Appeals Chamber finds that no reasonable trier of fact could have concluded that the Appellant ordered the detentions, and the finding of the Trial Chamber is overturned.

The Trial Chamber also found the Appellant guilty pursuant to Article 7(1) of the Statute of ordering the detainees to dig trenches, and for the treatment they suffered as a result. The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury and that any order to compel persons taking no active part in the hostilities to dig trenches or to prepare other forms of military installations under such circumstances constitutes cruel treatment.

The Appeals Chamber accordingly finds that a reasonable trier of fact could have come to the conclusion that the Appellant has violated the Laws or Customs of War under Article 3 of the Statute, and is guilty under Count 16 for ordering the use of detainees to dig trenches.

The Trial Chamber further found that the Appellant, by ordering the forced labour, knowingly took the risk that his soldiers might commit violent acts against vulnerable detainees. The Appeals Chamber finds that there is insufficient evidence from which to draw the conclusion beyond reasonable doubt that the Appellant ordered that detainees be used to dig trenches with the awareness of the substantial likelihood that crimes would be committed in the execution of those orders. On the contrary, while there is evidence that the Appellant did order trenches to be dug by detainees in specific instances, the evidence does not prove beyond reasonable doubt that the Appellant ordered that trenches be dug with the awareness of the substantial likelihood that crimes would be committed. The Appellant is therefore not guilty of Counts 15 and 16 under Article 7(1) of the Statute for the crimes associated with trench-digging.

The Appeals Chamber considers that the Trial Chamber found that the Appellant knew of the circumstances and conditions under which the Muslims were detained in the facilities and in any case did not perform his duties with the necessary reasonable diligence.

The trial evidence considered demonstrates that the Appellant on occasion knew of the mistreatment of non-combatant Bosnian Muslims in detention facilities. Furthermore, the Appeals Chamber has considered evidence from the trial record illustrating that detainees were held in locations in close proximity to the Appellant's headquarters in Vitez, namely: the Vitez Cultural Centre (containing the Cinema Hall) and the Vitez veterinary hospital.

The Appeals Chamber concludes that it was open to a reasonable trier of fact to conclude beyond reasonable doubt that the Appellant knew that detainees had been unlawfully detained in the two locations of the Vitez Cultural Centre (containing the Cinema Hall) and the Vitez veterinary hospital, and that he was aware that the conditions of their detention had been unlawful. This conclusion has not been contradicted by evidence admitted on appeal.

The Appeals Chamber is convinced beyond reasonable doubt that the Appellant, notwithstanding his knowledge that detention-related crimes had been committed in the Vitez Cultural Centre and the Vitez veterinary hospital, failed to punish those subordinates of his who were responsible, and over whom he was able to exercise effective control, and he failed to report the infractions of which he was aware to the competent authorities. The Appellant is, accordingly, guilty under Count 15 of grave breaches of the Geneva Conventions (inhuman treatment) pursuant to Articles 2(b) and 7(3) of the Statute.

b) Counts 17 and 18: Hostage-taking

The Trial Chamber convicted the Appellant of taking hostages, first for use in prisoner exchanges, and second in order to deter ABiH military operations against the HVO.

The Trial Chamber found that the Appellant did not order that hostages be taken or used, but that certain detainees were "threatened with death" in order to prevent the ABiH advance on Vitez, and that the Appellant was responsible by virtue of having ordered the defence of Vitez.

The Appeals Chamber considers, that it does not follow that the Appellant incurred criminal responsibility for someone else's unlawful choice of how to execute his legitimate order. There is no necessary causal nexus between an order to defend a position and the taking of hostages, and the Trial Chamber was wrong so to infer.

The Trial Chamber's finding is not supported by the evidence, and no reasonable trier of fact could have made that finding. The findings of the Trial Chamber with respect to hostage-taking are overturned.

c) Counts 19 and 20: Human Shields

The Trial Chamber found that the Appellant ordered the use of detainees as human shields to protect the headquarters of the Appellant at the Hotel Vitez on 20 April 1993, which inflicted considerable mental suffering upon the persons involved.

The use of prisoners of war or civilian detainees as human shields is prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met. Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself. To the extent that the Trial Chamber considered the intensity of the shelling of Vitez on 20 April 1993, that consideration was superfluous to an analysis of a breach of the provisions of the Geneva Conventions, but may be relevant to whether the use of the protected detainees as human shields amounts to inhuman treatment for the purposes of Article 2 of the Statute.

The Trial Chamber had no evidence before it permitting it to conclude that the Appellant positively ordered the use of the detainees as human shields. The Appeals Chamber finds that the reasoning of the Trial Chamber in finding the Appellant responsible for positively ordering the use of civilian detainees as human shields is flawed. A factual conclusion that detainees were in fact used as human shields on a particular occasion does not lead to the inference that the Appellant positively ordered that to be done.

A conviction under Article 7(1) is not, however, limited to the positive act of ordering. The Appeals Chamber notes that the Appellant was indicted by the Second Amended Indictment for having – through acts and omissions - planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful and inhumane treatment of Bosnian Muslims. The Second Amended Indictment therefore fairly charges the Appellant with other forms of participation

under Article 7(1) of the Statute in addition to the positive act of ordering. In particular, criminal responsibility for an omission pursuant to Article 7(1) of the Statute is expressly envisaged by the Second Amended Indictment.

The Appeals Chamber considers that the use of the detainees as human shields caused them serious mental harm and constituted a serious attack on human dignity, and concludes that the Appellant's conviction for the use of human shields under Count 19 was correct in substance. However, in the absence of proof that he positively ordered the use of human shields, the Appellant's criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: and that the Appellant is guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields, pursuant to Article 2(b) of the Statute.

10. Appeal Against Sentence

The Trial Chamber sentenced the Appellant to forty-five years' imprisonment, and the Appellant has appealed against this sentence. The Appellant contends that the sentence imposed on him should be vacated.

The Appeals Chamber has emphasised in previous judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines. The sentence must always be decided according to the facts of each particular case and the individual guilt of the perpetrator.

In this case, the Appeals Chamber heard several arguments by the Appellant against the Trial Chamber's sentence. These arguments have been considered in the Judgement of the Appeals Chamber, but will mostly not be discussed in this hearing in the interests of brevity.

However, the Appeals Chamber considers that it was wrong for the Trial Chamber to hold that "it is impossible to identify which acts would relate to which of the various counts - other than those supporting the prosecution for and conviction of persecution under count 1." Where it is impossible to identify which acts would relate to which of the various counts, it is likewise impossible to arrive at distinct convictions. Either an accused person is guilty of different crimes constituted by different elements which may sometimes overlap (but never entirely), or the accused is convicted of that crime with the most specific elements, and the remaining counts in which those elements are duplicated are dismissed as impermissibly cumulative. The Appeals Chamber finds that the reasoning of the Trial Chamber is wrong in law. The Trial Chamber also erred in failing to consider the Appellant's real and sincere remorse as a mitigating factor, and in considering his discriminatory intent as an aggravating factor in light of his conviction for persecutions at trial.

The Appeals Chamber has granted part of the appeal of the Appellant against his sentence. In this case, however, the application of the established test for the revising of a sentence would be inappropriate. The Appeals Chamber in this appeal is being called upon not simply to affirm or revise the sentence imposed by the Trial Chamber, but rather to impose a sentence *de novo*. Instead of revising the sentence of the Trial Chamber, the Appeals Chamber will substitute its own reasoned sentence for that of a Trial Chamber on the basis of its own findings, a function which the Appeals Chamber considers that it may perform in this case without remitting the case to the Trial Chamber.

The Appeals Chamber notes that no evidence has been presented to suggest that the Appellant is of bad character, but that several witnesses were at pains to point out the Appellant's good character, his equitable treatment of Bosnian Muslims both before and during the war and the absence of any bias against Bosnian Muslims, and his professionalism as a soldier. There was also evidence of respect for him by his ABiH opponents, and several witnesses attested to the fact that he is a man of duty. Furthermore, the Appellant is a father to young children.

In its discussion of the factors relevant to sentencing above, the Appeals Chamber has identified the following factors as aggravating circumstances proved beyond reasonable doubt: (i) the position of the accused as a colonel in the HVO, and his position as commander of the regional forces in the CBOZ; and (ii) the fact that many of the victims of the crimes of which the Appellant has been found guilty were civilians.

As mitigating circumstances proved on the balance of probabilities: (i) the Appellant's voluntary surrender to the International Tribunal; (ii) his real and sincere expression of remorse; (iii) his good character with no prior criminal convictions; (iv) his record of good comportment at trial and in detention; (v) his personal and family circumstances, including his poor health; (vi) his having been detained for over 8 years pending a final outcome in his case; and (vii) his particular circumstances at the outbreak of and during the war.

Rule 87(C) provides that a Chamber may decide to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused, and the Appeals Chamber decides to impose a single sentence in this case, as the criminal conduct for which he has been convicted forms part of similar overall behavior, and occurred within a close temporal context.

DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 16 and 17 December 2003;

SITTING in open session;

DISMISSES the Appellant's ground of appeal concerning denial of due process of law;

ALLOWS by majority, Judge Weinberg de Roca dissenting, the Appellant's ground of appeal concerning his responsibility for the crimes committed in Ahmići, Šantići, Pirići, and Nadioci, on 16 April 1993, **REVERSES** the Appellant's convictions pursuant to Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **REVERSES** the Appellant's convictions pursuant to Article 7(3) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for the crimes committed in parts of the Vitez Municipality other than Ahmići, Šantići, Pirići, and Nadioci, in April, July, and September 1993, **REVERSES** his convictions pursuant to Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **REVERSES** his convictions pursuant to Article 7(3) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for crimes committed in Lončari and Oćehnići in the Busovača Municipality in April 1993, **REVERSES** his convictions under Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **FINDS** that no finding was made by the Trial Chamber pursuant to Article 7(1) of the Statute in relation to the January 1993 attacks in Busovača, and that no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute concerning the crimes committed in Lončari and Oćehnići in April 1993;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for the crimes committed in April 1993 in Kiseljak, **REVERSES** his conviction under Article 7(1) of the Statute under Counts 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 for these crimes, and **FINDS** that no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute in relation to the crimes;

ALLOWS unanimously, the Appellant's ground of appeal concerning his responsibility for detention-related crimes, to the extent that his appeal against the convictions under Counts 17, 18, and 20 pursuant to Article 7(1) of the Statute is granted, and **REVERSES** his convictions under those counts;

AFFIRMS, unanimously, the Appellant's convictions under: 1) Count 15 pursuant to Article 7(3) of the Statute for the detention-related crimes committed in the relevant detention facilities, 2) Count 16 pursuant to Article 7(1) of the Statute for ordering the use of protected persons for the construction of defensive military installations, and 3) Count 19 under Article 7(1) of the Statute for the inhuman

treatment of detainees occasioned by their use as human shields, and **FINDS** that no finding was made by the Trial Chamber pursuant to Article 7(3) of the Statute under Counts 15 or 16 in relation to the use of protected persons for the construction of defensive military installations, under Counts 17 or 18 in relation to the taking of hostages, or under Counts 19 and 20 for the inhuman treatment of detainees occasioned by their use as human shields;

DISMISSES the Appellant's appeal against convictions in all other respects;

ALLOWS unanimously, in part, the Appellant's ground of appeal against the sentence, and **IMPOSES** by majority, Judge Weinberg de Roca dissenting, a new sentence;

SENTENCES the Appellant to nine years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention, that is from 1 April 1996 to the present day;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.
This Judgement is signed by Judges Mumba, Güney, Schomburg, Weinberg de Roca and myself this twenty-ninth day of July 2004 at The Hague, The Netherlands.

Judge Schomburg appends a separate opinion limited to the sentence.
Judge Weinberg de Roca appends a partial dissenting opinion.

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The full text of the Judgement is available upon request at the Public Information Services and is also available on the Internet site of the Tribunal.