UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-21-T
		Date:	16 November 1998
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Eugene O'Sullivan, for Zejnil Delalić
Ms. Nihada Buturović, Mr. Howard Morrison, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landžo

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I. INTRODUCTION

The trial of Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (hereafter "accused"), before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter "International Tribunal" or "Tribunal"), commenced on 10 March 1997 and came to a close on 15 October 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor (hereafter "Prosecution") and the Defence for each of the accused (hereafter, collectively, "Defence"), the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. The International Tribunal

1. The International Tribunal is governed by its Statute (hereafter "Statute"), which was adopted by the United Nations Security Council on 25 May 1993,[1] and by its Rules of Procedure and Evidence (hereafter the "Rules"), adopted by the Judges on 11 February 1994, as subsequently amended.[2] Under the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[3] Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

B. The Indictment

2. The Indictment against the four accused (hereafter "Indictment") was issued on 19 March 1996 by Richard J. Goldstone, being, at that time, the Prosecutor of the International Tribunal, and was confirmed by Judge Claude Jorda on 21 March 1996.[4] Four of the original forty-nine counts were subsequently withdrawn at trial, at the request of the Prosecution.[5] The Indictment is set forth in full in Annex B to this Judgement. At the time of the alleged commission of the crimes charged therein, the accused were citizens of the former Yugoslavia and residents of Bosnia and Herzegovina.[6]

3. The Indictment is concerned solely with events alleged to have occurred at a detention facility in the village of Čelebići (hereafter "Čelebići prison-camp"), located in the Konjic municipality, in central Bosnia and Herzegovina, during certain months of 1992. The Indictment charges the four accused with grave breaches of the Geneva Conventions of 1949, under Article 2 of the Statute, and

[1] S/RES/827 (1993).
[2] The Rules have been successively amended on 5 May 1994, 4 Oct. 1994, 30 Jan. 1995, 3 May 1995, 15 June 1995, 6 Oct. 1995, 18 Jan. 1996, 23 April 1996, 25 June and 5 July 1996, 3 Dec. 1996, 25 July 1997, revised 20 Oct. and 12 Nov. 1997, 9 and 10 July 1998.
[3] Article 1 of the Statute.
[4] Review of the Indictment, Case No. IT-96-21-I, 21 March 1996 (RP D282-D284).
[5] Counts 9 and 10, and counts 40 and 41 of the original Indictment were withdrawn on 21 April 1997 (RP D3254-D3255) and 19 Jan. 1998 (RP D5385-D5386) respectively.

violations of the laws or customs of war, under Article 3 of the Statute, in connection with acts allegedly perpetrated within the Čelebići prison-camp.

4. During the entire relevant period, the accused Esad Landžo is alleged to have worked as a guard at the Čelebići prison-camp. Hazim Delić and Zdravko Mucić are also alleged to have worked within the prison-camp and to have acted in the capacity of commanders, with Zdravko Mucić being commander, and Hazim Delić being deputy commander from May to November 1992, when he replaced Zdravko Mucić as commander. Zejnil Delalić is alleged to have exercised authority over the Čelebići prison-camp in his role first as co-ordinator of the Bosnian Muslim and Bosnian Croat forces in the area, and later as Commander of the First Tactical Group of the Bosnian Army.

5. Esad Landžo and Hazim Delić are primarily charged with individual criminal responsibility pursuant to Article 7(1) of the Statute, as direct participants in certain of the crimes alleged, including acts of murder, torture and rape.[7] Zdravko Mucić and Zejnil Delalić are primarily charged as superiors with responsibility, pursuant to Article 7(3) of the Statute, for crimes committed by their subordinates, including those alleged to have been committed by Esad Landžo and Hazim Delić. Several counts in the Indictment also charge Hazim Delić in his capacity as a superior with command responsibility. There follows a brief summary of the charges and the supporting factual allegations contained in the Indictment as they relate to each of the accused.

1. ESAD LANDŽO

6. Esad Landžo, also known as "Zenga", was born on 7 March 1973, and is alleged in the Indictment to have worked as a guard at the Čelebići prison-camp from approximately May 1992 to December 1992. In this capacity, he is charged as a direct participant with the following crimes under international humanitarian law.

[6] After the Dayton Peace Agreement in 1995, the Republic of Bosnia and Herzegovina became Bosnia and Herzegovina. While the events which concern this Judgement took place prior to 1995, we shall use the designation Bosnia and Herzegovina when referring to the State which was recognised as independent on 6 April 1992.
[7] The allegations of rape being charged as torture or cruel treatment.

(a) Wilful Killing and Murder

7. Esad Landžo is charged under counts 1, 5, 7 and 11 of the Indictment with wilful killing, a grave breach punishable under Article 2(a) of the Statute, and under counts 2, 6, 8 and 12 of the Indictment with murder, a violation of the laws or customs of war punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the deaths within the Čelebići prison-camp of the following individuals:

> **Šćepo Gotovac**, aged between 60 and 70, who was subjected to extensive beatings by Hazim Delić and Esad Landžo, among others, and who had an SDA badge nailed to his forehead. Mr. Gotovac died as a result of the injuries he sustained. (Indictment at paragraph 16 paraphrased.)
>
> **Simo Jovanović,** who was severely beaten over an extended period of time, sometime in July 1992, by a group including Hazim Delić and Esad Landžo. Mr. Jovanović died as a result of his injuries, having been denied medical treatment. (Indictment at paragraph 18 paraphrased.)
>
> **Boško Samouković**, who was struck repeatedly with a wooden plank by Esad Landžo sometime in July 1992. The blows rendered him unconscious and he died as a result of his injuries. (Indictment at paragraph 19 paraphrased.)
>
> **Slavko Šušić**, who was subjected to repeated and severe beatings sometime in July or August 1992, by a group including Hazim Delić and Esad Landžo, who beat him with objects, including a bat and a piece of cable. They also tortured him using objects including pliers, lit fuses and nails. After several days, Mr. Šušić died as a result of the injuries he sustained. (Indictment at paragraph 21 paraphrased.)

(b) Torture and Cruel Treatment

8. Esad Landžo is charged under counts 15, 16, 24, 25, 27, 28, 30 and 31 of the Indictment with torture, a grave breach punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute. In the alternative to the charges of torture under Article 3 of the Statute, Mr. Landžo is charged under counts 17, 26, 29 and 32 with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute. These charges relate to his alleged acts and omissions with respect to the following individuals within the Čelebići prison-camp:

Momir Kuljanin, who was severely and repeatedly beaten over a period beginning around 25 May 1992 until the beginning of September 1992, by Hazim Delić and Esad Landžo, among others. He was kicked to unconsciousness, had a cross burned on his hand, was hit with shovels, was suffocated and had an unknown corrosive powder applied to his body. (Indictment at paragraph 23 paraphrased.)

Spasoje Miljević, who was mistreated by Hazim Delić and Esad Landžo, among others, on numerous occasions beginning around 15 June 1992 continuing until August 1992. The mistreatment included placing a mask over Mr. Miljević's face so he could not breathe, placing a heated knife against parts of his body, carving a *Fleur de Lis* on his palm, forcing him to eat grass and subjecting him to severe beatings using fists, feet, a metal chain and a wooden implement. (Indictment at paragraph 26 paraphrased.)

Mirko Babić, who was mistreated by Hazim Delić and Esad Landžo, among others, on several occasions sometime around the middle of July 1992. On one occasion, both accused allegedly placed a mask over Mr. Babić's head and beat him with blunt objects until he lost consciousness. On another occasion, Esad Landžo burned Mr. Babić's leg. (Indictment at paragraph 27 paraphrased.)

Mirko Đorđić, who was mistreated by Esad Landžo from sometime around the beginning of June 1992 until the end of August 1992. The incidents of mistreatment included beating Mr. Đorđić with a baseball bat, forcing him to do push-ups while being beaten and placing hot metal pincers on his tongue and in his ear. (Indictment at paragraph 28 paraphrased.)

(c) Causing Great Suffering or Serious Injury and Cruel Treatment

9. Count 36 of the Indictment charges Esad Landžo with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute. He is further charged under count 37 with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the following individual within the Čelebići prison-camp:

Nedeljko Draganić, who was repeatedly mistreated by Esad Landžo from around the end of June 1992 through August 1992. The incidents of mistreatment included tying Mr. Draganić to a roof beam and beating him, striking him with a baseball bat and pouring gasoline on his trousers and setting them alight. (Indictment at paragraph 30 paraphrased.)

10. Esad Landžo is further charged under count 46 of the Indictment with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute, and under count 47 of the Indictment with cruel treatment, a violation of the laws or customs of war, punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the

following circumstances alleged to have existed in the Čelebići prison-camp:

> The subjection of the detainees at the Čelebići camp between May and October 1992, to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions through deprivation of adequate food, water, medical care as well as sleeping and toilet facilities, which conditions caused the detainees to suffer severe psychological and physical trauma. (Indictment at paragraph 35 paraphrased.)

2. HAZIM DELIĆ

11. Hazim Delić was born on 13 May 1964, and is alleged to have been the deputy commander of the Čelebići prison-camp from approximately May 1992 to November 1992. After the departure of the alleged commander of the prison-camp, Zdravko Mucić, in November 1992, Hazim Delić is alleged to have taken up the position of commander until the closing of the camp in December 1992.

12. Hazim Delić is charged both as a direct participant and as a superior in relation to a number of the acts alleged in the Indictment. Those counts alleging his direct responsibility are set out here below, whereas those which concern him in a superior capacity are discussed in the following sub-section. In his capacity as a direct participant, Hazim Delić is charged with the following crimes under international humanitarian law.

(a) Wilful Killing and Murder

13. Hazim Delić is charged under counts 1, 3, 5 and 11 of the Indictment with wilful killing, a grave breach punishable under Article 2(a) of the Statute and under counts 2, 4, 6 and 12 of the Indictment with murder, a violation of the laws or customs of war punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the deaths of the following individuals detained within the Čelebići prison-camp:

> **Šćepo Gotovac**, **Simo Jovanović** and **Slavko Šušić** (see above).
>
> **Željko Milošević**, who was repeatedly and severely beaten by guards over the course of several days, sometime around the middle of July 1992. Around 20 July 1992, Hazim Delić selected Mr. Milošević and, along with several others, took him outside and administered severe beatings. By the next morning, Mr. Milošević had died as a result of the injuries he sustained. (Indictment at paragraph 17 paraphrased.)

(b) Torture and Cruel Treatment

14. Hazim Delić is charged under counts 15, 16, 18, 19, 21, 22, 24, 25, 27 and 28 of the Indictment with torture, a grave breach punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute. In the alternative to the charges of torture under Article 3, he is charged under counts 17, 20, 23, 26 and 29 with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute. These charges relate to his alleged acts and omissions with respect to the following individuals within the Čelebići prison-camp:

> **Momir Kuljanin**, **Spasoje Miljević** and **Mirko Babić** (see above).
>
> **Grozdana Ćećez**, who was subjected to repeated incidents of forcible sexual intercourse by Hazim Delić and others over a period from around 27 May 1992 through early August 1992. During this period, Ms. Ćećez was raped by three different persons in one night and on another occasion she was raped in front of other persons. (Indictment at paragraph 24 paraphrased.)
>
> **Witness A**, who was subjected to repeated incidents of forcible anal and vaginal intercourse by Hazim Delić over a period from around 15 June 1992 until the beginning of August 1992. Hazim Delić raped Witness A during her first interrogation and continued to rape her every few days over a six-week period thereafter. (Indictment at paragraph 25 paraphrased.)

(c) Inhuman Treatment and Cruel Treatment

15. Hazim Delić is further charged, under count 42 of the Indictment, with inhuman treatment, a grave breach punishable under Article 2(b) of the Statute, and under count 43 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the following individuals within the Čelebići prison-camp:

> **Milenko Kuljanin** and **Novica Đorđić,** who, among others, were subjected to mistreatment by Hazim Delić from around 30 May 1992 until the latter part of September 1992, whereby he used a device emitting electrical current to inflict pain on the detainees. (Indictment at paragraph 33 paraphrased.)

(d) Causing Great Suffering or Serious Injury and Cruel Treatment

16. Hazim Delić is further charged under count 46 of the Indictment with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute, and under count 47 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for his alleged acts and omissions with respect to the following circumstances alleged to have existed in the Čelebići prison-camp:

> The subjection of the detainees at the Čelebići camp between May and October 1992, to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions through deprivation of adequate food, water, medical care as well as sleeping and toilet facilities, which conditions caused the detainees to suffer severe psychological and physical trauma. (Indictment at paragraph 35 paraphrased.)

(e) Unlawful Confinement of Civilians

17. Hazim Delić is charged under count 48 of the Indictment (paragraph 36) with the unlawful confinement of civilians, a grave breach punishable under Article 2(g) of the Statute, for his alleged acts and omissions with respect to the unlawful confinement of numerous civilians in the Čelebići prison-camp between May and October 1992.

(f) Plunder of Private Property

18. Hazim Delić is charged under count 49 of the Indictment with plunder, a violation of the laws or customs of war punishable under Article 3(e) of the Statute, for his acts and omissions with respect to the following events alleged to have been perpetrated in the Čelebići prison-camp:

> The plunder of money, watches and other valuable property belonging to persons detained at the Čelebići camp between May and September 1992. (Indictment at paragraph 37 paraphrased.)

3. ZEJNIL DELALIĆ and ZDRAVKO MUCIĆ

19. Zejnil Delalić was born on 25 March 1948, and is alleged to have co-ordinated the activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from approximately April 1992 to at least September 1992. From June 1992 to November 1992, he is alleged to have acted as Commander of the First Tactical Group of the Bosnian Army. In both capacities, he is alleged to have had authority over the Čelebići prison-camp and its personnel.

20. Zdravko Mucić, also known as "Pavo", was born on 31 August 1955, and is alleged to have been the commander of the Čelebići prison-camp from approximately May to November 1992.

21. It is alleged that Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, were responsible for the operation of the Čelebići prison-camp and were in positions of superior authority to all of the guards at the camp and to those other persons who entered the camp and mistreated the prisoners therein. Furthermore, it is alleged that Zejnil Delalić, Zdravko Mucić and Hazim Delić knew or had reason to know of the mistreatment of detainees in the prison-camp by their subordinates, but failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. In their respective capacities as superiors at the prison-camp, Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged with the following crimes under international humanitarian law.

(a) Wilful Killing and Murder

22. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged under count 13 of the Indictment with wilful killing, a grave breach punishable under Article 2(a) of the Statute, and under count 14 of the Indictment with murder, a violation of the laws or customs of war punishable under Article 3 of the Statute, for their alleged acts and omissions as superiors with respect to the killing of **Šćepo Gotovac**, **Zeljko Milošević**, **Simo Jovanović**, **Boško Samouković** and **Slavko Šušić**, all alleged to have been committed by their subordinates. In addition, they are also charged in this manner with responsibility for the killing of the following individuals, alleged to have been

committed by their subordinates in the Čelebići prison-camp:

> **Milorad Kuljanin**, who was shot by guards in June 1992;
> **Željko Ćećez**, who was beaten to death in June or July 1992;
> **Slobodan Babić**, who was beaten to death in June 1992;
> **Petko Gligorević**, who was beaten to death in the latter part of May 1992;
> **Gojko Miljanić**, who was beaten to death in the latter part of May 1992;
> **Željko Klimenta**, who was shot and killed during the latter part of July 1992;
> **Miroslav Vujičić**, who was shot on approximately 27 May 1992;
> **Pero Mrkajić**, who was beaten to death in July 1992. (Indictment at paragraph 22 paraphrased.)

(b) Torture and Cruel Treatment

23. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged under counts 33 and 34 of the Indictment with torture, a grave breach punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, or alternatively under count 35 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for their alleged acts and omissions as superiors with respect to the mistreatment of **Momir Kuljanin**, **Grozdana Ćećez**, **Witness A**, **Spasoje Miljević**, **Mirko Babić** and **Mirko Đorđić**, alleged to have been perpetrated by their subordinates. In addition, they are also charged in this manner with responsibility for the following incident, alleged to have been committed by their subordinates in the Čelebići prison-camp:

> The placing in a manhole of **Milovan Kuljanin** for several days, without food or water. (Indictment at paragraph 29 paraphrased.)

(c) Causing Great Suffering or Serious Injury and Cruel Treatment

24. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged under count 38 of the Indictment with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute, and under count 39 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for their alleged acts and omissions as superiors with respect to the mistreatment of **Nedeljko Draganić**, alleged to have been perpetrated by their subordinates. In addition, they are also charged in this manner with responsibility for the mistreatment of the following individuals by their subordinates in the Čelebići prison-camp:

> **Mirko Kuljanin** and **Dragan Kuljanin**, who were severely beaten;
> **Vukašin Mrkajić** and **Duško Benđo**, who had a burning fuse cord placed around their genital areas. (Indictment at paragraph 31 paraphrased.)

25. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged under count 46 of the Indictment with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute, and under count 47 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for their alleged acts and omissions as superiors with respect to the following circumstances alleged to have been brought about by their subordinates in the Čelebići prison-camp:

> The subjection of the detainees at the Čelebići camp between May and October 1992, to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions through deprivation of adequate food, water, medical care as well as sleeping and toilet facilities, which caused the detainees to suffer severe psychological and physical trauma. (Indictment at paragraph 35 paraphrased.)

Zdravko Mucić is also charged as a direct participant with respect to the creation of the foregoing conditions in the Čelebići prison-camp.

(d) Inhuman Treatment and Cruel Treatment

26. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić, are charged under count 44 of the Indictment with inhuman treatment, a grave breach punishable under Article 2(b) of the Statute, and under count 45 of the Indictment with cruel treatment, a violation of the laws or customs of war, punishable under Article 3 of the Statute, for their alleged acts and omissions as superiors with respect to the mistreatment of **Milenko Kuljanin** and **Novica Đorđić**, alleged to have been committed by their subordinate, Hazim Delić (see above). In addition, they are charged in this manner for further acts of mistreatment by unnamed subordinates, including the following:

> Forcing persons to commit fellatio with each other;
> Forcing a father and son to slap each other repeatedly. (Indictment at paragraph 34 paraphrased.)

(e) Unlawful Confinement of Civilians

27. Zejnil Delalić and Zdravko Mucić, along with Hazim Delić are charged under count 48 of the Indictment (paragraph 36) with the unlawful confinement of civilians, a grave breach punishable under Article 2(g) of the Statute, for their alleged acts and omissions as superiors with respect to the unlawful confinement of numerous civilians in the Čelebići prison-camp between May and October 1992. Zdravko Mucić and Zejnil Delalić are also charged with direct responsibility in relation to the foregoing charge.

(f) Plunder of Private Property

28. Zdravko Mucić, along with Hazim Delić, is charged under count 49 of the Indictment with plunder, a violation of the laws or customs of war punishable under Article 3(e) of the Statute, for their alleged acts and omissions as superiors with respect to the following events alleged to have been perpetrated by themselves and their subordinates in the Čelebići prison-camp:

> The plunder of money, watches and other valuable property belonging to persons detained at the Čelebići camp between May and September 1992. (Indictment at paragraph 37 paraphrased.)

Zdravko Mucić is also charged with direct responsibility in relation to the foregoing charge.

29. Having outlined the offences charged in the Indictment and the alleged role of the accused therein, it is appropriate to set out the procedural history of the present case, both prior to trial and during the trial itself.

C. Procedural History

30. Towards the close of investigations into the events which occurred in the Čelebići prison-camp during the recent conflict in Bosnia and Herzegovina, the Prosecutor, acting on information regarding the whereabouts of several individuals deemed to be suspects in relation to these events, made two separate requests to Germany and Austria for the provisional arrest of Zejnil Delalić and Zdravko Mucić, respectively, under Rule 40 of the Rules. Pursuant to these requests, both suspects

were arrested on 18 March 1996. Thereafter, on 19 March 1996, the Prosecutor issued the Indictment, charging Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo with grave breaches of the Geneva Conventions and violations of the laws or customs of war in connection with acts allegedly perpetrated in the Čelebići prison-camp. The Indictment was confirmed by Judge Claude Jorda on 21 March 1996 and arrest warrants for Hazim Delić and Esad Landžo, along with orders for their surrender, were transmitted to the authorities of Bosnia and Herzegovina. Arrest warrants for Zejnil Delalić and Zdravko Mucić, along with orders for their surrender, were issued to the authorities of Germany and Austria, respectively.

31. Thereafter, on 9 April 1996, Zdravko Mucić was transferred from Austria to the United Nations Detention Unit in The Hague (hereafter "Detention Unit") and subsequently, on 8 May 1996, Zejnil Delalić was transferred from Germany. Hazim Delić and Esad Landžo were both surrendered into the custody of the Tribunal by the Government of Bosnia and Herzegovina on 13 June 1996.

32. Zdravko Mucić, represented by Mr. Robert Rhodes, was the first to enter an initial appearance, on 11 April 1996, before Trial Chamber II, consisting of Judge Gabrielle Kirk McDonald, presiding, Judge Lal Chand Vohrah and Judge Rustam S. Sidhwa. Thereafter, on 9 May 1996, Zejnil Delalić entered his initial appearance, represented by Ms. Edina Rešidović. Hazim Delić and Esad Landžo entered their initial appearances on 18 June 1996, represented by Mr. Salih Karabdić and Mr. Mustafa Bračković respectively. The Prosecution team was led by Mr. Eric Östberg, appearing with Ms. Teresa McHenry. Each of the accused entered a plea of not guilty to all of the charges and they were thus remanded into the custody of the Detention Unit, pending trial.

33. This case is the first to be brought before the International Tribunal in which multiple accused have been jointly charged and tried. The trial covered a period of 19 months and was subject to numerous delays, for a variety of reasons. Over 1,500 exhibits were admitted into evidence during the course of the trial and the transcript of the proceedings runs to more than 16,000 pages in the English version. The parties also filed lengthy pre-trial briefs and final submissions.[8] The entire

[8] For pre-trial submissions, *see* Defendant Delić's Pre-Trial Memorandum, Case No. IT-96-21-PT, 21 Feb. 1997 (RP D2789-D2817) (hereafter "Delić Pre-Trial Brief"); The Prosecutor's Pre-Trial Brief, Case No. IT-96-21-PT, 24 Feb. 1997 (RP D2823-D2850) (hereafter "Prosecutor's Pre-Trial Brief); Pre-Trial Brief of Zejnil Delalić, Case No. IT-96-21-PT, 3 March 1997 (RP D2939-D2944) (hereafter "Delalić Pre-Trial Brief"); Pre-Trial Brief of the Accused Zdravko Mucić, Case No. IT-96-21-PT, 3 March 1997 (RP D2939-D2944) (hereafter "Mucić Pre-Trial Brief"); Pre-

proceedings were conducted with simultaneous interpretation into English, French and Bosnian/Croatian/Serbian. The Trial Chamber[9] has been called upon to address a host of unprecedented procedural and substantive issues relating to the trial. Although not constituting a comprehensive analysis, the most significant of these issues are set forth below in summary form. They are here presented in subject matter groupings, and do not, therefore, necessarily appear in chronological order.

1. Indictment-Related Issues

34. Pursuant to Rules 72 and 73 of the Rules,[10] three of the accused filed preliminary motions based on defects in the form of the Indictment, challenging, among other things, its alleged vague and unfounded allegations and cumulative charging.[11] Zdravko Mucić filed a motion of a similar nature, requesting the Trial Chamber to order the Prosecution to provide full particulars of the charges in the Indictment.[12] The Trial Chamber denied all of these motions,[13] after which Hazim Delić and Zejnil Delalić sought leave to appeal the Trial Chamber's ruling. Both of these applications for leave to appeal were, however, rejected by a Bench of the Appeals Chamber.[14]

Trial Brief of Esad Landžo and Response to Prosecutor's Pre-Trial Brief, Case No. IT-96-21-PT, 3 March 1997 (RP D2898-D2912) (hereafter "Landžo Pre-Trial Brief").
For final submissions, *see*: Closing Statement of the Prosecution, Case No. IT-96-21-T, 25 Aug. 1998 (RP D7610-D8082) (hereafter "Prosecution Closing Brief"); Defendant Hazim Delić's Final Written Submissions on the Issue of Guilt/Innocence, Case No. IT-96-21-T, 28 Aug. 1998 (RP D8180-D8364) (hereafter "Delić Closing Brief"); The Final Written Submissions of Delalić, Case No. IT-96-21-T, 28 Aug. 1998 (RP D8366-D8717) (hereafter "Delalić Closing Brief"); Defendant Zdravko Mucić's Final Submissions, Case No. IT-96-21-T, 28 Aug. 1998 (RP D8093-8178) (hereafter "Mucić Closing Brief"); Esad Landžo's Amended Final Submissions & Motion for Acquittal, Case No. IT-96-21-T, 31 Aug. 1998, (RP D9022-D9204) (hereafter "Landžo Closing Brief").

[9] As noted below, the composition of the Trial Chamber altered on 15 October 1996. Thus, in the following discussion, the term "Trial Chamber" is utilised both to refer to the original composition, prior to this date, and also to the later composition, after this date.

[10] The Rules referred to in this entire discussion are those that were in force at the time of the relevant motion or decision, in accordance with sub-Rule 6(c).

[11] Motion Based on Defects in the Form of the Indictment (Zejnil Delalić), Case No. IT-96-21-PT, 9 July 1996 (RP D731-D738); Preliminary Motions of Accused Hazim Delić Based on Defects in the Form of the Indictment, Case No. IT-96-21-PT, 1 Aug. 1996 (RP D885-D891); Objections Based on Defects in the Form of the Indictment (Esad Landžo), Case No. IT-96-21-PT, 16 July 1996 (RP D743-D747).

[12] Preliminary Motion by the Accused (Zdravko Mucić), Case No. IT-96-21-PT, 25 April 1996 (RP D327-D332).

[13] Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, Case No. IT-96-21-PT, 4 Oct. 1996 (RP D1576-D1590); Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment, Case No. IT-96-21-PT, 15 Nov. 1996 (RP D1810–D1819); Decision on Motion By the Accused Esad Landžo Based on Defects in the Form of the Indictment, Case No. IT-96-21-PT, 15 Nov. 1996 (RP D1803-D1809); Decision on the Accused Mucić's Motion for Particulars, Case No IT-96-21-PT, 8 July 1996 (RP D693-D701).

[14] Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, 6 Dec. 1996 (RP D22-D34); Decision on Application for Leave to Appeal (Form of Indictment), Case No. IT-96-21-AR72.3, 16 Oct. 1996 (RP D22-D26).

35. Upon discovering that the charges alleged in counts 9 and 10 of the Indictment were based on erroneous information, the Prosecution requested leave of the Trial Chamber to withdraw these counts pursuant to sub-Rule 50(A).[15] The Trial Chamber granted this request "with prejudice, such that the charges set forth in the said counts shall not be raised against any of the four accused persons at a later date."[16] Subsequently, the Prosecution sought to dismiss counts 40 and 41 of the Indictment, on the grounds that the relevant witness had refused to testify in the proceedings in support of these counts,[17] and this motion was granted by the Trial Chamber.[18]

2. Provisional Release and Fitness to Stand Trial

36. At an early stage, three of the accused filed motions seeking their provisional release pursuant to Rule 65.[19] The Trial Chamber, addressing the motions of Hazim Delić and Zejnil Delalić, determined that each of these accused had failed to meet the substantial burden of proving such exceptional circumstances as to warrant provisional release.[20] The Defence for both Zejnil Delalić and Hazim Delić applied for leave to appeal the Decisions, and this was rejected by a Bench of the Appeals Chamber.[21] In a confidential Decision, the Trial Chamber also denied Esad Landžo's request for provisional release.[22] Thereafter, on 11 December 1996, the Prosecution made an oral request that the Trial Chamber make a formal finding as to whether the accused Esad Landžo was fit to stand trial. The Prosecution renewed this request in writing[23] and the Trial Chamber issued a Decision, on 23 June 1997, finding Esad Landžo fit to stand trial.[24]

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[15] Motion to Withdraw Counts 9 and 10 of the Indictment, Case No. IT-96-21-T, 14 April 1997 (RP D3254-D3255).
[16] Order on Prosecution's Motion to Withdraw Counts 9 and 10 of the Indictment, Case No. IT-96-21-T, 21 April 1997 (RP D3376-D3377).
[17] Prosecution's Motion to Dismiss Counts 40 and 41, Case No. IT-96-21-T, 20 Nov. 1997 (RP D5320-D5321).
[18] Order on Prosecution Motion to Dismiss Counts 40 and 41, Case No. IT-96-21-T, 16 Jan. 1998 (RP D5385-D5386).
[19] Motion for Provisional Release (Zejnil Delalić), Case No. IT-96-21-PT, 5 June 1996 (RP D1-5/410 *bis*); Motion for Provisional Release (Esad Landžo), Case No. IT-96-21-PT, 16 July 1996 (RP D749-D752); Motion for Provisional Release (Hazim Delić) Case No. IT-96-21-PT, 20 Aug. 1996 (RP D1111-D1113).
[20] Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, Case No. IT-96-21-PT, 1 Oct. 1996 (RP D1504-D1523); Decision on Motion for Provisional Release Filed by the Accused Hazim Delić, Case No. IT-96-21-PT, 28 Oct. 1996 (RP D1676-D1689).
[21] Decision on Application for Leave to Appeal (Provisional Release), Case No. IT-96-21-AR72.2, 15 Oct. 1996 (RP D31-D37); Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, Case No. IT-96-21-AR72.4, 22 Nov. 1996 (RP D25-D34).
[22] Decision on Motion for Provisional Release Filed by the Accused Esad Landžo, Case No. IT-96-21-PT, 16 Jan. 1997 (RP D2325-D2556).
[23] Request for a Formal Finding of the Trial Chamber that the Accused Esad Landžo is Fit to Stand Trial, Case No. IT-96-21-T, 17 April 1997 (RP D3307-D3309).
[24] Order on the Prosecution's Request for a Formal Finding of the Trial Chamber that the Accused Esad Landžo is Fit to Stand Trial, Case No. IT-96-21-T, 23 June 1997 (RP D3879-D3880).

3. Matters Relating to the Detention Unit

37. It was brought to the attention of the Prosecution prior to trial that two of the accused, Zdravko Mucić and Zejnil Delalić, were attempting to communicate via notes left in a common area of the Detention Unit, arguably in violation of Regulation 6 of the Regulations to Govern the Supervision of Visits to and Communications with Detainees,[25] which requires all such correspondence to be submitted to the Registrar for review. The Prosecution sought to obtain the confiscated communications, arguing that it had a continuing duty to investigate crimes under Rule 39, or, alternatively, on the ground that such communication could constitute evidence of contempt under sub-Rule 77(C).[26] The Trial Chamber found that the Registrar had acted within her discretion under the Rules of Detention in withholding the confiscated communications from the Prosecution and deferred the decision regarding their disclosure to the President of the Tribunal.[27]

38. The President's Decision found that the only possible basis for permitting disclosure was that the confiscated material was relevant to the Prosecution's "investigation of a serious violation of international humanitarian law."[28] Accordingly, the Prosecution had to demonstrate that the material sought was relevant to an ongoing investigation or prosecution. After reviewing the confiscated communications, the President held that their content warranted total disclosure and directed the Registrar to provide certified copies of them to both the Prosecution and the Defence for Mr. Mucić and Mr. Delalić.

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[25] United Nations Detention Unit Regulations to Govern the Supervision of Visits to and Communications with Detainees (IT/98/REV.2).
[26] Prosecution's Motion for Production of Notes Exchanged Between Detainees Delalić and Mucić, Case No. IT-96-21-PT, 26 Aug. 1996 (RP D1115-D1130).
[27] Decision on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, Case No. IT-96-21-PT, 1 Nov. 1996 (RP D1739-D1750).
[28] Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, Case No. IT-96-21-PT, 11 Nov. 1996 (RP D1779-D1797), para. 37.

4. Assignment of Defence Counsel

39. Upon the request of lead counsel for Esad Landžo, Mr. Mustafa Bračković, the Registrar assigned Ms. Cynthia McMurrey as his co-counsel in December 1996.[29] Less than one month into the trial itself, Mr. Landžo submitted a written request to the Trial Chamber for the withdrawal of his lead counsel, Mr. Bračković. The Trial Chamber denied the request.[30] Thereafter, Mr. Bračković himself requested that the Trial Chamber revoke his power of attorney to act in the capacity of lead counsel for Mr. Landžo and this was granted.[31] On 25 May 1997, Mr. John Ackerman joined the Defence team for Mr. Landžo,[32] as lead counsel, to be later replaced in this capacity by Ms. McMurrey, effective 16 March 1998.[33] Upon the withdrawal of Mr. Ackerman, Ms. Nancy Boler was assigned to assist Ms. McMurrey as co-counsel.

40. Mr. Robert Rhodes was the first counsel assigned to represent Mr. Mucić. However, upon a request from Mr. Mucić, this assignment was withdrawn by the Registrar[34] and, on 10 July 1996, Mr. Branislav Tapušković was assigned in replacement,[35] assisted by Ms. Mira Tapušković as co-counsel.[36] Within a month of the commencement of trial, at the request of Mr. Tapušković, Mr. Michael Greaves was appointed to replace Ms. Tapušković as co-counsel.[37] By its Decision of 5 May 1997, upon a written request from Mr. Mucić, the Trial Chamber directed the Registrar to secure the services of Mr. Željko Olujić to replace Mr. Tapušković as lead counsel for Mr. Mucić.[38] In April 1998, at the request of the new lead counsel, Mr. Michael Greaves was replaced by Mr. Tomislav Kuzmanović as co-counsel.[39] Thereafter, in July 1998, Mr. Mucić, alleging a loss of confidence, requested that his lead counsel, Mr. Olujić, be replaced by Ms. Nihada Buturović. The Registrar denied this request[40] whereupon Mr. Mucić appealed the Registrar's Decision to the

[29] Decision of the Registrar, 20 Dec. 1996 (RP D2325).
[30] Order on the Request by the Accused Esad Landžo for Withdrawal of Lead Counsel, Case No. IT-96-21-T, 21 April 1997 (RP D3373-D3375).
[31] Order on Request for Revocation of Power of Attorney, Case No. IT-96-21-T, 25 April 1997 (RP D3444-D3446).
[32] Decision of the Registrar, 26 May 1997 (RP D3727-D3728).
[33] Decision of the Registrar, 21 Jan. 1998 (RP D5392-D5393).
[34] Decision of the Registrar, 2 July 1996 (RP D651).
[35] Decision of the Registrar, 10 July 1996 (RP D740).
[36] Decision of the Registrar, 11 Dec. 1996 (RP D2294).
[37] *See* Order on the Request by Defence Counsel for Zdravko Mucić for Assignment of a New Co-Counsel, Case No. IT-96-21-T, 17 March 1997 (RP D3114-D3116) and Decision of the Registrar, 17 March 1997 (RP D3118).
[38] Order on Request for Withdrawal of Counsel, Case No. IT-96-21-T, 5 May 1997 (RP D3552-D3554).
[39] Decision of the Registrar, 24 April 1998 (RP D6104).
[40] Decision of the Registrar, 27 July 1998 (RP D7358).

President. The Vice-President, acting in the capacity of President, granted the request.[41] On 4 September 1998, Mr. Kuzmanović was replaced as co-counsel by Mr. Howard Morrison.[42]

41. The Registrar assigned Ms. Edina Rešidović as lead counsel for Zejnil Delalić after it was determined that the accused satisfied the requirements of indigency.[43] In December 1996, Professor Eugene O'Sullivan was appointed as co-counsel and this Defence team remained unaltered throughout the trial.[44] Lead counsel assigned to Hazim Delić, Mr. Salih Karabdić, also requested the assistance of co-counsel and this was granted by the Registrar who, in January 1997, assigned Mr. Thomas Moran to act in this capacity.[45]

5. Matters Relating to Trial Proceedings

42. On 15 October 1996, the President of the Tribunal ordered the assignment of Judge Adolphus G. Karibi-Whyte (Nigeria) (presiding), Judge Elizabeth Odio Benito (Costa Rica) and Judge Saad Saood Jan (Pakistan) to the trial of the accused.[46] A provisional date for the commencement of trial was then set for 1 November 1996.[47] The final date for commencement of trial was established upon motions from two of the accused and in the interests of justice, for 10 March 1997.[48]

43. In addition to challenging the Indictment itself, the Defence for Zdravko Mucić made an application for a trial separate from that of Esad Landžo and Hazim Delić.[49] Thereafter, Zejnil Delalić also moved for a separate trial from the other three co-defendants, on the grounds that a joint trial could generate a conflict of interest, resulting in serious prejudice to the accused.[50] The Trial Chamber ordered Hazim Delić and Esad Landžo to respond to these motions by Mr. Mucić and Mr. Delalić,[51] and the Defence for each accused submitted motions accordingly.[52] In its

[41] Decision of the Vice-President, 6 Aug. 1998 (RP D7556-D7557).
[42] Decision of the Registrar, 4 Sept. 1998 (RP D9514).
[43] Decision of the Registrar, 4 Oct. 1996 (RP D1574).
[44] Decision of the Registrar, 11 Dec. 1996 (RP D2293).
[45] Decision of the Registrar, 13 Jan. 1997 (RP D2361).
[46] Order of the President Assigning Judges of the Tribunal to Trial Chamber, Case No. IT-96-21-PT, 15 Oct. 1996 (RP D1658-D1659).
[47] Order on the Preliminary Motion for Compliance with Article 20 of the Statute on the Behalf of Zdravko Mucić, Case No. IT-96-21-PT, 21 Oct. 1996 (RP D1673-D1674).
[48] Decision on the Applications for Adjournment of the Trial Date, Case No. IT-96-21-PT, 3 Feb. 1997 (RP D2682-D2691).
[49] Preliminary Motion by the Accused, Case No. IT-96-21-PT, 24 May 1996 (RP D385-D387).
[50] Motion for a Separate Trial, Case No. IT-96-21-PT, 5 June 1996 (RP D1-8/418 *bis*).
[51] Order to Respond to Motions for Separate Trial, Case No. IT-96-21-PT, 18 June 1996 (RP D535-D536).

response, the Prosecution argued that separate trials would be duplicative and inefficient, since the crimes with which the four accused were charged arose out of the same underlying events.[53] Accordingly, it was likely that almost every witness who would be called in a trial against Mr. Landžo and Mr. Delić would also be called in the trials of both Mr. Mucić and Mr. Delalić. The Trial Chamber denied the motions, finding that, in each case, there was no potential conflict of interest nor any interest of justice sufficient to warrant separate trials under sub-Rule 82(B).[54] A Bench of the Appeals Chamber later rejected an application filed by Zejnil Delalić for leave to appeal the Trial Chamber's Decision.[55]

44. The Defence for Zejnil Delalić filed a further application requesting that all transcripts and other documents relating to the trial be provided in Bosnian, the language of the accused, pursuant to Rule 3.[56] In its Decision on this motion, the Trial Chamber held that: (1) all evidence submitted by either party during trial and all the Orders and Decisions of the Trial Chamber must be made available in the language of the accused; (2) discovery should be made available in its original language, if that is the language of the accused, or in one of the working languages of the Tribunal; and (3) transcripts of the proceedings need only be made available in one of the working languages of the Tribunal.[57] The same issue was subsequently raised in a motion by Zdravko Mucić who requested that all transcripts of witness statements and other official texts pertaining to the court proceedings be translated into the language of that accused. The Trial Chamber denied the motion on the grounds that the subject matter of the motion had been previously and authoritatively decided by the Trial Chamber.[58]

45. Also in relation to the running of the trial and upon a motion by the Prosecution, the Trial Chamber ordered that the transmission of the video-recording of its proceedings to the public be

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[52] Response to the Requests of the Defence of the Accused, Delalić and Mucić, Seeking a Separate Trial and to the Prosecutor's Response to the Motions of the Defence, Case No. IT-96-21-PT, 10 July 1996 (RP D754-D760); Response of Accused Hazim Delić to the Motions by the Accused Mucić and Delalić and Prosecutor Response Thereto, Case No. IT-96-21-PT, 10 July 1996 (RP D764-D767).
[53] Prosecution Response to Delalić's Motion for a Separate Trial, Case No. IT-96-21-PT, 28 June 1996 (RP D574-D579).
[54] Decision on Motion for Separate Trial Filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, Case No. IT-96-21-PT, 26 Sept. 1996 (RP D1407-D1415).
[55] Decision on the Application for Leave to Appeal (Separate Trials), Case No. IT-96-21-AR72.1, 14 Oct. 1996 (RP D20–D29).
[56] Application for Forwarding the Documents in the Language of the Accused, Case No. IT-96-21-PT, 15 May 1996 (RP D1-2/368 *bis*).
[57] Decision on Defence Application for Forwarding the Documents in the Language of the Accused, Case No. IT-96-21-PT, 27 Sept. 1996 (RP D1472-D1480).
[58] Order on the Motion for Application of Redress of the Accused's Right of Information Pursuant to Articles 20 and 21 of the Statute of the International Tribunal, Case No. IT-96-21-PT, 19 Jan. 1998 (RP D5290-D5388).

delayed by a period of thirty minutes, so as to enable either party to object to their release, or to request that any transmission be edited, as appropriate.[59]

46. At the beginning of the trial itself, the Defence for Zejnil Delalić, Hazim Delić and Esad Landžo filed a joint motion requesting that they be permitted to cross-examine the witnesses for the Prosecution in the order of their choosing.[60] This request was granted by the Trial Chamber and the practice was adopted that, before the commencement of the cross-examination of a Prosecution witness, the Defence would inform the Trial Chamber of the order in which they would proceed.[61]

47. Just prior to the completion of its evidence in chief, the Prosecution filed a motion requesting that the Trial Chamber order the Defence to provide advance notice of its upcoming witnesses at trial, in order to allow the Prosecution time to prepare an effective cross-examination.[62] The Trial Chamber, exercising its power pursuant to Rule 54, ordered the Defence to provide the Prosecution with a list of the witnesses it intended to call, seven working days prior to their appearance at trial.[63] This decision was sought to be appealed by the Defence for Zejnil Delalić,[64] but the application was unanimously rejected by a Bench of the Appeals Chamber.[65] Thereafter, the Prosecution brought another motion seeking to establish the order in which Defence witnesses would be cross-examined.[66]

48. Shortly before the close of its case, in June 1998, the Defence for Zejnil Delalić filed an application which sought an order from the Trial Chamber for the conclusion of its case *in toto*, including rebuttal evidence, if any, from the Prosecution, and for judgement and sentence, if any, to

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[59] Order on the Prosecutor's Motion for Delayed Release of Transcripts and Video and Audio Tapes of Proceedings, Case No. IT-96-21-PT, 1 Oct. 1996 (RP D1545-D1547).
[60] Request Regarding the Order in Which Counsel for the Defendants May Cross-Examine Prosecution Witnesses, Case No. IT-96-21-T, 13 March 1997 (RP D3026-D3034).
[61] *See* transcript of trial proceedings, Case No. IT-96-21-T, 14 March 1997.
[62] Prosecutor's Motion for Order Requiring Advance Disclosure of Witnesses by the Defence, Case No. IT-96-21-T, 10 Dec. 1997 (RP D5364-D5368).
[63] Decision on Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, Case No. IT-96-21-T, 9 Feb. 1998 (RP D5469-D5487).
[64] Application of Defendant Zejnil Delalić for Leave to Appeal the Oral Decision of the Trial Chamber of 12 January 1998 Pursuant to Rule 73, Case No. IT-96-21-T, 28 Jan. 1998 (RP D5457-D5467).
[65] Decision on Application of Defendant Zejnil Delalić for Leave to Appeal the Oral Decision of the Trial Chamber of 12 January 1998 Pursuant to Rule 73, Case No. IT-96-21-AR 73.3 (RP A20-A28), filed 4 March 1998.
[66] Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-Examination by the Prosecution and Counsel for Co-accused, Case No. IT-96-21-T, 18 March 1998 (RP D5929-D5935) (motion granted in part by Trial Chamber's Order on the Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-Examination by the Prosecution and Counsel for the Co-Accused, Case No. IT-96-21-T, 3 April 1998 (RP D6041-D6044)).

be delivered before the second accused should embark upon his case.[67] The Trial Chamber denied this motion, concluding that it had not been given "any reason why it should, in the interests of justice, exercise its discretion to grant a separate trial at this stage of the joint trial."[68]

6. Witness-Related Issues

(a) Protective Measures

49. A series of protective measures were sought by both the Prosecution and the Defence, pursuant to Rule 75, and implemented throughout the trial proceedings with respect to both Prosecution and Defence witnesses. At the pre-trial stage, upon an application filed jointly by both parties, the Trial Chamber issued an Order for the non-disclosure of the names or any identifying data of potential witnesses to the public or the media, to ensure the privacy and protection of such victims and witnesses.[69]

50. The Trial Chamber's first Decision on the issue during trial granted protective measures to several Prosecution witnesses, including such measures as ordering that protective screens be erected in the courtroom; employing image altering devices to prevent certain witnesses from being identified by the public; ensuring that no information identifying witnesses testifying under a pseudonym be released to the public, and requiring that transcripts of closed session hearings be edited so as to prevent the release of information that could compromise a witness' safety.[70] Thereafter, the Prosecution filed several additional motions seeking protective measures for its witnesses.[71] Similarly, members of the Defence sought and were granted protective measures for certain of their respective witnesses.[72]

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[67] Motion by the Defendant Delalić Requesting Procedures for Final Determination of Evidence Immediately After the Close of Delalić Defence, Case No. IT-96-21-T, 2 June 1998 (RP D6407-D6413).
[68] Decision on the Motion by Defendant Zejnil Delalić Requesting Procedures for Final Determination of the Charges Against Him, Case No. IT-96-21-T, 2 July 1998 (RP D6842-D6861), D6843.
[69] Order for the Non-Disclosure to the Public or Media or Names of Potential Witnesses, Case No. IT-96-21-PT, 29 Nov. 1996 (RP D2004-D2005).
[70] Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", Case No. IT-96-21-T, 28 April 1997 (RP D3457-D3483).
[71] Confidential Motion for Protective Measures for Witness "N", Case No. IT-96-21-T, 25 March 1997 (RP D3163-D3166) (motion granted in Trial Chamber's Decision on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym "N", Case No. IT-96-21-T, 28 April 1997 (RP D3448-D3456)); Confidential Motion for Protective Measures for Witness "O", Case No. IT-96-21-T, 13 May 1997 (RP D3625-D3628) (motion granted by Trial Chamber's Order on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym "O", Case No. IT-96-21-T, 3 June 1997 (RP D3817-D3820)); Confidential Motion for Protective Measures for Witness "P", Case No. IT-96-21-T, 7 July 1997 (RP D3931-D3940) (motion granted by Trial

(b) Video-Link Testimony

51. The Prosecution additionally brought motions requesting that certain witnesses, designated by the pseudonyms K, L and M, be permitted to give their testimony by means of a video-link mechanism in order to relieve them from having to come to the seat of the International Tribunal in The Hague to testify.[73] The Trial Chamber granted such a motion with respect to Witnesses "K" and "L", where the circumstances met the relevant test for permitting video-link testimony although this was ultimately not availed of.[74] A later, confidential, motion requesting video-link testimony for additional witnesses was denied.[75]

Chamber's Order on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym "P", 18 July 1997 (RP D4028-D4031); Confidential Motion for Protective Measures for Witness Risto Vukalo, Case No. IT-96-21-T, 12 Aug. 1997 (RP D4137-D4139) (motion granted by Trial Chamber's Order on the Motion for Protective Measures for Witness Risto Vukalo, Case No. IT-96-21-T, 25 Sept. 1997 (RP D5184-D5187)); Confidential Motion for Protective Measures for Witness "T", Case No. IT-96-21-T, 2 Sept. 1997 (RP D5050-D5053) (motion granted by Trial Chamber's Order on the Motion for Protective Measures for Witness "T", Case No. IT-96-21-T, 23 Sept. 1997 (RP D5151-D5153)); Motion for Protective Measures for Witness "R", Case No. IT-96-21-T, 22 July 1997 (RP D4036-D4039) (motion granted by Trial Chamber's Order on the Prosecution's Motion for Protective Measures for Witness "R", Case No. IT-96-21-T, 2 Oct. 1997 (RP D5216-D5219)); Prosecutor's Request for Additional Measures in Respect of the Protection of Witnesses, Case No. IT-96-21-T, 4 July 1997 (RP D3964-D3967) (motion denied by the Trial Chamber's Decision on the Prosecution Motion for Additional Measures of Protection for Witnesses, Case No. IT-96-21-T, 8 Oct. 1998 (RP D5227-D5228)).

[72] *See e.g.* Order on the Motion for Protective Measures for the Witness Designated by the Pseudonym DB.1, Case No. IT-96-21-T, 29 May 1998 (RP D6379-D6382) (granting the motion); Order on the Motion for Protective Measures for the Witness Designated by the Pseudonym DA.1, Case No. IT-96-21-T, 29 May 1998 (RP D6383-D6386) (granting the motion); Order on the Motions for Protective Measures for the Witnesses Designated DA.4 and DB.4, Case No. IT-96-21-T, 29 June 1998 (RP D6807-D6810) (granting the motion); Motion for Safe Conduct for Defence Witnesses, Case No. IT-96-21-T, 12 June 1998 (RP D6626-D6631); Order Granting Safe Conduct to Defence Witnesses, Case No. IT-96-21-T, 25 June 1998 (RP (D6729-D6732) (granting the motion); Decision on Confidential Motion for Protective Measures for Defence Witnesses, Case No. IT-96-21-T, 25 Sept. 1997, (RP D5155-D5161) (granting the motion); Order on the Motions for Protective Measures for the Witnesses Designated by the Pseudonyms: DA.2, DB.2, DC.2, DD.2, DE.2, DF.2, DG.2 and DI.2, Case No. IT-96-21-T, 11 June 1998 (RP D6588-D6591) (granting the motion).

[73] During oral argument on the motion, the Prosecution withdrew its request in respect of Witness "M', on the basis that he was no longer unable to testify.

[74] Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony By Means of Video-Link Conference, IT-96-21-T, 28 May 1997 (RP D3751-D3762).

[75] Order on the Motion to Allow Certain Witnesses to Give Their Testimony by Means of Video-Link Conference, Case No. IT-96-21-T, 11 Nov. 1997 (RP D5317-D5318).

(c) Disclosure of Witness Identity

52. Prior to trial, the Defence for Esad Landžo moved the Trial Chamber to compel the Prosecution to provide the names and addresses of its prospective witnesses.[76] The Trial Chamber, while acknowledging that, under Article 20(1) of the Statute, the Defence was entitled to sufficient information to permit it to identify prospective Prosecution witnesses, denied the Defence request, holding that the current address of a witness was not necessary for the purposes of identification.[77] Subsequently, the Trial Chamber, on a motion by the Prosecution, determined that the Defence, pursuant to sub-Rule 67(A)(ii), has an explicit obligation to disclose the names and addresses of "those of its witnesses who will testify to alibi and to any special defence offered."[78] The Trial Chamber held that the Defence disclosure obligation under sub-Rule 67(A)(ii) is distinct from that of the Prosecution pursuant to sub-Rule 67(A)(i).

(d) Additional Witnesses and Issuance of *Subpoenae*

53. Subsequent to its filing of a list of witnesses intended to be called at trial, the Prosecution sought leave to call several additional witnesses. The Trial Chamber granted these requests, noting that, with respect to each additional witness, the Prosecution had fulfilled its obligation pursuant to sub-Rule 67(A) to disclose to the Defence the names of all witnesses as soon as it had formed an intention to call them at trial.[79] Thereafter, the Prosecution sought leave from the Trial Chamber to call two additional expert witnesses. The Trial Chamber also granted this request on the basis that the proposed witnesses would testify on issues newly raised by the Opinion and Judgment in the case of *Prosecutor v. Dusko Tadić* (hereafter "*Tadić Judgment*").[80]

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[76] Defence Motion to Compel the Discovery of Identity and Location of Witnesses, Case No. IT-96-21-PT, 19 Feb. 1997 (RP D2757-D2761).
[77] Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, Case No. IT-96-21-T, 18 March 1997 (RP D3122-D3130).
[78] Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses, Case No. IT-96-21-T, 13 June 1997 (RP D3857-D3864), D3856.
[79] Order on the Motion by the Prosecution for Leave to Call Additional Witnesses, Case No. IT-96-21-T, 1 Aug. 1997 (RP D4121-D4123); Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Case No. IT-96-21-T, 9 Sept. 1997 (RP D5111-D5116); Order on the Prosecution's Motion for Leave to Call Witness "R" as a Witness, Case No. IT-96-21-T, 1 Oct. 1997 (RP D5213-D5215).
[80] Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997 (RP D17338-D17687); Order on the Prosecution's Motion for Leave to Call Additional Expert Witnesses, Case No. IT-96-21-T, 13 Nov. 1997 (RP D5314-D5316).

54. After the close of the Defence case, the Prosecution filed a motion seeking to bring four witnesses in rebuttal. When the Trial Chamber denied the Prosecution's motion with respect to three of these witnesses, the Prosecution filed a motion seeking to reopen its case on the grounds that the proposed evidence was new evidence which was unavailable prior to the close of the Prosecution's case. The Trial Chamber denied the Prosecution's motion.[81]

55. In addition, on 14 October 1997, the Prosecution filed a motion requesting the Trial Chamber to issue *subpoenae ad testificandum* to certain specified persons who, after repeated requests from the Prosecution, were refusing to testify before the Tribunal and whose testimony was relevant to the case. The Prosecution further requested the Trial Chamber to issue an order to the Government of Bosnia and Herzegovina relating to the execution of such *subpoenae*.[82] The Trial Chamber issued *subpoenae ad testificandum* to all but one of the individuals named in the Prosecution's motion.[83] Furthermore, the Trial Chamber issued a Request to the Government of Bosnia and Herzegovina for its assistance in compelling the individuals subject to the *subpoenae* to appear before the Tribunal.[84] Thereafter, at the request of the Prosecution, the Trial Chamber vacated a *subpoena* as it related to one such witness.[85]

56. At the request of the Defence for Hazim Delić, the Trial Chamber also issued *subpoenae* to two witnesses to appear and testify before the Trial Chamber on behalf of this accused, along with an accompanying request to the Government of Bosnia and Herzegovina.[86] Thereafter, further *subpoenae* were issued on behalf of Mr. Delić.[87] The Trial Chamber also granted a request by Esad Landžo for the issuance of *subpoenae ad testificandum* to certain individuals.[88]

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[81] *See* sub-section 8 below.
[82] Request by the Prosecutor for the Issuance of Subpoenas *Ad Testificandum* and an Order to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 14 Oct. 1997 (RP D5258-D5263).
[83] Order on the Prosecution's Request for the Issuance of *Subpoena Ad Testificandum* and for an Order to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 16 Oct. 1997 (RP D5282-D5284).
[84] Request to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 16 Oct. 1997 (RP D5279-D5281).
[85] Order on the Prosecution's Oral Request for the Release of Esad Ramić from the *Subpoena ad Testificandum* Issued by the Trial Chamber, Case No. IT-96-21-T, 23 Oct. 1997 (RP D5298-D5299).
[86] *See* Order on the Motion of the Defence Hazim Delić for the Issuance of Subpoenas, Case No. IT-96-21-T, 26 June 1998 (RP D6744-D6746).
[87] *See* Order on the Second Motion for the Issuance of *Subpoena*, Case No. IT-96-21-T, 1 July 1998 (RP D6824-D6826) and accompanying *subpoenas*; *see also* Request to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 1 July 1998 (RP D6828-D6829).
[88] *See* Order on the Request by Esad Landžo for the Issuance of *Subpoenas*, Case No. IT-96-21-T, 6 July 1998 (RP D6952-D6954) and accompanying *subpoenas*; *see also* Confidential Request to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 6 July 1998 (RP D6957-D6959).

57. On several occasions during its case, the Defence for Zejnil Delalić was unable to produce sufficient witnesses, resulting in the cancellation of scheduled court sessions. On 2 June 1998, the Defence for Zejnil Delalić filed a schedule for the appearance of its remaining witnesses which provided for two weeks of witness testimony with an intervening week during which no witnesses were scheduled to appear. The Trial Chamber, in an oral ruling, stated that counsel for Zejnil Delalić should call all the scheduled witnesses during the continued sitting of the Trial Chamber, or close its case if it was unable to produce further witnesses. Thereafter, on 8 June 1998, the Defence for Mr. Delalić informed the Trial Chamber that it would be unable to call any additional witnesses and sought an adjournment of the trial until 22 June 1998 to enable it to do so, or, in the alternative, the issuance of *subpoenae* to certain individuals and a request for assistance to the Government of Bosnia and Herzegovina.[89] The Trial Chamber denied the Defence motion.[90] A subsequent application for leave to appeal this Decision filed by the Defence for Mr. Delalić was rejected by a Bench of the Appeals Chamber.[91]

(e) Miscellaneous

58. The Prosecution further moved the Trial Chamber to issue an order allowing investigators who might be called to testify at trial to be present in the public gallery when other witnesses were giving their testimony.[92] In its Decision on this motion, the Trial Chamber held that the provisions of sub-Rule 90(D) are "designed to ensure the purity of testimony admitted in evidence" and that permitting prospective witnesses to listen to the testimony of other witnesses in the case poses an "obvious risk to the administration of justice."[93] Accordingly, the Trial Chamber denied the Prosecution motion and ordered that "Prosecution and Defence investigators who may be called as witnesses should not be present in the public gallery of the courtroom and should not, otherwise, follow the proceedings when other witnesses are testifying."[94]

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[89] *See* Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June 1998 or Request for Issue of *Subpoenas* to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 8 June 1998 (RP D6557-D6561).
[90] Decision on the Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June 1992 or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina, Case No. IT-96-21-T, 23 June 1998 (RP D6700-D6719).
[91] Decision on the Application for Leave to Appeal Pursuant to Rule 73 by the Accused Zejnil Delalić, Case No. IT-96-21-AR73.4, 15 June 1998 (RP A15-A18).
[92] Motion to Allow the Investigators to Follow the Trial during the Testimonies of the Witnesses, Case No. IT-96-21-T, 10 March 1997 (RP D3003-D3005).
[93] Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, Case No. IT-96-21-T, 20 March 1997 (RP D3135-3142), D3136 and D3137.
[94] *Ibid.,* RP D3135.

59. Finally, the Defence for Zdravko Mucić filed an *ex parte* motion seeking an order from the Trial Chamber to compel an interpreter who was present during certain interviews of Mr. Mucić by Prosecution investigators, to testify before the Tribunal in his defence. The Trial Chamber, however, denied the motion on the grounds that: (1) the interpreter cannot be relied upon to testify on the evanescent words of the interpretation in the proceedings between the parties; and (2) it is an important consideration in the administration of justice to insulate the interpreter from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties.[95]

7. Evidentiary Issues

(a) Disclosure Requirements

60. On a motion from the Defence for Mr. Delalić,[96] the Trial Chamber issued a Decision setting forth its interpretation of the precise nature and scope of the parties' disclosure requirements pursuant to Rule 66 of the Rules.[97]

61. The Defence further filed a joint motion, arguing that, by virtue of its practice of serving additional evidence upon the Defence at very short notice, the Prosecution was in breach of its disclosure obligations under sub-Rule 66(A). The Defence urged the Trial Chamber to adopt a new rule of evidence in this regard, to ensure that the right of the accused to prepare an adequate defence was preserved.[98] The Trial Chamber declined to exercise its powers under sub-Rule 89(B) and denied the motion.[99]

62. In addition, the Defence for Hazim Delić filed a motion requesting that the Prosecution be ordered, pursuant to Rule 68, to produce all exculpatory evidence in its possession pertaining to the

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[95] Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, Case No. IT-96-21-T, 8 July 1997 (RP D3949-D3958).
[96] Motion for the Disclosure of Evidence, Case No. IT-96-21-PT, 10 June 1996 (RP D446-D447).
[97] Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-PT, 27 Sept. 1996 (RP D1444-D1452).
[98] Motion by the Defendants on the Production of Evidence by the Prosecution, Case No. IT-96-21-T, 5 May 1997 (RP D3528-D3533).
[99] Decision on the Motion by the Defendants on the Production of Evidence by the Prosecution, Case No. IT-96-21-T, 10 Sept. 1997 (RP D5133-D5139).

issue of whether the persons detained in the Čelebići prison-camp were prisoners of war for the purposes of the application of the Geneva Conventions of 1949.[100] This motion was denied by the Trial Chamber on the grounds that the Defence had failed to specify the material it sought to have disclosed.[101] On a motion by the Prosecution,[102] the Trial Chamber also held that the Defence is not obliged under sub-Rule 67(C), to provide the Prosecution with a list of documents it intends to use at trial.[103]

(b) Admissibility of Evidence

63. On another evidentiary issue, the Defence for Zdravko Mucić submitted a motion to exclude certain statements made by the accused prior to trial, urging their inadmissibility on several grounds.[104] The relevant statements arose out of a series of interviews with Mr. Mucić conducted by the Austrian police and Prosecution investigators in Vienna, between 18 March and 21 March 1996. In its Decision, the Trial Chamber, in line with the Prosecution's submissions on the matter, chose to analyse the interviews with the Austrian police separately from the questioning undertaken by the Prosecution investigators.[105] The Trial Chamber, while conceding that the Austrian provision restricting the accused's right to counsel during a criminal investigation "is within Article 6(3) [of the European Convention on Human Rights] as interpreted," nevertheless found it to be "inconsistent with the unfettered right to counsel in Article 18(3) [of the Statute] and sub-Rule 42(A)(i) [of the Rules]."[106] Accordingly, the Trial Chamber found the statements made by Mr. Mucić to the Austrian police to be inadmissible. As to the statements made to the Prosecution investigators, the Trial Chamber rejected the three grounds advanced by the Defence as bases for their exclusion.[107]

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[100] Request Pursuant to Rule 68 for Exculpatory Information, Case No. IT-96-21-T, 21 April 1997 (RP D3385-D3392).
[101] Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information, Case No. IT-96-21-T, 24 June 1997 (RP D3891-D3899).
[102] Motion to Specify the Documents Disclosed by the Prosecutor that Delalić's Defence Intends to Use as Evidence, Case No. IT-96-21-T, 13 May 1997 (RP D3641-D3646).
[103] Decision on the Motion to Specify the Documents Disclosed by the Prosecutor that Delalić's Defence Intends to Use as Evidence, Case No. IT-96-21-T, 10 Sept. 1997 (RP D5127-D5132).
[104] Motion to Exclude Evidence, Case No. IT-96-21-T, 8 May 1997 (RP D3587-D3595).
[105] Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, Case No. IT-96-21-T, 2 Sept. 1997 (RP D5082-D5105).
[106] *Ibid.,* para. 51.
[107] Ibid.

64. In addition, the Defence for Zejnil Delalić filed a motion, pursuant to sub-Rule 73(A)(iii) of the Rules, seeking to exclude certain of his pre-trial statements.[108] The propriety of these so-called "Munich Statements"[109] was first addressed in a Decision which dismissed the Defence arguments challenging the statements, but held that the Defence could object to the admissibility of the statements at trial where it could prove that the rights of the accused had been violated by irregularities in recording an interview.[110] The Defence for Mr. Delalić made several follow-up motions regarding the admissibility of the Munich Statements, among others. Thereafter, the Trial Chamber determined that the transcripts of the Munich Statements were admissible, finding no violation of Rule 42. The Trial Chamber further held that the Defence could object to the admissibility of the audio or video-recordings of the Munich Statements under Rule 43, if the Prosecution later sought to tender them into evidence. With respect to statements made by Mr. Delalić in further interviews with the Prosecution,[111] the Trial Chamber held that the Defence had presented insufficient evidence to establish a basis for excluding this evidence.[112]

65. On another occasion, and in an oral motion, the Prosecution sought to have certain other documents and videotapes admitted into evidence.[113] The material at issue had been seized by members of the Austrian police from the premises of a firm with which Zejnil Delalić was alleged to have close connections, and from the apartment of Mr. Mucić. Applying the relevant Rules, the Trial Chamber admitted all of this evidence tendered by the Prosecution.[114] The Defence for Mr. Delalić then filed an application for leave to appeal the Trial Chamber's Decision,[115] which was unanimously rejected by a Bench of the Appeals Chamber.[116] Thereafter, the Prosecution sought to introduce into evidence additional items seized by the Austrian police from Mr. Mucić's apartment. The Defence for Mr. Delalić objected to this on the grounds that there were a number of

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[108] Motion for Exclusion of Evidence, Case No. IT-96-21-PT, 5 June 1996 (RP D1/403 *bis*–4/403 *bis*)
[109] The "Munich Statements" are transcripts of interviews held between Zejnil Delalić and Prosecution investigators at the Office of the Bavarian Police in Munich, Germany on 18 and19 March 1996.
[110] Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material Seized From the Accused Zejnil Delalić, Case No. IT-96-21-PT, 10 Oct. 1996 (RP D1612-D1621).
[111] This refers to interviews held between Zejnil Delalić and Prosecution investigators at the Detention Unit in The Hague from 22–23 Aug. 1996, and various addenda made on 22 July and 10 Aug. 1996 to the Munich Statements.
[112] *See generally* Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalić, Case No. IT-96-21-T, 25 Sept. 1997 (RP D5162-D5180).
[113] Raised on 31 Oct. 1997.
[114] Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-T, 21 Jan. 1998 (RP D5423-D5440).
[115] Application of Defendant Zejnil Delalić for Leave to Appeal the Decision on the Motion of the Prosecution for the Admissibility of Evidence of 19 January 1998 Pursuant to Rule 73, Case No. IT-96-21-T, 28 Jan. 1998 (RP D5442-D5455).
[116] Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-AR 73.2, 5 March 1998 (RP A25-A36).

irregularities in the police search. The Trial Chamber, finding that the evidence tendered was relevant and of probative value, determined that this evidence was also admissible.[117]

66. The Prosecution also sought to introduce into evidence, through the testimony of a relevant witness, a letter purportedly written by Mr. Mucić containing information regarding his role in the Čelebići prison-camp. The Prosecution argued several grounds for the admissibility of this document and submitted that, in the event that such grounds proved insufficient, the Trial Chamber should direct Mr. Mucić to provide a sample of his handwriting for analysis and identification. Upon the submission of written briefs by both parties on this issue,[118] the Trial Chamber held that the letter contained sufficient indicia of reliability to be admissible. However, the Trial Chamber refused to order Mr. Mucić to provide a handwriting sample on the grounds that this would be tantamount to forcing him to testify against himself, and, as such, would constitute a violation of Article 21, paragraph 4(g) of the Statute.[119]

67. Also in relation to statements made to the Prosecution prior to trial, the Defence for Esad Landžo filed a motion pursuant to sub-Rule 73(C) for relief from waiver to bring a motion under sub-Rule 73(A) to exclude such statements made by Mr. Landžo.[120] The Trial Chamber held, however, that where the sole reason for the untimely filing of such a motion was the failure of Mr. Landžo's previous counsel to recognise the need for such a motion, this did not constitute good cause sufficient to warrant a grant of relief from waiver under sub-Rule 73(C).[121]

68. Similarly, the Defence for Hazim Delić filed a motion pursuant to sub-Rule 73(C), seeking relief from waiver to bring a motion under sub-Rule 73(A). The Trial Chamber held that the Defence argument that Mr. Delić's statement was made involuntarily and was, therefore, inadmissible, was unfounded. Hence, this argument did not constitute good cause sufficient to

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[117] Decision on the Tendering of Prosecution Exhibits 104-108, Case No. IT-96-21-T, 10 Feb. 1998 (RP D5489-D5497).
[118] Prosecution Brief Concerning the Standard for Admission of Evidence at Trial and the Production of Handwriting Samples, Case No. IT-96-21-T, 16 July 1997 (RP D4010-D4021); Reply to the Prosecution's Oral Motion of 8th July 1997, Case No. IT-96-21-T, 29 July 1997 (RP D4055-D4112).
[119] Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, Case No. IT-96-21-T, 21 Jan. 1998 (RP D5395-D5419).
[120] Motion for Extension of Time in Which to File Motions Pursuant to Sub-Rule 73(A)(iii) and Relief from Waiver Provided in Sub-Rule 73(C), Case No. IT-96-21-T, 7 May 1997 (RP D3575-D3577).
[121] Decision on Motion by Esad Landžo Pursuant to Rule 73, Case No. IT-96-21-T, 1 Sept. 1997 (RP D5067-D5074).

warrant a grant of relief from waiver to bring a motion under sub-Rule 73(A) to exclude the statement.[122]

69. Thereafter, the Defence for Zdravko Mucić filed a motion pursuant to sub-Rule 73(C), seeking relief from waiver to bring a motion to exclude certain pre-trial statements made by the accused which the Prosecution sought to introduce into evidence. The Defence argued that the statements had been obtained using methods which cast substantial doubt on their reliability. The Trial Chamber, in granting the motion, held that good cause had been shown as to why the relief should be granted, as it would be "unjust to deprive the accused of the right to challenge the admission of the Statements which are claimed to have been obtained in oppressive circumstances."[123]

(c) Evidence of Prior Sexual Conduct

70. The Trial Chamber was also called upon to address the issue of the inadmissibility of evidence concerning the prior sexual conduct of victims of sexual assault. Such evidence is specifically excluded by virtue of sub-Rule 96(iv) and it was on the basis of this provision that the Trial Chamber ordered the redaction from the public record of references made in open court to the prior sexual conduct of a Prosecution witness while testifying to a charge of sexual assault.[124] In its Decision on this matter, the Trial Chamber discussed the need for protection of the privacy of witnesses and the necessary balancing between such considerations and the general principle of public proceedings. However, where information has already entered the public domain, the Trial Chamber opined that it "cannot ordinarily transform a public fact into a private one by virtue of an order."[125] Thus, instead of utilising its powers under Rule 75, the Trial Chamber analysed the nature of the information which had been revealed and subsequently sought to be removed from the record, and determined that it did indeed constitute evidence of prior sexual conduct and was, therefore, irrelevant and inadmissible.

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[122] Decision on Hazim Delić's Motion Pursuant to Rule 73, Case No. IT-96-21-T, 10 Sept. 1997 (RP D5118-D5126).
[123] Decision on Zdravko Mucić's Motion for Leave to File an Out-of-Time Application Pursuant to Rule 73, Case No. IT-96-21-T, 3 Sept. 1997 (RP D5075-D5081), D5077.
[124] Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21-T, 5 June 1997 (RP D3826-D3845).
[125] *Ibid.,* RP D3834.

8. Miscellaneous Issues Relating to the Regulation of Proceedings

71. The Defence for Esad Landžo filed several preliminary motions addressing a diverse range of issues on 14 January 1997. The Trial Chamber disposed of these motions in a single order.[126] Included in these motions were: a Motion for Reconsideration of Application for Separate Trial, denied on the basis that the Defence had failed to establish good cause sufficient to warrant a grant of waiver pursuant to sub-Rule 73(C); and a motion entitled Defence Request for Bill of Particulars, denied in consideration of the Trial Chamber's prior Decision on the Motion Based on Defects in the Form of the Indictment.[127]

72. On 17 March 1997, in open session, the Trial Chamber heard the testimony elicited on re-examination of the Prosecution witness, Mr. Mirko Babić. The Trial Chamber then refused to allow the Defence for Esad Landžo to re-cross-examine Mr. Babić, holding that the relevant provisions of the Rules do not envision a right to re-cross-examination. Thereafter, the Defence for Esad Landžo filed a motion asserting the right of the Defence under sub-Rule 85(B) of the Rules and Article 21, paragraph 4(e) of the Statute, to further cross-examine any Prosecution witness who is subject to re-examination.[128] The Trial Chamber determined that such a right to re-cross-examination, by either party exists only in instances where "during re-examination new material is introduced. … Similarly, where questions put to a witness by the Trial Chamber after cross-examination raise entirely new matters, the opponent is entitled to further cross-examine the witness on such new matters."[129]

73. During the course of the trial, the Prosecution, in a closed session hearing, raised with the Trial Chamber the issue of an alleged disclosure and subsequent publication in the media of confidential information, by one of the accused. The Trial Chamber referred the Prosecution's complaint to the President of the International Tribunal[130] who, after a series of investigations,

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[126] Order Disposing of Motions Filed by the Defence, Case No. IT-96-21-PT, 27 Jan. 1997 (RP D2676-D2678).
[127] Other motions included a Defence Motion for Equal Access to Prosecution Witnesses for Interview, a Defence Motion for Disclosure of Exculpatory Material, a Defence Motion for Designation of Evidence and a Defence Motion for Discovery and Inspection of Evidence. With respect to these motions, the Trial Chamber urged the parties to attempt to resolve the matters at issue among themselves, noting that "if such matters cannot be so resolved, any party may raise them with the Trial Chamber during the trial proceedings", RP D2676.
[128] Motion for Decision on Presentation of Evidence, Case No. IT-96-21-T, 24 March 1997 (RP D3151-D3155).
[129] Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, Case No. IT-96-21-T, 1 May 1997 (RP D3491-D3504), D3492.
[130] Referral of Complaint, Case No. IT-96-21-T, 16 May 1997 (RP D3678-D3679).

issued a confidential report containing his findings and recommendations on the matter.[131] Thereafter, the Trial Chamber issued an order on the Prosecution's complaint accepting all but one of the President's conclusions. The Trial Chamber rejected the President's decision to leave the door open for the Prosecution to initiate proceedings against Zejnil Delalić for contempt of the Tribunal, on the grounds that "the findings in the report disclose no evidence on which the President could have relied for casting any element of doubt on the uncontradicted and unequivocal denial of [the] accused Zejnil Delalić."[132]

74. Another issue which arose during the trial involved a joint Defence motion alleging that the Prosecution had acted in an unprofessional and reprehensible manner by communicating with the President of the Tribunal on a matter relating to the trial.[133] The Trial Chamber found the allegations of impropriety to be ill-founded and denied the motion.[134]

75. Lead counsel for Mr. Mucić, Mr. Zeljko Olujić, was himself the subject of a series of orders issued by the Trial Chamber in May and June of 1998. The first such order related to a document filed by Mr. Olujić in response to a Scheduling Order previously issued by the Trial Chamber. The Trial Chamber found this response to be insufficient in fulfilling the obligations of the Defence for Mr. Mucić pursuant to the Scheduling Order, in addition to being "unacceptable as a document filed with the International Tribunal, in the quality of its language, its attacks on the Office of the Prosecutor and its impugning of the proceedings of the International Tribunal itself."[135] Thereafter, on 9 June 1998, the Trial Chamber filed a written order, requesting that Mr. Olujić comply with an oral order of the Trial Chamber directing counsel for all four accused to reassess their proposed witness lists and submit revised lists with a reduction in the number of proposed witnesses.[136] When Mr. Olujić failed to comply with the Order of 9 June 1998, the Trial Chamber issued a subsequent order compelling compliance, in which it reminded Mr. Olujić that he had been given two warnings under Rule 46[137] and, should he continue to resist compliance, the Trial Chamber

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[131] Report of the President in the Matter of the Referral of Complaint, Case No. IT-96-21-T, 27 May 1997 (RP D3733-D3736).
[132] Order on Complaint Brought by Prosecution, Case No. IT-96-21-T, 2 June 1997 (RP D3802-D3806).
[133] Motion for Warning Pursuant to Rule 46(A) and to Inform Professional Body Pursuant to Rule 46(B) and for Disclosure of Document, Case No. IT-96-21-T, 2 Sept. 1997 (RP D5055-D5065).
[134] Order Disposing of Defence Motion Pursuant to Rule 46 and for Disclosure of Document, Case No. IT-96-21-T, 8 October 1997 (RP D5224-D5226).
[135] Order, Case No. IT-96-21-T, 18 May 1998 (RP D6149-D6151).
[136] Order, Case No. IT-96-21-T, 10 June 1998 (RP D6584-6586).
[137] Sub-Rule 46(A) of the Rules provides that "A Chamber may, after a warning, refuse audience to counsel if, in its opinion, the conduct of that counsel is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings".

would exercise its discretion under Rule 46 to refuse him further audience as the legal representative of Mr. Mucić.[138]

76. At a status conference on 21 May 1998, having reviewed the proposed witness lists filed by each of the accused, the Trial Chamber impressed upon the Defence the need to limit their witness lists so as to avoid repetition and unnecessary duplication. The Trial Chamber further stated that, in the absence of compliance with its direction in this regard, it would itself take steps to limit the number of witnesses each accused would be permitted to call. In a joint motion, the Defence objected to the Trial Chamber's proposal.[139] In its Decision on the issue, the Trial Chamber found that the exercise of its right to regulate the proceedings, pursuant to Article 20(1) of the Statute, did not impinge upon the accused's right to a fair trial and in particular the rights enshrined in Article 21(4)(e) where the Trial Chamber sought to prescribe guidelines to assist the Defence in calling its witnesses so as to avoid duplication of witnesses and repetitive testimony.[140]

77. At the request of the Trial Chamber and during the case for the last accused, the Prosecution provided notification of the witnesses it anticipated calling in rebuttal.[141] The Trial Chamber granted leave to call only one of the four witnesses requested by the Prosecution.[142] Thereafter, the Prosecution filed an application to re-open its case to allow the other three proposed rebuttal witnesses to testify as additional witnesses (see sub-section 6(d) above).[143] This motion was denied by the Trial Chamber[144] and the Prosecution's subsequent application for leave to appeal was rejected.[145]

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[138] Order, Case No. IT-96-21-T, 16 June 1998 (RP D6633-6635).
[139] Joint Request by the Defendants Delalić, Mucić, Delić and Landžo Regarding Presentation of Evidence, Case No. IT-96-21-T, 25 May 1998 (RP D6192-D6199).
[140] Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated May 24 1998, Case No. IT-96-21-T, 12 June 1998 (RP D6593-D6610).
[141] Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, Case No. IT-96-21-T, 22 July 1998 (RP D7322-D7328).
[142] Order on the Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, Case No. IT-96-21-T, 30 July 1998 (RP D7497-D7499).
[143] Prosecution's Alternative Request to Reopen the Prosecution's Case, Case No. IT-96-21-T, 30 July 1998 (RP D7364-D7381).
[144] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Case No. IT-96-21-T, 19 Aug. 1998 (RP D7574-D7591).
[145] Decision on Prosecutor's Applications for Leave to Appeal the Order of 30 July 1998 and Decision of 4 August 1998 of Trial Chamber II *quater*, Case No. IT-96-21-AR73.6 and 73.7, 31 Aug. 1998 (RP A34-A37).

9. Defence of Diminished or Lack of Mental Capacity

78. In response to the charges brought against him, Esad Landžo raised the defence of diminished, or lack of, mental capacity at an early stage[146] and later made a submission requesting clarification from the Trial Chamber as to the precise legal parameters of this defence.[147] The Trial Chamber determined that a party offering a special defence of diminished or lack of mental responsibility "carries the burden of proving this defence on the balance of probabilities," but reserved a decision on the definition of diminished or lack of mental capacity until final judgement.[148] The Trial Chamber refused to reconsider a further request by the Defence for Esad Landžo to provide a legal definition of diminished, or lack of, mental capacity.[149]

10. Judges' Terms of Office

79. Early in the trial, the Prosecution filed a motion seeking a hearing to address the fact that the Judges' terms of office were likely to expire before the trial had ended. The Prosecution sought to elicit any objections the accused might have to the Judges of the Trial Chamber sitting beyond the expiry of their current terms.[150] The Trial Chamber determined that a hearing on the issue was unnecessary, since, pursuant to Article 13(4) of the Statute, which incorporates article 13(3) of the Statute of the International Court of Justice (hereafter "ICJ") by reference, the Judges, though replaced, are empowered, and indeed required, to finish any cases which they may have begun.[151] Subsequently, a Security Council resolution extended the Judges' terms of office until the conclusion of the Čelebići trial.[152]

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[146] *See* Notice of the Defence to the Prosecutor Pursuant to Rule 67(A)(ii)(b) of the Rules, (RP D2248-D2251).
[147] Esad Landžo's Submissions Regarding Diminished or Lack of Mental Capacity, Case No. IT-96-21-T, 8 June 1998 (RP D6542-D6555).
[148] Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, Case No. IT-96-21-T, 18 June 1998 (RP D6641-D6643), D6642.
[149] Order on Esad Landžo's Request for Definition of Diminished of Lack of Mental Capacity, Case No. IT-96-21-T, 15 July 1998 (RP D7229-D7230).
[150] Motion that Accused State Whether They Will Waive Any Objection to the Trial Chamber Sitting After 17 November 1997, Case No. IT-96-21-T, 28 May 1997 (RP D3738-D3740).
[151] Decision on the Prosecution's Motion that the Accused State Whether They Will Waive Any Objection to the Trial Chamber Sitting After November 17, 1997, Case No. IT-96-21-T, 23 June 1997 (RP D3882-D3887).
[152] Security Council Resolution No. 1126 (1997), 27 Aug. 1997.

80. The Defence filed a joint motion requesting that Judge Odio Benito cease to take part in the proceedings on the grounds that her judicial independence had been compromised by virtue of having taken the oath of office of Vice-President of Costa Rica.[153] The issue was referred to the Bureau of the Tribunal for determination. The Bureau, consisting of President McDonald, Vice-President Shahabuddeen, Judge Cassese and Judge Jorda, concluded that, since Judge Odio Benito had stated that she would not take up any of her duties as Vice-President of Costa Rica until she had completed her judicial duties at the International Tribunal and was, in essence, holding her political position in name alone, she was not disqualified under sub-Rule 15(A) of the Rules.[154]

11. Motion for Judgement of Acquittal

81. At the conclusion of the case for the Prosecution, on 16 February 1998, the Defence indicated that it would move to dismiss the case against each of the accused. The Defence for Zejnil Delalić, Hazim Delić and Esad Landžo filed a joint Defendant's Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case on 20 February 1998 (hereafter "Motion to Dismiss").[155] The Defence for Zdravko Mucić filed a separate motion for judgement of acquittal, or, in the alternative, dismissal, or provisional release.[156] Thereafter, the Prosecution filed a comprehensive response, setting forth its arguments as to why the motion should be denied.[157]

82. In its Decision on these motions, the Trial Chamber observed that the submission of a motion for judgement of acquittal constituted an effective closing of the Defence case, thereby entitling the Trial Chamber to determine the guilt or innocence of the accused, whereas a request for dismissal of the Indictment, if unsuccessful, would permit the accused to continue with their respective cases. In response to questions posed during oral argument, each of the Defence counsel submitted that they did not seek to close their respective cases at this time and that the motions should therefore be

[153] Motion on Judicial Independence, Case No. IT-96-21-T, 4 June 1998 (RP D6415-D6525).
[154] Decision of the Bureau on Motion on Judicial Independence, Case No. IT-96-21-T, 4 Sept. 1998 (RP D9516-D9528).
[155] Defendants' Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, Case No. IT-96-21-T, 20 Feb. 1998 (RP D5503-D5724).
[156] Defendant's Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case or in the alternative Motion for the Provisional Release from the Custody of the ICTY Tribunal Effective Immediately, Case No. IT-96-21-T, 20 Feb. 1998 (RP D5726-D5757).
[157] Prosecution's Response to Defendant's Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, Case No. IT-96-21-T, 6 March 1998 (RP D5759-D5861) (hereafter "Prosecution Response to the Motion to Dismiss").

understood as requests for dismissal of all counts of the Indictment. Thereafter, the Trial Chamber held that, as a matter of law, the Prosecution had presented sufficient evidence relating to each element of the offences charged to allow a reasonable tribunal to convict, were such evidence to be accepted. Accordingly, the Trial Chamber dismissed the Motion to Dismiss and the motion submitted by Mr. Mucić, in so far as it constituted a request for dismissal of the Indictment. The Trial Chamber also dismissed Zdravko Mucić's motion in so far as it constituted a request for provisional release, finding that the issue was not appropriately raised.[158]

12. Sentencing Procedure

83. At the Eighteenth Plenary Session of the International Tribunal, on 9 and 10 July 1998, the Judges, sitting in plenary, adopted several amendments to the rules pertaining to the Tribunal's procedure for sentencing. Whereas previously a separate hearing was held to determine sentencing where necessary, only after the judgement had been rendered as to the accused's guilt or innocence, the amended Rules provide for simultaneous judgement and sentencing.[159] Accordingly, on 10 September 1998, nine days after the final presentation of evidence in the trial, the Trial Chamber issued a scheduling order,[160] noting the aforementioned changes in the Rules and further noting that pursuant to sub-Rule 6(C) of the Rules, "an amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused."[161] Having determined that the application of the new sentencing procedures pursuant to amended sub-Rule 87(C) would not prejudice the rights of the accused, nor in any way indicate the guilt or otherwise of the accused, the Trial Chamber established a schedule for the parties submissions and subsequent hearings on the issue of sentencing.

84. Pursuant to the 10 September Scheduling Order, the Prosecution filed its submissions on sentencing on 1 October 1998.[162] Thereafter, the Defence for each accused filed their respective submissions on the issue of sentencing.[163] A four-day hearing was subsequently held, commencing

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[158] Order on the Motions to Dismiss the Indictment at the Close of the Prosecution's Case, Case No. IT-96-21-T, 18 March 1998 (RP D5924-D5927).
[159] Sub-Rule 87(C) provides: "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect to each finding of guilt."
[160] Scheduling Order, Case No. IT-96-21-T, 10 Sept. 1998 (RP D9643-D9646).
[161] Sub-Rule 6(C) of the Rules.
[162] Sentencing Submissions of the Prosecution, Case No. IT-96-21-T, 1 Oct. 1998 (RP D9660-D9787).
[163] Sentencing Submissions by the Accused Zejnil Delalić, Case No. IT-96-21-T, 5 Oct. 1998 (RP D9889-D10003); Esad Landžo's Submissions on Proposed Sentencing, Case No. IT-96-21-T, 5 Oct. 1998 (RP D9827-D9887);

on 12 October 1998, during which the parties presented their evidence and final submissions as to sentencing.

D. Structure of the Judgement

85. This Judgement is divided into six sections, each constituting an integral part of the whole. The introductory section has briefly addressed the mandate of the International Tribunal, introduced the Indictment and set out the procedural history of the case. The following section discusses the background and preliminary factual findings as to the conflict in the Konjic municipality and the political structure that existed during the relevant period, as well as the military forces involved in the fighting and the existence of the Čelebići prison-camp.

86. Section III addresses the applicable provisions of the Statute and their interpretation in the present context. The first eight sub-sections pertain to the provisions of the Statute concerning the subject-matter and personal jurisdiction of the International Tribunal and general principles of interpretation. In the final sub-section the Trial Chamber sets forth the elements of each of the offences alleged in the Indictment.

87. Section IV contains the Trial Chamber's factual and legal findings in relation to the allegations made in the Indictment. The role of each of the accused in the facts found proven is thus determined. Section V contains the discussion of sentencing and its applicability to each of the accused. Finally, in Section VI, the Judgement of the Trial Chamber on the guilt or innocence of each of the accused in relation to each of the charges against them, is laid out and the sentence for each accused in relation to those counts of which they are found guilty is imposed. The attached annexes include a glossary of abbreviations, the Indictment, a plan of the Čelebići prison-camp and certain photographs.

Sentencing Submission on Behalf of Zdravko Mucić a/k/a Pavo, Case No. IT-96-21-T, 5 Oct. 1998 (RP D9789-D9825); Defendant Hazim Delić's Memorandum of Law on Sentencing and Sentencing Memorandum, Case No. IT-96-21-T, 9 Oct. 1998 (RP D10024-D10059) (Confidential).

II. BACKGROUND AND PRELIMINARY FACTUAL FINDINGS

88. The Indictment at issue in the present case is solely concerned with events in the municipality (*opština*) of Konjic, in central Bosnia and Herzegovina, during a period of months in 1992. The Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political and historical background to these events, nor a general analysis of the conflict which blighted the whole of the former Yugoslavia around that time. The function of the Trial Chamber is to do justice in the case at hand and while this naturally involves presenting its findings in context, we will limit this background section to those facts which are necessary to situate the evaluation of the present case.

89. It is important to note that the Trial Chamber does not seek to identify causal factors, nor through history explain why the conflict with which we are concerned occurred. It would indeed do no justice to the victims of this conflict to attempt to explain their suffering by proffering historical "root causes" which somehow inexorably led to the violence which engulfed them. Such an endeavour would, in any case, be an exercise in futility.

90. The Trial Chamber has heard extensive witness testimony and been presented with many documents and written reports. For the purposes of this background, particular reliance is placed on the evidence presented through the historical, political and military expert witnesses of both the Prosecution and the Defence. In addition, we have taken notice of many public documents which bear substantial authority - in particular, resolutions of the United Nations Security Council and General Assembly, the Final Report of the United Nations Commission of Experts,[164] reports of the United Nations Secretary-General, and declarations and statements from the European Community and the Conference on Security and Cooperation in Europe (CSCE).

[164] S/1994/674 (hereafter "Commission of Experts Report").

A. Historical and Geographical Background of the Socialist Federal Republic of Yugoslavia

91. The Socialist Federal Republic of Yugoslavia (hereafter "SFRY") was created after the Second World War under the leadership of Josip Broz (better known as "Tito") out of the ashes of a Yugoslavia which had been occupied and divided by the Axis powers and which had witnessed widespread slaughter during that conflict. Tito's Partisan forces, which were aligned with the Communist party, had long perfected the art of guerrilla warfare and thus achieved victory against the invading German army, the Croatian Ustaša which supported it, and against the Četnik forces of Draža Mihailović, which operated as a Serb resistance movement. With the defeat in Europe of the Axis powers, Tito established a socialist State which comprised the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, and two autonomous provinces - Kosovo and Vojvodina - situated in Serbia. Each of the peoples of these Republics were regarded as distinct nations, all with equal status. In Bosnia and Herzegovina, however, which housed significant numbers of Croats, Serbs and Muslims, no one ethnic group was in the majority and thus there was no recognised Bosnian "nation". It was not until the Constitution promulgated in 1974 that the Muslim population of Bosnia and Herzegovina gained recognition as one of the peoples of the SFRY.

92. Under the leadership of Tito, a strict system of socialist self-management was instituted under a Constitution which sought to keep together the many nationalities living in the Republics. Any nationalist aspirations that may have surfaced were swiftly suppressed. The initial post-war Constitution envisaged a highly centralised State with power concentrated in the Communist party in the federal capital, Belgrade. Tito, however, remained a leader independent from the hold of the Soviet Union and in 1948 the SFRY was expelled from the common institutions of the eastern bloc. Throughout the 1960s and 1970s, the trend in the SFRY was towards further decentralisation of power to the governments of each of the Republics and this was entrenched in the final Constitution in 1974.

B. The Concept of All People's Defence (Total National Defence)

93. After the invasion of Czechoslovakia in 1968 by the USSR and due to the poor relations between the SFRY and the Soviet Union, a defence system known as "All People's Defence" (or "Total National Defence") was devised to protect the SFRY from external attack. This system integrated all citizens in the defence of the federation and aimed to utilise all resources. The right of all Yugoslav citizens to participate in the defence of the SFRY was enshrined in the 1969 Constitution, which provided for compulsory military service, compulsory labour service, civil defence and material contributions.

94. The centre of this defence system was the Yugoslav People's Army (hereafter "JNA"), which was the SFRY's regular, standing army, controlled by the Federal Ministry of Defence. As an institution, it possessed a right of representation on the central committee of the League of Communists. The JNA comprised 45,000-70,000 regular officers and soldiers along with 110,000-135,000 conscripts who served on a more short-term basis[165] and was equipped with modern conventional weapons and equipment. In the event of an armed conflict, the JNA was to be supported by the Territorial Defence forces (hereafter "TO"), which had a base in each of the Republics. Each of the TOs were responsible to the Presidency of the Republic in which they were based, and also to the General Staff of the JNA. The TO was made up of part-time soldiers who had been conscripts in the JNA and who received periodical further training. Its equipment was less sophisticated and lighter than that of the JNA.

95. In addition, the Federal Ministry of Interior controlled intelligence and State security forces, as well as the People's Police. These were also integrated into the overall system of All People's Defence.

[165] Commission of Experts Report, annex III, p. 10.

C. Disintegration of the SFRY and Emergence of the New States

96. With Tito's death in 1980 and the escalation of a serious economic crisis, cracks began to appear in the unity of the federal State. The federation was then governed by a Presidency consisting of representatives of the six Republics and two autonomous provinces. The League of Communists began to lose its grip on the Republics and their increasingly nationalist political movements and parties. With communism in decline throughout Eastern Europe in the 1980s, new leaders emerged who advocated social and political change which challenged the existing paradigm. Of particular note is Slobodan Milošević, who rose to power in Serbia in 1987 through the hierarchy of the Communist party and finally became President of Serbia in 1989. In addition, the Croatian Democratic Union (hereafter "HDZ") was formed in Croatia in 1989, under the leadership of Franjo Tuđjman, on a platform of Croatian nationalism.

97. By 1988, the Serbian government was seeking to achieve the full integration of the two autonomous provinces into Serbia. In October of that year, the authorities governing Vojvodina were removed and in March 1989 a new Constitution was adopted in Serbia which removed the autonomy of the province of Kosovo. Thus, with the support of the leadership of Montenegro, Serbia wielded substantial power in the Federal Presidency, to the disquiet of the representatives of the other Republics.

98. Towards the end of 1989, Slovenia was advocating its right to secede from the SFRY and in January 1990 the Slovenian delegation walked out of the Congress of the League of Communists, followed by the Croatian delegation. In May 1990, a new government was elected into office in Slovenia after its first multi-party elections. That same month, Franjo Tuđjman became the first democratically elected President of Croatia and the Republic's Constitution was subsequently amended such that citizens who were not of the Croat 'ethnic group' were deprived of their equal status as 'nations' and, essentially, reduced to being 'ethnic minorities'.[166] Consequently, in August 1990, the Serbs living in the Krajina region of Croatia held a referendum on self-autonomy and certain towns were declared to be part of Serbia. Violent clashes between the Krajina Serbs and the Croatian authorities rapidly developed. Meanwhile, Serbian parties had been formed in both

[166] *See* Constitution of the Republic of Croatia, promulgated 22 Dec. 1990.

Croatia and Bosnia and Herzegovina - entitled the Serbian Democratic Party (hereafter "SDS") - and the HDZ had also formed a branch within Bosnia and Herzegovina.

99. In Bosnia and Herzegovina the population of 4.3 million was the most heterogeneous of all the Republics. A census in 1991 designated roughly 43.5 per cent of this population as Muslim, 31.2 per cent as Serbian, and 17.4 per cent as Croat. Many areas were ethnically mixed, although it appears that individual towns and villages could be identified as Serb, or Croat, or Muslim, depending on the predominant ethnicity of their inhabitants. Nonetheless, accounts demonstrate that, prior to the build-up to the conflict, these groups had generally friendly relations and extensive interaction, including substantial inter-marriage. In November 1990, elections were held in which the voting was divided roughly proportionately amongst the three nationalist parties - the Muslim "Party of Democratic Action" (hereafter "SDA"), the SDS and the HDZ. A coalition government was thus formed headed by a seven member State Presidency, with the leader of the SDA, Alija Izetbegović, as the first President. Each of these parties, however, had distinct visions for the future constitutional structure of the Republic. While the SDS supported the maintenance of the Yugoslav State, the HDZ and SDA began to favour independence.

100. With a perceived increase in the dominance of the Serbian government in the Federal Presidency, further moves towards independence were made in both Slovenia and Croatia in late 1990 and into 1991. After national referendums confirmed the will of the people of these Republics to become separate from the SFRY, both declared their independence on 25 June 1991. Upon intervention by the European Community, however, they agreed to put their declarations on hold for three months. Meanwhile, in both Slovenia and Croatia, JNA units under the control of the Federal Presidency, now dominated by Serbia, were mobilised and conflicts ensued between the JNA and local TO forces loyal to their Republican governments. Throughout 1990, the JNA had sought to weaken the Republican TO forces in Slovenia and Croatia by withdrawing weapons from their bases. This attempt did not fully succeed in Slovenia, however, which managed to substantially re-arm before conflict broke out. Indeed, when the JNA attacked at the end of June, the Slovenian TO was able to mount an effective resistance.

101. From May 1991, the eight-member Federal Presidency of the SFRY was deadlocked due to the blocking of the automatic succession of Stipe Mesić, the Croatian representative, to the position of President by Serbia, along with its allies. This obstruction was lifted at the end of June in order for the Presidency to regain control of the JNA and finally order it to withdraw from Slovenia.

102. While Slovenia itself contained very few Serbs, Croatia supported a significant Serb population and included territory with historical links to Serbia. In Croatia, therefore, conflict between the forces of the Republican government and the Serbs of the Krajina region bordering on to Bosnia and Herzegovina, backed by the JNA, intensified throughout the summer of 1991. With its withdrawal from Slovenia, the JNA was able to concentrate more of its strength in Croatia and the intensity of the conflict there far exceeded the fighting in Slovenia.

103. The Croatian Army (hereafter "HV") grew out of the Croatian TO forces, along with additional volunteers, and the government also formed a Croatian National Guard. Furthermore, the Ministry of Interior created an internal security force from police reserves. These forces were, however, no match at the outset for the strength of the JNA and by the end of 1991 the JNA had occupied substantial parts of Croatian territory. In November, with the mediation of the United Nations envoy, Cyrus Vance, a cease-fire was signed, to be monitored by United Nations peacekeeping troops, and in resolution 743, adopted on 21 February 1992, the Security Council established the United Nations Protection Force (UNPROFOR) to fulfil this task and oversee the withdrawal of the JNA from Croatia.

104. Meanwhile, the Serbs in Bosnia and Herzegovina had begun to declare certain areas of that Republic "Serbian autonomous regions" (hereafter "SAOs"). Alarmed by the situation in Yugoslavia as a whole, the United Nations Security Council, on 25 September 1991, passed resolution 713, which imposed an arms embargo throughout the territory.

105. In October 1991, the Bosnian Parliament declared its support for the sovereignty of Bosnia and Herzegovina and its withdrawal from the SFRY. Subsequently, in December, the European Community invited all of the SFRY Republics to apply for recognition as independent States by 24 December and such applications were to be considered by an Arbitration Commission.[167] Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia all applied at this time. In response, the Serbs in Bosnia and Herzegovina, who had created their own "Assembly" and voted in a referendum to stay in Yugoslavia, declared their own independent "Serbian Republic of Bosnia and

[167] *See* EC Declaration on Yugoslavia, 3 Sept. 1991, EPC Press Release P. 84/91 and Declaration on the Occasion of the Ceremonial Opening of the Conference on Yugoslavia, 7 Sept. 1991, EPC Press Release P. 86/91. The Arbitration Commission is often referred to as the "Badinter Commission", after its Chairman, Robert Badinter.

Herzegovina" (hereafter "SRBH")[168] on 9 January 1992, to remain part of the Yugoslav Federation.[169]

106. The Arbitration Commission established by the European Community issued its Opinions on 11 January 1992, that Slovenia and Macedonia should be recognised as independent States.[170] In addition, subject to the enactment of suitable guarantees for ethnic minorities, the Commission recommended the recognition of Croatia as an independent state.[171] The Commission also took the view that, should the people in Bosnia and Herzegovina vote for independence in a referendum, that Republic should also gain recognition.[172] Such a referendum was immediately organised and held on 29 February and 1 March 1992. Despite a boycott by the Bosnian Serbs, a majority of the population voted in favour of independence. On 6 March, the Bosnian Government thus declared that Bosnia and Herzegovina had become an independent State and fighting between Serbs, Croats and Muslims ensued. Subsequently, on 6 April 1992, the European Community, closely followed by the United States, recognised Bosnia's statehood.[173]

107. The armed conflict in Bosnia and Herzegovina was the most protracted of all the conflicts which took place during the dissolution of the SFRY. It was characterised by a massive displacement of population as well as the practice of "ethnic cleansing", made notorious by many media reports along with those of the United Nations, and other violations of international humanitarian law. Estimates of the number of lives lost in the course of the conflict vary between 150,000 and 200,000.

108. The European Community and the United Nations sought to resolve the conflict through mediation and the proposal of various territorial settlements. These, however, were not successful until November 1995, when the Dayton Peace Agreement was reached through negotiation by a

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[168] This was later renamed the Republika Srpska.
[169] Exhibit 19. *See also*, Exhibits 13, 14, 15, 16, 17 and 18.
[170] Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States, 11 January 1992, reprinted in I.L.M. vol. 31 (1992) 1507 and Opinion No. 7 on International Recognition of the Republic of Slovenia by the European Community and its Member States, 11 Jan. 1992, reprinted in I.L.M. vol. 31 (1992) 1512.
[171] Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States, 11 Jan. 1992, reprinted in I.L.M. vol. 31 (1992) 1503. In spite of this, the European Community went ahead with the recognition of Croatia as well as Slovenia, but did not recognise the independence of Macedonia at that time.
[172] Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member States, 11 Jan. 1992, I.L.M. vol. 31 (1992) 1501.
[173] EC Declaration on Recognition of Bosnia and Herzegovina, 6 April 1992, UN Doc. S/23793, Annex. President Bush's Statement on the Recognition of Bosnia and Herzegovina, Croatia and Slovenia, 7 April 1992, reprinted in Review of International Affairs, Vol. XVIII (1.V 1992) p.26.

Contact Group.[174] Bosnia and Herzegovina, while remaining a single State, was thus divided into two entities - the Muslim-Croat Federation and the Republika Srpska. The nature of this conflict and the various military and paramilitary forces that were involved are described in more detail below, before attention is focused more particularly on the Konjic municipality.

D. Role of Military Forces in the Conflict in Bosnia and Herzegovina

109. Before the actual outbreak of the conflict in Bosnia and Herzegovina, preparations for war were already being made. The Serb population had been receiving arms and equipment from the JNA throughout 1991, whereas in areas where Muslims and Croats predominated, local TO units were downsized and disarmed by the JNA. The Bosnian Croats had also been receiving support from the Government of Croatia and its army. On 1 March 1992, the Bosnian Serbs erected road barricades around Sarajevo, effectively isolating it, and the Muslim and Croat populations in turn set up checkpoints elsewhere in the territory. In early April of that year, with the increase in violence, the Bosnian State Presidency declared a "state of imminent war danger" and the Parliament was subsequently dissolved.[175] The Presidency also issued a decision announcing a general mobilisation of the Bosnian TO, which was gradually transformed into the Bosnian Army. This Army was formally established on 15 April 1992, under the supreme command of the President of the Presidency and a General Staff based in Sarajevo. On 20 June 1992, the Presidency proclaimed a "state of war" and identified the aggressors as "the Republic of Serbia, the Republic of Montenegro, the Yugoslav Army and the terrorists of the Serbian Democratic Party."[176]

1. The JNA

110. The JNA, originally a pan-Yugoslav institution with regulations mandating proportionate representation of each of the main ethnic groups amongst its conscripts, had as its aim in the initial stages of the conflicts in Slovenia and Croatia the prevention of the break-up of the Federation. However, as these conflicts developed throughout 1991 and 1992, the JNA was increasingly dominated by the Serbs. The JNA leadership found itself acting in support of the political leaders in Belgrade and many of its non-Serb officers left to join their Republican TO units. The political

[174] General Framework Agreement on Peace for Bosnia and Herzegovina, concluded in Dayton, Ohio, Nov. 1995.
[175] Exhibit 29.
[176] Exhibit 30.

goals of the Serbian authorities in Belgrade appear to have been to carve a new set of territories for the Serbs out of both Croatia and Bosnia and Herzegovina, to be added to Serbia and Montenegro. These coincided with the attempts of the JNA forces to prevent each of the Republics from achieving effective independence.

111. A former officer of the JNA and witness for the Prosecution, General Arif Pasalić, described to the Trial Chamber the changes that took place within the structure of the JNA, including the dismissal from positions of command of personnel who were not pro-Serbian. General Pasalić testified that:

> [f]or me the Yugoslav People's Army no longer existed. It had acquired a completely different form of organization and had been transformed into an army which was carrying out aggression against its own people.[177]

112. In 1991, the JNA was withdrawn from both Slovenia and Croatia under international pressure, coupled with a recognition of the fact that their independence could not be prevented. The majority of units thus withdrawn were immediately redeployed within Bosnia and Herzegovina. According to Brigadier Muhamed Vejzagić, an expert Defence witness who was a former officer in the JNA and the Bosnian Army, JNA units were moved into Bosnia and Herzegovina in late 1991, and by the beginning of 1992 there were seven complete JNA corps in Bosnia and Herzegovina.[178] In his expert report, submitted to the Trial Chamber, (hereafter "Vejzagić Report"), the Brigadier stated that,

> [i]t can be established for sure that, upon orders and instructions issued by the General Staff of the Armed Forces of Yugoslavia and Federal Secretariat of People's Defence together with [the] political leadership of Serbia and through the direct co-operation with the Serb Democratic party of B-H, the JNA formed numerous formations in the territory of B-H (TO units and militia units) composed of the members of the Serb ethnic group.[179]

113. Brigadier Vejzagić further testified that, before the independence of Bosnia and Herzegovina, there was a huge concentration of JNA manpower in its territory – approximately 100,000 soldiers, 800 tanks, 1,000 armoured personnel carriers, 4,000 artillery pieces, 100 planes and 50

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[177] Transcript of trial proceedings, p. 8065 (T. 8065). All transcript page numbers (hereafter "T.") referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Small differences may therefore exist between this pagination and that of the final English transcript released to the public.
[178] *See* Exhibit D143-1a/1, p. 8.
[179] *Ibid.*, p. 9.

helicopters.[180] The JNA was also actively involved in preparations for the conflict in Bosnia and Herzegovina by participating in the distribution of weapons to citizens of Serb ethnicity.

114. With its declaration of independence on 6 March 1992, open conflict erupted in Bosnia and Herzegovina and the units of the JNA already present in the territory were actively involved in the fighting that took place. Reports of combat include an attack on Bosanski Brod on 27 March 1992 and the occupation of Derventa, as well as incidents in Bijeljina, Foča and Kupres in early April. After Bosnia and Herzegovina's independence was recognised by the European Community on 6 April 1992, these attacks increased and intensified, especially in Sarajevo, Zvornik, Višegrad, Bosanski Šamac, Vlasenica, Prijedor and Brčko.[181]

115. On 11 April 1992, the European Community issued a "Statement on Bosnia and Herzegovina"[182] which appealed for a cease-fire and called upon the Serbian and Croatian Governments "to exercise all their undoubted influence to end the interference in the affairs of an independent Republic". On 10 April 1992, the President of the United Nations Security Council also issued a statement demanding the cessation of all forms of outside interference in Bosnia and Herzegovina.[183]

116. By early May of 1992, the JNA was under the authority of the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereafter "FRY"),[184] which claimed to be the sole legitimate successor State to the SFRY. However, the mounting international pressure for the withdrawal of all forms of outside interference in Bosnia and Herzegovina necessitated a change in its tactics. On 4 May 1992, the authorities in Belgrade announced that all JNA personnel who were not citizens of Bosnia and Herzegovina would be withdrawn from that Republic by 19 May. In consequence, approximately 14,000 JNA troops left Bosnia and Herzegovina.[185]

117. On 13 May 1992, the authorities of the SRBH announced a decision to form their own army, to be composed of units of the former JNA based in Bosnia and Herzegovina. According to the Prosecution expert witness, Dr. Marie-Janine Calic, approximately 80 per cent of the JNA forces which had been present in Bosnia and Herzegovina were integrated into the new army of the SRBH

[180] T. 10465-T. 10466.
[181] *See* Exhibit D135-1a/1 (hereafter "Hadzibegović Report") and Vejzagić Report, p. 10.
[182] UN Doc. S/23812, Annex.
[183] UN Doc. S/23802.
[184] The FRY came into existence on 27 April 1992 with the passing of a new Constitution.
[185] Commission of Experts Report, annex III, p. 22.

(the "VSRBH", later named and hereafter referred to as "VRS"), which was under the command of a former JNA officer - General Ratko Mladić. Thus, many JNA officers - including non-Bosnian Serbs - who had been stationed in Bosnia and Herzegovina found themselves part of the new VRS. Those elements of the JNA that did not constitute the VRS became the Army of the FRY (hereafter "VJ"). Units of the VJ co-operated with, and provided support to, their erstwhile colleagues in the VRS.

2. The HVO

118. The Croatian Defence Council (hereafter "HVO") was formed on 8 April 1992 as the military force of the Croatian Community of Herceg-Bosna (HZH-B), the self-proclaimed para-State of the Bosnian Croats in certain parts of the Herzegovina region. The HVO had been distributing arms amongst the Bosnian Croats in preparation for conflict and HVO units were formed in many municipalities. The Croatian government and Army (HV) trained and armed many of these troops and some HV officers and soldiers were also integrated into the HVO. Dr. Calic stated in her report to the Trial Chamber that in 1992 there were approximately 30,000 HVO troops on the ground, who relied heavily on the HV for direction and support. During most of 1992, the HVO and units from the HV sided with the Bosnian TO (later the Bosnian Army) against the JNA and VRS. Towards the end of 1992, however, clashes developed between the HVO and the Bosnian Army and this conflict continued into 1993.

3. Paramilitary Groups

119. Various paramilitary units also played an important role in the conflict in Bosnia and Herzegovina, as well as in Croatia. The Trial Chamber has not been given substantial amounts of information about these groups, although it is clear that they operated on all sides in the conflict and had some connections with the governments with which they were aligned. The Commission of Experts, in its Final Report, identifies at least 45 such formations operating within Bosnia and Herzegovina. Notably, the Serb paramilitaries included the "Tigers", led by Željko Ražajatović (better known as "Arkan") and the "White Eagles", headed by Vojislav Šešelj.[186] On the side of the

[186] *See* Commission of Experts Report, annex IIIA.

Croats, the Croatian Defence Forces (hereafter "HOS") was formed as the paramilitary wing of the Croatian Party of Rights and operated throughout Bosnia and Herzegovina, in co-operation with units of the HVO and other paramilitaries. The "Green Berets" were another paramilitary organisation, created by Muslim leaders in 1991. In addition, the forces of the "Patriotic League" were active on the side of the Bosnian government and there are also reports of groups such as the *mujahedin* being sent in from sympathetic Islamic countries.

E. The Konjic Municipality - Geographical, Demographic and Political Structure

120. The former Socialist Republic of Bosnia and Herzegovina was divided into territorial units of self-management which were possessed of a certain level of autonomy. Each of these municipalities (*opština*) were governed by a Municipal Assembly, consisting of members directly elected by the local population, which in turn elected an Executive Council from its own members.[187] In Bosnia and Herzegovina there were 109 such municipalities. A map indicating the division of the Republic on this basis is attached to this Judgement as Annex C.[188]

121. The municipality of Konjic is located in the region of Bosnia and Herzegovina known as northern Herzegovina, roughly 50 kilometres south of Sarajevo, the State capital. It is a mountainous, heavily wooded area of great natural beauty. It extends on both sides of the Neretva River and borders on to the Bosnia region of Bosnia and Herzegovina in the south. The population of the municipality, according to the 1991 census, was 43,878, of which 54.3 per cent were designated Muslims, 26.2 per cent Croats, 15 per cent Serbs, 3 per cent Yugoslavs and 1.3 per cent others. The main town, also named Konjic, housed about a third of the total population of the municipality and was of a similar ethnic distribution. It appears that the mix of ethnicities in Konjic lived together harmoniously and in an integrated fashion until the escalation of tension and outbreak of hostilities in 1992.

122. The Konjic municipality is of clear strategic, as well as historical, importance due to its geographical location and characteristics. It lies on the fault line between areas which Croats and Serbs have long considered to be within their spheres of influence - the Bosnian Croats laying claim to the entire area of Herzegovina and the Serbs apparently interested primarily in the eastern

[187] *See* Exhibit 46 for diagram of the Organisation of the Municipality.
[188] Exhibit 44.

Neretva valley. The Mount Ivan saddle, located within Konjic, marks the border between the Bosnia and Herzegovina regions and is an important crossing point in times of both war and peace. The only railway line from the coast at Ploče up to central Bosnia and Herzegovina, and Sarajevo also passes through Konjic, as does the M17 highway, between Mostar and Sarajevo. This highway is characterised by its many tunnels and bridges, which, if blocked or destroyed, substantially impede passage through the municipality and hence the connection between the capital and south-western Bosnia and Herzegovina.

123. During times of armed conflict, the Konjic municipality was of strategic importance as it housed lines of communication from Sarajevo to many other parts of the State as well as constituting a supply line for the Bosnian troops. During the attacks on and siege of Sarajevo from 1992 until the end of the conflict, this route was vital to the efforts of the Bosnian government forces to lift the blockade. Furthermore, several important military facilities were contained in Konjic, including the Igman arms and ammunition factory, the JNA Ljuta barracks, the Reserve Command Site of the JNA (known as "ARK"), the Zlatar communications and telecommunications centre, and the Čelebići barracks and warehouses.

124. The political structure of the Konjic municipality, prior to the conflict, was similar to that of the other municipalities in Bosnia and Herzegovina. After the November 1990 elections, the Municipal Assembly was dominated by the three main national parties divided roughly along the same "ethnic" lines as the population. Of the 60 members of the Assembly, 28 were from the SDA, 14 from the HDZ and 9 from the SDS, and there were also representatives from other smaller parties. The President of the Municipal Assembly was Dr. Rusmir Hadžihusejnović, who was also President of the SDA in the municipality. The Executive Council, the primary executive body of the municipality, also had a President, Dragomir (or Drago) Perić, who was a member of the HDZ, along with five other members. There were also several municipal administrative bodies regulating fields such as education, tax and the economy.

125. In situations of war, it was envisaged that each Municipal Assembly, if unable to operate, would have their functions taken over by the "Presidency of the Municipal Assembly", which became known as the "War Presidency". A Defence Law, dated 20 May 1992, further provided that the War Presidency was to consist of the President of the Municipal Assembly, the President of the Executive Council, the head of the Municipal Department of the Ministry of Defence, the head of the Public Security Station of the Ministry of Internal Affairs (Chief of Police), the Commander of the Civil Defence Staff and the heads of the political party factions in the Municipal

Assembly.[189] The War Presidency was to act in all capacities in place of the Municipal Assembly in times of conflict, particularly in the passing of regulations and appointment of officials, the organising of the local defence in terms of logistics, the recruitment of soldiers and acquisition of weapons, and also the supply of the local population with food and medical assistance, as well as the supervision of displaced persons arriving in the municipality. It remained formally, however, a purely civilian body.

126. By April 1992, the normal administrative bodies in Konjic had ceased to function, with the withdrawal of the Serb representatives from the Municipal Assembly and Executive Council. An interim "Crisis Staff" was thus formed by the Muslim and Croat officials to continue administering the municipality. The War Presidency was later established upon the pronouncement of the Presidency of Bosnia and Herzegovina of a state of immediate war danger,[190] and the beginning of armed conflict. It had nine members, the only absentee being the representative of the SDS.

127. Although the Konjic municipality did not have a majority Serb population and did not form part of the declared "Serb autonomous regions",[191] in March 1992, the self-styled "Serb Konjic Municipality" adopted a decision on the Serbian territories. The potential for such action appears to have been recognised by the SDS on the basis of the number of Serb representatives in the Municipal Assembly.[192] Professor Iljas Hadžibegović, an expert witness for the Defence, further told the Trial Chamber that:

> [o]n 22 March the so-called assembly of the Serbian municipality formed the territory of the Serbian municipality. It did so on the basis of two principles. It took the settlements with a Serb majority ... and the other principle was property ownership. Wherever there was any property owned by Serb households, these were proclaimed Serb territories, and these villages were registered as being in the Serbs' interests and such villages and settlements in the municipality of Konjic were a total of 40, taking both principles as a basis.[193]

The SDS, in co-operation with the JNA, had also been active in arming the Serb population of the municipality and in training paramilitary units and militias. According to Dr. Andrew James Gow, an expert witness for the Prosecution, the SDS distributed around 400 weapons to Serbs in the area.

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[189] Exhibit 54, Article 40. It is unclear when exactly this new law was put into effect in each of the municipalities.
[190] Decision on the Proclamation of an Immediate Threat of War, 8 April 1992, Exhibit 29.
[191] Decision on Verification of the proclaimed Serbian Autonomous Districts in Bosnia and Herzegovina, 21 Nov. 1991.
[192] T. 9855, Dr. Gow.
[193] T. 10208.

128. Konjic was included in those areas claimed by the HDZ in Bosnia and Herzegovina as part of the "Croatian Community of Herceg-Bosna" as early as 1991,[194] despite the fact that the Croats did not constitute a majority of the population there either. Thus, there were HVO units established and armed in the municipality by April 1992.

129. Reports indicate that around 20,000 persons left Konjic as a result of the conflict there from 1992, the majority of whom appear to have been Bosnian Croats. The population of the municipality in September 1996 was around 32,000, according to one estimate, including displaced persons from other regions, and 88 per cent of this total has been designated as encompassing Bosniacs (the term utilised currently to refer to that segment of the population previously described as "Bosnian Muslim"), 4 per cent Croats, 2 per cent Serbs and 6 per cent others.[195]

F. Fighting in Konjic and Existence of the Čelebići Prison-camp

1. Military Action

130. Clearly, with the descent into armed conflict across Bosnia and Herzegovina in March and April 1992, Konjic was no exception to the prevailing trends of increasing tension and mutual suspicion amongst the ethnic groups making up the population. This led to frequent armed attacks, defensive action, population displacement and food shortages. Of particular note in this municipality, however, are: its perceived importance to the Bosnian Croats and the consequent presence of armed and organised HVO units; the existence of various military facilities manned by the JNA and yet of potential value to the local, under-equipped, TO forces; the arming of the minority Serb population by the SDS and JNA and the campaign of propaganda directed against their Muslim and Croat neighbours; and the necessity for control of the vital road and rail links which connected the municipality with Sarajevo and down to Mostar and the coast.

131. With the recognition of Bosnia and Herzegovina as an independent State, the Municipal Assembly in Konjic met to discuss how to respond to the situation in which the municipality found itself. In 1990 the General Staff of the armed forces of the SFRY had issued an order requiring all

[194] *See* Decision on the Founding of the Croatian Community of Herceg-Bosna, 3 July 1992, (Exhibit 24) which amends the original decision to found the Croatian Community of Herceg-Bosna of 18 Nov. 1991.
[195] *See* Exhibit 64, UNHCR report on Konjic municipality, Sept.-Oct. 1996.

TO arms to be placed in the JNA warehouses. Thus, the weapons of the Konjic TO were housed in the Ljuta barracks, under JNA control. On 17 April 1992, the Municipal Assembly met for the final time and the appropriate decisions for the defence of the municipality were taken. A mobilisation of the TO was pronounced and Mr. Enver Redžepović was nominated as its new commander, and subsequently appointed to this post by the TO Republican Staff. The SDS representatives in the Assembly did not support these decisions and abandoned the Assembly, which then ceased to function. As a result, the War Presidency was formed. Dr. Rusmir Hadžihusejnović, who was the President of the Municipal Assembly, and later on of the War Presidency, told the Trial Chamber how he had received threats from General Kukanjac - commander of the second military district formation of the JNA - which were then broadcast on the radio and television, that Konjic would be razed.[196]

132. Mr. Redžepović himself testified before the Trial Chamber and stated that the first attacks in Konjic started around 20 April 1992, in the vicinity of Ljubina.[197] Around that time, Brigadier Asim Džambasović was sent from the Republican TO staff as a military expert, to assist in the organising of the defence of Konjic. As a first step, the Konjic defence forces, which included the TO, the local HVO and the police under the control of the ministry of the interior (hereafter "MUP"), took control of the Igman military plant. This was achieved without the use of force. Thereafter, an agreement was entered into with the JNA troops stationed at the Čelebići barracks and warehouses and this facility was transferred peacefully to TO and MUP forces, the JNA soldiers being allowed to depart unharmed. Some weapons and other technical resources were thereby recovered and transferred to a farm at Ovčari for storage. In early May, the TO also captured the Ljuta barracks and seized more armaments there. There was some fighting in the course of this operation, as well as during the take-over of the facilities at Zlatar and the so-called ARK, but by the end of May all of these were secured.

133. By mid-April 1992, the town of Konjic was effectively surrounded and cut off from both Sarajevo and Mostar. Armed Serb forces had set up checkpoints at Bradina to the north, thus controlling the Mount Ivan saddle pass on the M17 road to Sarajevo. The highway to Mostar was also blocked at Donje Selo to the west and SDS formations controlled the area around Borci, to the south-east. Both road and rail traffic was thus halted and at the beginning of May, telephone links to Sarajevo were also severed. Bosnian Muslim and Croats from the surrounding villages began to

[196] T. 11754.
[197] T. 12051-T. 12052. *See also* T. 10484, Vejzagić.

arrive in Konjic town, having fled their homes. This further heightened the sense of panic and siege. In addition, displaced persons from other parts of Bosnia and Herzegovina began appearing, having travelled over the mountains and through the woods, with stories of killing and ethnic cleansing. Reports of the arrival of HOS soldiers in Konjic seem to have further contributed to the sense of fear and panic and Serb residents began to leave the town for the villages in the municipality with a majority Serb population.

134. On 4 May 1992, the first shells landed in Konjic town, apparently fired by the JNA and other Serb forces from the slopes of Borašnica and Kisera. This shelling, which continued daily for over three years, until the signing of the Dayton Peace Agreement, inflicted substantial damage and resulted in the loss of many lives as well as rendering conditions for the surviving population even more unbearable. With the town swollen from the influx of refugees, there was a great shortage of accommodation as well as food and other basic necessities. Charitable organisations attempted to supply the local people with enough food but all systems of production foundered or were destroyed. It was not until August or September of that year that convoys from the United Nations High Commissioner for Refugees (UNHCR) managed to reach the town, and all communications links were cut off with the rest of the State. The Trial Chamber has been presented with substantial evidence of the hardship faced by the inhabitants of Konjic and has been shown video footage of the damage sustained by the town. One witness summed up the atmosphere thus:

> I can say that, at first, panic struck. None of us, like any other Europeans, had any experience of shelling of a town - the dangers of walking in the street and the beginning of a great hunger.[198]

135. Although the general mobilisation of the TO at the Republican level was not announced until June 1992, the local authorities in Konjic had already, in April, organised their forces pursuant to existing defence regulations. Both the TO and the HVO, at that time, had a common interest in uniting against the Serbs and thus frequently co-operated. This arrangement was formalised on 12 May 1992 with the signing of a Joint Command. The commander of this Joint Command was Esad Ramić, the TO commander at that time, and his deputy was Dinko Zebić, the HVO commander.[199] In practice, however, there was no superior-subordinate relationship between them and each answered to their own commanders and controlled their own troops. Thus, beyond the

[198] T. 10664, Senad Begtasovic.

[199] It appears that the first relevant commander of the Konjic TO was Enver Redžepović (who had been preceded by Smajo Prevljak), who was subsequently replaced by Esad Ramić. Mr. Ramić was then replaced as TO commander by

municipal level, the HVO took its orders from the HVO headquarters at Grude and did not accept the authority of the TO Republican Staff.

136. The Konjic TO, in theory, came under the authority of the district TO headquarters in Mostar. For various reasons, however, these headquarters were not functional and the Konjic TO was therefore subordinated directly to the Republican headquarters in Sarajevo, with which communications were sometimes sporadic. While forming an integral part of the Konjic defence forces along with the TO and HVO, the local MUP had a separate line of command and authority to the Ministry of Internal Affairs of Bosnia and Herzegovina. In Konjic, there were roughly 60-70 active MUP police officers, and a reserve of around 300, prior to the conflict. The Konjic TO had a total of 3,312 troops in April 1992 and this increased to 4,154 in May, according to local records.[200] At that time, the TO had no military police officers and thus police and security affairs were handled by the MUP. The HVO also had a special military police unit which was staffed by both Muslims and Croats.

137. A clear priority for the Konjic authorities was the de-blocking of the routes to Sarajevo and Mostar. This objective required that the Serbian forces holding Bradina and Donje Selo, as well as those at Borci and other strategic points, be disarmed. Initially, an attempt was made at negotiation with the SDS and other representatives of the Serb people in Bradina and Donje Selo. This did not, however, achieve success for the Konjic authorities and plans were made for the launching of military operations by the Joint Command.

138. The first area to be targeted was the village of Donje Selo and its surrounds. On 20 May 1992 the Joint Command - headed at that time by Omer Borić and Dinko Zebić - authorised this operation and forces of the TO and HVO entered the area.[201] According to eye-witnesses, Croat and Muslim soldiers moved through Vinište towards Cerići and Bjelovčina. Cerići, which was the first shelled, was attacked around 22 May and some of its inhabitants surrendered to the TO and to the HVO military police. Bjelovčina was also attacked around that time. Around 23 May, the TO arrested some people living in Vinište. The MUP also assisted in the arrest of persons and seizing of weapons in these areas. The Trial Chamber was further informed that some units from Tarčin

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Omer Borić, although he may have once again acted as commander for a short time after Mr. Borić. He was then succeeded by Mirsad Catic and then Enver Tahirović.

[200] *See* Vejzagić Report, pp. 24 and 27.

[201] T. 11540-T. 11541, Midhat Cerovac.

and Pazarić participated in the operation to de-block the road at Donje Selo as well as the later one at Bradina, during which some casualties occurred.

139. The Bradina operation was launched on 25 and 26 May 1992 after the failure of negotiations. Many witnesses have testified that the village was shelled in the late afternoon and evening of 25 May and then soldiers in both camouflage and black uniforms appeared, firing their weapons and setting fire to buildings. Many of the population sought to flee and some withdrew to the centre of the village. These people were, nonetheless, arrested at various times around 27 and 28 May, by TO, HVO and MUP soldiers and police. In charge of the Bradina operation was Zvonko Zovko and the MUP was responsible for detaining persons arrested in its course, as well as for the seizure of weapons.

140. In June 1992, attention was turned to lifting the blockade at Borci in the south. An operation of the Joint Command was planned – code-named Operation Oganj - to achieve this aim, although, at the last minute, the HVO forces did not receive authorisation from their headquarters in Grude to participate. This marked the end of the functioning of the Joint Command and further conflicts of interest arose between the HVO and the TO forces. Open conflict between these two groups developed over the summer.

2. The Establishment of the Čelebići Prison-camp

141. These military operations resulted in the arrest of many members of the Serb population and it was thus necessary to create a facility where they could be housed. The public security station in the municipality had only limited space for prisoners as, prior to the conflict, pre-trial confinement of arrested persons was in Mostar. It appears that the recently secured Čelebići barracks and warehouses were thus chosen for the detention of large numbers of Serbs, who were taken there upon their capture. In addition, the Musala sports hall, situated in Konjic town, served a similar purpose, although it does not seem to have housed so many prisoners.

142. The question of who exercised control over the Čelebići prison-camp has not been fully clarified and it appears that various groups were involved in its administration. It must be noted that the whole compound was utilised for the accommodation of several units of the MUP and HVO and later the TO, as well as, it would appear, for the storage of some equipment. The part of the

compound used for the detention of prisoners seems to have been somewhat separate and security for the prison-camp was separate from that for the barracks in general.

143. What has been established is that the Čelebići compound was chosen out of necessity as the appropriate facilities for the detention of prisoners in Konjic were minimal. Mr. Sadik Džumhur, a member of the MUP at that time and a witness in this case, told the Trial Chamber that the chief of police, Mr. Jasmin Guska, probably in consultation with members of the HVO, decided that the Čelebići compound would function as a detention facility, as it had not been shelled and something could be improvised there.[202] The members of the MUP and HVO involved in the military operations which resulted in the arrest of many Serbs were told that this was the most appropriate solution and thus persons were transferred to Čelebići upon their capture. A unit of the MUP, apparently headed by one Rale Mušinovic, was itself stationed in the Čelebići barracks, along with a unit of the HVO military police, which would have been subordinated to the commander of the HVO in Konjic. These units certainly provided the security for the prison-camp during some period of its operation. Later, around mid-June, there were also TO units involved who provided some of the prison guards and these individuals would have been subordinate to the municipal TO staff.

3. Description of the Čelebići Compound

144. The Čelebići barracks and warehouses, located on the outskirts of the village of Čelebići, along the M17 highway, was and is a relatively large complex of buildings covering an area of about 50,000 square metres, with a railway line running through the middle. It had been used by the JNA for the storage of fuel and, therefore, as well as various hangars and assorted buildings, the complex contains underground tunnels and tanks. The Trial Chamber has been presented with numerous photographs, film and plans of the entire complex prepared by the first expert witness, Mr. Antonius Beelen, who visited it in 1996, and has also had the benefit of a large model created on the basis of his measurements and under his direction. A plan of the camp is attached to this Judgement as Annex D and several photographs of some of the relevant buildings and other structures are contained in Annex E.

145. Only a small part of the compound was utilised in 1992 for the detention of prisoners and it is solely with this part that the Trial Chamber is concerned. At the entrance gate there is a small

reception building (hereafter "Building A") beside a larger administration building (hereafter "Building B"). At the time of inspection by Mr. Beelen, Building B contained rooms with beds as well as a kitchen, a canteen and some toilets and a shower. Opposite these is a small building which contains water pumps (hereafter "Building 22"). To the north-east, beside a wall, there is the entrance to a tunnel (hereafter "Tunnel 9") which extends about 30 metres downwards into the ground and leads, after a steel door, to a fuel measuring and distribution station. The tunnel is only 1.5 metres wide and 2.5 metres high. There is a trapdoor and manhole leading up from behind the steel door to the outside, above. On the other side of the camp, beside other similar buildings, there is a large metal building, 30 metres long and 13 metres wide, (hereafter "Hangar 6") which is fully enclosed and has doors down one side.

4. The Arrival, Accommodation and Release of Prisoners

146. It appears that the Čelebići barracks and warehouses were first used for the detention of prisoners in the latter part of April 1992. Enver Tahirović testified before the Trial Chamber that he was offered the position of commander of the barracks by Esad Ramić and Dinko Zebić in May 1992, but that he did not accept the offer when he discovered that there were Serb prisoners being held there.[203] Sadik Džumhur also testified that it was probably when the villages, such as Čelebići and Idbar, were searched for illegal weapons by the MUP, prior to the military operations at Donje Selo and Bradina, that the Čelebići barracks were first used for the detention and interrogation of persons captured.[204] In any event, the Trial Chamber has heard direct evidence from numerous witnesses who were themselves detained in the Čelebići prison-camp and is thus able to draw some general conclusions.

147. The majority of the prisoners who were detained between April and December 1992 were men, captured during and after the military operations at Bradina and Donje Selo and their surrounding areas. At the end of May, several groups were transferred to the Čelebići prison-camp from various locations. For example, a group of around 15-20 men from Cerići were captured on 23 May 1992 and taken to Čelebići that day. Another group was taken near Bjelovčina around 22 May and spent one night at the sports hall at Musala before being transported to the Čelebići prison-camp. Military police also arrested many members of the male population of Brđani at the

[202] T. 12262.
[203] T. 11343-T. 11344.

end of May and these people were taken in a truck to the Čelebići prison-camp. A larger group was arrested in the centre of Bradina on 27 May and made to walk in a column along the road to Konjic. When these people reached a tunnel in the road, which had been blown up, they were searched and beaten by their captors before being loaded into trucks and taken to the Čelebići prison-camp. Others were arrested individually or in smaller groups at their homes or at military check-points, in, *inter alia,* Bradina, Vinište, Ljuta, Kralupi and Homolje, or upon surrender or capture during and after the operation in Donje Selo.

148. A number of witnesses have testified that, upon arrival at the Čelebići prison-camp, they were lined up against a wall near the entrance and searched or made to hand over valuables. In addition, several stated that they were severely beaten at that time by the soldiers or guards who were present. Those who were brought in on the first truck from Bradina were, in particular, subjected to this treatment and were made to stand against the wall with their arms raised for some time. Thereafter, these Bradina detainees, who numbered about 70-80, were taken directly to Hangar 6 and appear to have been the first group to be placed in that building. A few days later, another group of at least 70-80 people from Bradina were transferred to the Hangar from Tunnel 9, where they had been kept for four or five days. Other detainees were housed in Building 22 upon their arrival, which seems to have been very tightly packed with people, and later moved to Hangar 6. Others were placed in manholes, some 2 or 3 metres deep, before being taken to Hangar 6, and yet others were kept in the tunnel for only a few days before being moved to Building 22, whereas some spent a more substantial period of time in the tunnel.

149. The Trial Chamber has heard evidence concerning two doctors who were also arrested at this time and taken to the Čelebići prison-camp. These doctors appear to have arrived at the camp towards the end of April 1992 and then to have been sent to the "3rd March" School in Konjic to treat the ill and wounded who were collected there. Around 6 or 7 June 1992, they were transported back to the prison-camp, along with their patients, and a makeshift infirmary was established in Building 22.

150. Without seeking to describe in any detail at this stage the conditions in the prison-camp, which will be addressed in the section dealing with counts 46 and 47 of the Indictment alleging inhumane conditions, it is necessary to set out the circumstances in which the persons detained in the Čelebići prison-camp found themselves. It is clear that an atmosphere of fear and intimidation

[204] T. 12255-T. 12256.

prevailed at the prison-camp, inspired by the beatings meted out indiscriminately upon the prisoners' arrest, transfer to the camp and their arrival. Each of the former detainees who testified before the Trial Chamber described acts of violence and cruelty which they themselves suffered or witnessed and many continue today to sustain the physical and psychological consequences of these experiences.

151. As has been stated above, Tunnel 9 was utilised for the incarceration of many detainees, some for only a short while and others for a longer period. At one point, it certainly contained at least 80 individuals and, given its size, was extremely crowded. There was a great lack of ventilation and no blankets were provided to the prisoners, who slept as they were lined up on the concrete floor. The tunnel sloped downwards towards the steel door at the bottom and it was this bottom area that the prisoners used to urinate and defecate in when they were not permitted to leave the tunnel for this purpose.

152. Hangar 6 had the capacity to hold a much larger number of prisoners and there were over 240 individuals contained there at one stage. The prisoners were assigned places on the floor of the building, where they had to remain seated. They were arranged in rows - one circling the inside perimeter and two down the middle. As the Hangar was made entirely of metal, it became extremely hot during the daytime but the prisoners were not allowed to leave their places, except in small groups upon request to use the toilet facilities, which consisted of an outside ditch, around the back of the Hangar.

153. The few women who were confined in the camp were housed separately from the other prisoners, firstly in the administration building (Building B) and then in the small reception building at the entrance to the camp (Building A). Ms. Milojka Antić and Ms. Grozdana Ćećez told the Trial Chamber how they were kept in a small room in Building A with a bed and a mattress and a stove, and for a period other women from Bradina were also kept there. There was a barred window in the building from which they could see the entrance gate to the camp and there was a sink and a toilet in the building which they were permitted to use.

154. Many witnesses have testified that they were questioned, on one or several occasions, while in the prison-camp. A number of witnesses stated that they suffered physical violence in the course of, or directly after, this interrogation. In the course of these interrogations some signed statements, subsequently claiming that this was done under duress, saying that they had possessed certain

weapons or engaged in certain activities. Different persons appear to have conducted these interrogations, some of whom were known to the detainees involved as members of the police.

155. A Military Investigating Commission was constituted after the arrest of persons during the military operations, whose purpose was to establish the responsibility of these persons for any crimes. The Commission comprised representatives of both the MUP and the HVO, as well as the TO, who were each appointed by their own commanders.

156. The Commission interviewed many of the Čelebići inmates and took their statements, as well as analysing other documents which had been collected to determine their role in the combat against the Konjic authorities and their possession of weapons. As a result, prisoners were placed in various categories and the Commission compiled a report recommending that certain persons be released. Some of the individuals who had been placed in the lower categories were subsequently transferred to the sports hall at Musala. After working for about one month at the prison-camp, the Investigating Commission was disbanded at the instigation of its members, who wrote a report detailing the brutality of the conditions and treatment of the prisoners which they had observed and which, they claimed, made it impossible for them to continue their work with any integrity.[205]

157. From May until December 1992, individuals and groups were released from the Čelebići prison-camp at various times, some to continued detention at Musala, some for exchange, others under the auspices of the International Red Cross, which visited the camp on two occasions in the first half of August. Several also appear to have been released upon the personal intervention of influential persons in Konjic, or through family connections. The last prisoners to leave Čelebići prison-camp were a group of around 30 individuals who were transferred to the sports hall at Musala on 9 December 1992.

[205] Exhibit 162, report written between 20 and 30 June 1992. *See also* T. 5161-5437, Witness D.

III. APPLICABLE LAW

A. General Principles of Interpretation

158. The question of interpretation of the provisions of the Statute and Rules has continuously arisen throughout the proceedings in the present case. The Trial Chamber is aware that the meaning of the word "interpretation" in the context of statutes, including the Statute of the Tribunal, may be explained both in a broad and in a narrow sense. In its broad sense, it involves the creative activities of the judge in extending, restricting or modifying a rule of law contained in its statutory form. In its narrow sense, it could be taken to denote the role of a judge in explaining the meaning of words or phrases used in a statute. Within the context of the provisions of the Rules, the meaning of "interpretation" assumes a special complexity. This is because of the approach adopted in the formulation of these provisions, which accommodate principles of law from the main legal systems of the world.

159. The Tribunal's Statute and Rules consist of a fusion and synthesis of two dominant legal traditions, these being the common law system, which has influenced the English-speaking countries, and the civil law system, which is characteristic of continental Europe and most countries which depend on the Code system. It has thus become necessary, and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions. It is conceded that a particular legal system's approach to statutory interpretation is shaped essentially by the particular history and traditions of that jurisdiction. However, since the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same. It is, therefore, useful at the outset to discuss some of the rules which could be usefully applied in the interpretation of our enabling provisions.

1. General Aids to Interpretation

160. It cannot be disputed that the cornerstone of the theory and practice of statutory interpretation is to ensure the accurate interpretation of the words used in the statute as the intention of the legislation in question. In all legal systems, the primary task of the court or judge interpreting a provision is to ascertain the meaning of that particular statutory provision.

161. In every legal system, whether common law or civil law, where the meaning of the words in a statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation.[206] If only one construction is possible, to which the clear, plain or unambiguous word is unequivocally susceptible, the word must be so construed. In cases of ambiguity, however, all legal systems consider methods for determining how to give effect to the legislative intention.

162. Where the use of a word or expression leads to absurdity or repugnance, both common law and civil law courts will disregard the literal or grammatical meaning. Under the golden rule of interpretation, the common law court as well as the civil law court will modify the grammatical sense of the word to avoid injustice, absurdity, anomaly or contradiction, as clearly not to have been intended by the legislature.[207] Where the grammatical meaning is ambiguous and suggests more than one meaning, the text of the provision in question may be construed under the logical interpretation approach of civil law jurisprudence, or the golden rule of common law jurisprudence. If the literal meaning of the provision does not resolve the issue, the civil law courts may resort to analogy to extract the meaning.

163. The 'teleological approach', also called the 'progressive' or 'extensive' approach, of the civilian jurisprudence, is in contrast with the legislative historical approach. The teleological approach plays the same role as the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation.

164. The mischief rule (also known as the purposive approach), is said to have originated from *Heydon's case,*[208] decided by the ancient English Court of Exchequer in 1584. In *Heydon's case,* four questions were posed in order to discover the intention of the legislation in question: (a) what was the common law before the making of the Act; (b) what was the mischief and defect for which the common law did not provide; (c) what remedy has Parliament resolved and appointed to cure the disease; and (d) the true reason for the remedy. According to the approach taken, the court is enjoined to suppress the mischief and advance the remedy. This requires looking at the legislative

[206] See Johnston v. Ireland 9 EHRR 329, 1967.
[207] *See* Lord Simon of Glaisdale in *Maunsell v. Olins* [1975] AC 373, 391.
[208] (1584) 3 Co. Rep. 7a.

history for the "mischief" which may not be obvious on the face of the statute. This approach to interpretation is generously relied upon in Continental and American courts. In the important case of *AG v. Prince Ernest Augustus of Hanover,*[209] Viscount Simonds spelled out what he regarded as the meaning of context in the construction of statutes, as follows:

> (a) other enacting provisions of the same Statute;
> (b) its preamble;
> (c) the existing state of the law;
> (d) other statutes *in pari materia*;
> (e) the mischief which the statute was intended to remedy.

In addition, the object of a statute or treaty is to be taken into consideration in arriving at the ordinary meaning of its provisions.[210]

165. The method of judicial 'gap-filling', which may be adopted under the teleological interpretation of the civilian jurisprudence, would, under a common law approach, suggest two approaches. The first of these is to consider that, because the observation of the doctrine of the separation of powers preserves the judicial function to the judiciary, any judicial law-making would be an abuse of the legislative function by the judiciary.[211] The second view is that courts are established to ascertain and give effect to the intention of the legislature.[212] Filling any gap is also a means of securing this objective. The common law has rejected both views,[213] despite an attempt to argue that the filling of gaps is part of the judicial role in the interpretation of statutes. The interpretative role of the judiciary is, however, never denied.

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[209] *The Hanover Case*, [1957] AC 436, 461.
[210] *See Wemhoff Case*, 1 EHRR 55, 1979-80.
[211] In *Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189, 191, Viscount Simonds, speaking in the House of Lords disapproved of the judicial function of filling in the gaps of an enactment. He described it as a naked usurpation of the legislative function under the thin disguise of interpretation. In his view, "[i]f a gap is disclosed the remedy lies in an amending Act".
[212] The other view, similarly rejected, was expressed by Lord Denning who thought that it was the function of the court to fill gaps in the statute and make sense out of the legislation.
[213] See London Transport Executive v. Betts [1959] AC 213, 247.

2. Other Canons of Interpretation

166. The Trial Chamber would here refer to some other canons of interpretation, as illustrative in the interpretation of statutes. The five most common canons are:

(a) reading the text as a whole;
(b) giving technical words their technical meaning;
(c) reading words in their context *noscitur a sociis*;
(d) the *ejusdem generis* rule and the rank rule;
(e) the *expressio unius est exclusio alterius* rule.

167. In addition to the above, there are presumptions and precedents which are valuable aids to interpretation. The proper status of decided cases as judicial precedents and aids to interpretation is still not settled. The question is whether previous decisions involving words judicially interpreted are binding as to interpretation of the same words in a different statute. The general rule is that they are not. This view is based on the fact that the *ratio decidendi* of each case will be specific and confined to the particular piece of legislation being considered. The reasoning on the interpretation of the words of a statute will apply to cases decided on the same legislation. It does not necessarily relate to another statute. It might thus seem that decisions from the Appeals Chamber of the Tribunal on the provisions of the Statute ought to be binding on Trial Chambers, this being the fundamental basis of the appellate process. However, decisions from the same or other jurisdictions which have not construed the same provisions in their decisions as the case being considered, are of merely "persuasive" value.

3. Differences in Statutory Interpretation Between Systems

168. Notwithstanding the similarity between the various systems, some of the significant differences in judicial attitudes towards the use of precedents as an aid to the interpretation of statutes ought to be mentioned. These are differences in:

(i) materials used in argument;
(ii) use of *travaux préparatoires*;
(iii) styles in judicial opinion;
(iv) styles of justification;
(v) levels of abstraction;
(vi) modes of rationality.

Materials used in argument consist of authoritative and non-authoritative materials, which correspond with the idea of binding and non-binding materials. Authoritative texts which are binding include the statute itself, related instruments, and general principles of law or customary law, whereas dictionaries, technical lexicons and other factors which might have led to the passing of the statute are non-authoritative.

169. It seems to the Trial Chamber that any *travaux préparatoires,* opinions expressed by members of the Security Council when voting on the relevant resolutions, and the views of the Secretary-General of the United Nations expressed in his Report, on the interpretation of the Articles of the Tribunal's Statute cannot be ignored in the interpretation of provisions which might be deemed ambiguous. The vast majority of members of the international community rely upon such sources in construing international instruments.

4. Conclusion

170. The International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction. It is *sui generis*, with its own appellate structure. The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation. The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law. Thus, the utilisation of the literal, golden and mischief rules of interpretation repays effort.

171. It is with these general observations on interpretation in mind that the Trial Chamber turns its attention to the particular provisions of the Tribunal's Statute which are applicable in the present case.

B. Applicable Provisions of the Statute

172. The following Articles of the Statute of the International Tribunal are those which the Trial Chamber must consider in rendering its Judgement in the present case. Each of these is discussed in turn below.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

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

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 7
Individual criminal responsibility

1. 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.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 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.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

C. General Requirements for the Application of Articles 2 and 3 of the Statute

1. Provisions of Article 1

173. The terms of Article 1 provide the starting point for any discussion of the jurisdiction of the International Tribunal and constitute the basis for the more detailed provisions of the articles on jurisdiction which follow. The Tribunal is hereby confined to concerning itself with "serious violations of international humanitarian law" committed within a specific location and time-period. It is within this frame of reference that the Trial Chamber must consider the acts alleged in the Indictment and the applicability of Articles 2 and 3 of the Statute.

174. There is no question that the temporal and geographical requirements of Article 1 have been met in the present case. In their closing written submissions, however, each of the accused, with the exception of Mr. Mucić, challenge the jurisdiction of the Tribunal on the basis that the crimes charged in the Indictment cannot be regarded as "serious" violations of international humanitarian

law.[214] This argument was first raised by the Defence in their Motion to Dismiss, although it is unclear in that document whether it is being asserted by all of the accused (excluding Mr. Mucić, who filed a separate motion) or only by the Defence for Mr. Landžo.

175. The Defence[215] asserts that the International Tribunal was established by the United Nations Security Council to prosecute and punish only the most serious violators of international humanitarian law, that is, those persons in positions of political or military authority, responsible for the most heinous atrocities. The Defence states that the International Tribunal should not "become bogged down in trying lesser violators for lesser violations" as such persons are more appropriately the subjects of prosecution by national courts.[216] In addition, it is argued on behalf of Mr. Landžo that he is but one of thousands of individuals who might be prosecuted for similar offences committed in the former Yugoslavia and this places him in the unfair position of being made into a kind of representative of all these other persons, who are not the subject of proceedings before the International Tribunal.

176. The provisions of Articles 2, 3, 4 and 5 of the Statute set out in some detail the offences over which the International Tribunal has jurisdiction and clearly all of these crimes were regarded by the Security Council as "serious violations of international humanitarian law". Article 7 further establishes that individual criminal responsibility attaches to the perpetrators of such offences and those who plan, instigate, order, or aid and abet the planning, preparation or execution of such offences, as well as, in certain situations, their superiors. It is clear from this latter article that the Tribunal was not intended to concern itself only with persons in positions of military or political authority. This was recognised previously by Trial Chamber I in its "Sentencing Judgement" in the case of *Prosecutor v. Dražen Erdemović,* when it stated that "[t]he Trial Chamber considers that individual responsibility is based on Articles 1 and 7(1) of the Statute which grant the International Tribunal full jurisdiction not only over "great criminals" like in Nürnberg - as counsel for the accused maintains – but also over executors."[217]

177. Article 9 of the Statute enunciates the principle that the International Tribunal has concurrent jurisdiction with national courts for the prosecution of the crimes over which it has jurisdiction.

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[214] *See* Landžo Closing Brief; Delić Closing Brief; Delalić Closing Brief.
[215] Ibid., para. 80.
[216] Motion to Dismiss, RP D5707; Landžo Closing Brief, RP D9064; Delić Closing Brief, RP D8329; Delalić Closing Brief, RP D8682.
[217] *Prosecutor v. Dražen Erdemović,* IT-96-22-T, Sentencing Judgement of 29 Nov. 1996 (RP D1-58/472 *bis*), para. 83 (footnote omitted).

This article also states that the International Tribunal has primacy over such national courts and thus several of the Rules are concerned with the matter of deferral of national prosecutions to the Tribunal. States are, indeed, obliged to comply with formal requests for deferral to the International Tribunal and, therefore, there can be no doubt that the question of forum is one solely to be decided first by the Prosecutor and then by the Judges of the Tribunal.[218]

178. A mere cursory glance over the Indictment at issue in the present case provides a lasting impression of a catalogue of horrific events which are variously classified as crimes such as wilful killing, torture, inhuman acts, cruel treatment and plunder. To argue that these are not crimes of the most serious nature strains the bounds of credibility.[219] While the fact that these acts are not alleged to have occurred on a widespread and systematic scale in this particular situation may have been of relevance had they been charged as crimes against humanity under Article 5 of the Statute, there is no such requirement incorporated in Articles 2 and 3, with which the Trial Chamber is here concerned.

179. The final argument of Mr. Landžo, that he is somehow being presented as a representative of countless others who are not in the custody of the Tribunal or named in any indictment, is also completely without merit. First, this contention is simply incorrect. The Prosecutor has at this time issued 20 public indictments against 58 individuals of various rank and position and several of these individuals have been, are currently being, or are soon to be, tried. There are many and varied reasons why the other indictees are not in the custody of the Tribunal and are, therefore, not subject also to its judicial process, but this is not an issue for the concern of this Trial Chamber in the current context.

180. In addition, it is preposterous to suggest that unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial. Furthermore, the decision of whom to indict is that of the Prosecutor alone and, once such an indictment has been confirmed, it is incumbent upon the Trial Chambers to perform their judicial function when such accused persons are brought before them.

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[218] *See* Rules 9, 10 and 11.

[219] The Trial Chamber is not here concerned with the argument raised by the Defence for Mr. Mucić and Mr. Delić that the particular acts of plunder alleged in the Indictment do not constitute serious violations of international humanitarian law. This matter is instead addressed below in Section IV.

181. In sum, the interpretation of Article 1 put forward by the Defence does not bear close scrutiny and is, therefore, dismissed. Accordingly, the Trial Chamber must turn its attention to the substance of Articles 2 and 3 and the requirements for their applicability.

2. Existence of an Armed Conflict

182. In order to apply the body of law termed "international humanitarian law" to a particular situation it must first be determined that there was, in fact, an "armed conflict", whether of an internal or international nature. Without a finding that there was such an armed conflict it is not possible for the Trial Chamber to progress further to its discussion of the nature of this conflict and how this impacts upon the applicability of Articles 2 and 3.

183. For this purpose, the Trial Chamber adopts the test formulated by the Appeals Chamber in its "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", in the case of *The Prosecutor v. Duško Tadić* (hereafter "*Tadić Jurisdiction Decision*").[220] According to the Appeals Chamber,

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[221]

The Appeals Chamber continued by stating that,

> [i]nternational 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. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[222]

184. Clearly, therefore, this test applies both to conflicts which are regarded as international in nature and to those which are regarded as internal to a State. In the former situation, the existence of armed force between States is sufficient of itself to trigger the application of international

[220] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72 (RP D6413-D6491).
[221] Tadić Jurisdiction Decision, para. 70.
[222] Ibid.

humanitarian law. In the latter situation, in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved. At this juncture, however, the Trial Chamber does not seek to discuss whether there was an international or an internal armed conflict for the purposes of the determination of the present case, as this will be dealt with in sub-section D below.

185. In addition, whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable. Thus, the Trial Chamber is not required to find that there existed an "armed conflict" in the Konjic municipality itself but, rather, in the larger territory of which it forms part.

186. The preceding background section has discussed in some detail the military and political situations in the States of the former SFRY leading up to 1992. Particular attention was focused upon the State of Bosnia and Herzegovina and there is no need for repetition of the relevant facts. Suffice it to say that in Bosnia and Herzegovina as a whole there was continuing armed violence at least from the date of its declaration of independence – 6 March 1992 – until the signing of the Dayton Peace Agreement in November 1995. Certainly involved in this armed violence, and relevant to the present case, were the JNA, the Bosnian Army (consisting of the TO and MUP), the HVO and the VRS.

187. The JNA was the official army of the SFRY and was, after the creation of the FRY, under that State's authority until its division (the FRY claiming to be the sole legitimate successor State of the SFRY). However, the authorities of the so-called SRBH also announced the existence of their own army in May 1992 – the VSRBH (later the VRS) – which was comprised of former JNA units in Bosnia and Herzegovina. The remainder of the JNA became the VJ, the army of the FRY. The VRS was controlled from Pale by the leadership of the Bosnian Serb administration, headed by Radovan Karadžic, and throughout 1992, and thereafter, it occupied significant amounts of Bosnia and Herzegovina. The HVO was in a position similar to that of the VRS, in that it was established by the self-proclaimed para-State of the Bosnian Croats as its army and operated from territory under its control. The remaining participants, the Bosnian TO and MUP, were clearly acting on behalf of the authorities of Bosnia and Herzegovina.

188. As has been discussed at some length in Section II above, the Konjic municipality was indeed itself the site of some significant armed violence in 1992. In April of that year the municipal TO was mobilized and a War Presidency was formed. The JNA, which had occupied various military

facilities and other locations throughout the municipality, was involved in the mobilization of Serb volunteers, in co-operation with the local SDS, and had distributed weapons among them. It also appears that the JNA itself participated in some of the military operations, at least until May 1992.[223]

189. The Trial Chamber has been presented with significant amounts of evidence regarding military attacks on and the shelling of Konjic town itself, as well as many of the villages in the municipality, including Borci, Ljubina, Džajići and Gakići, by these Serb forces. It is further uncontested that military operations were mounted by the forces of the municipal authorities, incorporating the TO, MUP and, within the period of the Joint Command, the HVO, against the villages of, *inter alia*, Donje Selo, Bradina, Bjelovčina, Cerići, and Brđani. It was as a result of these operations that persons were detained in the Čelebići prison-camp.

190. The level of the fighting in Bosnia and Herzegovina as a whole, as in Konjic itself, was clearly intense and consequently attracted the concern of the United Nations Security Council and General Assembly, along with other international organizations. Acting under Chapter VII of the United Nations Charter, the Security Council passed numerous resolutions in relation to the conflict and consistently called upon all of the parties involved to put an end to their military operations.[224]

191. In Konjic, the TO and MUP were joined for a short period by the HVO as part of a Joint Command established and organized to fight the Serb forces. At the very least, these forces representing the "governmental authorities" were engaged against the forces of the Bosnian Serbs – the JNA and VRS joined by local volunteers and militias – who themselves constituted "governmental authorities" or "organized armed groups". This finding is without prejudice to the possibility that the conflict may in fact have been international and the parties involved States and their representatives.

192. The Trial Chamber must therefore conclude that there was an "armed conflict" in Bosnia and Herzegovina in the period relevant to the Indictment and notes that, regardless of whether or not this conflict is considered internal or international, it incorporated the municipality of Konjic. Thus, the first fundamental precondition is met for the application of international humanitarian law, including those norms of the law incorporated in Articles 2 and 3 of the Statute, to the present

[223] *See, e.g.,* T. 10993, Vejzagić.
[224] *See, e.g.,* resolution 757, 30 May 1992 and resolution 770, 13 Aug. 1992.

case, providing there is shown to be a sufficient nexus between the alleged acts of the accused and this armed conflict.

3. Nexus Between the Acts of the Accused and the Armed Conflict

193. It is axiomatic that not every serious crime committed during the armed conflict in Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during an armed conflict, for example, this would be sufficient to render the offence a violation of international humanitarian law. Such a direct connection to actual hostilities is not, however, required in every situation. Once again, the Appeals Chamber has stated a view on the nature of this nexus between the acts of the accused and the armed conflict. In its opinion,

> [i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[225]

194. This re-emphasises the view expressed above that there need not have been actual armed hostilities in the Konjic municipality in order for the norms of international humanitarian law to have been applicable. Nor is it required that fighting was taking place in the exact time-period when the acts alleged in the Indictment occurred.

195. This Trial Chamber shares the view of Trial Chamber II in the *Tadić Judgment*, where it stated that it is not necessary that a crime "be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict."[226] Such a requirement would indeed serve to detract from the force of the concept of individual criminal responsibility.

196. In the present case, all of the alleged acts of the accused took place within the confines of the Čelebići prison-camp, a detention facility in the Konjic municipality operated by the forces of the governmental authorities of Bosnia and Herzegovina. The prisoners housed in the prison-camp were arrested and detained as a result of military operations conducted on behalf of the Government

[225] Tadić Jurisdiction Decision, para. 70.
[226] *Tadić Judgment*, para. 573.

of Bosnia and Herzegovina and in the course of an armed conflict to which it was a party. Each of the accused is alleged to have been involved, in some capacity, in the operation of the camp and the acts for which they have been indicted are alleged to have been committed in the performance of their official duties as members of the Bosnian forces.

197. The Trial Chamber is, therefore, in no doubt that there is a clear nexus between the armed conflict in Bosnia and Herzegovina, including the military operations in Konjic, and the acts alleged in the Indictment to have been committed by the four accused in the present case.

198. Having satisfied these more general prerequisites for the applicability of international humanitarian law, it is now possible to turn to the more specific requirements of Articles 2 and 3 of the Statute.

D. Article 2 of the Statute

199. Article 2 of the Statute pertains to "grave breaches of the Geneva Conventions of 1949" and lists eight categories of criminal conduct which fall within the jurisdiction of the International Tribunal when committed against persons or property protected under the provisions of the relevant Geneva Convention. In considering this Article, it therefore falls to the Trial Chamber to determine whether the offences alleged in counts 1, 3, 5, 7, 11, 13, 15, 18, 21, 24, 27, 30, 33, 36, 38, 42, 44, 46 and 48 of the Indictment satisfy the requirements for its application.

200. The four Geneva Conventions of 1949[227] (hereafter "Geneva Conventions" or "Conventions") provide the basis for the conventional and much of the customary international law for the protection of victims of armed conflict. Their provisions seek to guarantee the basic human rights to life, dignity and humane treatment of those taking no active part in armed conflicts and their enforcement by criminal prosecution is an integral part of their effectiveness. The system of mandatory universal jurisdiction over those offences described as "grave breaches" of the

[227] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter "First Geneva Convention" or "Geneva Convention I"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (hereafter "Second Geneva Convention" or "Geneva Convention II"); Geneva Convention III Relative to the Treatment of Prisoners of War (hereafter "Third Geneva Convention" or "Geneva Convention III"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (hereafter "Fourth Geneva Convention" or "Geneva Convention IV"), all of 12 August 1949.

Conventions requires all States to prosecute or extradite alleged violators of the Conventions. Hence, this State jurisdiction is concurrent with that of the International Tribunal under Article 2 of the Statute.

201. It seems that both the Prosecution and the Defence are in broad agreement that the application of Article 2 requires the satisfaction of two conditions; first, that the alleged offences were committed in the context of an international armed conflict; and, secondly, that the alleged victims were "persons protected" by the Geneva Conventions. In closing arguments, Mr. Niemann for the Prosecution, stated the view that Article 2 could also be applied in situations of internal armed conflict, yet the Prosecution has consistently maintained that the conflict in Bosnia and Herzegovina must in fact be deemed international by the Trial Chamber.[228]

202. While Trial Chamber II in the *Tadić* case did not initially consider the nature of the armed conflict to be a relevant consideration in applying Article 2 of the Statute,[229] the majority of the Appeals Chamber in the *Tadić Jurisdiction Decision* did find that grave breaches of the Geneva Conventions could only be committed in international armed conflicts and this requirement was thus an integral part of Article 2 of the Statute.[230] In his Separate Opinion, however, Judge Abi-Saab opined that "a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict".[231] The majority of the Appeals Chamber did indeed recognise that a change in the customary law scope of the "grave breaches regime" in this direction may be occurring. This Trial Chamber is also of the view that the possibility that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of "grave breaches" to internal armed conflicts should be recognised.

203. Nonetheless, in the adjudication of the present case, the Trial Chamber deems it apposite to consider the nature of the armed conflict within which the acts alleged in the Indictment occurred. The Defence has, on occasion, asserted that the conflict must be viewed as internal and, more forcefully, that the alleged victims cannot be regarded as "protected persons". The Prosecution, on the other hand, takes the view that the conflict was clearly international and the victims were

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[228] *See* T. 15710.
[229] *See* Decision on the Defence Motion on Jurisdiction, 10 Aug. 1995 (RP D4979-D5011), para. 53.
[230] In its final Judgement in the *Tadić* case, Trial Chamber II did apply the reasoning of the Appeals Chamber and required the existence of an international armed conflict for the purposes of application of Article 2.
[231] Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995 (RP D6397-D6403), D6398.

persons protected under either Geneva Convention III (the Prisoners of War Convention) or Geneva Convention IV (the Civilians Convention). Each of these contentions is thus dealt with in turn.

1. Nature of the Armed Conflict

(a) Arguments of the Parties

204. In its Pre-Trial Brief, the Prosecution maintains that the conflict in Bosnia and Herzegovina must be regarded as international from the date of its independence in March 1992 and at least for the duration of that year.[232] The Prosecution quotes the International Committee of the Red Cross[233] Commentary to Geneva Convention IV[234] (hereafter "Commentary" or "Commentary to Geneva Convention IV") in the view that the Convention applies as soon as *de facto* hostilities occur. Further, "[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the parties denies the existence of a state of war."[235] According to the Prosecution, Bosnia and Herzegovina and its armed forces were one of the parties to this international conflict and the other parties were, first, the SFRY and its army, the JNA, and then the FRY and its army, the VJ, along with the SRBH (becoming the RS) and its army, the VSRBH (becoming, and here referred to as, the VRS). It contends that the military involvement of the SFRY and FRY in Bosnia and Herzegovina and the existence of *de facto* hostilities between them, along with the SRBH/RS whom they controlled, and the State of Bosnia and Herzegovina, was thus sufficient to render the conflict international. Armed hostilities, which did not have a separate status, occurred in the Konjic municipality as part of this international armed conflict.

205. In its Motion to Dismiss, the Defence[236] argue that the Prosecution should not be permitted to posit the existence of an international armed conflict as this issue has already been decided by Trial Chamber II in the *Tadić Judgment*, a case to which the Prosecution was obviously a party. In that Judgement, Trial Chamber II found that the conditions necessary for the application of Article 2 were not satisfied. The Defence asserts that this was partly on the basis that they did not find there

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[232] Prosecutor's Pre-Trial Brief, RP D2823-D2850.
[233] Hereafter "ICRC".
[234] Jean Pictet (ed.) – Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) – 1994 reprint edition.
[235] Commentary, p.20.

to have been an international armed conflict at the relevant time – the same time-period as concerns the present case. Thus, in the view of the Defence, the matter is *res judicata* and beyond further debate by the Prosecution. The Defence also points to a reference made by the Appeals Chamber in the *Tadić Jurisdiction Decision* to an agreement signed in May 1992 by the parties to the conflict in Bosnia and Herzegovina as evidence that they themselves considered the conflict to be internal, and concludes that the Appeals Chamber has thus also resolved the matter of the nature of the conflict contrary to the position taken by the Prosecution. The Defence additionally asserts that the evidence before the Trial Chamber does not reveal a sufficient degree of control by the FRY over the actions of the VRS to merit a finding different from that of Trial Chamber II in the *Tadić Judgment*.

206. In its Response to the Defence Motion to Dismiss, the Prosecution maintains once again that the evidence shows that there existed an international armed conflict in 1992 between Bosnia and Herzegovina on the one side and the SFRY, FRY and SRBH/RS on the other. It claims that there was clear, direct involvement of the JNA and VJ in the conflict, as well as a requisite level of linkage between these forces and those of the SRBH/RS, for the latter to be regarded as forming part of a party to this international armed conflict. The Defence Reply to this Response discusses the decision of the ICJ in the *Nicaragua Case*[237] in support of its view that the FRY did not exercise a sufficient amount of command and control over the SRBH/RS and their forces in order to render them part of the FRY forces.[238]

207. In its Closing Brief, the Prosecution reiterates its previous arguments and emphasises that the conflict in Konjic cannot be viewed separately from that in Bosnia and Herzegovina as a whole.[239] In its view, if the latter was an international armed conflict, it is irrelevant whether or not the JNA or VJ were present in the Konjic municipality itself, or whether there were actual combat activities there, during the entire time-period relevant to the Indictment. The Prosecution also challenges the test of "effective control" adopted in the *Nicaragua Case* and utilised by the majority in the *Tadić Judgment* for determining whether the VRS was acting as an agent of the FRY, and urges the Trial Chamber to adopt a different standard. It maintains that it has adduced more than enough evidence

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[236] Here referring to the Defence for Mr. Delalić, Mr. Delić and Mr. Landžo as the Defence for Mr. Mucić, as noted above at para. 80, filed a separate Motion.
[237] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*) (Merits) 1986 I.C.J. Reports, 14 (hereafter "*Nicaragua Case*").
[238] Reply of Defendants Delalić, Delić and Landžo to Prosecution's Response to Defendants' Motion for Judgement of Acquittal, or in the alternative, Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, 10 March 1998 (RP D 5866-D5922) (hereafter "Reply on the Motion to Dismiss"), RP D5909-D5910.
[239] Prosecution Closing Brief, RP D3017-D3019.

to show that the VRS and Bosnian Serb militia were demonstrably linked to the FRY and VJ and has, in fact, also satisfied the stricter standard of "effective control" advocated by the Defence. The Closing Briefs of the Defence are confined to a restatement of their previous arguments on this issue.[240]

(b) Discussion

208. In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" is an international armed conflict and "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place."[241]

209. Before proceeding any further, the Trial Chamber deems it necessary to address the possibility that there may be some confusion as to the parameters of this concept of an "international armed conflict". We are not here examining the Konjic municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict. Should the entire conflict in Bosnia and Herzegovina be considered internal, the provisions of international humanitarian law applicable in such internal conflicts apply throughout those areas controlled by the parties to the conflict, until a peaceful settlement is reached.

210. In the present case the Trial Chamber is concerned only with Geneva Conventions III and IV, as the Prosecution has asserted that the victims of the acts alleged were all either protected civilians or prisoners of war. Article 6 of the Fourth Geneva Convention provides for its immediate application at the outset of any armed conflict between two or more of the "High Contracting Parties" to the Convention, this ceasing only upon the general close of military operations. Article 5 of the Third Geneva Convention provides for its application to all prisoners of war from the time they fall into the power of the enemy and until their final release and repatriation – this

[240] The Defence for Mr. Mucić, in its Closing Brief, joins in the arguments of the other accused in this regard.

may be either before or after the end of the conflict itself. It is, however, important to note that the issue of whether the conflict was international in nature is quite separate from that of whether the individual victims of the alleged criminal acts were protected persons, although, as is discussed later, they are obviously closely related.

211. The relevant question to be addressed by the Trial Chamber is, therefore: was there an international armed conflict in Bosnia and Herzegovina in May 1992 and did that conflict continue throughout the rest of that year, when the offences charged in the Indictment are alleged to have been committed?

212. There can be no question that the JNA strengthened its presence in Bosnia and Herzegovina throughout the latter half of 1991 and into 1992 and that, consequently, significant numbers of its troops were on the ground when the government declared the State's independence on 6 March 1992. Witnesses for both the Prosecution and the Defence have testified that the initial aim of the JNA was to prevent the break-away of Bosnia and Herzegovina from the SFRY and that, by the time of Bosnia and Herzegovina's declaration of independence, the JNA was dominated largely by Serbia and staffed mainly by Serb officers. In addition, the JNA had been providing arms and equipment to the Serb population of Bosnia and Herzegovina from 1991, who had, in turn, been organising themselves into various units and militia in preparation for combat. Similarly, the Bosnian Croat population had been receiving such support from the Government of Croatia and its armed forces.

213. As already noted in Section II above, there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992, aided by various paramilitary groups. This offensive was accompanied by a campaign designed to drive non-Serbs out of desired territory, a practice gaining notoriety under the term "ethnic cleansing".[242] As a result, the Government of the newly independent State of Bosnia and Herzegovina found its authority limited to a core area, surrounded by regions controlled by hostile Serb forces. The United Nations Security Council and the European Community recognised the involvement of these and other outside forces in the conflict by calling for the Governments of Croatia and Serbia to "exert their undoubted influence" and demanding the cessation of all forms of outside interference. In early May 1992, however, the authorities in the

[241] Commentary, p. 20.
[242] *See* Commission of Experts Report, paras. 129-150.

FRY, clearly asserting control of the JNA, announced that all of its personnel who were not citizens of Bosnia and Herzegovina would be withdrawn by 19 May.[243]

214. On the basis of this evidence alone, the Trial Chamber can conclude that an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.

215. It is evident that there was no general cessation of hostilities in Bosnia and Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Trial Chamber must, however, address the possibility that the nature of the armed conflict was changed by the withdrawal of the external forces involved, and hence the cessation of those hostilities, and the commencement of a distinct, self-contained, internal conflict between the Government of Bosnia and Herzegovina and organised armed groups within that State.

216. On 15 May 1992, the United Nations Security Council adopted resolution 752 which noted the decision of the Belgrade authorities to withdraw JNA personnel from Bosnia and Herzegovina and once again demanded that all forms of outside interference, including units of the JNA and elements of the Croatian army, cease immediately. The resolution demanded that those units of the JNA and Croatian army still present in Bosnia and Herzegovina be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed. This call echoed the demands of the European Community made in a Declaration on Bosnia and Herzegovina on 11 May[244] and also of the Committee of Senior Officials of the CSCE in its Declaration on Bosnia and Herzegovina on 12 May, which noted the aggression against the Bosnian State and identified the JNA as participants in this aggression.[245] The Government of the FRY responded to the latter two Declarations by emphasising that the withdrawal of JNA personnel from Bosnia and Herzegovina was in progress and expressing its dismay at the "one-sided manner" in which the European Community was addressing the crisis in Bosnia.[246]

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[243] Many references are made to this announcement as having occurred on 4 May 1992. Exhibit D38/4, dated 11 May 1992, consists of the order implementing this decision, thus actually transferring various brigades, battalions and divisions and requiring this to be completed by 15 May 1992.
[244] UN Doc. S/23906, Annex.
[245] Review of International Affairs, Vol. XLIII (5.VI-5.VII 1992), p.21.
[246] Statement of the Federal Secretariat for Foreign Affairs of Yugoslavia, 12 May 1992 (Review of International Affairs, Vol. XLIII (1.V-1.VI 1992), p.24), and Statement of the Federal Secretariat for Foreign Affairs, 13 May 1992 (Review of International Affairs, Vol. XLIII (5.VI-5.VII 1992), p.21).

217. As has been previously noted, on 13 May 1992 the SRBH had announced its decision to form the army of the Serb Republic, comprised of units of the former JNA based in Bosnia and Herzegovina. The commander of this new army (the VRS) was General Ratko Mladić, of the JNA, and it answered to the authorities of the SRBH/RS in Pale. The remaining units of the JNA then became the army of the FRY, named the VJ.

218. The plan to divide the JNA into the VRS and the VJ, so as to disguise its presence in Bosnia and Herzegovina once that Republic became an independent State, was conceived several months earlier in Belgrade. On 5 December 1991, the Serbian president, Slobodan Milošević, and Serbia's representative in the Presidency of the SFRY, Borisav Jović, met and discussed the issue of a future conflict in Bosnia. According to the diary which Jović kept of the meeting that day:

> When Bosnia-Herzegovina is recognised internationally, the JNA will be declared a foreign army and its withdrawal will be demanded, which is impossible to avoid. In that situation, the Serb population in Bosnia-Herzegovina, which has not created its own paramilitary units, will be left defenseless and under threat.
>
> Sloba feels that we must withdraw all citizens of Serbia and Montenegro from the JNA in Bosnia-Herzegovina in a timely fashion and transfer citizens of Bosnia-Herzegovina to the JNA there in order to avoid general military chaos upon international recognition, caused by moving the military around from one part of the country to another. That will also create the possibility for the Serb leadership in Bosnia-Herzegovina to assume command over the Serb part of the JNA […][247]

219. Clearly, this project had been put in motion well in advance and the JNA utilised to strengthen the local Serb forces in preparation for conflict. The military expert witness for the Defence, Brigadier Vejzagić, told the Trial Chamber that,

> [t]he JNA was included into the process of forming, organising, training and equipping with arms as well as was the SDS party, they worked hand in hand to create Serbian forces, which might, once the JNA was withdrawn, make a new military power, a new military force of the Serbian republic.[248]

220. In addition, General Veljko Kadijević, former Federal Defence Minister of the SFRY, has stated that,

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[247] Exhibit 207.
[248] T. 10471.

> we had to orient ourselves toward concrete cooperation with representatives of the Serbs and with the Serb nation as such. … This had enabled us during the war in Croatia to manoeuvre and move JNA troops via Bosnia-Herzegovina, which was of vital significance for the JNA. ... This also enabled the mobilisation in the Serb parts of Bosnia-Herzegovina to be very successful.
>
> Assessing the further development of events, we felt that after leaving Croatia we should have strong JNA forces in Bosnia-Herzegovina. […]
>
> […] The units and headquarters of the JNA formed the backbone of the army of the Serb Republic, complete with weaponry and equipment. That army, with the full support of the Serb people, which is required in any modern war, protected the Serb people and created the military conditions for an adequate political solution that would meet its national interests and goals, to the extent, of course, that present international circumstances allow.[249]

221. Despite the attempt at camouflage by the authorities of the FRY and their insistence that all non-Bosnian JNA troops had been removed from Bosnia and Herzegovina by 19 May, and that they were, consequently, no longer taking any decisions which could affect the conflict there,[250] the United Nations Security Council recognised the continued influence and control that Belgrade exercised over the Serb forces in Bosnia and Herzegovina. In resolution 757, on 30 May 1992, the Security Council deplored the fact that its demands for the withdrawal of external armed forces, particularly units of the JNA, from Bosnia and Herzegovina, in resolution 752, had not been fully complied with. It condemned the failure of the authorities of the FRY to take effective measures to implement resolution 752 and also demanded that any elements of the Croatian Army still present in Bosnia and Herzegovina act in accordance with that resolution. The Security Council went further and imposed comprehensive trade sanctions on the FRY for its non-compliance, stating that these would remain in place until effective measures were taken to fulfil the requirements of resolution 752.

222. The United Nations General Assembly also issued a resolution in August 1992, which demanded the withdrawal of all remaining units of the JNA and the Croatian Army – a clear indication that it also believed these forces still to be involved in the conflict.[251] Subsequently, in a report dated 3 December 1992, the United Nations Secretary-General emphasised that this resolution had not been complied with. He stated that the United Nations force (UNPROFOR) in

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[249] Exhibit 37, p. 80.
[250] *See* Letter from the Vice-President of the Federal Republic of Yugoslavia addressed to the Secretary-General, 25 May 1992, UN Doc. A/46/928 – S/24007, Annex.
[251] U.N.G.A. res. 46/242 Concerning the Situation in Bosnia and Herzegovina, 25 Aug. 1992.

Bosnia and Herzegovina had "received credible reports of extensive involvement of forces of the Croatian Army in Bosnia and Herzegovina." In addition, "[t]he Bosnian Serb forces allegedly continue to receive supplies and support from elements in the Federal Republic of Yugoslavia (Serbia and Montenegro)." Furthermore, "[t]hough [the] JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the Serb Republic."[252]

223. It further appears that those forces of the former JNA which had been transformed into the VJ continued to play an active role in the Bosnian conflict. The Prosecution expert witness, Dr Gow, testified that, after 19 May 1992 the VJ contributed in terms of personnel and supplies to the execution of the Serbian "new State project" in Bosnia and Herzegovina. It supported the VRS where additional support or special forces were required and it continued to act as one body with the VRS, albeit with a broad degree of operational authority given to the commander in Bosnia and Herzegovina, General Mladić, whose objectives were to execute the armed campaign without bringing Belgrade's role into question. VJ troops were also specifically identified in a number of locations throughout the conflict, for example during the air operations in 1994 and in the Posavina region. Dr. Gow further stated that, while the Serbian authorities in Belgrade professed to having no more active role in the conflict, as well as conceiving of the plan to expand Serb controlled territory and participating in the execution of this plan through the VRS and VJ, their security service also organised Serbian paramilitary groups in Bosnia and Herzegovina. The continued involvement of those elements of the JNA which had become the VJ is supported also by the above-mentioned calls for the complete withdrawal of outside forces by, *inter alia*, the United Nations Security Council and General Assembly.

224. In October 1991, the Assembly of the Serbian people in Bosnia and Herzegovina had already issued a decision to remain in "the Joint State of Yugoslavia".[253] It subsequently determined that various areas within Bosnia and Herzegovina would remain part of this State.[254] In March 1992 it proclaimed a Constitution for the SRBH, reaffirming this principle.[255] Thus, the conflict in which the forces of this purported Republic were involved, was fought primarily to further this aim and to expand the territory which would form part of the Republic. This does not display the existence of a separate armed conflict from 19 May 1992 with different aims and objectives from the conflict

[252] *Report of the Secretary-General*, 3 Dec. 1992, A/47/747 (Exhibit 38), (hereafter "Report of the Secretary-General") para. 11.
[253] Exhibit 13.
[254] *See* Exhibits 15 and 16.

involving the FRY and JNA. Rather, it evinces a continuation of that conflict. The FRY, at the very least, despite the purported withdrawal of its forces, maintained its support of the Bosnian Serbs and their army and exerted substantial influence over their operations.

225. The Government of Bosnia and Herzegovina, for its part, undoubtedly considered itself to be involved in an armed conflict as a result of aggression against that State by Serbia and Montenegro, the Yugoslav Army and the SDS.[256] On 20 June 1992, it proclaimed a state of war, identifying these parties as the aggressors, despite the insistence of the FRY that it was no longer involved in the conflict. In addition, it clearly considered the Bosnian Serb forces organised by the SDS to be a party to that same armed conflict.[257]

226. It is clear that the "new" army belonging to the Bosnian Serbs constituted no more than a re-designation of the JNA units in Bosnia and Herzegovina. The expert witness, Brigadier Vejzagić, explained that,

> [the w]ithdrawal of the JNA from B-H was done in such a way that formations numbering 60 to 80 thousand members of the former JNA were transformed into the Army of [the] self-proclaimed "Serb Republic of B-H". The JNA left all arms for the Army of Bosnian Serbs as well as ammunition and all other necessary military equipment.[258]

227. Despite the formal change in status, the command structure of the new Bosnian Serb army was left largely unaltered from that of the JNA, from which the Bosnian Serbs received their arms and equipment as well as through local SDS organizations.

(c) Findings

228. There can be no question that the issue of the nature of the armed conflict relevant to the present case is not *res judicata*.[259] The principle of *res judicata* only applies *inter partes* in a case where a matter has already been judicially determined within that case itself. As in national criminal systems which employ a public prosecutor in some form, the Prosecution is clearly always a party to cases before the International Tribunal. The doctrine of *res judicata* is limited, in

[255] Exhibit 20.
[256] *See* Exhibit 30, excerpt from the Official Gazette of the Republic of Bosnia-Herzegovina, 20 June 1992.
[257] Ibid.
[258] Vejzagić Report, p.12.
[259] *Res judicata pro veritae accipitur*, literally "a thing adjudicated is received as the truth".

criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated. In national systems where a public prosecutor appears in all criminal cases, the doctrine is clearly not applied so as to prevent the prosecutor from disputing a matter which the prosecutor has argued in a previous, different case. Moreover, this Trial Chamber is certainly not bound by the Decisions of other Trial Chambers in past cases and must make its findings based on the evidence presented to it and its own interpretation of the law applicable to the case at issue. The circumstances of each case differ significantly and thus also the evidence presented by the Prosecution. Even should the Prosecution bring evidence which is largely similar to that presented in a previous case, the Trial Chamber's assessment of it may lead to entirely different results.

229. It is, further, incorrect to contend that the Appeals Chamber has already settled the matter of the nature of the conflict in Bosnia and Herzegovina. In the *Tadić Jurisdiction Decision* the Chamber found that "the conflicts in the former Yugoslavia have both internal and international aspects"[260] and deliberately left the question of the nature of particular conflicts open for the Trial Chambers to determine. Its reference to an agreement made by representatives of Bosnia and Herzegovina, the Bosnian Serbs, and the Bosnian Croats in May 1992 merely demonstrates that some of the norms applicable to international armed conflicts were specifically brought into force by the parties to the conflict in Bosnia and Herzegovina, some of whom may have wished it to be considered internal, and does not show that the conflict must therefore have been internal in nature.[261] Indeed, the subsequent Proclamation of a State of War by the Bosnian Government would tend to illustrate that that party, at least, took the view that it was international.

230. A lengthy discussion of the *Nicaragua Case* is also not merited in the present context. While this decision of the ICJ constitutes an important source of jurisprudence on various issues of international law, it is always important to note the dangers of relying upon the reasoning and findings of a very different judicial body concerned with rather different circumstances from the case in hand. The International Tribunal is a criminal judicial body, established to prosecute and punish individuals for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention. It is, therefore, inappropriate to

[260] Tadić Jurisdiction Decision, para. 77.
[261] See *Tadić Judgment,* para. 583, which states that "the signing of such agreements does not in any way affect the legal status of the parties to the conflict and does not in any way affect the independent determination of the nature of that conflict by this Trial Chamber."

transpose wholesale into the present context the test enunciated by the ICJ to determine the responsibility of the United States for the actions of the contras in Nicaragua. [262]

231. With this in mind, we can consider a very important point of distinction between the *Nicaragua Case* and the one here at issue. In that case, the ICJ was charged with determining whether there had been a use of force in violation of customary international law and article 2(4) of the United Nations Charter by the United States against Nicaragua, as well as an unlawful intervention in the internal affairs of Nicaragua on the part of the United States. This issue rests on the predominant, traditional perception of States as bounded entities possessed of sovereignty which cannot be breached or interfered with. More specifically, what was in question was the incursion of the forces of one such distinct, bounded entity into another and the operation of agents of that entity within the boundaries of the other. In contrast, the situation with which we are here concerned, is characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of continuity of control of particular forces. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.

232. The Trial Chamber must keep in mind that the forces constituting the VRS had a prior identity as an actual organ of the SFRY, as the JNA. When the FRY took control of this organ and subsequently severed the formal link between them, by creating the VJ and VRS, the presumption remains that these forces retained their link with it, unless demonstrated otherwise.[263]

233. The Trial Chamber's position accords fully with that taken by Judge McDonald in her Dissent to the majority Judgment in the *Tadić* case. Judge McDonald found that:

> [t]he evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the

[262] The Trial Chamber notes that this position has recently been advocated by a prominent jurist, thus: "Obviously, the *Nicaragua* test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In practice, applying the *Nicaragua* test to the question in *Tadić* produces artificial and incongruous conclusions." T. Meron – Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout, 92 A.J.I.L. (1998) 236 (hereafter "Meron"), at 237.

[263] The majority in the *Tadić Judgment* concede that the circumstances of the *Nicaragua Case* differ from that of the *Tadić* case in that, in *Tadić,* what was important was whether the FRY had sufficiently distanced itself from the VRS after 19 May 1992. However, "it appears that the majority ultimately finds these differences to be of no consequence in determining the appropriate test for a finding of agency, and applies the effective control standard employed in *Nicaragua*. By failing to consider the context in which the *Nicaragua* test of agency was determined, the majority erroneously imports the requirement of effective control to an agency determination." Separate and Dissenting Opinion of Judge McDonald, (hereafter "Dissent"), para. 19.

> establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations.[264]
> […]
>
> … [i]t would perhaps be naïve not to recognize that the creation of the VRS, which coincided with the announced withdrawal by the JNA, was in fact nothing more than a ruse.[265]

234. In light of the above discussion, the Trial Chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature. The withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.[266]

235. Having reached this conclusion, the Trial Chamber makes no finding on the question of whether Article 2 of the Statute can only be applied in a situation of international armed conflict, or whether this provision is also applicable in internal armed conflicts. The issue which remains to be decided is simply whether the victims of the acts alleged in the Indictment were "persons protected" by the Geneva Conventions of 1949.

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[264] Dissent, para. 7.
[265] *Ibid,* para. 10.
[266] The Trial Chamber notes that this finding was also made recently by the Bavarian Supreme Court in the case of the *Public Prosecutor v. Novislav Djajic, Bayerisches Oberstes Landesgericht*, 3 St 20/96 Judgement of 23 May 1997. The Court found that the conflict in Bosnia and Herzegovina was international in nature, for the purposes of applying the grave breaches provisions of the Fourth Geneva Convention, from the time of that State's independence and as a consequence of the involvement of the JNA. Furthermore, the Court held that the nature of the conflict did not change as a result of the purported withdrawal of the JNA due to the fact that Yugoslavia continued to be involved. *See* pp. 108-112.

2. Status of the Victims as "Protected Persons"

(a) Positions of the Parties

236. In its Pre-Trial Brief, the Prosecution asserts that all of the victims of the acts alleged in the Indictment were at all relevant times "persons protected" by either the Third Geneva Convention, on prisoners of war, or the Fourth Geneva Convention, on civilians. Article 4 of the Fourth Geneva Convention states:

> Persons protected by the Convention are 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.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and 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.

237. The provisions of the second paragraph of article 4 are, however, wider in application, as defined in article 13:

> Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

238. Article 4(A) of the Third Geneva Convention defines those who are subject to its protection in the following terms:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognisable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

239. Thus, the Prosecution maintains that the victims of the acts alleged in the Indictment were either non-combatants linked to one side in an international armed conflict and in the hands of the other side to that conflict, or prisoners of war from one side in the conflict, detained by the other side. Due to the nature of the crimes charged, the Prosecution deems it irrelevant which of the two Conventions is applied, except in relation to the charge of unlawful confinement of civilians.[267]

240. In their Pre-Trial Briefs, the Defence for Mr. Landžo and Mr. Delić respond that the alleged victims do not satisfy the requirements of article 4(A) of Geneva Convention III or of article 4 of Geneva Convention IV and therefore cannot be "protected persons". In their view, the definition of "prisoners of war" is strict and the detainees in the Čelebići prison-camp did not fit into any of the categories listed in article 4(A). In addition, the nationality of all of the detainees was Bosnian, the

same as that of the party to the conflict detaining them and, thus, they are outwith the ambit of article 4 of Geneva Convention IV.

241. The Prosecution counters these arguments by contending that the victims in the present case were all Bosnian Serbs and, as such, should not be considered as nationals of Bosnia and Herzegovina. During its case it brought an expert witness on the question of nationality, Professor Constantine Economides, who discussed the concept of an "effective link" requirement between a State and its nationals, as well as the development of the right of an individual to opt for a particular nationality. In its Motion to Dismiss, the Defence maintains its position and considers the testimony of Professor Economides as confirming rather than refuting it.[268]

242. The Prosecution argues, in its Response to the Motion to Dismiss, that it is unnecessary to consider whether some of the victims were prisoners of war, unless it is found that they cannot qualify as protected civilians on account of their nationality. Its position remains that some of the detainees were civilians while others may have been prisoners of war and, in relation to the latter of these categories, if there was any doubt as to their status, article 5 of Geneva Convention III required that they should receive the protections of that Convention until a "competent tribunal" had made a proper determination. In any case, in its view, it does not matter whether it is unclear if some persons were civilians or prisoners of war, for there is no gap between the Conventions and their provisions on "grave breaches" are the same in relation to the offences alleged in the Indictment. While some individuals may indeed have been involved in activities "hostile to the security of the State", and thus they may have been legitimately detained, they were nevertheless protected by article 5 of the Fourth Geneva Convention, which requires their humane treatment.

243. In their Closing Briefs, the Prosecution and the Defence restate these positions and discuss the evidence which has been adduced in relation to the status of the detainees in the Čelebići prison-camp. The Defence for Mr. Delalić, Mr. Mucić and Mr. Delić particularly argue that there can be no doubt that the relevant persons were not part of the armed forces of a party to the conflict, nor of an irregular militia or resistance movement satisfying the conditions of article 4(A)(2) of the Third Geneva Convention, nor of a *levée en masse* as envisaged in article 4(A)(6). The Prosecution focuses on the Fourth Geneva Convention and urges the Trial Chamber to take an approach which

[267] Count 48 of the Indictment.
[268] The Defence for Mr. Delalić thus joining the earlier arguments of Mr. Delić and Mr. Landžo. The Defence for Mr. Mucić filed a separate Motion, but stated that it adopted the arguments of the other parties on issues such as this.

extends the protection of the Geneva Conventions equally and fairly to all victims on all sides of the conflict.

(b) Discussion

244. It is logical to deal in turn with the relevant provisions of the two Geneva Conventions with which we are here concerned. For the sake of clarity, the Trial Chamber deems it most appropriate first to address the question of protection under the Fourth Geneva Convention and to then consider the requirements of the Third Geneva Convention.

(i) Were the Victims Protected Civilians?

245. The operative part of article 4 of the Fourth Geneva Convention for the present purposes is clearly the first paragraph, in particular the requirement that persons be "in the hands of a party to the conflict or occupying power of which they are not nationals" in order to be considered "protected". It is this phrase which has engendered such intense discussion of the concept of nationality by the parties in this case, as well as in other cases, and in recent literature on this area of international humanitarian law. It is also here that there arises a connection with the issue of the nature of the armed conflict, for clearly a showing that individuals are "in the hands of" a party of foreign nationality would generally lead to the conclusion that the conflict is international in nature. Conversely, if individuals are deemed not to be protected by the Fourth Geneva Convention on the grounds that they are of the same nationality as their captors, it may well be, although it does not necessarily follow, that the relevant conflict is an internal one.[269]

246. It is necessary to note that the expression "in the hands of" is used in article 4 in a general sense. It is not to be understood merely in the physical sense of being held prisoner, but indicates that the civilian in question is in territory which is under the control of an opposing party to the conflict.[270] This issue clearly does not arise in the present case as there is no dispute that the victims of the alleged offences were, at all relevant times, detained in a prison-camp belonging to

[269] It is here that the *Tadić Judgment* has on occasion been misquoted, for the reasoning of the majority was that the victims in that case could not be "protected persons" on the basis of their common nationality with those forces in whose hands they were. The implication of this finding was that the majority also did not consider the conflict to have been international in nature after 19 May 1992, although this was not expressly stated.
[270] See Commentary, p. 47.

the Bosnian authorities, a party to the conflict. The Trial Chamber thus may proceed directly with a discussion of the question of nationality.

247. Traditional tenets of international legal theory maintained that States are the only real subjects of international law. Thus, individuals were only of concern to international law as part of the State to which they are linked by their nationality.[271] In consequence, it is a matter for a State's domestic jurisdiction who are to be considered its nationals. Jennings and Watts state this position thus:

> In principle, and subject to any particular international obligations which might apply, it is not for international law but for the internal law of each State to determine who is, and who is not, to be considered its national.[272]

248. However, international law does have a role to play in placing limitations on States in the exercise of their discretion in the granting of nationality. Jennings and Watts concede,

> although the grant of nationality is for each State to decide for itself in accordance with its own laws, the consequences as against other States of this unilateral act occur on the international plane and are to be determined by international law.
>
> … the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question.[273]

249. The Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws also reflects this position. In its first article, it provides that, while it is for each State to determine under its own law who are its nationals, such law must be recognised by other States only "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."[274]

250. It was in the spirit of the traditional view of the role of international law that article 4 of the Fourth Geneva Convention was phrased in the negative to exclude from that Convention's protection persons who are considered "nationals" of the State in whose hands they are. As observed in the Commentary, "the Convention thus remains faithful to a recognised principle of

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[271] "Nationality is the principle link between individuals and international law." Jennings and Watts (eds.) - *Oppenheim's International Law*, 9th ed. (London, 1992), vol. I (hereafter "*Oppenheim*"), p 857.
[272] *Oppenheim*, p. 852 (footnotes omitted).
[273] *Ibid.,* p. 853.
[274] Convention on Certain Questions relating to the Conflict of Nationality Laws, The Hague, 12 April 1930, Art. 1. Reprinted in 9 *Sveriges Överenskommelser med Främmande Makter* (1937) 41.

international law: it does not interfere in a State's relations with its own nationals."[275] The Commentary summarises the meaning of this first part of article 4 thus:

> there are two main classes of protected person: (1) enemy nationals within the national territory of each of the Parties to the conflict and (2) the whole population of occupied territories (excluding the nationals of the Occupying Power).[276]

251. An analysis of the relevant laws on nationality in Bosnia and Herzegovina in 1992 does not, however, reveal a clear picture. At that time, as we have discussed, the State was struggling to achieve its independence and all the previous structures of the SFRY were dissolving. In addition, an international armed conflict was tearing Bosnia and Herzegovina apart and the very issue which was being fought over concerned the desire of certain groups within its population to separate themselves from that State and join with another.

252. According to the 1974 constitution of the SFRY, every citizen of one of its constituent republics was simultaneously a citizen of the SFRY. Thus, all citizens of Bosnia and Herzegovina were also considered citizens of the SFRY and remained so until its dissolution. Although Bosnia and Herzegovina declared its independence in March 1992, it did not pass any legislation on citizenship until October of that year, in the form of a decree which was subsequently supplemented by further decrees.[277] This provided that all people who had the citizenship of Bosnia and Herzegovina in accordance with previous regulations were to be considered citizens, and also allowed for the possibility of people holding another nationality simultaneously. In an additional decree of 23 April 1993, all those who had citizenship of the SFRY on 6 April 1992 and were domiciled in Bosnia and Herzegovina, were to be considered citizens of Bosnia and Herzegovina.[278]

253. Despite this, the Bosnian Serbs, in their purported constitution of the SRBH, proclaimed that citizens of the Serb Republic were citizens of Yugoslavia.[279] This was confirmed in a subsequent "Law on Serb Citizenship" passed by the National Assembly of Republika Srpska on 18 December

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[275] Commentary, p. 46.
[276] Ibid.
[277] Decree with Legal Power on the Citizenship of the Republic of Bosnia and Herzegovina, 7 Oct. 1992, Official Gazette No. 18/92.
[278] Decree with a Legal Power on Changes and Supplements to the Decree with Legal Power on the Citizenship of the Republic of Bosnia and Herzegovina, 23 April 1993, PR Nr. 1494/93.
[279] 16 March 1992, Exhibit 20. The Constitution of the SRBH was declared unconstitutional by the Constitutional Court of Bosnia and Herzegovina, on 8 Oct. 1992. *See* Exhibit 23.

1992.[280] The constitution of the FRY of 27 April 1992, however, does not appear to allow for the extension of its citizenship beyond the citizens of Serbia and Montenegro.[281]

254. In the context of these provisions, the Prosecution has urged the Trial Chamber to consider two principles in determining whether the Bosnian Serb victims of the alleged offences in the Indictment can be considered "protected persons" in relation to the Bosnian government authorities which were detaining them. These are the emerging doctrine of the right under international law to the nationality of one's own choosing, and the requirement of an effective link between a State and its nationals in order for the grant of nationality to be recognised on the international plane. These are discussed here briefly.

255. In its consideration of the relevant international law on nationality, the Trial Chamber notes the evidence of Professor Economides on the work of the International Law Commission (hereafter "ILC") on nationality issues in cases of State succession. In addition, the Professor testified about the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, prepared by the European Commission for Democracy through Law (hereafter "Venice Commission"). He explained that the conclusions of both of these bodies were that there existed certain fundamental principles, namely: that each individual involved in a case of State succession has the right to a nationality; that States must endeavour to avoid cases of statelessness; and that the will of the persons involved must be respected by a State conferring its nationality. The Professor also testified that it is a rule of customary international law that a successor State must grant its nationality to all nationals of the predecessor State habitually residing in its territory. He took the view that the will of the persons involved in a State succession was gaining ground as a criterion for the granting of nationality and, while a State may automatically confer its nationality on a person after a succession has taken place, after a period of time it must allow him or her to exercise their right to opt for another nationality.

256. It is not, however, altogether clear that the obligation on States to grant such a right is a settled rule of international law. The Draft Articles on Nationality in Relation to the Succession of States produced by the ILC,[282] along with the Venice Commission Declaration, which refer to this right, probably cannot be said to yet reflect binding customary international law, on the basis of

[280] Law on the Serb Citizenship, in The Official Messenger of the Republika Srpska, No. 19, 18 Dec. 1992.
[281] Exhibit D15/3, Art. 17.
[282] A/52/10 Report of ILC 12 May – 18 July 1997.

State practice and *opinio juris*.[283] In any case, whilst the Arbitration Commission established by the European Community (the Badinter Commission) expressed the opinion that the successor States of the SFRY must afford minorities and ethnic groups, such as the Serbian population in Bosnia and Herzegovina, the right to choose their nationality,[284] it is clear that no formal act was taken by Bosnia and Herzegovina to implement this right. It is, therefore, difficult for the Trial Chamber to conclude that the principle of a right of option is, of itself, determinative in viewing the Bosnian Serbs to be non-nationals of Bosnia and Herzegovina.

257. Professor Economides also referred to the doctrine of "effective link" as having a role to play in cases of armed conflict when there is some ambiguity concerning the nationality of the various groups involved. This doctrine gained currency after the *Nottebohm Case*, decided by the ICJ in 1955.[285] In that case, the ICJ stated that,

> nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[286]

Thus the Court found that Mr. Nottebohm could not be considered a national of Liechtenstein for the purposes of a claim against Guatemala, a State with which he had, in fact, a closer connection.

258. There has been a considerable amount of literature written on the *Nottebohm Case* and its implications and limitations. However, although the principle of effective link traditionally was recognised in the context of dual nationality, "the particular context of origin does not obscure its role as a general principle with a variety of possible applications."[287] Thus, operating on the

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[283] In 1979, Professor Weis wrote, "[i]n the view of the present writer … it cannot be concluded, from the widespread but not universal treaty practice and from other instances of State practice, that there exists a rule of international law imposing a duty on the States concerned in a transfer of territory to grant to the inhabitants of the transferred territory a right of option to decline (or acquire) the nationality of those States." P. Weis - *Nationality and Statelessness in International Law* (1979), pp. 158-160. It is not apparent to the Trial Chamber that this position has yet been altered.
[284] Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, Paris, 11 Jan. 1992, reprinted in 31 I.L.M. Vol. XXI, No. 6 (1992) 1497.
[285] Liechtenstein v. Guatemala, ICJ Rep. (1955) 4.
[286] *Ibid.*, p. 23.
[287] Brownlie – *Principles of Public International Law* (4th ed., 1990) (hereafter "Brownlie Principles"), p. 407.

international plane, the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law.[288]

259. Assuming that Bosnia and Herzegovina had granted its nationality to the Bosnian Serbs, Croats and Muslims in 1992, there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case. The granting of nationality occurred within the context of the dissolution of a State and a consequent armed conflict. Furthermore, the Bosnian Serbs had clearly expressed their wish not to be nationals of Bosnia and Herzegovina by proclaiming a constitution rendering them part of Yugoslavia and engaging in this armed conflict in order to achieve that aim. Such a finding would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose. It would also be in the spirit of that law by rendering it as widely applicable as possible.

260. Reference should also here be made to the concept of agency, discussed by Trial Chamber II in the *Tadić Judgment*. This approach to the issue of protection under the Fourth Geneva Convention considers whether the Bosnian Serbs should be regarded as the agents of the FRY on the basis of its control over them. Thus, persons "in the hands of" the forces of the Bosnian Serbs are constructively "in the hands of" the FRY, a foreign party to the conflict. In the *Tadić Jurisdiction Decision*, the Appeals Chamber addressed this possibility and reasoned that the outcome of the application of the agency concept would render Bosnian Serb civilians in the hands of Bosnian government forces unprotected by the Fourth Geneva Convention, while Bosnian Muslim and Croat civilians in the hands of Bosnian Serb forces would be protected persons. The Appeals Chamber labelled such an asymmetrical outcome as "absurd" and thus dismissed the Prosecution's argument in that case that the Security Council had determined the conflict to be international in nature when it adopted the Statute of the International Tribunal.[289]

261. However, it is the view here taken that such an outcome is not the inevitable consequence of the application of the doctrine. As has been discussed, it is not necessarily the case that Bosnian Serb civilians are to be viewed as Bosnian nationals for the purpose of applying the grave breaches

[288] Brown advocates such an approach in his assertion that, "[i]nternational law recognises nationality only when it is based on a genuine connection between the State and the individual. Common nationality in the formal sense between victim and defendant should not preclude individual criminal responsibility for grave breaches of the Geneva Conventions where there is no de facto linkage to bind them." B. Brown – Nationality and Internationality in International Humanitarian Law, 34 Stanford Journal of International Law 2 (1998) 347 (hereafter "Nationality and Internationality"), p. 351.

regime of the Fourth Geneva Convention. Hence, it would be possible to regard Bosnian Serb civilians as protected when detained by Bosnian government forces.[290]

262. Given the reasoning set out above in the discussion of the international nature of the conflict in Bosnia and Herzegovina in 1992, this Trial Chamber takes a different view to that of the majority in the *Tadić Judgment*. It has been found that the purported withdrawal of the JNA and severance of involvement of the FRY in the conflict after 19 May 1992 was merely a smokescreen and that there can be no doubt of their continued influence. There was a clear common purpose between the FRY and the Bosnian Serbs to execute a project conceived of in Belgrade – that of an expanded Serbian State – and it is, therefore, possible to regard the Bosnian Serbs as acting on behalf of the FRY in its continuing armed conflict against the authorities of Bosnia and Herzegovina.

263. Bearing in mind the relative merits of the "effective link" and the "agency" approaches, this Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events.[291] The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests"[292] and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would, indeed, be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.

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[289] Tadić Jurisdiction Decision, para. 76.
[290] As has already been noted, however, the majority of the Trial Chamber in the Tadić case did not consider it proven that the FRY had "effective control" over the VRS, the test, in its view, required to establish the relationship of agency.
[291] Brown calls for a "functional approach" to the issue of nationality and points out that in 1992 the outcome of the Bosnian conflict was unknown, thus placing all Bosnians in a state of uncertainty which effectively negated their common nationality. Nationality and Internationality, p. 397.
[292] Commentary, p. 21.

264. The law must be applied to the reality of the situation before us and thus, to reiterate, the relevant facts are as follows:

- Upon the dissolution of the SFRY, an international armed conflict between, at least, the FRY and its forces and the authorities of the independent State of Bosnia and Herzegovina took place;
- A segment of the population of Bosnia and Herzegovina, the Bosnian Serbs, declared their independence from that State and purported to establish their own Republic which would form part of the FRY;
- The FRY armed and equipped the Bosnian Serb population and created its army, the VRS;
- In the course of military operations in the Konjic municipality, being part of this international armed conflict, the Bosnian government forces detained Bosnian Serb men and women in the Čelebići prison-camp.

265. Without yet entering the discussion of whether or not their detention was unlawful, it is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been "protected persons" within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.

266. This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals.[293] Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken. As was recently stated by Meron,

> [i]n interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.[294]

[293] Commentary, p. 46.
[294] Meron, p. 239.

(ii) Were the Victims Prisoners of War?

267. Article 4(A) of the Third Geneva Convention sets rather stringent requirements for the achievement of prisoner of war status. Once again, this provision was drafted in light of the experience of the Second World War and reflects the conception of an international armed conflict current at that time. Thus, the various categories of persons who may be considered prisoners of war are narrowly framed.

268. In the present case, it does not appear to be contended that the victims of the acts alleged were members of the regular armed forces of one of the parties to the conflict, as defined in sub-paragraph 1 of the article. Neither, clearly, are sub-paragraphs 3, 4 or 5 applicable. Attention must, therefore, be focused on whether they were members of militias or volunteer corps belonging to a party which: (a) were commanded by a person responsible for his subordinates; (b) had a fixed distinctive sign recognisable at a distance; (c) carried arms openly; and (d) conducted their operations in accordance with the laws and customs of war. Alternatively, they could have constituted a *levée en masse*, that is, being inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and at all times they carried arms openly and respected the laws and customs of war.

269. The Prosecution seeks to invoke the provisions of Additional Protocol I[295] to interpret and clarify those of article 4(A)(2) and wishes to take a liberal approach to the detailed requirements that the sub-paragraph contains. Even should this be accepted, and despite the discussion above of the need to take a broad and flexible approach to the interpretation of the Geneva Conventions, the Trial Chamber finds it difficult, on the evidence presented to it, to conclude that any of the victims of the acts alleged in the Indictment satisfied these requirements. While it is apparent that some of the persons detained in the Čelebići prison-camp had been in possession of weapons and may be considered to have participated to some degree in 'hostilities', this is not sufficient to render them entitled to prisoner of war status. There was clearly a Military Investigating Commission established in Konjic, tasked with categorising the Čelebići detainees, but this can be regarded as related to the question of exactly what activities each detainee had been engaged in prior to arrest

[295] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts (hereafter "Additional Protocol I").

and whether they posed a particular threat to the security of the Bosnian authorities. Having reached this conclusion, it is not even necessary to discuss the issue of whether the Bosnian Serbs detained in Čelebići "belonged" to the forces of one of the parties to the conflict.

270. Similarly, the Trial Chamber is not convinced that the Bosnian Serb detainees constituted a *levée en masse*. This concept refers to a situation where territory has not yet been occupied, but is being invaded by an external force, and the local inhabitants of areas in the line of this invasion take up arms to resist and defend their homes. It is difficult to fit the circumstances of the present case, as described in Section II above, into this categorisation. The authorities in the Konjic municipality were clearly not an invading force from which the residents of certain towns and villages were compelled to resist and defend themselves. In addition, the evidence provided to the Trial Chamber does not indicate that the Bosnian Serbs who were detained were, as a group, at all times carrying their arms openly and observing the laws and customs of war. Article 4(A)(6) undoubtedly places a somewhat high burden on local populations to behave as if they were professional soldiers and the Trial Chamber, therefore, considers it more appropriate to treat all such persons in the present case as civilians.

271. It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied. The Commentary to the Fourth Geneva Convention asserts that;

> [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.[296]

272. This position is confirmed by article 50 of Additional Protocol I which regards as civilians all persons who are not combatants as defined in article 4(A) (1), (2), (3) and (6) of the Third Geneva Convention, and article 43 of the Protocol itself.

[296] Commentary, p. 51.

273. The Prosecution has further argued that article 5 of the Third Geneva Convention required that, where there was some doubt about the status of the Čelebići detainees, they had to be granted the protections of the Convention until that status was determined by a competent tribunal.[297] On this basis, they were "protected persons" and subject to the grave breaches provisions of the Third Convention. While there may, on the basis of this article, have been a duty upon the Bosnian forces controlling the Čelebići prison-camp to treat some of the detainees as protected by the Third Geneva Convention until their status was properly determined and thus treat them with appropriate humanity, the Trial Chamber has found that they were not, in fact, prisoners of war. They were, instead, all protected civilians under the Fourth Geneva Convention and the Trial Chamber thus bases its consideration of the existence of "grave breaches of the Geneva Conventions" on this latter Convention.

(c) Findings

274. On the basis of the above discussion, the Trial Chamber concludes that all of the victims of the acts alleged in the Indictment were "persons protected" by the Fourth Geneva Convention of 1949. For the purposes of the application of Article 2 of the Statute, these victims must be regarded as having been in the hands of a party to the conflict of which they were not nationals, being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina.

275. This finding is strengthened by the Trial Chamber's fundamental conviction that the Security Council, in persistently condemning the widespread violations of international humanitarian law committed throughout the conflict in Bosnia and Herzegovina and, indeed, in establishing the International Tribunal to prosecute and punish such violations, did not consider that the protection of the whole corpus of international humanitarian law could be denied to particular groups of individuals on the basis of the provisions of domestic citizenship legislation. The International Tribunal must, therefore, take a broad and principled approach to the application of the basic norms of international humanitarian law, norms which are enunciated in the four Geneva Conventions. In particular, all of those individuals who took no active part in hostilities and yet found themselves

[297] Article 5 of the Third Geneva Convention provides: "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

engulfed in the horror and violence of war should not be denied the protection of the Fourth Geneva Convention, which constitutes the very basis of the law concerned with such persons.

276. The Trial Chamber does not consider it necessary to discuss at length in the present context the development of the law of the Third Geneva Convention relating to prisoners of war, for even if none of the victims can be viewed as prisoners of war, there is no gap between the Geneva Conventions and they must, therefore, be considered protected civilians, along with the other detainees. This finding does not prejudice the later discussion of whether the authorities of Bosnia and Herzegovina were legitimately entitled to detain all of these civilians.

277. Having decided that Article 2 of the Statute is applicable to the facts of the present case, the Trial Chamber now turns its attention to the application of Article 3, concerning violations of the laws or customs of war.

E. Article 3 of the Statute

1. Introduction

278. In addition to the charges of grave breaches of the Geneva Conventions, the Indictment also contains 26 counts of violations of the laws or customs of war, punishable under Article 3 of the Statute.[298] In the *Tadić Jurisdiction Decision*, the Appeals Chamber opined that Article 3 refers to a broad category of offences, namely all "violations of the laws or customs of war", and that the enumeration of some of these in the Article itself is merely illustrative, not exhaustive.[299] In particular, Article 3 is not limited to offences under "Hague law", being the law regulating the conduct of hostilities and most notably finding expression in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, (hereafter "Hague Convention IV") and annexed Regulations, but includes some violations of the Geneva Conventions.[300]

[298] Several of these counts are charged in the alternative, as discussed in the factual and legal findings section below.
[299] Tadić Jurisdiction Decision, para. 87.
[300] Ibid.

279. The Appeals Chamber, in its discussion of Article 3, proceeded further to enunciate four requirements that must be satisfied in order for an offence to be considered as within the scope of this Article. These requirements are the following:

> (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. (…);
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[301]

280. This Trial Chamber finds no reason to depart from the position taken by the Appeals Chamber on this matter and considers that the first and third of these requirements have been dealt with by our discussion of the general requirements for the application of both Articles 2 and 3 of the Statute above.[302]

281. With the exception of count 49 (plunder), the Indictment specifies that the offences charged as violations of the laws or customs of war are "recognised by" article 3 common to the four Geneva Conventions, which reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are, and shall remain, prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[301] *Ibid.*, para. 94.
[302] With the *caveat* that the "serious" nature of the offence charged as plunder remains to be discussed below.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

282. Thus, the Trial Chamber, in its discussion of the applicability of Article 3 of the Statute to the present case, must perforce consider common article 3 of the Geneva Conventions. The Defence has challenged the nature of this provision and its place within the bounds of Article 3 of the Statute, on the basis that it does not form part of customary international law and that any violation thereof does not entail individual criminal responsibility.

283. In relation to the charge of plunder in count 49 of the Indictment, the Trial Chamber notes that Article 3(e) of the Statute specifically enumerates this offence as a violation of the laws or customs of war within the jurisdiction of the International Tribunal. Nonetheless, it must be established that the prohibition of plunder is a norm of customary international law which attracts individual criminal responsibility.

284. In order to proceed with its determination on the applicability of Article 3, the Trial Chamber deems it necessary, for the sake of clarity, to briefly set out the arguments of the parties in relation to these issues.

2. Arguments of the Parties

285. In the *Tadić Jurisdiction Decision*, the Appeals Chamber found that the International Tribunal may have jurisdiction over offences under Article 3 of the Statute whether the offences alleged were committed in an international or internal armed conflict.[303] In reaching this conclusion, it examined the customary nature of common article 3 of the Geneva Conventions, as well as other

[303] Tadic Jurisdiction Decision, para. 137.

norms governing internal armed conflicts, and determined that their violation does entail individual criminal responsibility. The Prosecution contends that the findings of the Appeals Chamber on this matter should be applied in the present case. On this basis, the Prosecution takes the view that it is only required to prove that an armed conflict existed and that the alleged violations were related to this conflict in order for the Trial Chamber to apply Article 3 of the Statute in the present case.

286. In relation to violations of the substantive prohibitions contained in common article 3 of the Geneva Conventions, the Prosecution submits that these are clearly part of customary international law and that it must simply demonstrate that the victims of the alleged offences satisfy the requirements of sub-paragraph (1) (that is, that they be taking no active part in the hostilities). In sum, it is the view of the Prosecution that common article 3 of the Geneva Conventions can be applied by the International Tribunal when four conditions are met, namely, that:

1) the unlawful acts were committed in the context of an armed conflict;
2) the perpetrator was connected to one side involved in the armed conflict;
3) the victims were persons taking no active part in the hostilities, which includes civilians, members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause; and
4) one of the enumerated acts listed in common article 3 of the Geneva Conventions was committed.[304]

287. In addition, the Prosecution contends that violations of article 75 of Additional Protocol I, which reflects customary international law, are covered by Article 3 of the Statute. It asserts that the offences charged under Article 3 in the Indictment, clearly also constitute violations of this provision.[305]

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[304] Prosecution Closing Brief, RP D2733.
[305] See Prosecutor's Response to the Pre-Trial Briefs of the Accused, Case No.: IT-96-21-T, 18 April 1997 (RP D3311-D3363) (hereafter "Prosecution Response to the Pre-Trial Briefs of the Accused") (RP D3348-D3350). Article 75 of Additional Protocol I reads: "In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national, or social origin, wealth, birth or other status, or on any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons. The following acts are, and shall remain, prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: violence to the life, health, or physical or mental well-being of persons, in particular: murder; torture of all kinds, whether physical or mental; corporal punishment and mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; the taking of hostages; collective punishments; and threats to commit any of the foregoing acts. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the

288. The Prosecution finally argues that the prohibition of plunder is a well-established principle in international law, recognised in the 1907 Hague Convention (IV) and annexed Regulations, as well as Geneva Convention IV.

289. The Defence concedes that its position on Article 3, which is that it cannot incorporate common article 3 of the Geneva Conventions, is contrary to that taken by the Appeals Chamber in the *Tadić Jurisdiction Decision*.[306] Nonetheless, it contends that the Appeals Chamber wrongly decided the issue of whether common article 3 of the Geneva Conventions is included in Article 3 of the Statute.

290. The first argument raised by the Defence in support of its position is that the Security Council, in establishing the International Tribunal, never intended it to have jurisdiction over violations of common article 3. By examining the provisions of the statute of the International Criminal Tribunal for Rwanda (hereafter "ICTR"), the Defence deduces that, without explicit reference to common article 3 in the Statute as is contained in the statute of the ICTR, the Security Council could not have intended to include it within the ambit of the jurisdiction of the International Tribunal.

291. The Defence further contends that the listed offences in Article 3 of the Statute are illustrative of offences under "Hague law" – that is the laws enunciated in the 1907 Hague Convention (IV)

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reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure, which include the following: the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; no one shall be convicted of an offence except on the basis of individual penal responsibility; no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; anyone charged with an offence is presumed innocent until proved guilty according to law; anyone charged with an offence shall have the right to be tried in his presence; no one shall be compelled to testify against himself or to confess guilt; anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; anyone prosecuted for an offence shall have the right to have the judgements pronounced publicly; and a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised."

[306] It is not clear that the Defence for Mr. Mucić has joined with the other Defence in relation to this issue.

and annexed Regulations – which relates to the conduct of hostilities, not the protection of victims taking no active part in the fighting. In its view, had the Security Council intended to include certain provisions of "Geneva law" – such as common article 3 - within Article 3 of the Statute, it would have done so explicitly.

292. Responding to the Prosecution on this matter, the Defence examines the statements made by certain State representatives to the Security Council at the time of adoption of the Statute of the Tribunal. The Defence challenges the Prosecution's interpretation of these statements and maintains that they cannot be regarded as an endorsement of the inclusion of common article 3 of the Geneva Conventions into Article 3 of the Statute.

293. Fundamentally, the Defence argues that the provisions of common article 3 of the Geneva Conventions do not constitute settled customary international law on the basis of State practice and *opinio juris*. The Report of the Secretary-General, adopted by the Security Council and containing the Statute, clearly states that the Tribunal is to apply "rules of international humanitarian law which are beyond doubt part of customary law"[307] and it is the view of the Defence that common article 3 does not conform to this requirement.

294. The second leg of the Defence argument is that, even should the substantive prohibitions in common article 3 be regarded as customary international law, individual criminal responsibility does not necessarily flow from their violation. In support of this view, it discusses the historical development of international law and concludes that it is only recently that the concept of individual criminal responsibility has been introduced to this field. It notes that, in 1949, the States adopting the four Geneva Conventions did not include common article 3 in the system of "grave breaches" established to enforce the Conventions' proscriptions. It then argues that there has been no development of customary international law since that time such as to attach individual criminal responsibility to violations of common article 3.

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

3. Discussion

295. Bearing in mind the findings made in sub-section C above concerning the relevant nexus between the alleged acts of the accused and the armed conflict, along with the position of the alleged victims as detainees in the Čelebići prison-camp and of the accused in relation to that prison-camp, the Trial Chamber turns to the question of the customary nature of the prohibitions contained in common article 3 of the Geneva Conventions and their incorporation into Article 3 of the Statute.

296. The Trial Chamber is instructed in its consideration of Article 3 by the views expressed by the Appeals Chamber in the *Tadić Jurisdiction Decision*. In that Decision, the Appeals Chamber engages in a lengthy discussion of the nature of Article 3 and the incorporation of common article 3 of the Geneva Conventions therein, a discussion which this Trial Chamber finds unnecessary to revisit in whole.

297. Fundamentally, the Appeals Chamber describes the division of labour between Articles 2 and 3 of the Statute thus:

> Article 3 may be taken to cover all violations of international humanitarian law other than "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).[308]

Furthermore,

> Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[309]

298. The Trial Chamber observes that the finding of the Appeals Chamber on the extent of application of Article 2 of the Statute, excluding internal armed conflicts from the ambit of the Tribunal's jurisdiction over "grave breaches" of the Geneva Conventions, is such that its approach to Article 3 has to be rather broader, in order to achieve this goal of making our jurisdiction

[308] Tadić Jurisdiction Decision, para. 87.
[309] *Ibid.,* para. 91.

"watertight". Hence, violations of common article 3 of the Geneva Conventions find their place within Article 3 of the Statute.

299. In similar spirit, this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal. Thus, if violations of common article 3 of the Geneva Conventions are not to be considered as having been incorporated into the "grave breaches" regime, and hence falling under Article 2 of the Statute, such violations must be considered as forming part of the more general provisions of Article 3.

300. It is noteworthy that the Appeals Chamber qualifies its discussion of the existence of customary rules of international humanitarian law relating to internal armed conflicts with the *caveat* that not all of the rules applicable in international armed conflicts have been extended to internal conflicts and that it is the essence of these rules that is important and not their detailed provisions.[310] However, the prohibitions contained in the first paragraph of common article 3 of the Geneva Conventions express "the fundamental principle underlying the four Geneva Conventions" – that of humane treatment.[311] The perpetrators of violations of this article during internal conflicts cannot, on any level of reasoning, be treated more leniently than those who commit the same acts in international conflicts. It would, therefore, appear that the prohibitions contained in common article 3 are of precisely the nature which may be expected to apply in internal, as well as international, armed conflicts.

301. While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised.[312] This development is illustrative of the evolving nature of customary international law, which is its strength. Since at least the middle of this century, the prevalence of armed conflicts within the

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[310] *Ibid.*, para. 126.
[311] *See* Commentary, p. 38. The Commentary continues, "The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say."
[312] *See Tadić Jurisdiction Decision,* para. 98, and subsequent discussion in paras. 100-127.

confines of one State or ensuing from the breakdown of previous State boundaries is apparent and absent the necessary conditions for the creation of a comprehensive new law by means of a multilateral treaty, the more fluid and adaptable concept of customary international law takes the fore.

302. The evidence of the existence of such customary law - State practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice *outside* of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant.[313] Such is the position of the four Geneva Conventions, which have been ratified or acceded to by most States.

303. Despite these difficulties, international tribunals do, on occasion, find that custom exists alongside conventional law, both having the same substantive content. This occurred, in relation to the prohibition on the use of force contained in the United Nations Charter, in the *Nicaragua Case*.[314] Additionally, in that case, the ICJ's discussion of the Geneva Conventions, particularly common articles 1 and 3 thereof, indicates that it considered these also to be part of customary international law.[315] Furthermore, the ICJ found that common article 3 was not merely to be applied in internal armed conflicts, but that,

> [t]here is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22).[316]

304. Additionally, in a recent Judgement, the ICTR also discussed the customary status of common article 3 in the context of its application of the provisions of its statute.[317] The Trial Chamber

[313] This is the "paradox" identified by Baxter, in "Treaties and Custom", 129 Recueil des Cours (1970) 64.
[314] *Nicaragua Case,* paras.172-190.
[315] *Ibid.,* paras. 218-220. *See* the discussion of this aspect of the *Nicaragua Case* in Meron – The Geneva Conventions as Customary Law, 81 A.J.I.L. (1987) 348. Contrary to the argument of the Defence for Mr. Delalić and Mr. Delić, the nature of the court's discussion of this matter is irrelevant, as is the question of whether it is binding upon the Trial Chamber.
[316] *Ibid.,* para. 218.
[317] Akayesu Judgement.

adjudicating that case stated that,

> [i]t is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute violations of Common Article 3.[318]

305. It should be noted that the Secretary-General, in charging the International Tribunal to apply the customary rules of international humanitarian law, specified particular conventions as being incorporated in custom. Included in these are the four Geneva Conventions of 1949, with no mention of the exclusion of certain of their provisions, such as common article 3.[319] That common article 3 was considered included in the law to be applied by the Tribunal is borne out by the statement of the representative of the United States upon the adoption of Security Council resolution 827, which was not contradicted by any other State representative, that

> it is understood that the "laws or customs of war" referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.[320]

306. On the basis of these considerations, the Trial Chamber is in no doubt that the prohibitions contained within common article 3 of the Geneva Conventions are prohibitions of customary international law which may be considered to be within the scope of the jurisdiction of the International Tribunal under Article 3 of the Statute.

307. The Trial Chamber is thus led to the second argument of the Defence that, even if it should constitute custom in its prohibitions, there is no customary law to suggest that common article 3 attracts individual criminal responsibility in its violation. Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadić Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings.[321] In its Decision, the Appeals Chamber examines various national laws, as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts.[322] From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of

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[318] *Ibid.,* para. 608.
[319] Report of the Secretary-General, paras. 34-35.
[320] Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, S/PV. 3217, 25 May 1993, p. 15.
[321] Tadić Jurisdiction Decision, paras. 128-136.
[322] *See ibid.*, paras. 130-132.

individual criminal responsibility for violations of common article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.

308. The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common article 3 clearly does not in itself, preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.

309. This conclusion finds support in the ILC Draft Code of Crimes Against the Peace and Security of Mankind (hereafter "ILC Draft Code").[323] Article 20 of the ILC Draft Code, entitled "War Crimes", includes violations of international humanitarian law applicable in non-international armed conflicts, as well as those violations which constitute grave breaches of the Geneva Conventions. The crimes listed in this section mirror the provisions of common article 3 of the Geneva Conventions, along with article 4 of Additional Protocol II (hereafter "Additional Protocol II").[324] Moreover, the final Statute of the International Criminal Court, adopted in Rome on 17 July 1998, specifically lists serious violations of common article 3 of the Geneva Conventions as war crimes, under its article 8.[325] Another recent instrument, the statute of the ICTR, also enumerates violations of common article 3 as offences within the jurisdiction of that tribunal. While recognising that these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common article 3 are not incompatible with the attribution of individual criminal responsibility.

310. The statute of the ICTR and the Report of the Secretary-General relating to that statute cannot be interpreted so as to restrict the application of our Statute. While article 4 of the ICTR statute contains explicit reference to common article 3 of the Geneva Conventions and Additional Protocol II, the absence of such express reference in the Statute of the International Tribunal does

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[323] Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, General Assembly Official Records, fifty-first Session, supp. No. 10 UN Doc. A/51/10.
[324] 1977 Geneva Protocol II Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
[325] Rome Statute, The International Criminal Court, 17 July 1998, A/CONF.183/9 (hereafter "Rome Statute of the International Criminal Court"), Article 8(c).

not, by itself, preclude the application of these provisions. The Defence cites the Report of the Secretary-General relating to the ICTR, which states that article 4 of that statute "for the first time criminalizes common article 3 of the four Geneva Conventions"[326] in support of its position. The Trial Chamber notes, however, that the United Nations cannot "criminalize" any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the statute of the ICTR.

311. The Defence is extremely concerned to draw attention to the principle of *nullum crimen sine lege* and, from its application, concludes that none of the accused can be convicted of crimes under common article 3 of the Geneva Conventions. It maintains that for the Tribunal to attach individual criminal responsibility to violations of common article 3 would amount to the creation of *ex post facto* law. Such a practice is contrary to basic human rights, as enunciated, *inter alia*, in the International Covenant on Civil and Political Rights 1966 (hereafter "ICCPR"). Article 15 of the ICCPR states, in relevant part:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. […]
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

312. In addition to what has been stated above concerning the customary nature of the prohibitions contained in common article 3 of the Geneva Conventions and the individual criminal responsibility which their violation entails, this Trial Chamber places particular emphasis on the provisions of the Criminal Code of the SFRY, which were adopted by Bosnia and Herzegovina in April 1992.[327] This legislation establishes the jurisdiction of the Bosnian courts over war crimes committed "at the time of war, armed conflict or occupation", drawing no distinction between internal and international armed conflicts. Thus, each of the accused in the present case could have been held individually criminally responsible under their own national law for the crimes alleged in the Indictment. Consequently, on this ground also there is no substance to the argument that applying

[326] Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), 13 Feb. 1995, UN Doc. S/1995/134, para. 12.
[327] Criminal Code of SFRY, 1990 ed., Art. 142-143.

the provisions of common article 3 of the Geneva Conventions under Article 3 of the Statute violates the principle of *nullum crimen sine lege*.

313. Moreover, the second paragraph of article 15 of the ICCPR is of further note, given the nature of the offences charged in the Indictment. It appears that this provision was inserted during the drafting of the Covenant in order to avoid the situation which had been faced by the International Military Tribunals at Nürnberg and Tokyo after the Second World War. These tribunals had applied the norms of the 1929 Geneva Conventions and 1907 Hague Conventions, among others, despite the fact that these instruments contained no reference to the possibility of their criminal sanction. It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.

314. While common article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflict. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflict. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3. Nor is it necessary for the Trial Chamber to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts. These provisions are clearly based upon the prohibitions contained in common article 3 and may also constitute customary international law. However, the Trial Chamber finds sufficient basis in the substance of common article 3 to apply Article 3 of the Statute to the acts alleged in the present case.[328]

315. Finally, the Trial Chamber is in no doubt that the prohibition on plunder is also firmly rooted in customary international law. The Regulations attached to the 1907 Hague Convention (IV)

Respecting the Laws and Customs of War on Land (hereafter "Hague Regulations") provide expression to the prohibition and it is reiterated in the Geneva Conventions.[329] The Hague Regulations have long been considered to be customary in nature, as was confirmed by the Nürnberg and Tokyo Tribunals. Moreover, the Report of the Secretary-General makes explicit mention of the Hague Regulations in its Commentary on Article 3 of the Statute, in the following terms:

> The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
>
> The Nürnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognized that war crimes defined in article 6(b) of the Nürnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.[330]

There is, on this basis, no need to expand further upon the applicability of Article 3 of the Statute in relation to the charge of plunder.

4. Findings

316. In conclusion, the Trial Chamber finds that both the substantive prohibitions in common article 3 of the Geneva Conventions, and the provisions of the Hague Regulations, constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility for the offences alleged in the Indictment. As a consequence of the division of labour between Articles 2 and 3 of the Statute thus far articulated by the Appeals Chamber, such violations have been considered as falling within the scope of Article 3.

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[328] The Trial Chamber is unconvinced by, and finds no reason to discuss, the various additional arguments raised by some members of the Defence, seeking to challenge the applicability of common article 3 of the Geneva Conventions.
[329] Art. 46 of the Regulations states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Art. 47 further states that "Pillage is formally forbidden". Art. 33 of the Fourth Geneva Convention also states that "Pillage is prohibited". *See also*, Art. 15 of Geneva Convention I, Art. 18 of Geneva Convention II and Art. 18 of Geneva Convention III.
[330] Report of the Secretary-General, paras. 41 and 42.

317. Recognising that this would entail an extension of the concept of "grave breaches of the Geneva Conventions" in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within Article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed. The Trial Chamber has determined that an international armed conflict existed in Bosnia and Herzegovina during the time-period relevant to the Indictment and that the victims of the alleged offences were "protected persons", rendering Article 2 applicable. In addition, Article 3 is applicable to each of the crimes charged on the basis that they also constitute violations of the laws or customs of war, substantively prohibited by common article 3 of the Geneva Conventions (with the exception of the charges of plunder and unlawful confinement of civilians).

318. Having thus found that the requirements for the applicability of Articles 2 and 3 of the Statute are satisfied in the present case, the Trial Chamber must turn its attention to the nature of individual criminal responsibility as recognised under Article 7 of the Statute.

F. Individual Criminal Responsibility Under Article 7(1)

1. Introduction

319. The principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question. Instead, as stated in the Report of the Secretary-General: "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible".[331]

320. Article 7(1) accordingly 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.

321. This recognition that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law. As concluded by Trial Chamber II in the *Tadić Judgment*, there can further be no doubt that this corresponds to the position under international customary law.[332] However, it is incumbent upon the Trial Chamber to set out more specifically the degree of participation which is necessary for an individual to be considered sufficiently connected with an offence under the Tribunal's jurisdiction so as to be held criminally responsible under the present provision.

2. Arguments of the Parties

322. Citing the *Tadić Judgment*, the Prosecution submits that to demonstrate liability under Article 7(1) it is necessary to establish two factors: (i) intent, in the form of awareness of the act of participation and a conscious decision to participate in the commission of a crime; and (ii) participation, in the form of conduct which contributes to the illegal act. The Prosecution further relies on the "common purpose" doctrine, the gist of which is said to be that a person who knowingly participates in a criminal venture with others may be held criminally liable for illegal acts that are the natural and probable consequences of their common purpose.[333]

323. The Prosecution accordingly concludes that in order to incur criminal responsibility for unlawful killing, it is not necessary for the accused to have physically caused the death of the victim, or, in other words, to have "delivered the fatal blow".[334] It is submitted that for criminal liability to attach, the accused's act(s) of participation need not have been committed in the same place or at the same time as the acts that caused the victim's death, nor that he be present when those same acts are perpetrated. Instead, the Prosecution argues, it must be shown that the accused

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[331] Report of the Secretary-General, para. 54.
[332] *Tadić Judgment*, para. 669. In addition to the substantial case law cited therein, reference may be made to a number of international legal instruments which recognise the individual culpability of individuals who have ordered, incited, aided and abetted or otherwise participated in criminal offences. *See e.g.* article III of the Convention on the Prevention and Punishment of Genocide (1948); article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984). *See also* article 2 of the ILC Draft Code and article 25 of the Rome Statute of the International Criminal Court. On the principle of individual criminal responsibility for ordering the commission of a crime; *see also* article 49 of Geneva Convention I; article 50 of Geneva Convention II; article 129 of Geneva Convention III; article 146 of Geneva Convention IV.
[333] Prosecution Closing Brief, Annex 1, RP D2712-D2717.
[334] *Ibid.*, RP D 2710.

through his act(s) either aided and abetted in the commission of the unlawful act, or that he participated in a common enterprise or transaction which resulted in the death of the victim.[335]

324. The Defence, similarly relying on the *Tadić Judgment,* adopts the view that, for an accused to be criminally liable for the direct acts of another pursuant to Article 7(1), four criteria must be met. It is thus submitted that the accused must: (i) have intended to participate in an act; (ii) in violation of international humanitarian law; (iii) knowing that the act was unlawful; and (iv) that this participation directly and substantially aided the commission of the illegal act. It is noted that a direct contribution to the commission of the offence does not require the accused's presence at the scene of the crime or his direct physical assistance in its commission and, conversely, that physical presence at the scene of the crime in itself is insufficient to prove that an accused is an aider and abetter.[336]

3. Discussion and Findings

325. As noted above, the applicable standard for the imposition of individual criminal responsibility under Article 7(1) has previously been considered by Trial Chamber II in the *Tadić Judgment*. In reaching its findings, the Trial Chamber there carried out a detailed investigation of the parameters of individual responsibility under customary international law, considering at some length the existing body of precedents arising out of the war crimes trials conducted after the Second World War. The Trial Chamber, having considered the relevant material, adopts as sound the reasoning thus expressed, and concludes that the standard there adopted is applicable to the present case.

326. It is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the

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[335] Ibid.
[336] Delalić Closing Brief, RP D8592-D8594; Delić Closing Brief, RP D8254; Mucić Closing Brief, RP D8138-D8140. The Trial Chamber notes that the accused Esad Landžo has not presented any arguments on this matter.

commission of the illegal act". [337] The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime".[338]

327. More specifically, the Trial Chamber accepts as a correct statement of the law the determination that aiding and abetting includes all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence. Furthermore, such assistance may consist not only of physical acts, but may also manifest itself in the form of psychological support given to the commission of an illegal act through words or again by physical presence at the scene of the perpetration of the offence.[339]

328. As regards the mental element of such participation, it is the Trial Chamber's view that it is necessary that the act of participation be undertaken with knowledge that it will contribute to the criminal act of the principal. The Trial Chamber agrees that the existence of this *mens rea* need not have been explicitly expressed, but that it may be inferred from all relevant circumstances.[340] Nor is it required that the Trial Chamber find that there was a pre-existing plan to engage in the criminal conduct in question.[341] However, where such a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct. Depending upon the facts of any given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abetter to, the crime in question.

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[337] *Tadić Judgment*, para. 689. *See also* paras. 681-688, and the authorities cited therein.
[338] *Ibid*., para. 674. *See also* paras. 675-680 and the authorities cited therein.
[339] *Ibid.,* paras. 678-687, 689-691 and the authorities cited therein.
[340] *Ibid.*, para. 676.
[341] *Ibid*., para. 677.

329. In conclusion, the following concise statement from the *Tadić Judgment* accurately reflects the view of the Trial Chamber on the scope of individual criminal responsibility under Article 7(1):

> the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[342]

G. Individual Criminal Responsibility Under Article 7(3)

1. Introduction

330. Alongside the charges of individual criminal responsibility based on personal participation in criminal conduct, the Indictment charges three of the accused - Zejnil Delalić, Zdravko Mucić and Hazim Delić – with criminal responsibility on the basis of their alleged positions as superiors to the perpetrators of the crimes alleged in the Indictment. Through the operation of counts 13, 14, 33 to 35, 38, 39 and 44 to 49 of the Indictment, these three accused are thus charged with responsibility as superiors for all the criminal acts alleged in the Indictment, with the exception of count 49 (plunder of private property) where the charge of such responsibility is limited to the accused Zdravko Mucić and Hazim Delić.

331. The type of individual criminal responsibility for the illegal acts of subordinates which is alleged in this way against the three accused is commonly referred to as "command responsibility".[343] Although no explicit reference is made to this concept in the Statute of the International Tribunal, its governing principles have been incorporated into Article 7(3), which, to reiterate, provides that:

> [t]he fact that any of the acts referred to in articles 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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[342] *Ibid*., para. 692.
[343] In this Judgement the Trial Chamber employs the terms "command responsibility" and "superior responsibility" interchangeably.

332. It is, accordingly, to the construction of this provision, properly understood as a formulation of the principle of command responsibility, that the Trial Chamber now must direct its attention. However, it is first necessary to briefly consider the legal character of this species of criminal responsibility and its status under customary international law more generally.

2. Legal Character of Command Responsibility and its Status Under Customary International Law

333. That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise either out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) or from his culpable omissions ("indirect" command responsibility or command responsibility *strictu sensu)*. Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates. As noted in the Report of the Secretary-General on the establishment of the International Tribunal:

> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew, or had reason to know, that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[344]

334. The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act.[345] As is most clearly evidenced in the case of military commanders by article 87 of Additional Protocol I, international law imposes an

[344] Report of the Secretary-General, para. 56.
[345] ILC Draft Code 1996. *See also* International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 (Yves Sandoz *et al*. eds., 1987) (hereafter "Commentary to the Additional Protocols"), para. 3537.

affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.

335. Although historically not without recognition in domestic military law, it is often suggested that the roots of the modern doctrine of command responsibility may be found in the Hague Conventions of 1907. It was not until the end of the First World War, however, that the notion of individual criminal responsibility for failure to take the necessary measures to prevent or to repress breaches of the laws of armed conflict was given explicit expression in an international context.[346] In its report presented to the Preliminary Peace Conference in 1919, the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that a tribunal be established for the prosecution of, *inter alia,* all those who,

> ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.[347]

336. Such a tribunal was never realised, however, and it was only in the aftermath of the Second World War that the doctrine of command responsibility for failure to act received its first judicial recognition in an international context. Whilst not provided for in the Charters of the Nürnberg or Tokyo Tribunals, nor expressly addressed in Control Council Law No. 10, a number of States at this time enacted legislation recognising the principle. For example, article 4 of the French Ordinance of 28 August 1944, Concerning the Suppression of War Crimes, provided:

> Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.[348]

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[346] *Cf.* Commentary to the Additional Protocols, para. 3530.
[347] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties - Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in 14 AJIL, 95 (1920), p. 121.
[348] *See* Vol. IV, Law Reports of Trials of War Criminals (UN War Crimes Commission London, 1949) (hereafter "Law Reports") p. 87.

337. Similarly, article IX of the Chinese Law of 24 October 1946, Governing the Trial of War Criminals, stated:

> Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.[349]

338. In a number of cases against German and Japanese war criminals following the Second World War, beginning with the trial of the Japanese General Tomoyuki Yamashita before a United States Military Commission in Manila,[350] the principle of command responsibility for failure to act was relied upon by military courts and tribunals as a valid basis for placing individual criminal responsibility on superiors for the criminal acts of their subordinates. Thus, the United States Supreme Court, in its well-known holding in *In Re Yamashita,* answered in the affirmative the question of whether the law of war imposed on an army commander a duty to take the appropriate measures within his power to control the troops under his command for the prevention of acts in violation of the laws of war, and whether he may be charged with personal responsibility for failure to take such measures when violations result.[351] Similarly, the United States Military Tribunal at Nürnberg, in *United States v. Karl Brandt and others* (hereafter "*Medical Case*"), declared that "the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."[352] Likewise, in *United States v Wilhelm List et al*. (hereafter "*Hostage Case*") it was held that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts

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[349] *See* Vol. IV, Law Reports, p.88.
[350] Vol. IV, Law Reports, p.1.
[351] *In Re Yamashita*, 327 US 1, 14-16 (1945). This case was brought before the Supreme Court on petition for writ of *habeas corpus*, and presented the Court with the limited issue of whether the Military Commission in Manila possessed lawful jurisdiction to try Yamashita. It was alleged that such jurisdiction was lacking, *inter alia,* on the ground that the charges preferred against Yamashita failed to allege a violation of the laws of war. In rejecting this contention the Court described "the gist of the charge" against Yamashita as one of an unlawful breach of duty as an army commander to control the operations of his command by permitting them to commit a number of atrocities.
[352] *United States v. Karl Brandt et al.,* Vol. II, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, (U.S. Govt. Printing Office: Washington 1950) 186, (hereafter "TWC") p. 212 (relating to the criminal responsibility of the accused Schroeder). *See also* the tribunal's finding in relation to the accused Handloser, *ibid*., p. 207.

which the corps commander knew or ought to have known about.[353] Again, in *United States v Wilhelm von Leeb et al.* (hereafter "*High Command Case*") the tribunal declared that:

> [u]nder basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.[354]

339. While different aspects of this body of case law arising out of the Second World War will be considered in greater detail below as the Trial Chamber addresses the more specific content of the requisite elements of superior responsibility under Article 7(3), it is helpful here to further recall the finding made in the trial of the Japanese Admiral Soemu Toyoda before a military tribunal in Tokyo. Declaring that it had carefully studied, and followed, the precedents of other tribunals on the question of command responsibility, the tribunal, after setting out at some length what it considered to be the essential elements of this principle, concluded:

> In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.[355]

340. In the period following the Second World War until the present time, the doctrine of command responsibility has not been applied by any international judicial organ. Nonetheless, there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 of the Protocol gives expression to

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[353] United States v. Wilhelm List et al., Vol. XI, TWC, 1230, 1303.
[354] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, 512.
[355] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006. In greater detail, the tribunal declared the essential elements of command responsibility to be: 1. […] that atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: (a.) Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or (b.) Constructive. That is, the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offences or of the existence of an understood and acknowledged routine for their commission; 3. Power of command. That is, the accused must be proved to have actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders; 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations to the laws of war; 5. Failure to punish offenders. (*Ibid.*, pp. 5005-06).

the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol. The concomitant principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise this duty is formulated in article 86 of the Protocol. A survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law. Thus, the Swedish delegate declared that these articles reaffirmed the principles of international penal responsibility that were developed after the Second World War. [356] Similarly, the Yugoslav delegate expressed the view that the article on the duty of commanders contained provisions which had already been accepted in "military codes of all countries".[357]

341. The Trial Chamber, while not determining the accuracy of this latter statement, notes the inclusion of provisions recognising the principle of command responsibility in two highly influential domestic military manuals: the United States Army Field Manual on the law of war, and the British Manual of Military Law.[358] Certainly, such a provision existed in the regulations concerning the application of the international law of war to the armed forces of the SFRY, which, under the heading "Responsibility for the acts of subordinates", provided as follows:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorized to charge them, and he did not report them to the authorized military commander, he would also be personally responsible.
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> A military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts.[359]

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[356] CCDH/I/SR.64, in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Swiss Federal Political Department: Bern 1978) (hereafter "Official Records") Vol. IV, p. 315, para. 61.
[357] CCDH/1/SR.71, in Official Records, Vol. IX, p. 399, para.2.
[358] US Department of Army FM 27-10: The Law of Land Warfare (1956), para 501; The War Office, *The Law of War on Land being Part III of the Manual of Military Law* (The War Office: London 1958), para. 631.
[359] SFRY Federal Secretariat for National Defence, Regulations Concerning the Application of International law to the Armed forces of SFRY (1988) Art. 21, reprinted in M. Cherif Bassiouni's, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), p. 661.

342. The validity of the principle of superior responsibility for failure to act was further reaffirmed in the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which contains a formulation of the doctrine very similar to that found in Article 7(3).[360] Most recently, a provision recognising a superior's failure to take all necessary and reasonable measures to prevent or repress the crimes of subordinates under the superior's effective authority and control, where the superior either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes, as a ground for individual criminal responsibility was made part of the Rome Statute of the International Criminal Court.[361]

343. On the basis of the foregoing, the Trial Chamber concludes that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.

3. The Elements of Individual Criminal Responsibility Under Article 7(3)

(a) Introduction

344. In brief, the Prosecution avers that the recognised legal requirements of the doctrine of superior responsibility, as contained in Article 7(3) of the Statute, are the following:

> (1) The superior must exercise direct and/or indirect command or control whether *de jure* and/or *de facto*, over the subordinates who commit serious violations of international humanitarian law, and/or their superiors.
> (2) The superior must know or have reason to know, which includes ignorance resulting from the superior's failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.
> (3) The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.[362]

345. In contrast, the Defence for the accused Zejnil Delalić and Hazim Delić[363] assert that the Prosecution, in order to establish guilt under a command responsibility theory pursuant to Article 7(3), must prove the following five elements:

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[360] ILC Draft Code, p. 34, Art. 6.
[361] Art. 28(2) of the Rome Statute of the International Criminal Court.
[362] Prosecution Response to the Motion to Dismiss, RP D5310-D5311.

> (1) The status of the accused as a commander or a civilian exercising the equivalent of military command authority over a person who committed a violation of the law of war.
> (2) That a violation of the law of war actually occurred or was about to occur.
> (3) That the commander had either actual knowledge of the commission of the violation of the law of war or that the commander had knowledge enabling him to conclude that the laws of war had been violated.
> (4) That the commander failed to act reasonably in suppressing violations by investigating allegations and punishing perpetrators or by taking action to prevent future violations.
> (5) And that the commander's failure to act was the cause of the war crime which actually was committed.[364]

346. While it is evident that the commission of one or more of the crimes under Articles 2 to 5 of the Statute is a necessary prerequisite for the application of Article 7(3), the Trial Chamber agrees with the Prosecution's proposition that the principle of superior responsibility properly is analysed as containing three constitutive parts. From the text of Article 7(3) it is thus possible to identify the essential elements of command responsibility for failure to act as follows:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

347. The alleged separate requirement of causation, listed by the Defence under (5) above, is discussed by the Trial Chamber below, in connection with its consideration of the requirement that the superior take the necessary and reasonable measures to prevent or repress the illegal acts committed by his subordinate.

(b) The Superior–Subordinate Relationship

(i) Arguments of the Parties

348. The Prosecution asserts that the essential requirement of the doctrine of command responsibility is proof of the superior's control over his subordinates and his ability to prevent them

[363] The Trial Chamber notes that the accused Zdravko Mucić has offered only limited arguments on the requisite standard for the imposition of individual criminal responsibility under Art. 7(3) of the Statute.
[364] Motion to Dismiss, RP D5628.

from committing violations or punish them for such violations. More specifically, it contends that although the more common situation in which the doctrine is applied is in relation to regular armed forces under the direct subordination of an officially designated military commander, the legal duties of a superior (and therefore the application of the doctrine of command responsibility) do not depend only on *de jure* (formal) authority, but can arise also as a result of *de facto* (informal) command and control, or a combination of both.

349. The Prosecution asserts that the degree of control necessary for the application of the doctrine can take different forms. Thus, it is maintained that command and control over subordinates can be exercised in a number of ways: operationally, tactically, administratively, executively in territories under the control of the superiors, and even through influence. It is submitted that the criminal responsibility of the superior will depend upon the degree and form of the control which he exercises and the means at his disposal to control his subordinates.[365]

350. The Defence for Zejnil Delalić and Hazim Delić contend that, in order to be found guilty on the basis of command responsibility, the accused must be either the commander of the person committing the violation of the law of war or in some other position allowing him to exercise the same type of authority as a military commander over the person who committed the violation.[366]

351. Although not absolutely unambiguous, it appears that the Defence for Mr. Delalić rejects the Prosecution's assertion that command responsibility can be imposed on the basis of *de facto* authority. Thus, while it contends that the touchstone for such responsibility is the accused's "actual ability to control" the person committing the offence,[367] it also asserts that a person charged under Article 7(3) with having superior authority must be shown to exercise authority over his subordinates which is "commensurate with" the authority to issue "binding orders" and to punish violations of those orders.[368] It is further submitted that the "lawful" authority of the accused is the key factor in determining liability under Article 7(3).[369]

352. The Defence emphasises that the crucial distinction in this context is that between military commanders and those with similar authority over subordinates on the one hand, and other types of superiors not exercising that type of authority on the other. Relying on this distinction, the Defence

[365] *See* Prosecution Response to the Motion to Dismiss, RP D5818.
[366] Motion to Dismiss, RP D5637.
[367] Delalić Pre-Trial Brief, RP D2941.
[368] Motion to Dismiss, RP D5624.

submits that the concept of "superior" in article 86 of Protocol I and Article 7(3) of the Statute does not extend criminal liability to non-commanders simply because they hold higher rank than the perpetrator of a war crime.[370] Instead, the Defence for Hazim Delić forcefully contends that customary international law places this type of liability only on individuals with authority to issue binding orders in their own name and the power to punish violations of those orders. It is submitted that in the military only a commander possesses such authority, and asserted that an application of vicarious criminal liability to persons other than commanders would have an *ex post facto* effect and would violate the principle of *nullum crimen sine lege*.[371]

353. In response, the Prosecution explains that it does not in any way argue that the doctrine of command responsibility could apply to those who do not exercise command. Accordingly, it states that a position of strict liability, in the sense that any person of higher rank than the perpetrator is automatically responsible for the perpetrator's crimes, is not being advocated. In contrast, it emphasises that, in order for command responsibility to attach, the perpetrator is required to be a subordinate of the person of higher rank, in that he must be under the direct or indirect control of the superior. However, it is the Prosecution's position that those who are, in this sense, in command may occupy a variety of positions and that this category of persons is not limited to those formally designated as "commanders".[372]

(ii) Discussion and Findings

354. The requirement of the existence of a "superior-subordinate" relationship which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control",[373] is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case - situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined. It is the Trial Chamber's conclusion, the reasons for which are set out below, that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons

[369] *Ibid*., RP D5627.
[370] *Ibid*., RP D5586*;* Delalić Closing Brief, RP D8578.
[371] Motion to Dismiss, RP D5579-D5592. *See also* Transcripts from the hearing of oral arguments on the Motion to Dismiss, T. 9991-9994, Delić's Pre-Trial Brief, RP D1809; Hazim Delić's Response to the Prosecutor's Pre-Trial Brief, Case No. IT-96-21-PT, 3 March 1997 (RP D2930-D2988); Delić's Closing Brief RP D8219-D8220.
[372] Prosecution Response to the Motion to Dismiss, RP D5305-D5306; Prosecution Response to the Pre-Trial Briefs of the Accused, RP D3358; Prosecution's Closing Brief, RP D2798-D2799.
[373] Commentary to the Additional Protocols, para. 3544.

who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus the Trial Chamber accepts the Prosecution's proposition that individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.

a. The Responsibility of Non-Military Superiors

355. Before turning to the substance of the requisite superior-subordinate relationship, the Trial Chamber deems it appropriate first to set out its reasoning in relation to the question of the application of the principle enshrined in Article 7(3) to persons in non-military positions of authority.

356. It is apparent from the text of this provision that no express limitation is made restricting the scope of this type of responsibility to military commanders or situations arising under a military command. In contrast, the use of the generic term "superior" in this provision, together with its juxtaposition to the affirmation of the individual criminal responsibility of "Head[s] of State or Government" or "responsible Government official[s]" in Article 7(2), clearly indicates that its applicability extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority. This interpretation is supported by the explanation of the vote made by the representative of the United States following the adoption of Security Council resolution 827 on the establishment of the International Tribunal. The understanding of the United States was expressed to be that individual criminal responsibility arises in the case of "the failure of a superior – whether political or military – to take reasonable steps to prevent or punish such crimes by persons under his or her authority".[374] This statement was not contested. The same position was adopted by Trial Chamber I in its review of the Indictment pursuant to Rule 61 in *Prosecutor v. Milan Martić*, where it held that:

> [t]he Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.[375]

[374] UN Doc. S/PV.3217 (25 May 1993), p. 16.
[375] *Prosecutor v. Milan Martić*, Case No. IT-95-11-I, 8 March 1996 (RP D170-D183), D175.

357. This interpretation of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility. As observed by the Commission of Experts in its Final Report, while "[m]ost legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused, [p]olitical leaders and public officials have also been held liable under this doctrine in certain circumstances".[376] Thus, the International Military Tribunal for the Far East (hereafter "Tokyo Tribunal") relied on this principle in making findings of guilt against a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to prevent their breach. For example, while holding General Iwane Matsui criminally liable for the infamous "Rape of Nanking" by declaring that "[h]e had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty",[377] the tribunal was also prepared to place such responsibility upon the Japanese Foreign Minister at the time, Koki Hirota. In finding the latter guilty of having disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war, the tribunal thus declared:

> As Foreign Minister he received reports of these atrocities immediately after the entry of the Japanese forces into Nanking. According to the Defence evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.[378]

358. Similarly, the tribunal found Prime Minister Hideki Tojo and Foreign Minister Mamoru Shigemitsu criminally liable for their omissions to prevent or punish the criminal acts of the Japanese troops. In respect of the latter the tribunal declared:

> We do no injustice to SHIGEMITSU when we hold that the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have

[376] Commission of Experts Report, p. 16 (Exhibit 39).
[377] The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial, Vol. 20 (Garland Publishing: New York & London 1981) (hereafter "Tokyo Trial Official Transcript"), 49,816.
[378] *Ibid.*, p. 49,791.

> been. Indeed a witness gave evidence for him to that effect. Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.[379]

359. In *United States v, Friedrich Flick and others,*[380] the six accused, all leading civilian industrialists, were charged with the commission of war crimes and crimes against humanity in that they were said to have been principals in, accessories to, to have ordered, abetted, taken a consenting part in, or to have been connected with plans and enterprises involving the enslavement and deportation to slave labour of civilians from occupied territory, enslavement of concentration camp inmates and the use of prisoners of war in work having a direct relation to war operations. More specifically, it was alleged that the defendants sought and utilised such slave labour programmes by using tens of thousands of slave labourers in the industrial enterprises owned, controlled or influenced by them.[381]

360. While acquitting four of the accused, the tribunal found the defendants Flick and Weiss guilty, as instances had been proved of Weiss' voluntary participation in the slave labour programme. Concerning Flick, the person controlling the industrial enterprise in question, and Weiss' superior, the judgement makes mention of no more than his "knowledge and approval" of Weiss' acts.[382] Noting this absence of explicit reasoning, the United Nations War Crimes Commission has commented that it "seems clear" that the tribunal's finding of guilt was based on an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.[383]

361. Similarly, civilian superiors were found criminally liable for the ill-treatment of forced labourers employed in the German industry in an appellate decision by the Superior Military Government Court of the French Occupation Zone in Germany, in the *Roechling*[384] case. This case involved five accused, all holders of senior positions within the Roechling Iron and Steel Works in Voelklingen, four of whom were charged, *inter alia*, with having "employed under compulsion nationals of countries at that time occupied, prisoners of war, and deported persons, who were

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[379] *Ibid.,* p. 49,831.
[380] Trial of Friedrich Flick et al, Vol. VI, TWC, 1187.
[381] See Trial of Friedrich Flick et al., Vol VI, TWC, pp. 11-16.
[382] Trial of Friedrich Flick et al, Vol. VI, TWC, 1187, 1202.
[383] *Trial of Friedrich Flick et al*., Vol IX, Law Reports, p. 54.

subjected to ill- treatment by [their] orders or with [their] consent".[385] In its appeal judgement, the court clarified this charge by declaring that

> Herman Roechling and the other accused members of the Directorate of the *Voelklingen* works are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses.[386]

362. Finding that three of the defendants had possessed sufficient authority to intervene in order to ensure an improvement in the treatment accorded to the deportees, the court proceeded to register findings of guilt on the basis of the accused's failure to act.

363. Thus, it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority.

b. The Concept of Superior

364. The Trial Chamber now turns to the issue which lies at the very heart of the concept of command responsibility for failure to act, the requisite character of the superior–subordinate relationship.

365. As noted above, the Defence contends that the fundamental distinction to be drawn in this connection is that between commanders on the one hand, and other types of superiors (including non-commanders with higher rank than individuals committing the underlying offences) on the other. It explains this distinction by way of the following quotation:

> "Commanders" are those who can issue orders on their own authority and over their own names to troops in the units they command, whether large (division, corps) or small (platoon, company). But except in very small units, a commander cannot function effectively without helpers, who bring him information about the condition of his troops,

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[384] The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1061.
[385] *Ibid*., pp. 1072-74.
[386] The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Judgement on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, Vol. XIV, TWC, Appendix B, 1097, 1136.

> the whereabouts and intentions of the enemy, and other circumstances which together form the basis for his decisions and orders. These helping officers are a "staff", and if the unit is a large one and the staff correspondingly numerous, it is headed by a "Chief of Staff". This officer may be of high rank and his function very important, but he cannot issue orders (other than to his own staff subordinates) except by the authority and in the name of the unit commander.[387]

366. This may be compared with the definition of the position and duties of a chief of staff which was given in the *High Command* case:

> Staff officers, except in limited fields, are not endowed with command authority. Subordinate staff officers normally function through the chiefs of staff. The chief of staff in any command is the closest officer, officially at least, to the commanding officer. It is his function to see that the wishes of his commanding officer are carried out. It is his duty to keep his commanding officer informed of the activities which take place within the field of his command. It is his function to see that the commanding officer is relieved of certain details and routine matters, that a policy having been announced, the methods and procedures for carrying out such policy are properly executed. His sphere and personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander.[388]

367. Consistent with these views, the United States Military Tribunals in the *Hostage* and *High Command* cases adopted the position that, while chiefs of staff may be held criminally responsible for their own positive acts, they cannot be held criminally responsible on the basis of command responsibility.[389] Thus it was held in the *High Command* case that:

> [s]taff officers are an indispensable link in the chain of their final execution. If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective, commits a criminal act under international law . . .
> Since a Chief of Staff does not have command authority in the chain of command, an order over his signature does not have authority for subordinates in the chain of command […] A failure to properly exercise command authority is not the responsibility of a Chief of Staff. In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.[390]

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[387] Motion to Dismiss, RP D5636, citing Telford Taylor, *The Anatomy of the Nuremberg Trials* (Back Bay Publishing 1992) p. 105.
[388] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, 513-514.
[389] *United States v. Wilhelm List et al*., Vol. XI, TWC, 1230, 1286, 1288 (the accused von Geitner); *United States v. Wilhelm von Leeb et al.,* Vol. XI, TWC, 462, p. 514.

368. While these two cases offer support for the view that the possession of powers of command is a necessary prerequisite for the imposition of command responsibility, it may be thought that the legal position is rendered less clear when the Tokyo Tribunal's conviction of Lieutenant General Akira Muto is taken into account. Muto had been a staff officer under General Iwane Matsui at the time of the "Rape of Nanking", and later served as Chief of Staff to General Yamashita in the Philippines. In discussing his responsibility in the former position, the tribunal held that, while there was no doubt that Muto knew of the atrocities, he could in his subordinate position take no steps to stop them, and could therefore not be held criminally liable for their commission. However, the tribunal took a different view of his responsibility in his position as Chief of Staff to Yamashita:

> His position was now very different from that which he held during the so-called "Rape of Nanking". *He was now in a position to influence policy*. During his tenure of office as such Chief of Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. MUTO shares responsibility for these gross breaches of the Laws of War. We reject his defence that he knew nothing of these occurrences. It is wholly incredible.[391]

369. In this case, then, a chief of staff, with no formal powers of command, was apparently held responsible on the basis of the doctrine of command responsibility. At least one prominent commentator on the subject relies on this case as support for the proposition that persons in non-command positions, such as advisers to a military unit, may be held criminally responsible on the basis of command responsibility. In this view, such a person, while lacking the authority to control the conduct of the forces in question, is still obliged to utilise all means available to prevent the perpetration of war crimes (such means may include protesting to the unit commander, notifying the next higher level of command, or, finally, seeking release from his position in the unit).[392]

370. While the matter is, thus, not undisputed, it is the Trial Chamber's opinion that a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to

[390] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, pp. 513-514.
[391] Tokyo Trial Official Transcript, 49,820-1 (emphasis added).

attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.

371. While the terms of the Statute offer little guidance in relation to this issue, it is clear that the term "superior" is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control. The same term is employed in article 86 of Additional Protocol I, which, in article 87, further establishes that the duty of a military commander to prevent violations of the Geneva Conventions extends not only to his subordinates but also to "other persons under his control". This type of superior–subordinate relationship is described in the Commentary to the Additional Protocols by reference to the concept of "indirect subordination", in contrast to the link of "direct subordination" which is said to relate the tactical commander to his troops.[393] Among the examples offered of such indirect subordination, this Commentary notes that:

> [i]f the civilian population in its own territory is hostile to prisoners of war and threatens them with ill-treatment, the military commander who is responsible for these prisoners has an obligation to intervene and to take the necessary measures, even though this population is not officially under his authority.[394]

372. A survey of the existing judicial precedents demonstrates that commanders in regular armed forces have, on occasion, been held criminally responsible for their failure to prevent or punish criminal acts committed by persons not formally under their authority in the chain of command. Thus, in the *Hostage* and *High Command* trials it was accepted that commanders in charge of occupied territory may be held responsible for war crimes committed against civilians and prisoners of war in that area by troops not under their command.[395] As the tribunal in the *Hostage* case declared:

> [t]he matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordination are [sic] relatively unimportant. His responsibility is general and not limited to a control of units directly under his command.[396]

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[392] William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, (1973) 86.
[393] Commentary to the Additional Protocols, para. 3555.
[394] *Ibid.*, n. 9.
[395] United States v. Wilhelm List et al., Vol. XI, TWC, 1230, 1260; United States v. Wilhelm von Leeb et al., Vol. XI, TWC, 462, 542-549, 630-632.
[396] United States v. Wilhelm List et al., Vol. XI, TWC, 1230, 1260.

373. Likewise, the finding in the *High Command* case that a commander may be held criminally liable for failing to prevent the execution of an illegal order issued by his superiors, which has been passed down to his subordinates independent of him,[397] indicates that legal authority to direct the actions of subordinates is not seen as an absolute requirement for the imposition of command responsibility. Similarly, the finding in the *Toyoda* case, whereby the tribunal rejected the alleged importance of what it called the "theoretical" division between operational and administrative authority, may be seen as supporting the view that commanders are under an obligation to take action to prevent the commission of war crimes by troops under their control despite a lack of formal authority to do so. An officer with only operational and not administrative authority does not have formal authority to take administrative action to uphold discipline, yet in the view of the tribunal in the *Toyoda case*; "[t]he responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own".[398]

374. Again, in the *Pohl* trial,[399] the finding of guilt against the accused Karl Mummenthey, an officer of the *Waffen SS* and business manager of a large establishment of industries employing concentration camp labour, is best read as predicated upon his possession of *de facto* powers of control. Charged with responsibility for the conditions to which labourers were exposed, Mummenthey based his defence in part on the contention that any mistreatment of prisoners was caused by concentration camp guards over whom he had no control (and, by implication, for which he therefore could not be held responsible). In rejecting this assertion the tribunal held:

> It has been Mummenthey's plan to picture himself as a private businessman in no way associated with the sternness and rigour of SS discipline, and entirely detached from concentration camp routine. The picture fails to convince. Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, wielded military power of command. If excesses occurred in the industries under his control he was in a position not only to know about them, but to do something. From time to time he attended meetings of the concentration camp commanders where all items pertaining to concentration camp routine such as labour assignment, rations, clothing, quarters, treatment of prisoners, punishment, etc., were discussed.[400]

375. Similarly, as noted above, the Tokyo Tribunal's conviction of General Akiro Muto for acts occurring during his tenure as Chief of Staff to General Yamashita demonstrates that it considered

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[397] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, 512.
[398] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5012.
[399] United States v. Oswald Pohl et al, Vol. V, TWC, 958.
[400] *Ibid*., pp. 1052-53.

powers of influence not amounting to formal powers of command to provide a sufficient basis for the imposition of command responsibility.[401]

376. The cases imposing responsibility for failure to act on civilians occupying positions of authority, also indicate that such persons may be held liable for crimes committed by persons over whom their formal authority under national law is limited or non-existent. Thus, it has been noted that the Tokyo Tribunal convicted Foreign Minister Koki Hirota on the basis of command responsibility for war crimes although he lacked the domestic legal authority to repress the crimes in question.[402] The tribunal found Hirota derelict in his duty in not "insisting" before the cabinet that immediate action be taken to put an end to the crimes, language indicating powers of persuasion rather than formal authority to order action to be taken.[403] Moreover, the *Roechling* case is best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders. While the accused in this case were found guilty, *inter alia,* of failing to take action against the abuse of forced labourers committed by the members of the Gestapo, it is nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command. Instead, the judgement employs the wording "sufficient" authority, a term not normally used in relation to formal powers of command, but rather one used to describe a degree of (informal) influence. This view is further supported by the reasoning employed in the judgement of the court of first instance in this case, which, in response to the claim of one of the accused that he could not give orders to the plant police and the personnel of a punishment camp, as these were under the orders of the Gestapo, makes reference to his status as Herman Roechling's son-in-law - clearly a source of no more than *de facto* influence - as a factor affecting his authority to obtain an alleviation in the treatment of workers by the plant police.[404]

377. While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his

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[401] Tokyo Trial Official Transcript, 49,820-1.
[402] *See* Hessler, *Command Responsibility for War Crimes,* 82 Yale Law Journal, 1274 (1973) n.12.
[403] *See* Tokyo Trial Official Transcript, 49,791.
[404] The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1075, 1092.

subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute. While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.

378. Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[405]

(c) The Mental Element: "Knew or had reason to know"

(i) Arguments of the Parties

379. The Prosecution asserts that the requisite *mens rea* under Article 7(3) may be established as follows:

> (1) actual knowledge established through direct evidence; or
> (2) actual knowledge established through circumstantial evidence, with a presumption of knowledge where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or in a wide geographical area; or
> (3) wanton disregard of, or failure to obtain, information of a general nature within the reasonable access of a commander indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates.[406]

[405] ILC Draft Code, p. 37.
[406] Prosecution Response to the Motion to Dismiss, RP D5810; Prosecution's Pre-Trial Brief, RP D2836.

380. The Defence notes that Article 7(3) sets out a rather unclear "knew or had reason to know" *mens rea* standard, which it submits is substantially lower than that set out in article 86 of Additional Protocol I, and concludes that the latter standard should be used in construing the Statute. It is asserted that the French text of Additional Protocol I (which, it is claimed, should be considered to be governing rather than the English version) requires that a commander actually possessed information which allowed him to conclude that subordinates had committed violations of the law of war. It is contended that if the Trial Chamber was to use the lower burden of "knew or had reason to know", substantial issues of *nullum crimen sine lege* would be raised, in that criminal liability would be based on a knowledge component which is less demanding than what was required by the law at the time when the events alleged in the Indictment are said to have occurred. Thus, it is proposed that the two standards be harmonised by construing Article 7(3) to mean that a commander has "reason to know" only when he actually possesses knowledge allowing him to conclude that a violation has occurred.

381. The Defence further asserts that the type and extent of knowledge available to a commander must be weighed to determine whether the commander had information allowing him to conclude that war crimes had been committed. The Defence agrees that this may be proved by circumstantial evidence such as the fact that the commander had executive authority over an area where war crimes were frequent and widespread, or where reliable reports of the crimes were made to the commander's headquarters. It is submitted that, in the absence of actual knowledge, there must be evidence that the commander encouraged the criminal misconduct of his subordinates through his failure to discover and intervene, and that for this to occur there must be a serious personal dereliction of duty on the part of the commander, sufficient to constitute wilful and wanton disregard of the crimes.[407]

382. In response to these assertions, the Prosecution rejects the contention that the application of the doctrine of superior responsibility, as it is enshrined in Article 7(3), compromises the principle of *nullum crimen sine lege*. It asserts that the Statute's language of "knew or had reason to know" must be construed as having the same meaning as the applicable standard under existing humanitarian law, including Protocol I. It states, however, that, according to this standard, it is not necessary for the accused to have information in his actual possession which enables him to conclude that violations are about to be, or have been, committed. A superior is required to discover and obtain all information within his powers, which includes properly supervising his

[407] Motion to Dismiss, RP D5634-D5636.

subordinates, and he cannot wantonly disregard information within his reasonable access. The Prosecution states that "[t]he information itself need not conclude, or the superior need not actually have concluded that violations will or have been committed. It is sufficient that the superior should have concluded in the circumstances, and the information need only disclose, a likelihood of prospective or past offences."[408]

(ii) Discussion and Findings

383. The doctrine of superior responsibility does not establish a standard of strict liability for superiors for failing to prevent or punish the crimes committed by their subordinates. Instead, Article 7(3) provides that a superior may be held responsible only where he knew or had reason to know that his subordinates were about to or had committed the acts referred to under Articles 2 to 5 of the Statute. A construction of this provision in light of the content of the doctrine under customary law leads the Trial Chamber to conclude that a superior may possess the *mens rea* required to incur criminal liability where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.

a. Actual Knowledge

384. Regarding the standard of actual knowledge, the Prosecution asserts the existence of a rule of presumption where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or over a wide geographical area. However, the legal authorities cited by the Prosecution in this regard are insufficient to support the operation of such a rule. Among the cases relied upon by the Prosecution in this respect is that of General Yamashita. An examination of the findings of the Military Commission however, does not bear out this claim. In fact, the nature of the *mens rea* ascribed to General Yamashita in that case is not immediately apparent from

[408] Response to the Motion to Dismiss, RP D5808. *See also* Prosecution Response to the Pre-Trial Briefs of the Accused, RP D3359-D3360.

the Commission's decision. It has thus been commented by the United Nations War Crimes Commission that:

> the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing *either* prima facie evidence that the accused knew of their perpetration, *or* evidence that he must have failed to fulfil a duty to discover the standard of conduct of his troops.[409]

385. The Commentary to the Additional Protocols, on which the Prosecution relies, also cites the *High Command* case and the judgement of the Tokyo Tribunal,[410] neither of which, however, make a clear ruling on the existence of any such general rule of presumption. While, in the *High Command* case, the tribunal held in relation to the accused von Kuechler that the numerous reports of illegal executions which were made to his headquarters "must be presumed" to have been brought to his attention,[411] this case offers no support for the existence of a more general rule of presumption such as that proposed by the Prosecution. In contrast, the tribunal in that case explicitly rejected the argument that, in view of the extent of the atrocities and the communications available to them, it could be held that all the accused must have had knowledge of the illegal activities carried out in their areas of command. The tribunal declared that no such general presumption could be made and held that the question of the knowledge of the commanders had to be determined on the basis of the evidence pertaining to each individual defendant.[412]

386. It is, accordingly, the Trial Chamber's view that, in the absence of direct evidence of the superior's knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence. In determining whether a superior, despite pleas to the contrary, in fact must have possessed the requisite knowledge, the Trial Chamber may consider, *inter alia,* the following indicia, listed by the Commission of Experts in its Final Report:

(a) The number of illegal acts;
(b) The type of illegal acts;
(c) The scope of illegal acts;
(d) The time during which the illegal acts occurred;
(e) The number and type of troops involved;

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[409] *Trial of General Tomoyuki Yamashita,* Vol. IV, Law Reports, p. 94 (footnote and emphasis in original omitted and emphasis added).
[410] Commentary to the Additional Protocols, paras. 3546-8, n.39 with further reference to the trials of Takashi Sakai, Kurt Student, Kurt Meyer and Karl Rauer.
[411] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, 568.
[412] *Ibid*., pp. 547-49.

(f) The logistics involved, if any;
(g) The geographical location of the acts;
(h) The widespread occurrence of the acts;
(i) The tactical tempo of operations;
(j) The modus operandi of similar illegal acts;
(k) The officers and staff involved;
(l) The location of the commander at the time. [413]

b. "Had reason to know"

387. Regarding the mental standard of "had reason to know", the Trial Chamber takes as its point of departure the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.

388. In this respect, it is to be noted that the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates. Indeed, from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was "at fault in having failed to acquire such knowledge".[414]

389. For example, in the *Hostage* case the tribunal held that a commander of occupied territory is

> charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. *If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.*[415]

[413] Commission of Experts Report, p. 17 (Exhibit 39).
[414] Tokyo Trial Official Transcript, 48,445.
[415] United States v. Wilhelm List et al., Vol. XI, TWC, 1230, 1271.

Likewise, in the trial against Admiral Toyoda, the tribunal declared that the principle of command responsibility applies to the commander who "*knew, or should have known, by use of reasonable diligence"* of the commission of atrocities by his subordinates.[416] Similarly, the tribunal in the *Pohl* case, describing Mummenthey's position as one of an "assumed or *criminal* naivete",[417] held that the latter's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction did not exonerate him, adding that "*it was his duty to know"*.[418] Again, in the *Roechling* case, the court, under the heading of "The defence of lack of knowledge", declared that:

> [n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence. [419]

390. While this body of precedent accordingly may be thought to support the position advocated by the Prosecution, the Trial Chamber is bound to apply customary law as it existed at the time of the commission of the alleged offences. Accordingly, the Trial Chamber must, in its construction of Article 7(3), give full consideration to the standard established by article 86 of Additional Protocol I, in addition to these precedents.

391. Article 86 underwent considerable change during the drafting of the Protocol, and the Trial Chamber notes that the drafters explicitly rejected the proposed inclusion of a mental standard according to which a superior would be criminally liable for the acts of his subordinates in situations where he should have had knowledge concerning their activities. Thus, not only was the proposed ICRC draft, according to which superiors would be held responsible for the illegal acts of a subordinate "if they *knew or should have known* that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach",[420] rejected, but an amended version put forward by the United States employing the formulation "if they *knew or should reasonably have known* in the circumstances at the time" was also not accepted. [421]

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[416] *United States v. Soemu Toyoda* [Official Transcript of Record of Trial], p. 5006 (emphasis added).
[417] United States v. Oswald Pohl et al, Vol. V, TWC, 958, 1054.
[418] *Ibid*., p. 1055 (emphasis added).
[419] The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, Vol. XIV, TWC, Appendix B, 1097, 1106.
[420] Draft Additional Protocols to the Geneva Conventions of 12 August 1949 – ICRC, in Official Records, Vol. I, Part Three, p. 25.
[421] CDDH/1/306, in Official Records, Vol. III, p. 328.

392. When considering the language of this provision as finally adopted, problems of interpretation arise if the English and French texts are compared. While the English text contains the wording "information which should have enabled them to conclude", the French version, rather than the literal translation "*des information qui auraient dû leur permettre de concluire*", is rendered "*des information leur permettant de concluire*" (literally: information enabling them to conclude). The proposition has been made that this discrepancy amounts to a distinction between the English text, which is said to embrace two requirements, one objective (that the superior had certain information) and one subjective (from this information available to the superior he should have drawn certain conclusions), and the French text containing only the objective element.[422] The Trial Chamber notes, however, that this discrepancy in language was considered during the drafting of the Protocol, when it was expressly declared by delegates that the difference was not to be considered one of substance.[423]

393. An interpretation of the terms of this provision in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point. It may be noted, however, that the provision on the responsibility of military commanders in the Rome Statute of the International Criminal Court provides that a commander may be held criminally responsible for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control.[424]

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[422] Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff: The Hague 1982) (hereafter "Bothe Commentary") p. 525.

[423] Thus the French representative, insisting on the French text remaining as drafted, declared that "[a]ny resulting difference between the two texts would at least not be a difference of substance." Similarly the Canadian delegate stated that the English text amounted to saying in legal terms precisely what the French text said. *See* CCDH/I/SR.61, in Official Records, Vol. IX, p. 278, paras. 56 and 57.

[424] Rome Statute of the International Criminal Court, Art. 28(1)(a). It will be observed that the Statute adopts a different mental standard for superiors other than military commanders or persons effectively acting as a military

(d) Necessary and Reasonable Measures

394. The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.

395. It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.[425]

(e) Causation

396. As noted above in sub-section (a), the Defence asserts the existence of a separate requirement of causation. It is contended that, if the superior's failure to act did not cause the commission of the offence, the commander cannot be held criminally liable for the acts of his subordinates. The Defence submits that this applies also to a commander's failure to punish an offence, as it may be argued that inaction in the form of failure to punish is the cause of future offences.[426]

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commander, declaring them to be criminally liable if they "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit" crimes within the jurisdiction of the court. *See ibid*., Art. 28(2)(a).

[425] ILC Draft Code, in which the International Law Commission stated its view as follows: "for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect", pp. 38-39.

[426] Motion to Dismiss, RP D5629.

397. In response, the Prosecution rejects the contention that causation is an element of the doctrine of superior responsibility. It submits that superiors may be held responsible if they fail to adequately take the steps within their powers to prevent or punish violations, and explains that this requirement does not entail proving that the superior's failure directly caused each violation. It argues that this point is reinforced by the fact that many superiors at different levels can be held responsible, within their spheres of competence, for the illegal acts of the same subordinates, irrespective of which superior's omission may have resulted in the commission of the violations. It is further claimed that a causation requirement would undermine the "failure to punish" component of superior responsibility, which, it is pointed out, can only arise after the commission of the offence. It is noted that as a matter of logic a superior could not be held responsible for prior violations committed by subordinates if a causal nexus was required between such violations and the superior's failure to punish those who committed them.[427]

398. Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.[428]

399. This is not to say that, conceptually, the principle of causality is without application to the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.

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[427] Prosecution Response to the Motion to Dismiss, RP D5807-D5808.

[428] The one authority cited by the Defence is the position adopted by Cherif Bassiouni. As part of his analysis of the requirement that the superior has failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates, this author indeed suggests the existence of causation as "the essential element" in cases of command responsibility. *See* M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), p. 350. *See also* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 372 (Martinus Nijhoff, Dordrecht 1992), p. 372.

400. In contrast, while a causal connection between the failure of a commander to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, the Prosecution correctly notes that no such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence. The very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.

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401. Having thus examined the applicable provisions of the Tribunal's Statute, the Trial Chamber must analyse the individual offences with which the accused are charged, in the context of these provisions. Before proceeding with this analysis, a brief note is made here of various aspects of the construction of criminal statutes.

H. Construction of Criminal Statutes

402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.

403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.

404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition,

the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.

405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.

406. The result of this difference has been well expressed by Professor Bassiouni, expressing the view that,

> [i]t is a well established truism in international law that if a given conduct is permitted by general or particular international law, that permissibility deprives the conduct of its criminal character under international criminal law. But if a given conduct is prohibited by general or particular international law it does not mean that it is criminal *ipso iure*. The problem thus lies in distinguishing between prohibited conduct which falls within the legally defined criminal category and that which does not.[429]

407. This exercise being one of interpretation generally, and of the criminal law in particular, we now turn to general principles to consider the interpretation of the criminal provisions of the Tribunal's Statute and Rules.

1. Aids to Construction of Criminal Statutes

408. To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time. Secondly, they must not be given retroactive effect. This is in addition to the well-recognised paramount duty of the judicial interpreter, or judge, to read into the

[429] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) Chapter 3, p. 113 (footnote omitted).

language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object. This rule would appear to have been founded on the firm principle that it is for the legislature and not the court or judge to define a crime and prescribe its punishment.

409. A criminal statute is one in which the legislature intends to have the final result of inflicting suffering upon, or encroaching upon the liberty of, the individual. It is undoubtedly expected that, in such a situation, the intention to do so shall be clearly expressed and without ambiguity. The legislature will not allow such intention to be gathered from doubtful inferences from the words used. It will also not leave its intention to be inferred from unexpressed words. The intention should be manifest.

410. The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. In the construction of a criminal statute no violence must be done to its language to include people within it who do not ordinarily fall within its express language. The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them. The interpreter of a provision can only determine whether the case is within the intention of a criminal statute by construction of the express language of the provision.

411. A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. In other words, a strict construction requires that an offence is made out in accordance with the statute creating it only when all the essential ingredients, as prescribed by the statute, have been established.

412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.

413. The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.[430] This is why ambiguous criminal statutes are to be construed *contra proferentem*.

2. Interpretation of the Statute and Rules

414. It is obvious that the subject matter jurisdiction of the Tribunal is constituted by provisions of international law.[431] It follows, therefore, that recourse would be had to the various sources of international law as listed in Article 38 of the Statute of the ICJ, namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as judicial decisions and the writings of jurists. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system.

415. With respect to the content of the international humanitarian law to be applied by the Tribunal, the Secretary-General, in his Report, stated the position with unequivocal clarity, in paragraph 29, as follows:

> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

Further, at paragraph 34, explaining the application of the principle of *nullum crimen sine lege*, the Secretary-General stated:

> In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

[430] See R. v. Wimbledon JJ, ex p. Derwent [1953] 1 QB 380.

416. It is clear, therefore, that the Secretary-General was in these paragraphs referring to the application of existing customary international humanitarian law. This position avoids any misunderstanding that the absence of corresponding national legislation may cause. The Secretary-General went on, in paragraph 35 of the Report, to specify the customary law applicable as being,

> the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

417. The implication of these explanations is that the Security Council, not being a legislative body, cannot create offences. It therefore vests in the Tribunal the exercise of jurisdiction in respect of offences already recognised in international humanitarian law. The Statute does not create substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law.

418. It is with these considerations in mind that the Trial Chamber addresses the elements of the offences charged in the Indictment.

I. Elements of the Offences

419. The Trial Chamber must look to customary international law in order to arrive at a determination of the elements of the offences alleged in the present case as they stood during the time-period to which the Indictment relates. These offences are here categorised under the following headings: wilful killing and murder; offences of mistreatment; unlawful confinement of civilians; and plunder.

[431] *See* Arts. 2-5 of the Statute.

1. Wilful Killing and Murder

(a) Introduction

420. The Indictment alleges that each of the accused is responsible for the killing of several of the detainees in the Čelebići prison-camp, on account of either their personal participation in such killings, or their superior authority over those directly involved. The Indictment has been formulated in such a way as to classify these acts as both "wilful killing" – punishable under Article 2 of the Statute - and "murder" – punishable under Article 3. Before analysing the evidence concerning these particular charges, the Trial Chamber must, therefore, establish the meaning to be attached to their classification in such a way.

421. The first question which arises is whether there is a qualitative difference between "wilful killing" and "murder" such as to render the elements constituting these offences materially different. The Trial Chamber notes that the term "wilful killing" has been incorporated directly from the four Geneva Conventions, in particular articles 50, 51, 130 and 147 thereof, which set out those acts that constitute "grave breaches" of the Conventions. In the French text of the Conventions, this terminology is translated as "*l'homicide intentionnel*". On the other hand, "murder", prohibited by common article 3 of the Conventions, is translated literally in the French text of the Conventions as "*meurtre*".

422. The Trial Chamber takes the view that it is the simple essence of these offences, derived from the ordinary meaning of their terms in the context of the Geneva Conventions, which must be outlined in the abstract before they are given concrete form and substance in relation to the facts alleged. With this in mind, there can be no line drawn between "wilful killing" and "murder" which affects their content.

423. In addition, it should not be forgotten that the primary purpose of common article 3 of the Geneva Conventions was to extend the "elementary considerations of humanity" to internal armed conflicts. Thus, as it is prohibited to kill protected persons during an international armed conflict, so it is prohibited to kill those taking no active part in hostilities which constitute an internal armed conflict. In this spirit of equality of protection, there can be no reason to attach meaning to the

difference of terminology utilised in common article 3 and the articles referring to "grave breaches" of the Conventions.[432]

424. Having reached this conclusion, the remaining issue becomes the formulation of the elements of these crimes of "wilful killing" and "murder". It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects.[433] The first of these may be termed the *actus reus* – the physical act necessary for the offence. In relation to homicide of all natures, this *actus reus* is clearly the death of the victim as a result of the actions of the accused. The Trial Chamber finds it unnecessary to dwell on this issue, although it notes that omissions as well as concrete actions can satisfy the *actus reus* element[434] and, further, that the conduct of the accused must be a substantial cause of the death of the victim.[435]

425. The second aspect of the analysis of any homicide offence relates to the necessary mental element, or *mens rea*. Often this debate centres around the question of "intent" and it is, indeed, this issue which is the subject of dispute between the parties in the present case. Thus, before proceeding further in its discussion, the Trial Chamber deems it necessary to set out the arguments raised by the parties in this regard.

(b) Arguments of the Parties

426. Simply stated, it is the position of the Prosecution that the *mens rea* element of wilful killing and murder is established where the accused possessed the intent to kill, or inflict grievous bodily harm on the victim. It argues that the word "wilful" must be interpreted to incorporate reckless acts

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[432] In relation to the Third Geneva Convention, Levie has written that "wilful killing" means "murder – an offense under the military and civilian penal codes of every civilized nation." H. Levie – *Prisoners of War in Armed Conflict*, Naval War College International Law Studies (vol. 59), p. 353.

[433] While the terminology utilised varies, these two elements have been described as "universal and persistent in mature systems of law". *See Morissette v. United States* (1952) 342 U.S. 246.

[434] The Commentary to the Fourth Geneva Convention states that "[w]ilful killing would appear to cover cases where death occurs through a fault of omission", p. 597.

[435] An examination of various domestic legal systems reveals that: in England a 'substantial' or 'significant' contributing cause is sufficient: *R. v. Hennigan* [1971] 3 All E.R. 133; in Australia a 'substantial' or 'significant' contributing cause is also the test: *Royall v. R.* (1991) 172 CLR 378 (High Court); in the United States, most jurisdictions require an 'operative cause', being sufficiently direct or operative: *Commonwealth v. Rementer* 598 A. 2d 1300; in Canada the requirement is for a contributing cause greater than *de minimus*: *Smithers v. R.* (1977) 75 DLR (3d) 321. Belgium requires 'adequate causation' to be established: *see* Hennau and Verhaegan, *Droit Pénal Général* (1991). The test in Norway is also 'adequate causation': *see* Johannes Andenaes, *The General Part of the Criminal Law of Norway* (1965), p. 211ff. Under German law, a 'significant and operative cause' is required: *see* Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (1996), pp. 275, 286-289. The Dutch

as well as a specific desire to kill, whilst excluding mere negligence. More particularly, the Prosecution contends that, while the accused's acts must be "intentional", the concept of intention can assume different forms, including both direct and indirect intention to commit the unlawful act. Such indirect intention incorporates the situation where the accused commits acts and is reckless to their consequences and where death is foreseeable.[436] In support of this argument, the Prosecution relies on the Commentary to article 85 of Additional Protocol I which defines 'wilfully' in the following terms:

> *wilfully*: the accused must have acted consciously and with intent, *i.e.,* with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses concepts of 'wrongful intent' or 'recklessness', *viz*., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e*., when a man acts without having his mind on the act or its consequences.[437]

427. The Defence[438] seeks to rely on a narrower concept of intent and, in particular, would exclude from its scope any notion of recklessness. According to the Defence for Mr. Landžo and Mr. Delić, the *mens rea* element of the offence of wilful killing requires a showing by the Prosecution that the accused had the specific intent to cause death by his actions.[439] Expanding upon this, the Defence submits that the words "reckless" and "intent" are mutually exclusive, and that "in the common law tradition offences requiring intent are typically to be distinguished from those where mere recklessness will suffice."[440] In this regard, it cites the English case of *R v Sheppard*[441] and quotes the statement made by Lord Diplock therein, that "[t]he primary meaning of 'wilfully' is 'deliberate'".[442] This, in the view of the Defence, is the preferable construction of the *mens rea* requirement for wilful killing or murder under the Geneva Conventions and Additional Protocol I.

428. The Defence further contends that this interpretation accords with the French text of article 130 of the Third Geneva Convention and article 147 of the Fourth Geneva Convention (dealing with grave breaches) which equates "*l'homicide intentionnel"* with "wilful killing". In its view there is a difference of meaning between the two translations of the Conventions, the term

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Supreme Court (Hoge Raad) has referred to the 'reasonable imputability' of the consequences to the accused: *see* Hazewinkel-Suringa, *Inleiding tot de Studie van het Nederlands Strafrecht* (1995), pp. 184-186.

[436] *See* Prosecution Response to the Pre-Trial Briefs of the Accused, RP D3326.

[437] Commentary to the Additional Protocols, para. 3474.

[438] Once again, it is not altogether clear whether the Defence for Mr. Mucić joins with the other Defence in relation to this matter.

[439] *See* Landžo Pre-Trial Brief, RP D1899; Delić Pre-Trial Brief, RP D2792.

[440] Motion to Dismiss, RP D5672.

[441] [1981] AC 394 HL in *ibid.,* RP D5668.

'intentional' being a much stronger word in English than 'wilful'. Thus, the French text should be preferred over the English on the basis that "where such differences exist, they should be decided in favour of the Defendant."[443]

429. The Defence further finds there to be a contradiction between the definition of "wilful" in the Commentary to article 85 of Additional Protocol I and the provisions of article 32 of the Fourth Geneva Convention, which prohibits the High Contracting Parties,

> from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

The Commentary to this article states:

> "*Purpose of the prohibition*" – The Diplomatic Conference deliberately employed the words 'of such a character as to cause' instead of the formula 'likely to cause' which figured in the original draft. In thus substituting a causal criterion for one of intention, the Conference aimed at extending the scope of the Article; henceforth, it is not necessary that an act should be intentional for the person committing it to be answerable for it. The aim is to ensure that every protected person shall receive humane treatment from the civil and military authorities. In this respect, Article 32 is as general as possible and mentions only as examples the principal types of atrocity committed during the Second World War, which should be prohibited for ever. However, it should be noted that most of the acts listed in the second sentence of this Article can only be committed with intent.[444]

The Defence relies on the final sentence of this Commentary, stating that it "strongly suggests that murder requires 'intent'".[445]

430. In response to these arguments, the Prosecution asserts that the Defence wrongly seeks to equate the concept of recklessness with simple negligence. In addition, the Prosecution takes issue with the Defence reading of *R v Sheppard*, and submits that the House of Lords held

[442] *R v. Sheppard* [1981] AC 394 HL, p. 418.
[443] Motion to Dismiss, RP D5668.
[444] Commentary, p. 222 (footnote omitted).
[445] Motion to Dismiss, RP D5672.

in that case that:

> a man 'wilfully' fails to provide adequate medical attention for a child if he *either* (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention; *or* (b) does so because he does not care whether the child may be in need of medical treatment or not.[446]

(c) Discussion

431. Both the Prosecution and the Defence have focused upon the word "wilful" in their discussion of the necessary *mens rea* required to establish the offences of "wilful killing" and "murder". This has had the unfortunate result of drawing attention away from the nature and purpose of the prohibition contained in the Geneva Conventions, which is clearly to proscribe the deliberate taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions' protections.[447] It is this nature and purpose which primarily guides the Trial Chamber's consideration of the matter and its examination of the terminology utilised, for a simple semantic approach, or one which confines itself to the specificities of particular national jurisdictions, can only lead to confusion or a fruitless search for an elusive commonality. In any national legal system, terms are utilised in a specific legal context and are attributed their own specific connotations by the jurisprudence of that system. Such connotations may not necessarily be relevant when these terms are applied in an international jurisdiction.

432. Article 32 of the Fourth Geneva Convention contains the fundamental prohibition on acts which result in the death or physical suffering of protected civilians. The Commentary to this article notes that it is formulated in a manner which emphasises the link of causality between act and result, whilst recognising that the listed offences generally require an element of intent – that which we have here termed *mens rea*. The nature of this "intent" requirement is left unexplained. Guidance may, however, be found in the Commentary to Additional Protocol I. In relation to article 11 of that instrument, the commentary incorporates the concept of "recklessness" into that of "wilfulness", whilst excluding mere negligence from its scope. Likewise, in relation to article 85 of the Additional Protocol, the commentary seeks to distinguish ordinary negligence from wrongful intent or recklessness, and regards only the latter as encompassed by the term "wilful".

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[446] Prosecution's Response to Motion to Dismiss, RP D5780.
[447] *See* Dieter Fleck (ed.) – *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 532, which states simply that the term "wilful killing" "covers all cases in which a protected person is killed."

433. The Trial Chamber is further instructed by the plain, ordinary meaning of the word "wilful", as found in the Concise Oxford English Dictionary, which is "intentional, deliberate". There is, on this basis, no divergence of substance between the use of the term "wilful killing" and the French version, "*l'homicide intentionnel*". In *Le Nouveau Petit Robert* dictionary, "*intentionnel*" is defined as "*ce qui est fait exprès, avec intention, à dessein.*" The essence to be derived from the usage of this terminology in both languages is simply that death should not be an accidental consequence of the acts of the accused. The ordinary meaning of the English term "murder" is also understood as something more than manslaughter and thus, as stated above, no difference of consequence flows from the use of "wilful killing" in place of "murder".

434. At common law, the term "malice" is often utilised to describe the necessary additional element that transforms a homicide from a case of manslaughter to one of murder. Yet again, however, there is a strong danger of confusion if such terminology is transposed into the context of international law, without explanation of its exact meaning. Malice does not merely refer to ill-will on the part of the perpetrator of the killing, but extends to his intention to cause great bodily harm or to kill without legal justification or excuse and also "denotes a wicked and corrupt disregard of the lives and safety of others".[448] In most common law jurisdictions, the *mens rea* requirement of murder is satisfied where the accused is aware of the likelihood or probability of causing death or is reckless as to the causing of death. In Australia, for example, knowledge that death or grievous bodily harm will *probably* result from the actions of the accused is the requisite test.[449] Under Canadian law, the accused is required to have a simultaneous awareness of the probability of death and the intention to inflict some form of serious harm,[450] and this is also the position in Pakistan.[451]

435. The civil law concept of *dolus* describes the voluntariness of an act and incorporates both direct and indirect intention.[452] Under the theory of indirect intention (*dolus eventualis*), should an accused engage in life-endangering behaviour, his killing is deemed intentional if he "makes peace" with the likelihood of death. In many civil law jurisdictions the foreseeability of death is relevant and the possibility that death will occur is generally sufficient to fulfil the requisite intention to kill.

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[448] *American Jurisprudence* (2nd ed. 1995) – Homicide: Malice, or malice aforethought § 50.
[449] *R v. Crabbe* (1985) 58 ALR 417. *Cf.* the previous view that the possibility of death or grievous bodily harm might be sufficient, *Pemble v. the Queen,* (1971) 124 CLR 107.
[450] Canadian Criminal Code, RSC 1985, Art. 229.
[451] Criminal Code, s. 300.
[452] For Belgium, *see* Christine Hennau and Jacques Verhaegen, *Droit Pénal Général* (1991) paras. 350ff. For Germany, *see* Adolf Schönke and Horst Schröder, *Strafgesetzbuch Kommentar* (1997). For Italy, *see* Francesco Antolisei, *Manuale di Diritto Penale* (1989) pp. 305-306.

436. The Trial Chamber is mindful of the benefits of an approach which analyses the amount of risk taken by an accused that his actions will result in death and considers whether that risk might be deemed excessive. Under this approach, all of the circumstances surrounding the infliction of harm and the resulting death of the victim are examined and the relevant question is whether it is apparent from these circumstances that the accused's actions were committed in a manner "manifesting extreme indifference to the value of human life."[453] Such an approach enables the adjudicative body to take into account factors such as the use of weapons or other instruments, and the position of the accused in relation to the victim.

(d) Findings

437. While different legal systems utilise differing forms of classification of the mental element involved in the crime of murder, it is clear that some form of intention is required. However, this intention may be inferred from the circumstances, whether one approaches the issue from the perspective of the foreseeability of death as a consequence of the acts of the accused, or the taking of an excessive risk which demonstrates recklessness. As has been stated by the Prosecution, the Commentary to the Additional Protocols expressly includes the concept of "recklessness" within its discussion of the meaning of "wilful" as a qualifying term in both articles 11 and 85 of Additional Protocol I.

438. Bearing in mind our discussion of the relevant principles of interpretation above, it is in this context, and in that of the nature and purpose of the Geneva Conventions, that the Trial Chamber determines the meaning of the terms utilised in the Statute of the Tribunal. As stated by Fletcher;

> [t]he method of analyzing ordinary usage invites us to consider what these terms mean as they are used, not what they "mean" when wrenched out of context and defined for the purposes of legal analysis.[454]

439. On the basis of this analysis alone, the Trial Chamber is in no doubt that the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life. It is in this light that the

[453] Model Penal Code, §210.2(1)(b). *See* Fletcher - *Rethinking Criminal Law* (1978) (hereafter "Fletcher") p. 265.
[454] Fletcher, p. 451.

evidence relating to each of the alleged acts of killing is assessed and the appropriate legal conclusion reached in Section IV below.

2. Offences of Mistreatment

(a) Introduction to Various Offences of Mistreatment

440. The Indictment alleges that each of the accused is responsible for various forms of mistreatment of the detainees in the Čelebići prison-camp. Such mistreatment, not resulting in death, is variously categorised and alleged as: torture, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognised by article 3(1)(a) of the Geneva Conventions; rape as torture, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognised by article 3(1)(a) of the Geneva Conventions; wilfully causing great suffering or serious injury, a grave breach of the Geneva Conventions punishable under Article 2(c) of the Statute; inhuman treatment, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute; and cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute and recognised by article 3(1)(a) of the Geneva Conventions.

441. The offences of torture, wilfully causing great suffering or serious injury to body or health and inhuman treatment are proscribed as grave breaches of the Geneva Conventions. The offences of torture and cruel treatment are prohibited under common article 3 of the Geneva Conventions. However, no definition or elaboration of these offences are provided in the Conventions themselves. Thus, the Trial Chamber must find the customary international law definitions of the elements of these offences as they stood at the time period to which the Indictment relates. A detailed explanation of the reasoning underlying this determination will be discussed in the following paragraphs.

442. The Trial Chamber finds that torture is the most specific of those offences of mistreatment constituting "grave breaches" and entails acts or omissions, by or at the instigation of, or with the consent or acquiescence of an official, which are committed for a particular prohibited purpose and cause a severe level of mental or physical pain or suffering. The offence of wilfully causing great

suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture. Finally, within this framework of grave breach offences, inhuman treatment involves acts or omissions that cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. Accordingly, all acts or omissions found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated in the foregoing two, and extends further to acts which violate the basic principle of humane treatment, particularly the respect for human dignity.

443. The offences of torture and cruel treatment, proscribed under common article 3, are also interrelated. The characteristics of the offence of torture under common article 3 and under the "grave breaches" provisions of the Geneva Conventions, do not differ. The offence of cruel treatment under common article 3 carries the same meaning as inhuman treatment in the context of the "grave breaches" provisions. Thus, for the purposes of common article 3, all torture is encapsulated in the offence of cruel treatment. However, this latter offence extends to all acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.

444. The general requirements for the application of Articles 1, 2 and 3 of the Statute have already been discussed above in Section III. Most importantly, it has been found that, in order for any of the acts to which the various charges of mistreatment refer to constitute violations of Article 2 or Article 3 of the Statute, the Trial Chamber must be satisfied that the precondition that there be a nexus between the acts of the accused and the armed conflict is met. The Trial Chamber has found that this nexus undoubtedly exists in relation to each of the acts alleged in the Indictment.

445. Having made these preliminary remarks about the interrelationship of the mistreatment offences, both under the "grave breaches" provisions of the Geneva Conventions and common article 3, and the general requirement of the nexus between the acts of the accused and the armed conflict as a precondition to the application of Articles 1, 2 and 3 of the Statute, the Trial Chamber proceeds with the following detailed consideration of definitions and criteria to be attached to each of these offences under customary international law.

(b) Torture

(i) Introduction

446. The torture of persons not taking an active part in hostilities is absolutely prohibited by the Geneva Conventions, both in internal and international armed conflicts. The commission of acts of torture is specifically enumerated in the Conventions as constituting a grave breach, as well as violating common article 3 and other provisions of the Conventions and Additional Protocols.[455] The requisite elements of this offence merit particular clarification as they form the basis upon which torture is differentiated from other offences of ill-treatment contained in the Geneva Conventions. Both the Prosecution and the Defence have made significant submissions on this issue and the Trial Chamber thus deems it useful to outline these before continuing with its discussion.

(ii) Arguments of the Parties

447. The Prosecution consistently maintains that the Trial Chamber ought to apply the customary law definition of torture as expressed in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "Torture Convention"). In its Response to the Motion to Dismiss, and its Closing Brief, the Prosecution further submits that the Trial Chamber should rely on the customary law definition of torture. It notes that this definition is broader than that suggested in the Commentary to the Fourth Geneva Convention.[456] It cites Professor Bassiouni in this regard, who suggests that torture requires a secondary purpose behind the acts of injury, which inhuman treatment does not. In his view, this secondary purpose must be to obtain a confession, or for any other purpose. Further, Bassiouni suggests that what constitutes this secondary purpose has changed over time, noting the provisions of Additional Protocol I and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "Declaration on Torture").[457]

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[455] Art. 12 Geneva Conventions I and II; Art. 50 Geneva Convention I; Art. 51 Geneva Convention II; Arts. 17, 87 and 130 Geneva Convention III; Arts. 32 and 147 Geneva Convention IV; common Art. 3 Geneva Conventions I–IV; Art. 75 Additional Protocol I; Art. 4 Additional Protocol II.
[456] Motion to Dismiss, RP D5772; Prosecution Closing Brief, RP D2723-D2724. The Commentary states that torture is "the infliction of suffering on a person to obtain from that person, or another person, confessions or information … It is more than a mere assault on the moral or physical integrity of a person. What is important is not so much the pain itself as the purpose behind its infliction", p. 598.
[457] Prosecution Response to the Motion to Dismiss, RP D5772; Prosecution Closing Brief, RP D2723.

448. In support of the contention that torture can be employed for a variety of purposes beyond that of illiciting information, the Prosecution notes Bassiouni's comment, when considering the issue of rape as torture, that the commission of mass rape was employed during the conflicts in the former Yugoslavia in order to punish the victims and/or to intimidate them or their communities.

449. The Defence argues that the customary and conventional definition of torture, in the context of international humanitarian law, is narrower than that posited by the Prosecution. It submits that, under the Geneva Conventions, torture must have as its motive the obtaining of information. Accordingly, in the view of the Defence, the Prosecution's proposed definition seeks to broaden the customary definition of torture for the purposes of international humanitarian law, contrary to the intent of the Secretary-General and Security Council that the Tribunal only apply settled customary international law so as to avoid violating the principle of *nullum crimen sine lege.*

450. In support of this argument, the Defence relies upon the commentary to article 147 of the Fourth Geneva Convention. It further emphasises that the distinguishing feature of the offence of torture is the purpose for which it is inflicted. In its view, it is clear that the "prohibited purpose" is that of obtaining "from that person or another person, confessions or information" and it is unclear whether it could also include any other purpose. The Defence also refers to Bassiouni in support of this proposition. It submits that Bassiouni is unclear whether the required motive can serve a purpose other than the obtaining of a confession or information and that the other motives in the Prosecution's proposed definition are overly broad, that is, they do not reflect what is beyond any doubt part of customary law. Accordingly, the Defence submits that the Trial Chamber should construe the "prohibited purpose" requirement of torture narrowly and in favour of the defendant, so as to comply with the Report of the Secretary-General and with the general principle of criminal law that ambiguous statutes should be construed narrowly, in favour of the defendant.

451. During closing oral submissions, Mr. Michael Greaves, on behalf of the Defence, stated that torture and rape were included within the meaning of "other inhumane acts" contained in article 6(c) of the Charter of the International Military Tribunal.[458] However, in his view, the elements of these offences remain to be identified. He further suggested that the Trial Chamber could rely on the applicable criminal law of the former republics of the SFRY in the construction of these elements, as this would be in accordance with the principle of legality. In addition, he argued that the definition contained in the Torture Convention does not reflect settled customary

[458] Nürnberg Charter, p.10.

international law. In support of this proposition, counsel referred to article 1 of the Torture Convention, which provides that the definition contained therein is "for the purposes of this Convention". Further, counsel submitted that the definition of torture differs in various other jurisdictions, quoting the decision of the European Court of Human Rights (hereafter "European Court") in the case of *Republic of Ireland v. United Kingdom*,[459] although he did not offer his view on the definition of torture proposed in that case.

(iii) Discussion

a. The Definition of Torture Under Customary International Law

452. There can be no doubt that torture is prohibited by both conventional and customary international law. In addition to the proscriptions of international humanitarian law, which are pleaded in the Indictment, there are also a number of international human rights instruments that express the prohibition. Both the Universal Declaration of Human Rights[460] and the ICCPR contain such provisions.[461] Torture is also prohibited by a number of regional human rights treaties, including the European Convention on Human Rights[462] (hereafter "European Convention"), the American Convention on Human Rights,[463] the Inter-American Convention to Prevent and Punish Torture[464] (hereafter "Inter-American Convention"), and the African Charter on Human and Peoples' Rights.[465]

453. In addition, there are two international instruments that are solely concerned with the prohibition of torture, the most significant of which is the Torture Convention .[466] This Convention was adopted by the General Assembly on 10 December 1984 and has been ratified or acceded to by 109 States, including the SFRY, representing more than half of the membership of the United

[459] Republic of Ireland v United Kingdom, 2 EHRR 25, 1979-80, (hereafter "Northern Ireland Case").
[460] Art. 5 provides "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."
[461] Art. 7 provides "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without free consent to medical or scientific experimentation".
[462] Art. 3 provides "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[463] Art. 5(2) provides "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."
[464] Art. 1 provides "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."
[465] Art. 5 states "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."
[466] Professor P. Kooijmans, Special Rapporteur for Torture, enumerated a number of specific international instruments that prohibit torture or other ill treatment. "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment",

Nations.[467] It was preceded by the Declaration on the Protection from Torture, which was adopted by the United Nations General Assembly on 9 December 1975 without a vote.[468]

454. Based on the foregoing, it can be said that the prohibition on torture is a norm of customary law. It further constitutes a norm of *jus cogens,*[469] as has been confirmed by the United Nations Special Rapporteur for Torture.[470] It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances.[471]

455. Despite the clear international consensus that the infliction of acts of torture is prohibited conduct, few attempts have been made to articulate a legal definition of torture. In fact, of the instruments prohibiting torture, only three provide any definition. The first such instrument is the Declaration on Torture, article 1 of which states:

> torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. . . . Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.

456. This definition was used as the basis for the one subsequently articulated in the Torture Convention,[472] which states, in article 1 that,

> the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, (hereafter "Report of the Special Rapporteur"), para. 26.

[467] As at 5 Nov. 1998.

[468] GA res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34), 91, U.N. Doc. A/10034 (1975).

[469] *Jus cogens* is a peremptory norm of international law that may only be modified by a subsequent norm of *jus cogens*. *See* Art. 53 of the Vienna Convention on the Law of Treaties (A/CONF.39/27(1969)).

[470] *See* Report of the Special Rapporteur, para. 3.

[471] *See e.g.* Art. 2(2) Torture Convention; Art. 15(2) European Convention; Art. 4(2) ICCPR; Art. 27(2) American Convention on Human Rights; Art. 5 Inter-American Convention.

[472] *See* the fifth paragraph of the preamble of the Torture Convention, Report of the Special Rapporteur, para. 31 and Nigel S. Rodley, *The Treatment of Prisoners under International Law* (2nd Edition Clarendon Press, Oxford, forthcoming 1998) (hereafter "Rodley") p. 85.

457. This differs from the formulation utilised in the Declaration on Torture in two ways. First, there is no reference to torture as an aggravated form of ill-treatment in the Torture Convention. However, this quantitative element is implicit in the requisite level of severity of suffering. Secondly, the examples of prohibited purposes in the Torture Convention explicitly include "any reason based on discrimination of any kind", whereas this is not the case in the Declaration on Torture.

458. The third such instrument, the Inter-American Convention, was signed on 9 December 1985.[473] The definition of torture contained in Article 2 thereof incorporates, but is arguably broader than, that contained in the Torture Convention, as it refrains from specifying a threshold level of pain or suffering which is necessary for ill treatment to constitute torture.[474]

459. It may, therefore, be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.

460. Having reached this conclusion, the Trial Chamber now considers in more depth the requisite level of severity of pain or suffering, the existence of a prohibited purpose, and the extent of the official involvement that are required in order for the offence of torture to be proven.

b. Severity of Pain or Suffering

461. Although the Human Rights Committee, a body established by the ICCPR to monitor its implementation, has had occasion to consider the nature of ill-treatment prohibited under article 7 of the ICCPR, the Committee's decisions have generally not drawn a distinction between the various prohibited forms of ill-treatment. However, in certain cases, the Committee has made a specific finding of torture, based upon the following conduct: beating, electric shocks and mock

[473] The Convention entered into force on 28 Feb. 1987.
[474] Art. 2 provides: "… [t]orture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."

executions;[475] *plantones*, beatings and lack of food;[476] being held incommunicado for more than three months whilst being kept blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection.[477]

462. The European Court and the European Commission of Human Rights have also developed a body of jurisprudence that deals with conduct constituting torture, prohibited by article 3 of the European Convention. As with the findings of the Human Rights Committee, it is difficult to obtain a precise picture of the material elements of torture from the decisions of these bodies, although they are useful in providing some examples of prohibited conduct. The most notable findings from this jurisdiction are the *Greek Case*[478] and the *Northern Ireland Case.* The *Greek Case* was the first extensively reasoned decision on the conventional prohibition of torture, in which the practice of administering severe beatings to all parts of the body, known as *falanga*, as practised by the Athens Security Police, was held by the European Commission of Human Rights to constitute torture and ill-treatment.[479]

463. The *Northern Ireland Case* best illustrates the inherent difficulties in determining a threshold level of severity beyond which inhuman treatment becomes torture. Whereas the European Commission of Human Rights considered that the combined use of wall-standing, hooding, subjection to noise, sleep deprivation and food and drink deprivation constituted a violation of article 3 amounting to torture, in this case, the European Court concluded that such acts did not amount to torture as they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood".[480] Instead, the European Court found that the relevant acts constituted inhuman and degrading treatment in breach of article 3 of the European Convention.

464. In its decision in the *Northern Ireland Case*, the European Court found that the offence of torture was confined to ill-treatment resulting in "very serious and cruel suffering".[481] In doing so, it relied in part upon that section of the definition articulated in the Declaration of Torture that describes torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." The Trial Chamber notes that the European Court expressly acknowledged that the

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[475] *Muteba v. Zaire*, (124/1982) Report of the Human Rights Committee. UN Official Records of the General Assembly (hereafter "GAOR"), 22nd Session, Supplement No. 40, (1984), para.10.2.
[476] *Setelich v. Uruguay*, (63/1979) Report of Human Rights Committee, GAOR, 14th Session, para. 16.2. The practice of *plantones* involves forcing prisoners to remain standing for extremely long periods of time.
[477] *Weinberger v. Uruguay*, (28/1978) Report of Human Rights Committee, GAOR, 31st Session, para. 4.
[478] *The Greek Case*, 1969, Y.B.Eur.Conv. on H.R. 12 (hereafter "*Greek Case"*).
[479] *Greek Case,* para. 504.
[480] See Northern Ireland Case, para. 167.

use of the five techniques of interrogation in question had caused "intense physical and mental suffering" but then, nonetheless, concluded that the intensity of the suffering inflicted was insufficient to warrant a finding of torture, without further explanation. Indeed, this aspect of the decision has been the subject of criticism in human rights literature.[482] Furthermore, in later cases, forms of ill-treatment analogous to those considered by the European Court in the *Northern Ireland Case* have been found by other human rights bodies to constitute torture.[483]

465. In two other cases, the European Court has found breaches of article 3 amounting to torture. In *Aksoy v. Turkey*,[484] the Court held that the applicant had been subjected to torture contrary to article 3 where he had been stripped naked and suspended by his arms which had been tied together behind his back. It took the view that,

> this treatment could only have been deliberately inflicted: indeed a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.[485]

466. Similarly, in *Aydin v. Turkey,*[486] the European Court made a specific finding of a breach of article 3 amounting to torture, on two separate grounds. First, the rape of the applicant during her detention was held to constitute torture - this is discussed in further detail below. Secondly, the European Court found that the following acts constituted independent grounds for a finding of torture:

> [The applicant] was detained over a period of three days during which she must have been bewildered and disorientated by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.[487]

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[481] *Ibid*., para. 167.
[482] *See e.g*. Rodley, p. 117.
[483] *See Cariboni v. Uruguay*, (159/1983) Report of the Human Rights Committee, GAOR, 31st Session, para 4.
[484] *Aksoy v. Turkey*, Judgement of 18 Dec. 1996, ECHR.
[485] *Ibid*., para. 64.
[486] *Aydin v. Turkey*, Judgement of 25 Sept. 1997, ECHR.
[487] *Ibid*., para. 84.

467. Finally, it should also be noted that the Special Rapporteur on Torture, in his 1986 report, provided a detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe enough to constitute the offence of torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions. [488]

468. From the foregoing discussion it can be seen that the most characteristic cases of torture involve positive acts. However, omissions may also provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental. Mistreatment that does not rise to the threshold level of severity necessary to be characterised as torture may constitute another offence.

469. As evidenced by the jurisprudence set forth above, it is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture. However, the existence of such a grey area should not be seen as an invitation to create an exhaustive list of acts constituting torture, in order to neatly categorise the prohibition. As stated by Rodley, "… a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition."[489]

c. Prohibited Purpose

470. Another critical element of the offence of torture is the presence of a prohibited purpose. As previously stated, the list of such prohibited purposes in the Torture Convention expands upon those enumerated in the Declaration on Torture by adding "discrimination of any kind". The use of the words "for such purposes" in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative.

[488] Report of the Special Rapporteur, para 119.

Further, there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.

471. A fundamental distinction regarding the purpose for which torture is inflicted is that between a "prohibited purpose" and one which is purely private. The rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law.[490] In particular, rape and other sexual assaults have often been labelled as "private", thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition. Accordingly,

> [o]nly in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture … on the ground that he acted for purely private reasons.[491]

472. As noted above, the Defence argues that an act can only constitute torture if it is committed for a limited set of purposes, enumerated in the Commentary to article 147 of the Fourth Geneva Convention. This proposition does not reflect the position at customary law as discussed above, which clearly envisages prohibited purposes additional to those suggested by the Commentary.

d. Official Sanction

473. Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.

474. The incorporation of this element into the definition of torture contained in the Torture Convention again follows the Declaration on Torture and develops it further by adding the phrases

[489] Rodley, p. 105.
[490] Report of the Special Rapporteur, para 38.

"or with the consent or acquiescence of" and "or other person acting in an official capacity". It is thus stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs.

(iv) Rape as Torture

475. The crime of rape is not itself expressly mentioned in the provisions of the Geneva Conventions relating to grave breaches, nor in common article 3, and hence its classification as torture and cruel treatment. It is the purpose of this section to consider the issue of whether rape constitutes torture, under the above mentioned provisions of the Geneva Conventions. In order to properly consider this issue, the Trial Chamber first discusses the prohibition of rape and sexual assault in international law, then provides a definition of rape and finally turns its attention to whether rape, a form of sexual assault, can be considered as torture.

a. Prohibition of Rape and Sexual Assault Under International Humanitarian Law

476. There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against humanity under article 6(c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.

[491] See J. Herman Burgess and Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Martinus Nijhoff, Dordrecht 1988), p. 119.

477. There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape. Thus, the task of the Trial Chamber is to determine the definition of rape in this context.

b. Definition of Rape

478. Although the prohibition on rape under international humanitarian law is readily apparent, there is no convention or other international instrument containing a definition of the term itself. The Trial Chamber draws guidance on this question from the discussion in the recent judgement of the ICTR, in the case of the *Prosecutor v. Jean-Paul Akayesu*[492] (hereafter "*Akayesu Judgement*") which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while "rape has been defined in certain national jurisdictions as non-consensual intercourse", there are differing definitions of the variations of such an act. It concluded,

> that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. […]
>
> The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive. […][493]

479. This Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the *Akayesu Judgement* on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive. Having reached this conclusion, the Trial Chamber turns to a brief discussion of the jurisprudence of other international judicial bodies concerning rape as torture.

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[492] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR–96-4-T, Trial Chamber I, 2 Sept. 1998.
[493] *Ibid.*, p. 241.

c. Decisions of International and Regional Judicial Bodies

480. In order for rape to be included within the offence of torture it must meet each of the elements of this offence, as discussed above. In considering this issue, the Trial Chamber finds it useful to examine the relevant findings of other international judicial and quasi-judicial bodies as well as some relevant United Nations reports.

481. Both the Inter-American Commission on Human Rights (hereafter "Inter-American Commission") and the European Court of Human Rights have recently issued decisions on the question of whether rape constitutes torture. On 1 March 1996, the Inter-American Commission handed down a decision in the case of *Fernando and Raquel Mejia v. Peru*,[494] which concerned the rape, on two occasions, of a schoolteacher by members of the Peruvian Army. The facts of the case are as follows.

482. On the evening of 15 June 1989, Peruvian military personnel, armed with submachine guns and with their faces covered, entered the Mejia home. They abducted Fernando Mejia, a lawyer, journalist and political activist, on suspicion of being a subversive and a member of the Tupac Amaru Revolutionary Movement. Shortly thereafter, one of these military personnel re-entered the home, apparently looking for identity documents belonging to Mr. Mejia. While his wife, Raquel Mejia, was searching for these documents, she was told that she was also considered a subversive, which she denied. The soldier involved then raped her. About 20 minutes later the same soldier returned, dragged her into her room and raped her again. Raquel Mejia spent the rest of the night in a state of terror. Her husband's body, which showed clear signs of torture, was subsequently found on the banks of the Santa Clara River.

483. The Inter-American Commission found that the rape of Raquel Mejia constituted torture in breach of article 5 of the American Convention of Human Rights.[495] In reaching this conclusion, the Inter-American Commission found that torture under article 5 has three constituent elements. First, there must be an intentional act through which physical or mental pain and suffering is

[494] Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996.
[495] *Ibid.*, p. 187.

inflicted on a person; secondly, such suffering must be inflicted for a purpose; and, thirdly, it must be inflicted by a public official or by a private person acting at the instigation of a public official.[496]

484. In considering the application of these principles to the facts, the Inter-American Commission found that the first of these elements was satisfied on the basis that:

> [r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.[497]

485. In finding that the second element of torture had also been met, the Inter-American Commission found that Raquel Mejia was raped with the aim of punishing her personally and intimidating her. Finally, it was held that the third requirement of the definition of torture was met as the man who raped Raquel Meija was a member of the security forces.[498]

486. Two important observations may be made about this decision. First, in considering whether rape gives rise to pain and suffering, one must not only look at the physical consequences, but also at the psychological and social consequences of the rape. Secondly, in its definition of the requisite elements of torture, the Inter-American Commission did not refer to the customary law requirement that the physical and psychological pain and suffering be severe. However, this level of suffering may be implied from the Inter-American Commission's finding that the rape, in the instant case, was "an act of violence" occasioning physical and psychological pain and suffering that caused the victim: a state of shock; a fear of public ostracism; feelings of humiliation; fear of how her husband would react; a feeling that family integrity was at stake and an apprehension that her children might feel humiliated if they knew what had happened to their mother.[499]

487. The European Court has also recently considered the issue of rape as torture, as prohibited by article 3 of the European Convention, in the case of *Aydin v. Turkey*. In this case, a majority of the Court referred to the previous finding of the European Commission for Human Rights,

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[496] *Ibid*., p. 185.
[497] *Ibid*., p. 186 (footnote omitted).
[498] *Ibid*., p. 187.
[499] *Ibid*., p. 186.

when it stated that, after being detained, the applicant was taken to a police station where she was:

> blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water, and raped. It would appear probable that the applicant was subject to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and/or deter her family and other villagers from becoming implicated in terrorist activities.[500]

488. The European Court held that the distinction between torture and inhuman or degrading treatment in article 3 of the European Convention was embodied therein to allow the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.[501] It went on to state that:

> [w]hile being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.
> […]
>
> Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. *Indeed the court would have reached this conclusion on either of these grounds taken separately*.[502]

489. By stating that it would have found a breach of article 3 even if each of the grounds had been considered separately, the European Court, on the basis of the facts before it, specifically affirmed the view that rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture. A majority of the Court (14 votes to 7) thus found that there had been a breach of article 3 of the European Convention and, while those judges who disagreed with this finding were not convinced that the events alleged actually took place, they did not otherwise disagree with the reasoning of the majority on the application of article 3.[503] Indeed, two of the dissenting judges

[500] *Aydin v. Turkey*, para. 40, sub-para. 4.
[501] *Ibid*., para. 82.
[502] *Ibid*., paras. 83 and 86 (emphasis added).
[503] *Ibid*., p. 38. Joint Dissenting Opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev on the Alleged Ill-treatment (Art. 3 of the Convention), p.45.

explicitly stated that, had they found the acts alleged proven, they would constitute an extremely serious violation of article 3.[504]

490. In addition, the *Akayesu Judgement* referred to above expresses a view on the issue of rape as torture most emphatically, in the following terms:

> Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. [505]

491. The view that rape constitutes torture, is further shared by the United Nations Special Rapporteur on Torture. In an oral introduction to his 1992 Report to the Commission on Human Rights, the Special Rapporteur stated that:

> since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.[506]

In his first report he also listed various forms of sexual aggression as methods of torture, which included rape and the insertion of objects into the orifices of the body.[507]

492. The profound effects of rape and other forms of sexual assault were specifically addressed in the Report of the Commission of Experts thus:

> Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.[508]

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[504] *Ibid*., Partly Concurring, Partly Dissenting Opinion of Judge Matscher, p. 40, and Partly Concurring, Partly Dissenting Opinion of Judge Pettiti, p. 41.
[505] Akayesu Judgement, para. 597.
[506] E/CN.4/1992/SR.21, para.35. See "Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment" Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1995/34, para. 16.
[507] Report of the Special Rapporteur, para. 119.
[508] Commission of Experts Report, Annexes IX to XII S/1994/674/Add.2 (Vol.V), para. 25.

493. Finally, in a recent report, the United Nations Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, has considered the issue of rape as torture with particular regard to the prohibited purpose of discrimination. The United Nations Special Rapporteur referred to the fact that the Committee on the Elimination of Discrimination against Women has recognised that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Upon this basis, the United Nations Special Rapporteur opined that, "in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture."[509]

(v) Findings

494. In view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
(ii) which is inflicted intentionally,
(iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
(iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

495. The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring

[509] "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict"; Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998, para. 55.

for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

496. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.

497. It is in the light of these findings that the evidence relating to the charges of torture contained in the Indictment is considered in Section IV below.

(c) Wilfully Causing Great Suffering or Serious Injury to Body or Health

498. The offence of wilfully causing great suffering or serious injury to body or health is expressly prohibited as a grave breach in each of the four Geneva Conventions. However, in order to attach meaning to the prohibition, it is necessary to analyse the circumstances in which particular actions may constitute the causing of such suffering or serious injury. This very issue is indeed the subject of contention between the parties in the present case.

(i) Arguments of the Parties

499. It is clear from the submissions of the Prosecution that it takes the position that there are two separate offences, one being "wilfully causing great suffering" and the second being "wilfully causing serious injury to body or health". In its view, the elements of the first of these are as follows, first, the accused intended to inflict great suffering without the underlying intention and purposes of torture, with recklessness constituting a sufficient form of intention. Secondly, great suffering was in fact inflicted upon the victim, which need not be limited to physical suffering, but can also include mental or moral suffering.

500. The Prosecution further submits that the second offence of "wilfully causing serious injury to body or health" has two main elements. First, the accused intended to cause injury to the body or health of the victim, including his mental health, with recklessness constituting a sufficient form of such intention. Secondly, serious injury to body or health was in fact inflicted upon the victim.

501. The Prosecution argues that the elements of these offences are clearly set out by their terms and refers to the Commentary to article 147 of the Fourth Geneva Convention. This suggests that suffering may be inflicted without a contemplated purpose, such as is required for torture, and that "wilfully causing great suffering" does not necessarily imply injury to body or health. The Prosecution further submits that while "wilfully causing injury to body or health" does require the actual infliction of such injury, it need not be a permanent injury.

502. In its Response to the Motion to Dismiss, the Prosecution submits that there is no support for the adoption of additional requirements in relation to both offences, such as, that the victim must have been maimed and lost the use of a bodily member or organ, or that injury to health may only encompass bodily damage. In its view, such requirements are wholly unsupportable and contrary to the definitions of the crimes.[510]

503. The Defence makes two main submissions. First, it argues that the offence of causing "great suffering or injury" has two sources, the first being common article 3 to the Geneva Conventions that prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." The second is the prohibition of "wilfully causing great suffering or serious injury to body or health" contained in article 130 of the Third Geneva Convention and article 147 of the Fourth Geneva Convention. It contends, however, that these terms lack the specificity required of criminal statutes and they cannot, therefore, form the basis of a criminal prosecution, as this would violate the principle of *nullum crimen sine lege*.[511]

504. In the alternative, should the above argument fail, the Defence argues that the elements of this offence are that:

1. the violation was wilful; and
2. it caused great suffering; or
3. serious injury to body or health.

505. The Defence maintains that the term "wilful" carries the same meaning as it does for the purposes of the offence of wilful killing and, accordingly, this means that it must have been the

[510] Prosecution Response to the Motion to Dismiss, RP D5767.
[511] Motion to Dismiss, RP D5541-D5546; The arguments were repeated in the closing submissions by the Defence for Delalić; Delalić Closing Brief, RP D8598-D8603 and by the Defence for Landžo; Landžo Closing Brief, RP D9081-D9086; Closing oral arguments, T. 15602.

specific intent of the perpetrator of the mistreatment to cause the actual result, being either great suffering or serious injury to body or health. The Defence submits that it is insufficient to show simply that the perpetrator intended to commit an act and that the act caused the result. The Defence also submits that the suffering must be both real and great, by objective standards. It rejects the discussion in the Commentary of the meaning of the term "serious injury to body or health" and maintains that a serious injury is one that causes a protracted loss of use of a bodily member or organ. The use of the word "protracted" is suggested in order to avoid the "incapacity to work" standard suggested by the Commentary, while at the same time recognising that some injuries are serious while others are not.

(ii) Discussion

506. Article 2(c) of the Statute enumerates the offence of wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions. This terminology is utilised in the same manner in each of the four Geneva Conventions.[512] The construction of the phrase "wilfully causing great suffering or serious injury to body or health" indicates that this is one offence, the elements of which are framed in the alternative and apparent on its face.

507. The Commentary to the Fourth Geneva Convention, which is identical to the Commentaries to the Second and Third Geneva Conventions in this regard,[513] makes a number of useful observations on the meaning of the phrase "wilfully causing great suffering or serious injury to body or health".

> *Wilfully causing great suffering* - this refers to suffering inflicted with the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. In view of the fact that suffering in this case does not seem, to judge by the phrase which follows, to imply injury to body or health, it may be wondered if this is not a special offence not dealt with by national legislation. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.
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> *Serious injury to body or health* – this is a concept quite normally encountered in penal codes, which usually use as a criterion of seriousness the length of time the victim is incapacitated for work.[514]

[512] Art. 50 Geneva Convention I; Art. 51 Geneva Convention II; Art. 130 Geneva Convention III; and Art. 147 Geneva Convention IV.
[513] Commentary to Geneva Convention II, p. 269 and Commentary to Geneva Convention III, p. 628.
[514] Commentary, p. 599.

508. Thus, the Commentary first draws a distinction between this offence and the offence of torture, on the basis that the prohibited purpose required in order for an act to constitute the latter is not required for the former. While the Trial Chamber is in accord with this fundamental distinction, the presence of the prohibited purpose of punishment may raise the causing of great suffering or serious injury to the level of torture as defined above.

509. Secondly, the Commentary suggests that "causing great suffering" encompasses more than mere physical suffering, and includes moral suffering. This view is supported by the plain, ordinary meaning of the words "wilfully causing great suffering", which are not qualified by the words "to body or health", as is the case with "causing injury". Thus, the suffering incurred can be mental or physical.

510. Thirdly, the Commentary posits a possible criterion for judging the seriousness of the injury, being an incapacity to work. While this may well be the case in some situations, when ascertaining the meaning of the term "serious" in the absence of other interpretive material, the Trial Chamber must look to the plain ordinary meaning of the word. The Oxford English Dictionary defines this word as "not slight or negligible". Similarly, the term "great" is defined as "much above average in size, amount or intensity". The Trial Chamber therefore views these quantitative expressions as providing for the basic requirement that a particular act of mistreatment results in a requisite level of serious suffering or injury.

(iii) Findings

511. The Trial Chamber thus finds that the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.

(d) Inhuman Treatment

512. There are several counts of the Indictment which charge the accused with inhuman treatment, punishable under Article 2(b) of the Statute. The following discussion seeks to establish the content of the prohibition on inhuman (or inhumane) treatment.

(i) Arguments of the Parties

513. The Prosecution takes the position that:

1. Inhuman treatment is any act or omission that causes the physical, intellectual, or moral integrity of the victim to be impaired, or causes the victim to suffer indignity, pain or suffering.
2. the accused must have intended to unlawfully impair the physical, intellectual or moral integrity of the victim, otherwise subject the victim to indignities, pain or suffering out of proportion to the treatment expected of one human being by another. Recklessness would constitute a sufficient form of such intention.[515]

514. The Prosecution further states that it is unnecessary to prove that the act in question had grave consequences for the victim. [516] In addition, it refers to the discussion in the *Tadić Judgment* of the meaning of "cruel treatment" as prohibited by common article 3(1) of the Geneva Conventions, where Trial Chamber II did not find such an element to be required.[517] In that case it was held that the prohibition on cruel treatment is a means to an end, being that of "ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely".[518]

515. The Defence submits, in its Motion to Dismiss,[519] that the offence of inhumane treatment lacks sufficient specificity to form the basis of a criminal prosecution except in the clearest cases. The Defence, in its closing oral arguments,[520] further adds that, due to this lack of specificity, it potentially violates the principle of *nullum crimen sine lege.*

(ii) Discussion

516. The offence of inhuman treatment - or *traitements inhumains* in the French text - appears in each of the four Geneva Conventions as a grave breach.[521] In addition, article 119 of the Fourth Geneva Convention provides that any disciplinary penalties inflicted upon detained civilians must

[515] Prosecution Closing Brief, RP D2722.
[516] Prosecution Response to the Motion to Dismiss, RP D5765; and Prosecution Closing Brief, RP D2722.
[517] Tadić Judgment, para. 723.
[518] Ibid.
[519] Motion to Dismiss, RP D5530-D5532; The argument was repeated in the closing submissions by the Defence for Delalić, Delalić Closing Brief, RP D8595-D8597.
[520] T. 15602.
[521] Art. 50 Geneva Convention I; Art. 51 Geneva Convention II; Art. 130 Geneva Convention III; Art. 147 Geneva Convention IV.

not be "inhuman, brutal or dangerous for the health of internees". An equivalent prohibition with respect to prisoners of war is contained in article 89 of the Third Geneva Convention.

517. As with torture, there can be no doubt that inhuman treatment is prohibited under conventional and customary international law. The same international human rights and United Nations instruments that contain the prohibitions against torture, also proscribe inhuman treatment.[522] On the strength of this almost universal condemnation of the practice of inhuman treatment, it can be said that its prohibition is a norm of customary international law. However, unlike the offence of torture, none of the aforementioned instruments have attempted to fashion a definition of inhuman treatment. It thus falls to this Trial Chamber to identify the essential meaning of the offence.

518. The Oxford English Dictionary defines treatment as inhuman when it is "brutal, lacking in normal human qualities of kindness, pity etc." The noun "inhumane" is simply defined as "not humane", which denotes "kind-hearted, compassionate, merciful". Similarly, in relation to the French version, the *Le Nouveau Petit Robert* dictionary defines "*inhumain*" as "*qui manque d' humanité*", "*barbare*, *cruel*, *dur*, *impitoyable*, *insensible*". It is therefore apparent from the plain ordinary meaning of the adjective "inhuman(e)", that the term "inhuman treatment" is defined by reference to its antonym, humane treatment.

519. This accords with the approach taken by the ICRC in its Commentary to article 147 of the Fourth Geneva Convention. In seeking to explain this term, the Commentary refers to article 27 of the same Convention, and states that "the sort of treatment covered by this article, therefore, would be one which ceased to be humane."[523] Further support is lent to this view by the Commentary to article 119, which states "[t]hat this paragraph … reaffirms the humanitarian ideas contained in Articles 27 and 32, and thus underlines the need never to lose sight of these essential principles".[524] The Commentary to inhuman treatment as a grave breach under article 51 of the Second Geneva Convention also defines this offence by reference to article 12 of that Convention, which provides that protected persons must be treated with humanity. Accordingly, the Commentary to article 51

[522] Art. 5 Universal Declaration of Human Rights; Art. 7 ICCPR; Art. 3 European Convention; Art. 5 African Charter on Human and Peoples' Rights; Art. 5(2) American Convention on Human Rights; Art. 6 Inter-American Convention; Art. 16 Torture Convention; and Art. 3 Declaration on Torture.
[523] Commentary, p. 598.
[524] *Ibid.*, p. 483.

states that the "sort of treatment covered here would therefore be whatever is contrary to that general rule".[525]

520. Having identified the basic premise that inhuman treatment is treatment which is not humane, and which is thus in breach of a fundamental principle of the Geneva Conventions, the Trial Chamber now turns to a more detailed discussion of the meaning of the terms "inhuman treatment" and "humane treatment". While the dictionary meanings referred to above are obviously important to this consideration, in order to determine the essence of the offence of inhuman treatment, the terminology must be placed within the context of the relevant provisions of the Geneva Conventions and Additional Protocols.

521. The Commentary to article 147 of the Fourth Geneva Convention opines that inhuman treatment,

> could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought down to the level of animals. That leads to the conclusion that by "inhuman treatment" the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.[526]

522. This language is repeated in relation to article 51 of the Second Geneva Convention in the commentary to that Convention,[527] and also in that concerning article 130 of the Third Geneva Convention.[528] The only difference is that the words "could conceivably be" in the last sentence of the quotation above are replaced in the Commentary to the Second and Third Geneva Conventions by the words "should be". This difference in terminology would seem to indicate that the drafters of the commentaries to the Second and Third Geneva Conventions took a stronger position on the issue of whether acts causing grave injury to human dignity are also encompassed in the concept of inhuman treatment.

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[525] Commentary to the Second Geneva Convention, p. 268. The Commentary to the Third Geneva Convention similarly states that "[t]he requirement of humane treatment and the prohibition of certain acts inconsistent with it are general and absolute in character", p. 140.
[526] Commentary, p. 598.
[527] Commentary to the Second Geneva Convention, p. 268.
[528] Commentary to the Third Geneva Convention, p. 627.

523. As has been previously stated in this Judgement, the concept of humane treatment permeates all four of the Geneva Conventions and the Additional Protocols, and is encapsulated in the Hague Regulations and the two Geneva Conventions of 1929.[529] The key provision of the Fourth Geneva Convention containing the obligation to treat protected persons humanely is contained in article 27, the first two paragraphs of which state that:

> [p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all attacks of violence and threats thereof and against insults and public curiosity. Women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

524. This article is the 'basis of the Convention, proclaiming … the principles upon which the whole of the "Geneva Law' is founded" being the "principle of respect for the human person and the inviolable character of the basic rights of individual men and women."[530] The Commentary makes the fundamental significance of humane treatment clear by stating that it is "in truth the *leitmotiv* of the four Geneva Conventions".[531] It goes on to state that the word "treatment",

> must be understood here in its most general sense as applying to all aspects of man's life … The purpose of this Convention is simply to define the correct way to behave towards a human being, who himself wishes to receive humane treatment and who may, therefore, also give it to his fellow human beings.[532]

In its conclusion, the Commentary characterises humane treatment, and the prohibition of certain acts which are incompatible with it, as general and absolute in character, valid in all circumstances and at all times.[533]

525. After proclaiming the general principle of humane treatment, article 27 of Geneva Convention IV gives examples of acts that are incompatible with it, such as acts of violence or intimidation "inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values", including insult and exposing people to public curiosity.[534] This list has been supplemented by article 32 of the same Convention, which prohibits all acts

[529] Commentary, p. 204.
[530] Commentary, p. 199-200.
[531] Commentary, p. 204.
[532] Commentary, p. 204.
[533] Commentary, p. 204-205.
[534] Commentary, p. 204.

causing physical suffering or extermination including murder, torture, corporal punishment, mutilation, medical or scientific experiments not necessitated by the medical treatment of the person concerned, and any other measures of brutality.[535] This article is not exhaustive, it is as general as possible and only gives examples of the principal types of atrocities committed during the Second World War.[536]

526. Article 13 of the Third Geneva Convention similarly contains the principles and prohibitions of articles 27 and 32 of the Fourth Geneva Convention. It provides that prisoners of war must be treated humanely at all times. Again, the principle is stated by reference to behaviour that is inconsistent with it. After setting out the general principle that all prisoners shall be treated humanely, the article states that unlawful acts or omissions causing death or endangering the health of a prisoner of war are considered as serious breaches:

> In particular no prisoner of war may be subjected to physical mutilation, or to medical or scientific experiments of any kind which are not justified … [l]ikewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation, and against insults and public curiosity.

527. The Commentary to the Third Geneva Convention, in relation to this provision, directly addresses the application of the principle of humane treatment, and the prohibition of acts which are inconsistent with it, in the situation where protected persons are legitimately detained. It states that:

> [t]he requirement of humane treatment and the prohibition of certain acts inconsistent with it are general and absolute in character. They are valid at all times, and apply, for example, to cases where the repressive measures are legitimately imposed on a protected person, since the dictates of humanity must be respected even if measures of security or repression are being applied. *The obligation remains fully valid in relation to persons in prison or interned, whether in the territory of a party to the conflict or in occupied territory. It is in such situations, when human values appear to be in greatest peril, that the provision assumes its full importance*". [537]

528. This Commentary goes on to state that the concept of humane treatment implies, in the first place, an absence of any type of corporal punishment, but that it does not only have this negative aspect. It also involves a notion of protection of a prisoner of war, which means "to stand up for him, to give him assistance and support and also to defend or guard him from injury or danger."[538] Thus, a positive obligation of protection flows from the requirement of humane treatment, which

[535] Commentary, p. 221.
[536] Commentary, p. 222.
[537] Commentary to the Third Geneva Convention, p. 140, (emphasis added).
[538] Commentary to the Third Geneva Convention, p. 141.

"extends to moral values, such as the independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity)."[539]

529. The principle of humane treatment is also enunciated in the second, third and fourth paragraphs of article 12 of both the First and Second Geneva Conventions, dealing with the wounded and sick on land and sea. The commentaries to these Conventions make the point that the purpose of these paragraphs was to develop and define the concept of humane care and treatment.[540] After setting out the general obligation of humane treatment, article 12 provides that it is to be applied without discrimination, and prohibits any attempts upon life or violence to the person, in particular, murder, extermination, torture, biological experiments, wilfully being left without medical assistance or care, or the creation of conditions which expose persons to contagion or infection. The Commentary to the First Geneva Convention provides that treatment in this context is to be understood in its most general sense as applying to all aspects of a man's existence.[541]

530. The Third Geneva Convention also includes two further provisions that enshrine the fundamental principle of humane treatment. Article 20 provides that prisoners of war must be evacuated humanely, which includes being supplied with sufficient food, potable water, clothing and medical attention. The Commentary to the Third Geneva Convention recognises that there may be different physical and living conditions between prisoners of war and the troops of the detaining power. Moreover, "treatment which may be bearable for the captors might cause indescribable suffering for their prisoners. Account must be taken of varying habits with regard to climate, food, comfort, clothing, etc".[542] The determining factor is humane treatment - life or health must not be endangered and serious hardship and suffering must be avoided.[543] In addition, article 46 of the Third Geneva Convention provides similar safeguards with respect to the transfer of prisoners of war. Indeed, it goes further than article 20 by expressly stating that account must be taken of climatic conditions to which the prisoners of war are accustomed. Accordingly, the prohibition on inhumane treatment also extends to the living conditions of protected persons and would be violated if adequate food, water, clothing, medical care and shelter, were not provided in light of the protected persons' varying habits and health.

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[539] Commentary to the Third Geneva Convention, p. 141.
[540] Commentary to the First Geneva Convention, p. 137; Commentary to the Second Geneva Convention, p.91.
[541] Commentary to the First Geneva Convention, p. 137.
[542] Commentary to the Third Geneva Convention, p.174.

531. Article 75 of Additional Protocol I and articles 4 and 7 of Additional Protocol II also enshrine the basic principle of humane treatment. Indeed, the Commentary to Additional Protocol II, states that the "right of protected persons to respect for their honour, convictions and religious practices is an element of humane treatment", with reference to article 27 of the Fourth Geneva Convention.[544]

532. Finally, and importantly, the principle of humane treatment constitutes the fundamental basis underlying common article 3 of the Geneva Conventions. This article prohibits a number of acts, including violence to life and to the person, such as murder, mutilation, cruel treatment, torture and outrages on personal dignity, and humiliating and degrading treatment. The Commentary to the First Geneva Convention, in relation to common article 3, addresses the issue of the definition of the concept of humane treatment, and hence inhumane treatment, thus:

> It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him 'humanely', that is as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover vary according to circumstances – particularly the climate - and to what is feasible. On the other hand, there is less difficulty in enumerating things which are incompatible with human treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions … No possible loophole is left; there can be no excuse, no attenuating circumstances.[545]

In relation to the enumeration of prohibited behaviour, it continues that,

> [h]owever much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.[546]

It is this Commentary which best explains the general approach of the Geneva Conventions to the concept of humane and inhuman treatment. As has been emphasised throughout this Judgement, humane treatment is the cornerstone of all four Conventions, and is defined in the negative in relation to a general, non-exhaustive catalogue of deplorable acts which are inconsistent with it, these constituting inhuman treatment.

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[543] Commentary to the Third Geneva Convention, p.174.
[544] Commentary to Additional Protocol II, para. 4521.
[545] Commentary to the First Geneva Convention, p.3.
[546] Commentary to the First Geneva Convention, p.4.

533. The foregoing discussion with regard to inhuman treatment is also consistent with the concept of "inhumane acts", in the context of crimes against humanity. These acts are prohibited and punishable under Article 5 of the Statute and include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts. This list is in accord with article 6(c) of the Nürnberg Charter and article II 1(c) of Control Council Law No. 10, which was the first time such acts were expressly recognised as crimes against humanity. Article 18(k) of the ILC Draft Code contains a more extensive list of acts which may constitute crimes against humanity than that contained in the foregoing provisions. It also provides that "other inhumane acts" are acts that, in fact, severely damage the physical or mental integrity of the victim, or his health or human dignity. The ILC also recognises that it is impossible to establish an exhaustive list of inhumane acts that may constitute crimes against humanity.[547]

534. Having considered the meaning of inhuman treatment in the context of the Geneva Conventions, as well as in relation to the category of crimes against humanity, the Trial Chamber now turns to a consideration of how the prohibition has been interpreted by other international adjudicative bodies. As has been noted above, the European Court and the European Commission of Human Rights have developed a substantial body of jurisprudence addressing the various forms of ill-treatment prohibited under article 3 of the European Convention. Insofar as these bodies have sought to distinguish the various offences prohibited under article 3 of the European Convention, they have done so by reference to a sliding scale of severity.[548] Using this approach, the European Court has found that the special stigma of torture attaches only to deliberate inhuman treatment causing very serious and cruel suffering.[549] The Trial Chamber has already discussed the finding of the European Court in the *Northern Ireland Case* that this distinction between the notion of torture and that of inhuman or degrading treatment "derives principally from a difference in the intensity of the suffering inflicted."[550]

535. The European Court has also used the purpose for which the ill-treatment was inflicted to distinguish torture from other inhuman or degrading treatment. Two recent opinions of the

[547] ILC Draft Code, p. 103.
[548] For example, in *Tyrer v. United Kingdom*, 2 EHRR 1, 1979-80, the Court employed a sliding scale, based on the level of severity of the suffering occasioned by the ill-treatment, to classify the alleged offence under article 3. The Court found that the punishment at issue did not "amount to" torture, nor was the suffering occasioned by the punishment severe enough to bring it within the definition of inhuman treatment under article 3. However, the Court recognised a violation of article 3 of the European Convention, as the punishment attained the minimum level of severity required to constitute degrading treatment.
[549] Aksoy v. Turkey, para. 63.

European Court finding violations of article 3 amounting to torture have been discussed above, but are also relevant in this regard. In *Aydin v. Turkey*, the European Court noted that the suffering inflicted on the applicant that amounted to torture was calculated to enable the security forces to elicit information.[551] Similarly, in *Aksoy v. Turkey*, the European Court noted that the ill-treatment found to constitute torture "would appear to have been administered with the aim of obtaining admissions or information from the applicant."[552]

536. At the other end of the scale, the European Court has held that, in order for ill-treatment to fall within the scope of the prohibition contained in article 3, it must;

> . . . attain a minimum level of severity. [...] The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[553]

537. In *Tomasi v. France*, where the European Court made an explicit finding of inhuman treatment amounting to a violation of article 3, the applicant alleged that, during a police interrogation he had been slapped, kicked, punched, given forearm blows, made to stand for long periods without support, had his hands handcuffed behind his back, been spat upon, made to stand naked in front of an open window, deprived of food and threatened with a firearm. The court held that the "large number of blows inflicted on Mr. Tomasi and their intensity . . . are two elements which are sufficiently serious to render such treatment inhuman and degrading."[554] In *Ribitsch v. Austria*,[555] the European Court found that the applicant had been subjected to inhuman and degrading treatment in violation of article 3 when he had been beaten while in police custody, and he and his wife, who was detained with him, had been threatened and insulted. The European Court went even further to find that:

> [i]n respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention.[556]

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[550] Northern Ireland Case, para. 167.
[551] Aydin v. Turkey, para. 85.
[552] Aksoy v. Turkey, para. 64.
[553] *A v. United Kingdom*, Judgement 23 Sept. 1998, Eur. Ct. H.R., para.20 (citing: *Costello-Roberts v. United Kingdom*, Judgement 25 March 1993, 247-C Eur. Ct. H.R. (Ser.A) 1993).
[554] *Tomasi v. France*, 13 EHRR 1, 1993, para. 115.
[555] *Ribitsch v. Austria*, 21 EHRR 573, 1996.
[556] *Ibid*., para. 38.

538. More recently, the European Court has found ill-treatment amounting to a violation of article 3 where a boy of nine years had been beaten with considerable force on more than one occasion with a garden cane.[557] In the most coherent framing of the concept, the European Commission of Human Rights has described inhuman treatment as that which "deliberately causes serious mental and physical suffering."[558]

539. Article 7 of the ICCPR provides that:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Human Rights Committee has adopted a comprehensive approach to the application of article 7 in its General Comment to this provision, choosing not to "establish sharp distinctions between the different kinds of punishment or treatment." [559] The Committee has noted, however, that any distinction between the terms would depend on the "nature, purpose and severity of the treatment applied."[560]

540. In a few cases, the Human Rights Committee has made specific findings of inhuman treatment in violation of article 7 of the ICCPR. In *Portorreal v. Dominican Republic*,[561] the applicant had been arrested and taken to a cell measuring 20 by 5 metres, where approximately 125 persons accused of various crimes were held, and where, owing to lack of space, some detainees had to sit on excrement. The applicant received no food and water until the following day and he was finally released after 50 hours in detention. The Committee found that this constituted inhuman and degrading treatment amounting to a violation of article 7 of the ICCPR. In *Tshisekedi v. Zaire*,[562] the Committee also found there to have been a violation of article 7 amounting to inhuman treatment where the applicant had been "deprived of food and drink for four days after his arrest . . . and was subsequently kept interned under unacceptable sanitary conditions."[563] Again, in

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[557] *A v. United Kingdom,* Judgement 23 Sept. 1998, Eur. Ct. H.R., para. 21.
[558] As discussed in *Yagiz v. Turkey*, 22 EHRR 573, 1996. The original definition of inhuman treatment set forth in the *Greek Case* contained an additional element, whereby the applicant had to show that in the particular situation, the treatment alleged to constitute a violation of article 3 was unjustifiable. However, this notion of justifiability was effectively abandoned by the Court which later held that the rights under article 3 are absolute and non-derogable. *See* e.g. *Chahal v. United Kingdom*, 23 EHRR 413, 1997, para. 79.
[559] General Comment of the Human Rights Committee 20/44 of 3 April 1992, para. 4.
[560] Ibid.
[561] (191/1985) Human Rights Committee, GAOR, 31ST Session.
[562] *Tshisekedi v. Zaire*, (242/1987), Human Rights Committee, GAOR, 37th Session.
[563] *Ibid*., para. 13.

Bouton v. Uruguay, the Committee found that being forced to stand blindfolded and bound for 35 hours, while listening to the cries of other detainees being tortured, being threatened with punishment, and being forced to sit blindfolded and motionless on a mattress for many days, constituted inhuman treatment. [564]

541. Based on the Human Rights Committee's enumeration of the distinctions between torture and inhuman and degrading treatment, Nowak has remarked that inhuman treatment must include "all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements."[565] Furthermore, in his view, inhuman treatment also includes ill-treatment that does not reach the requisite level of severity to qualify as torture.[566]

542. Clearly, the international adjudicative bodies that have considered the application of this offence of inhuman(e) treatment have tended to define it in relative terms. That is, inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture. Furthermore, the offence need not have a prohibited purpose or be committed under official sanction as required by torture.

(iii) Findings

543. In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain, ordinary meaning of the term inhuman treatment in the context of the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.

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[564] *Soriano de Bouton v. Uruguay,* (37/1978), Human Rights Committee, GAOR, 12th Session.
[565] Manfred Nowak - UN Covenant on Civil and Political Rights, CCPR Commentary, p.131, (hereafter "Nowak Commentary").
[566] Nowak Commentary, p.131.

544. In this framework of offences, all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated into the other two and extends further to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. Ultimately, the question of whether any particular act which does not fall within the categories of the core group is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.

(e) Cruel Treatment

545. The offences charged as cruel treatment in the Indictment are brought under Article 3 of the Statute, either in the alternative to charges of torture, or additional to charges of wilfully causing great suffering or serious injury or inhuman treatment, brought under Article 2 of the Statute.

(i) Arguments of the Parties

546. The Prosecution argues that cruel treatment has the same elements as the offence of inhuman treatment and encompasses situations where the accused mistreats the victim and subjects him or her to mental or physical pain or suffering, without thereby pursuing any of the purposes underlying the offence of torture.[567] In its Response to the Motion to Dismiss,[568] the Prosecution refers to the discussion in the *Tadić Judgment* of the meaning of "cruel treatment", in support of this proposition.[569] In that case, Trial Chamber II held that the prohibition on cruel treatment is a means to an end, being that of "ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely".[570] The Judgement further refers to article 4 of Additional Protocol II, wherein the prohibition refers to "violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment."[571]

[567] Prosecution Closing Brief, RP D2717; Prosecution Pre-Trial Brief, RP D2825.
[568] Prosecution Response to the Motion to Dismiss, RP D5765.
[569] *Tadić Judgment*, paras. 723-726.
[570] *Tadić Judgment*, para. 723.
[571] *Tadić Judgment*, para. 725.

547. The Defence has not made specific submissions with respect to the definition of the offence of cruel treatment. However, in its discussion of "great suffering or serious injury" in the Motion to Dismiss, the Defence stated that the "the drafters of Common Article 3 deliberately kept prohibited acts poorly defined".[572]

(ii) Discussion

548. The basis of the inclusion of cruel treatment within Article 3 of the Statute is its prohibition by common article 3(1) of the Geneva Conventions, which proscribes, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture". In addition to its prohibition in common article 3, cruel treatment or cruelty is proscribed by article 87 of the Third Geneva Convention, which deals with penalties for prisoners of war, and article 4 of Additional Protocol II, which provides that the following behaviour is prohibited:

> violence to life, health and physical and or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.

549. As with the offence of inhuman treatment, no international instrument defines this offence, although it is specifically prohibited by article 5 of the Universal Declaration of Human Rights, article 7 of the ICCPR, article 5, paragraph 2, of the Inter-American Convention of Human Rights and article 5 of the African Charter of Human and Peoples' Rights. In each of these instruments, it is mentioned in the same category of offence as inhuman treatment.

550. In the *Tadić Judgment*, Trial Chamber II provided its view of the meaning of this offence, stating that, according to common article 3, "the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in hostilities shall in all circumstances be treated humanely."[573] Thus, that Trial Chamber acknowledged that cruel treatment is treatment that is inhuman.

551. Viewed in the context of common article 3, article 4 of Additional Protocol II, the various human rights instruments mentioned above, and the plain ordinary meaning, the Trial Chamber is of the view that cruel treatment is treatment which causes serious mental or physical suffering or

[572] Motion to Dismiss, RP D5545.
[573] *Tadić Judgment*, para. 723.

constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.

(iii) Findings

552. In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.

553. Having considered in detail the meaning of the foregoing offences, the Trial Chamber shall now address inhumane conditions, which have been alleged in the Indictment as wilfully causing great suffering and cruel treatment.

(f) Inhumane Conditions

554. Counts 46 and 47 of the Indictment allege the existence of inhumane conditions in the Čelebići prison-camp and these are charged as wilfully causing great suffering, under Article 2(c), and cruel treatment, under Article 3 of the Statute. While there is no offence of "inhumane conditions" recognised as such in international humanitarian law, it is necessary to determine whether this concept can be considered as being incorporated into the offences of wilfully causing great suffering or serious injury to body or health or cruel treatment.

555. In its Response to the Motion to Dismiss, the Prosecution addresses the issue of inhumane conditions. [574] It rejects an argument made by the Defence that, if conditions at a detention facility are inadequate but are nonetheless all that could be provided in the circumstances prevailing at the relevant time, they are not inhumane. In support of its position, the Prosecution argues that, as a

[574] Prosecution Response to the Motion to Dismiss, RP D5764.

matter of law, a detaining authority is not allowed to starve or otherwise keep prisoners in clearly inhumane and life threatening conditions.

556. The phrase "inhumane conditions" is a factual description relating to the nature of the general environment in which detained persons are kept and the treatment which they receive. Accordingly, the Trial Chamber is bound to apply the legal standards found for the offences of wilfully causing great suffering or serious injury to body or health and cruel treatment to this factual category.

557. These legal standards are absolute and not relative. Thus, when considering the factual allegation of inhumane conditions with respect to these legal offences, no reference should be made to the conditions prevailing in the area of detention in order to determine what the standard of treatment should have been. The legal standard in each of the mistreatment offences discussed above delineates a minimum standard of treatment which also applies to conditions of detention. During an armed conflict, persons should not be detained in conditions where this minimum standard cannot be met and maintained.

558. Given that, in the context of Article 3 of the Statute, cruel treatment carries the same meaning as inhuman treatment in the context of Article 2, this allegation of inhumane conditions is appropriately charged as cruel treatment. However, in light of the above discussion of these offences, the Trial Chamber is of the view that, while it is possible to categorise inhumane conditions within the offence of wilfully causing great suffering or serious injury to body or health under Article 2, it is more appropriately placed within the offence of inhuman treatment.

3. Unlawful Confinement of Civilians

559. The Indictment charges three of the accused, namely Hazim Delić, Zdravko Mucić and Zejnil Delalić, with direct participation in, as well as superior responsibility for, the unlawful confinement of numerous civilians in the Čelebići prison-camp. It is the purpose of this section of our discussion of the applicable law to determine the parameters of this offence as a grave breach of the Geneva Conventions.

(a) Arguments of the Parties

560. According to the Prosecution, the Fourth Geneva Convention only permits the confinement or internment of "protected persons" in the territory of a party to a conflict if the security of the detaining power makes it absolutely necessary and, in occupied territory, for imperative reasons of security.[575] Thus, in the view of the Prosecution, confinement should always be considered as an exceptional measure and can only be lawful in the event of a real threat to security. Furthermore, such determinations have to be made on an individual basis and the mere fact that a civilian is a subject of an enemy power cannot justify his or her confinement.

561. The Prosecution argues, moreover, that certain procedural protections for such detained civilians must exist, including the right to appeal against the confinement and have it periodically reviewed. It maintains that, in the absence of these procedural guarantees, an otherwise lawful internment is rendered unlawful. In addition, the Prosecution argues that, even if a confinement can initially be considered lawful, some basic procedural rights have to be upheld during the period of the confinement. In particular, the confinement has to be reviewed by a competent tribunal.

562. In response, the Defence relies on the Commentary to the Fourth Geneva Convention in this regard.[576] The Commentary describes the prohibition on the unlawful confinement of protected civilians in the following terms:

> Unlawful confinement: Most national legal systems punish unlawful deprivation of liberty and this breach could therefore be dealt with as an offence against ordinary law. The offence, however, would probably be very difficult to prove. Indeed, the belligerent Powers can intern any enemy citizens or aliens on their territory if they consider it absolutely necessary for their security. In the same way, Occupying Powers can intern some of the inhabitants of the occupied territories. The illegal nature of the confinement would therefore be very difficult to prove in view of the extended powers granted in this matter to States. Obviously, however, internment for no particular reason, especially in occupied territories, could come within the definition of this breach. [577]

[575] Prosecution Pre-Trial Brief, RP D2827.
[576] Motion to Dismiss, RP D5513.
[577] Commentary, p. 599.

(b) Discussion

563. The offence of unlawful confinement of civilians is punishable under Article 2(g) of the Statute as a grave breach of the Geneva Conventions, as recognised in article 147 of Geneva Convention IV. The first issue to be addressed in analysing this offence is the circumstances in which civilians can be confined and, secondly, what requirements have to be fulfilled to render a confinement in a given case lawful. These two questions are dealt with here in turn.

(i) Legality of Confinement

564. The Trial Chamber has already determined that the persons detained in the Čelebići prison-camp were persons protected under the Fourth Geneva Convention and can, therefore, be regarded as civilians. Hence, it is only deemed necessary to decide whether the confinement of the persons concerned in the given case was in violation of international humanitarian law.

565. The protection of civilians from harm during armed conflict is a fundamental aim of international humanitarian law. However, the freedom of movement of "enemy" civilians during armed conflict may be restricted, or even temporarily suppressed, if circumstances so require. Thus there is no absolute right in the Geneva Conventions to freedom of movement. However, this does not mean that there is a general suspension of this right during armed conflict either. To the contrary, the regulations concerning civilians in the territory of a party to an armed conflict are based on the concept that the individual freedom of civilians should remain unimpaired. The right in question is therefore a relative one, which may be restricted.[578]

566. When the ICRC draft text for the Fourth Geneva Convention was presented to the 1949 Diplomatic Conference, several delegations stated that, in cases involving spies, saboteurs or other unprivileged combatants, there should be some derogation permitted from the rights normally accorded to protected persons. Otherwise, those rights could be used to the disadvantage of a party to an armed conflict.[579] Therefore, the confinement of civilians is permitted in certain limited situations. The general rule providing for the limitation of the rights of civilians is contained in

[578] Commentary, p. 202.
[579] Gehring - Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I, Military Law Review (hereafter "Gehring"), Vol. 90 (1980), Pamphlet No. 27-100-90, 49, p. 79; Commentary, pp. 52-53.

article 5 of the Fourth Geneva Convention, which provides as follows:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where, in occupied territory, an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

567. The language of article 5 is very broad and its provisions may be applicable in a wide variety of situations.[580] The concept of "activities prejudicial or hostile to the security of the State" is difficult to define. What appears to be included is, above all, espionage, sabotage and intelligence activities for the enemy forces or enemy nationals. The clause cannot simply refer to an individual's political attitude towards the State.[581] However, no further guidance as to the kinds of action envisaged is given in the text of article 5.

568. While there is no requirement that the particular activity in question must be judged as criminal under national law before a State can derogate from the rights of protected civilians under article 5, it is almost certain that the condemned activity will in most cases be the subject of criminal punishment under national law.[582] However, the instances of such action that might be deemed prejudicial or hostile to State security must be judged as such under international law, both for cases arising in occupied and unoccupied territory. Clearly, a civilian cannot shoot a passing enemy soldier, secrete a bomb in the enemy encampment, or otherwise directly and intentionally harm his enemy and hope to retain all the protections of the Fourth Geneva Convention.[583]

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[580] *See* Commentary, p. 58: "The article, as it stands, is involved – one might even say, open to question. It is an important and regrettable concession to State expediency. What is most to be feared is that widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check."
[581] Commentary, p. 56.
[582] Gehring, p. 80 (footnote 73).
[583] Gehring, p. 67.

However, all of these acts involve material, direct harm to the adversary, rather than merely granting support to the forces of the party with which the civilian is aligned.

569. There can be no doubt that the confinement of civilians can fall under those "measures of control and security" which parties to a conflict may take according to article 27 of Geneva Convention IV. This article provides that,

> [p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

570. However, these security measures which States are entitled to take are not specified. Once again, the Convention merely lays down a general provision and a great deal is thus left to the discretion of the parties to the conflict as regards the choice of means. It appears that these would include, for example, a mild restriction such as the duty of registering and also more stringent measures like assigned residence or internment. What is essential is that the measures of constraint adopted should not affect the fundamental right of the persons concerned to be treated with humanity.[584] The right to respect for the human person covers all the rights of the individual, that is, those rights and qualities which are inseparable from a person by the very fact of his or her existence, in particular, the right to physical, moral and intellectual integrity.[585]

571. Although the fundamental human rights of the persons concerned are not, generally speaking, in any danger as a result of some of the administrative measures which might be taken in relation to them, this is not necessarily so in the case of assigned residence or internment. The experience of

[584] Commentary, p. 207.
[585] *Ibid.*, p. 201.

the Second World War has shown in tragic fashion that under such conditions there is a particularly great danger of offences against the human person. Furthermore, all too often in situations of armed conflict, the mere fact of being an enemy subject has been regarded as a justification for internment. For these reasons, the relevant norms of international humanitarian law have been developed such that only absolute necessity, based on the requirements of State security, can justify recourse to these measures, and only then if security cannot be safeguarded by other, less severe means.[586]

572. The drafters of the Fourth Geneva Convention, conscious of these dangers, only permitted internment and assigned residence as a last resort, and makes them subject to strict rules (articles 41 to 43 and article 78).

573. Article 41 of Geneva Convention IV provides as follows:

> Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.
>
> In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

574. Article 41 thus points out that the internment of civilians is admissible only in limited cases and is, in any case, subject to strict rules. These rules are contained primarily in articles 42 and 43, which are based on the general reservation of article 27, paragraph 4, permitting "such measures of control and security as may be necessary as a result of the war". Articles 42 and 43 return to the term "security", itself a somewhat broad criterion, as justification for the restrictions upon liberty that they permit. "Security" remains as vague here as in earlier articles, and the expression does not appear susceptible to more concrete definition. The measure of activity deemed prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the authorities of that State itself.

[586] Commentary, p. 258.

575. Article 42 of Geneva Convention IV provides as follows:

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

576. Clearly, internment is only permitted when absolutely necessary. Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.

577. On the other hand, the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. The fact that an individual is male and of military age should not necessarily be considered as justifying the application of these measures.

578. In relation to occupied territory, specific provisions of the Geneva Conventions apply. Although the present case does not relate to a situation of occupation, it is useful to briefly consider these provisions insofar as they are relevant to the unlawful confinement of civilians. Article 78 of Geneva Convention IV sets up a rule similar to article 41 in situations of occupation, allowing Occupying Powers to intern protected persons under certain conditions.[587] However, internment and assigned residence, whether in the occupying power's national territory or in the occupied

[587] Article 78 of Geneva Convention IV provides as follows: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention."

territory, are exceptional measures to be taken only after careful consideration of each individual case.[588] Such measures are never to be taken on a collective basis.

(ii) Procedural Safeguards

579. In case the internment of civilian persons can be justified according to articles 5, 27 or 42 of Geneva Convention IV, the persons so detained must still be granted some basic procedural rights. These rights are entrenched in article 43 of Geneva Convention IV which provides as follows:

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

580. Article 43 supplements articles 41 and 42 by laying down a procedure which is designed to ensure that the parties to an armed conflict, which resort to measures of internment, respect the basic procedural rights of the persons concerned. As Geneva Convention IV leaves a great deal to the discretion of the detaining party in the matter of the original internment or placing in assigned residence of an individual, the party's decision that such measures of detention are required must be "reconsidered as soon as possible by an appropriate court or administrative board".

581. The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the reviewing body would be bound to vacate them. Clearly, the procedures established in Geneva Convention IV itself are a minimum and the fundamental consideration must be that no civilian

[588] Gehring, p. 87; Commentary, p. 258.

should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands.[589]

582. It need only be mentioned briefly that article 78, relative to the confinement of civilians in occupied territory, also safeguards the basic procedural rights of the persons concerned. It can therefore be concluded that respect for these procedural rights is a fundamental principle of the Convention as a whole.

(c) Findings

583. For the reasons set out above, it is the opinion of this Trial Chamber that the confinement of civilians during armed conflict may be permissible in limited cases, but has in any event to be in compliance with the provisions of articles 42 and 43 of Geneva Convention IV. The security of the State concerned might require the internment of civilians and, furthermore, the decision of whether a civilian constitutes a threat to the security of the State is largely left to its discretion. However, it must be borne in mind that the measure of internment for reasons of security is an exceptional one and can never be taken on a collective basis. An initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 of Geneva Convention IV.

4. Plunder

(a) Introduction

584. Count 49 of the Indictment alleges that the accused Zdravko Mucić and Hazim Delić are responsible, both as direct participants and by virtue of their alleged positions as superiors, for the plunder of money, watches, and other valuable property belonging to persons detained in the

[589] This point is also emphasised in article 132, Geneva Convention IV which provides as follows: "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist. The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time."

Čelebići prison-camp. The two accused are, on this count, charged with a violation of the laws or customs of war punishable under Article 3(e) of the Statute – "plunder of public or private property". Before proceeding to consider the merits of the charge, the Trial Chamber must here establish the meaning to be attached to the offence of "plunder" under international law.

(b) Arguments of the Parties

585. According to the Prosecution, the prohibition of "plunder" or "pillage" is a well-established principle in international law, which is found, *inter alia,* in articles 28 and 47 of the Regulations annexed to the 1907 Hague Convention IV and article 33 of Geneva Convention IV. In its view, in addition to the requirement that the accused be linked to one side of an armed conflict, the elements of this offence are as follows:

> a) The accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict.
> b) The destruction, taking, or obtaining by the accused of such property was committed with the intent to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner.[590]

586. While declining to offer any alternative definition of the offence of plunder, the Defence for the accused Hazim Delić and Zdravko Mucić contend that the prerequisites for its application to the present case have not been met. With reference to Article 1 of the Statute, the Defence asserts that any theft of money, watches and other valuable property as alleged in the Indictment cannot constitute such *serious* violations of international humanitarian law as to give the International Tribunal subject matter jurisdiction over the alleged offences.[591] In addition to this argument, based on the jurisdictional limits placed upon the International Tribunal by its Statute, the Defence further appears to contend that the acts alleged in the Indictment do not in law constitute the offence of plunder. In its submissions in the Defence Motion to Dismiss, the Defence for Mr. Delić thus maintains that "the Hague Regulations forbidding plunder were designed to prevent abuses such as those of the Nazis during the Second World War in taking valuable property such as artworks from occupied nations. They were not designed to punish under international law private soldiers who

[590] Prosecution Pre-Trial Brief, RP D2824; Prosecution Closing Brief, RP D2731.
[591] Motion to Dismiss, RP D5507-D5508; *cf.* Mucić Closing Brief, RP D8093-D8094.

steal property of little value from civilians."[592] Similarly, it was contended by the Defence during closing oral arguments that,

> "[s]tealing watches and coins is not what plunder is about. It is not a serious grave breach of the Geneva Conventions [sic]. Plunder is what Herman Goering did with the art of Eastern Europe. That's what grave breaches are. Or, for example, emptying entire houses of their quality furniture".[593]

(c) Discussion and Findings

587. In considering the elements of the offence of plunder, the Trial Chamber must take as its point of departure the basic fact that international humanitarian law not only proscribes certain conduct harmful to the human person, but also contains rules aimed at protecting property rights in times of armed conflict. Thus, whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party. The basic norms in this respect, which form part of customary international law, are contained in the Hague Regulations, articles 46 to 56 which are broadly aimed at preserving the inviolability of public and private property during military occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated.[594] While subject to a number of well-defined restrictions, such as the right of an occupying power to levy contributions and make requisitions,[595] this rule is reinforced by article 47, which unequivocally establishes that "[p]illage is formally forbidden". Similarly, article 28 of the Regulations provides that "[t]he pillage of a town or place, even when taken by assault, is prohibited".

588. The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. Thus, while article 18 of Geneva Convention III protects the personal property of prisoners of war from arbitrary appropriation, article 15 of Convention I and article 18 of Convention II expressly provide that parties to a conflict must take all possible measures to protect the shipwrecked, wounded and sick against pillage, and prevent their being despoiled.

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[592] Motion to Dismiss, RP D5506-D5507.
[593] T. 15603, closing argument by Mr. Greaves.
[594] This article provides, in full: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."
[595] *See* Hague Regulations articles 48, 49, 51 to 53.

Likewise, article 33 of Convention IV categorically affirms that "[p]illage is prohibited". It will be noted that this prohibition is of general application, extending to the entire territories of the parties to a conflict, and is thus not limited to acts committed in occupied territories.[596]

589. The basic principle that violations of the rules protecting property rights in armed conflict can constitute war crimes, for which individual criminal liability may be imposed, has not been questioned in the present case.[597] Instead, the Defence would seem to challenge the Prosecution's assertions regarding the type, and level, of violations for which criminal responsibility may arise. Intimately connected with this matter is the essentially terminological question of whether the acts alleged in the Indictment, if at all criminal under international law, constitute the specific offence of "plunder". It is to these issues that the Trial Chamber must now turn.

590. In this connection, it is to be observed that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals[598] does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War.[599] Commenting upon this fact, the United Nations War Crimes Commission correctly described such offences as "war crimes of the more traditional type".[600]

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[596] As demonstrated by the inclusion of this prohibition among the provision in Section I of Part III of Geneva Convention IV "Provisions common to the Territories of the Parties to the conflict and to occupied territories".

[597] For an early statement recognising the criminal nature of such acts, see the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, presented to the Preliminary Peace Conference, 29 March 1919 which in its list of war crimes included the acts of pillage, confiscation of property, and exaction of illegitimate or of exorbitant contributions and requisitions, (14 AJIL (1920), p. 95, p. 115). This view was subsequently affirmed by the inclusion of the offence of "plunder of public and private property" in the Nürnberg Charter at Art. 6(b), and Control Council Law No. 10, Art. II 1(b), and the judicial decision based on these instruments, cited below.

[598] *See e.g. The Pohl case*, Vol. V TWC, p. 958 ff.: *The IG Farben case*, Vol. VIII TWC, p. 1081 ff.; *The Krupp case*, Vol. IX TWC, p. 1327 ff; *The Flick case*, Vol. VI TWC, p. 1187 ff.

[599] *See Trial of Alois and Anna Bommer and their daughters* before the Permanent Military Tribunal at Metz, Judgement delivered on 19 Feb. 1947, Vol. IX, Law Reports, p. 62 ff; *Trial of August Bauer*, Judgement of the

591. While the Trial Chamber, therefore, must reject any contention made by the Defence that the offences against private property alleged in the Indictment, if proven, could not entail individual criminal responsibility under international law, it must also consider the more specific assertion that the acts thus alleged do not amount to the crime of "plunder". In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed "pillage", "plunder" and "spoliation". Thus, whereas article 47 of the Hague Regulations and article 33 of Geneva Convention IV by their terms prohibit the act of "pillage", the Nürnberg Charter,[601] Control Council Law No. 10[602] and the Statute of the International Tribunal[603] all make reference to the war crime of "plunder of public and private property". While it may be noted that the concept of pillage in the traditional sense implied an element of violence[604] not necessarily present in the offence of plunder,[605] it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. The Trial Chamber reaches this conclusion on the basis of its view that the latter term, as incorporated in the Statute of the International Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage". It will be noted that it is not possible, absent a complete analysis of the existing legal framework for the protection of public and private property under international humanitarian law, to here set out a more comprehensive description of the circumstances under which such criminal responsibility arises.

592. As indicated above, the Defence further contends that facts alleged in the Indictment do not display a violation of international law of a sufficient serious character as to provide the International Tribunal with subject-matter jurisdiction over the alleged offence. As this is a matter more closely related to the particular charge made in the Indictment than to an analysis of the

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Permanent Military Tribunal at Metz, 10 June 1947; *ibid*., p. 65; *Trial of Willi Buch*, Judgement of the Permanent Military Tribunal at Metz, 2 Dec. 1947, *ibid*., p. 65; *Trial of Elizabeth Neber*, Judgement of the Permanent Military Tribunal at Metz 6 April 1948; *ibid*. p. 65; *Trial of Christian Baus*, Judgement of the Permanent Military Tribunal at Metz 21 Aug. 1947; *ibid*. p. 68 ff.

[600] Law Reports, Vol. XV, p. 130.

[601] Article 6(b) (Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), London, 8 Aug. 1945, 85 U.N.T.S. 251.

[602] Law No. 10 of the Control Council for Germany, Art. 2(1)(b) (Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, *Journal Officiel du Commandement en Chef Francais en Allemagn*e, No. 12 of 11 Jan. 1946.

[603] Statute of the International Tribunal, Art. 3(e).

[604] Law Reports, Vol. IX, p. 64.

[605] *See e.g. The Krupp Trial*, in which it was held that acts of plunder had been committed "through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count and though the results in the latter case were achieved through "contracts" imposed on others, the illegal results, namely, the deprivation of property, was achieved, just as though materials had been physically shipped to Germany", (Vol. IX TWC, p. 1347).

offence of plunder considered *in abstracto*, it will be considered by the Trial Chamber in Section IV following.

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593. This concludes the Trial Chamber's discussion of the law applicable to the present case and the Trial Chamber is thus now in a position to analyse the evidence brought by both the Prosecution and the Defence, in order to make the appropriate findings of the innocence or guilt of the accused as to the charges contained in the Indictment.

IV. FACTUAL AND LEGAL FINDINGS

A. The Nature of the Evidence Before the Trial Chamber

594. As a general principle, the Trial Chamber has attached probative value to the testimony of each witness and exhibit according to its relevance and credibility. The Trial Chamber notes that, pursuant to Rule 89 of the Rules, it is not bound by any national rules of evidence and as such, has been guided by the foregoing principles with a view to a fair determination of the issues before it. In particular, the Trial Chamber notes the finding in the *Tadić Judgment* that corroboration of evidence is not a customary rule of international law, and as such should not be ordinarily required by the International Tribunal.[606]

595. The majority of witnesses who appeared before the Trial Chamber were eyewitnesses and, in some cases, victims of events that occurred in the Čelebići prison-camp. Their testimonies were based on incidents they had seen, heard or experienced and, in many cases, consisted of a recounting of horrific acts, in some cases committed against themselves, their family members or friends. The Trial Chamber recognises that recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions, including feelings of pain, fear and loss. This may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context. The Trial Chamber acknowledges the courage of these witnesses, without whom it would not be able to perform its task.

596. In addition, during the course of the trial, both the Defence and the Prosecution, sought to rely on pre-trial statements made by some witnesses or to use them in cross-examination for the purposes of impeachment. In particular, the Defence sought to impeach a number of witnesses on the basis of inconsistencies between their prior statements and their testimony before the Trial Chamber. In many cases there has been a significant time lapse between the events about which these witnesses were testifying, the making of their prior statements, and their testimony before the Trial Chamber. The Trial Chamber recognises the difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion that one is asked to do so.

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[606] Tadić Judgment, para. 539. See also, Akayesu Judgement, paras. 132-136.

597. The Trial Chamber has considered the oral testimony before it in the light of these considerations. Accordingly, inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, are relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness' testimony unreliable. The Trial Chamber has attached probative value to testimony primarily on the basis of the oral testimony given in the courtroom, as opposed to prior statements, where the demeanour of the relevant witnesses could be observed first hand by the Trial Chamber and placed in the context of all the other evidence before it.

598. However, before proceeding with the facts of the present case, it is necessary to make brief reference to the operation of the appropriate burdens of proof.

B. Burdens of Proof

599. The provisions of Article 21(3), of the Statute presume the innocence of the accused until he or she is proven guilty. The Rules do not, however, anywhere expressly prescribe the burden of proof on any party in the proceedings. In accordance with the procedure for the presentation of evidence contained in Rule 85, when a trial commences on an indictment filed by the Prosecution, alleging offences committed by the accused, it would seem clear that the burden of proving the allegations in the indictment rests on the Prosecution. However, there are situations in a case where the accused himself makes allegations or denies the accepted situation, for example, that he is a person of sound mind. Where the obligation of either party at trial is to satisfy the requirement of a rule of law that a fact in issue be proved or disproved, either by a preponderance of evidence or beyond reasonable doubt, there is a *legal burden* on such party. It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.

1. Burden of Proof on the Prosecution

600. Since 1935, in the English legal system, the burden of proof on the prosecutor has been accepted in criminal cases as being proof beyond reasonable doubt.[607] In *Miller v. Minister of Pensions,*[608] Lord Denning further explained that the expression "proof beyond reasonable doubt" should be understood as follows:

> It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In a subsequent case in 1950, Lord Goddard C.J. suggested that it was sufficient only to charge the jury to be satisfied on the guilt of the accused and it is the duty of the prosecutor to do so.[609] In *Dawson v. R.*[610] Dixon C.J. of Australia disapproved of the practice of departing from the time-honoured formula of proof beyond reasonable doubt as formulated in *Woolmington v. DPP*. He rejected the substitutes as having never prospered either in England or Australia. Furthermore, in the words of Barwick C.J., in *Green v. R.*:

> A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgement.[611]

601. The general principle to be applied by the Trial Chamber is clearly, on the basis of this brief analysis, that the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.

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[607] *Woolmington v. DPP* [1935] AC 462.
[608] *Miller v. Minister of Pensions* [1947] 1 All ER 372, 373-4.
[609] *See R. v. Kritz* [1950] 1 KB 82, 90.
[610] *Dawson v. R.* (1961) 106 CLR1, 18.
[611] *See Green v. R.* (1972) 46 ALJR 545.

2. Burden of Proof on the Defence

602. The burden is different where it is the accused who makes an allegation, or when the allegation made by the prosecutor is not an essential element of the charges in the indictment. In such a situation the legal burden in a civil case will satisfy the standard required. In *R. v. Carr-Briant,*[612] Humphreys J. stated:

> In any case where either by Statute or common law, some matter is presumed against an accused person, 'unless the contrary is proved' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that the burden may be discharged by evidence satisfying the jury of that which the accused is called upon to establish.

This standard has been approved by the English Judicial Committee of the Privy Council in *Sodeman v. R.*,[613] where it was applied to a defence of insanity. The Trial Chamber will further consider this issue in its discussion of the special defence of diminished mental capacity below.

603. Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the accused is required to prove any issues which he might raise on the balance of probabilities. In relation to the charges being laid against him, the accused is only required to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he brings should be enough to suggest a reasonable possibility. In any case, at the conclusion of the proceedings, if there is any doubt that the Prosecution has established the case against the accused, the accused is entitled to the benefit of such doubt and, thus, acquittal.

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604. Bearing these considerations in mind, the Trial Chamber here proceeds to examine the superior responsibility of Zejnil Delalić in relation to the charges laid against him, before engaging in the same analysis of the evidence in relation to Zdravko Mucić and Hazim Delić. Upon the completion of this discussion and the making of factual and legal findings on the alleged superior responsibility of each of these accused, the Trial Chamber considers each of the counts of the

[612] *R. v. Carr-Briant* [1943] KB 607, 612.

Indictment in turn and makes its findings on the responsibility of the accused for the charges contained therein.

C. Superior Responsibility of Zejnil Delalić

1. Introduction

605. On the basis of his alleged position of superior authority over the Čelebići prison-camp, Zejnil Delalić is charged with responsibility as a superior for all but one of the criminal acts alleged in the Indictment.[614] In addition to being charged with responsibility as a direct participant for the unlawful confinement of civilians (count 48), Delalić is accordingly charged in the Indictment with responsibility pursuant to Article 7(3) of the Statute for acts of murder (counts 13 and 14), acts of torture (counts 33 to 35), acts causing great suffering or serious injury to body or health (counts 38 and 39), inhumane acts (counts 44 and 45), the subjection of detainees to inhumane conditions constituting the offences of wifully causing great suffering or serious injury to body or health and cruel treatment (counts 46 and 47), and the unlawful confinement of civilians (count 48).

606. In sub-section F below, the Trial Chamber will make its factual findings in relation to the underlying offences for which the accused is alleged to be criminally liable in this manner. It is first necessary to assess whether, as the Prosecution alleges, Zejnil Delalić has been shown *inter alia* to have been in such a position of superior authority in relation to the Čelebići prison-camp and that the conditions for the imposition of criminal responsibility pursuant to Article 7(3) of the Statute have been met.

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[613] *Sodeman v. R.* [1936] 2 A11 ER 1138.
[614] Zejnil Delalić is not charged with responsibility under count 49 (Plunder of Private Property).

2. The Indictment

607. The relevant general allegations made in the Indictment in relation to the superior responsibility of Zejnil Delalić read as follows:

> 3. Zejnil Delalić, born 25 March 1948, co-ordinated activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from approximately April 1992 to at least September 1992 and was the Commander of the First Tactical Group of the Bosnian Muslim forces from approximately June 1992 to November 1992. His responsibilities included authority over the Čelebići camp and its personnel.
>
> [. . .]
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> 7. The accused Zejnil Delalić, Zdravko Mucić and Hazim Delić had responsibility for the operation of Čelebići camp and were in positions of superior authority to all camp guards and to those other persons who entered the camp and mistreated detainees. Zejnil Delalić, Zrdavko Mucić and Hazim Delić knew or had reason to know that their subordinates were mistreating detainees, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. By failing to take the actions required of a person in superior authority, Zejnil Delalić, Zdravko Mucić and Hazim Delić are responsible for all the crimes set out in this indictment, pursuant to Article 7(3) of the Statute of the Tribunal.

3. Arguments of the Parties

608. The Trial Chamber has considered the lengthy submissions of the parties on this matter, along with the evidence presented by them. An overview of this material is set out here.

(a) The Prosecution

609. According to the Prosecution, Zejnil Delalić had direct control over, and responsibility for, the Čelebići prison-camp and the camp commander, almost from the very moment it was established in May 1992, up until the time when he left Bosnia and Herzegovina on 25 November 1992. It is contended that, at the very least, Mr. Delalić was in a position to exercise

considerable authority, control and influence over the prison-camp itself, the commander of the prison-camp and the region in which it was located.[615]

610. More specifically, the Prosecution asserts that, from the time Zejnil Delalić returned to Konjic from abroad at the end of March or beginning of April 1992, he played a key role in the military affairs of the area. It is asserted that he was appointed co-ordinator of the Konjic Defence forces on 18 May 1992, and subsequently, on 11 July 1992, commander of Tactical Group 1. According to the Prosecution, Mr. Delalić was, in both of these roles, in a position of authority, with powers of control and influence over the Čelebići prison-camp and its commander. It is contended that this position arose as a result of both formal and *de facto* forms of command and control, and that it is immaterial that no official instrument can be identified specifically conferring formal responsibility for the camp on Mr. Delalić.[616]

611. In support of these contentions the Prosecution relies on evidence, considered below, which is purported to directly demonstrate Mr. Delalić's control and authority over the Čelebići prison-camp. In addition, it is argued that this evidence is reinforced by evidence relating to the general situation pertaining in the Konjic region, and the overall position and functions exercised by Zejnil Delalić at the relevant time. From this more general perspective, it is asserted that, due to the fluid situation existing in the region at the time, in which well developed structures were lacking, persons often carried out functions, including command functions, without formal appointments. Accordingly, it is the Prosecution's position that the evidence of Mr. Delalić's authority and control over the Čelebići prison-camp must be considered in light of the fact that no other person or group of persons has been identified as having had formal or informal authority to supervise the commander of the Čelebići prison-camp. Indeed, it is submitted that the evidence shows that in the area of Konjic, and Bosnia and Herzegovina generally, there were no laws or regulations setting forth who had control over military prisons in general, and the Čelebići prison-camp in particular. It is noted that, when the prison-camp first began its operations, the HVO, MUP, TO and the War Presidency were all involved in various aspects of its operation, and submitted that Mr. Delalić's involvement therein is logical, given his official role as co-ordinator. In this context it is said to be immaterial whether Mr. Delalić's authority over the camp and its personnel arose out of either an

[615] Prosecution Closing Brief, RP D2977, Prosecution Response to the Motion to Dismiss, RP D5804.
[616] Prosecution Closing Brief, RP D2833-D2834, D2870.

express delegation, or by an implicit delegation, or even by an abdication of responsibility by the bodies involved in the operation of the prison-camp.[617]

612. Moreover, the Prosecution asserts that, even if Zejnil Delalić is not characterised as a "superior" of the camp commander and considered to have been in a position to control him and the other perpetrators of offences, he would still have superior responsibility for the crimes committed in the prison-camp by virtue of the authority he exercised in relation to the prison-camp and the Konjic region. In its view, it is clear that he was one of the leading figures of authority in the region at that time, and that his power and influence extended to matters pertaining to the Čelebići prison-camp and at the very least to the classification and release of detainees. Consequently, whatever Zejnil Delalić may claim about the limits of his authority, it is said to be manifest that his means of intervention to prevent the commission of crimes in the prison-camp or to ensure the punishment of perpetrators were not entirely foreclosed. On this basis, it is submitted that an interpretation of the word "superior" in Article 7(3) to exclude a person in Mr. Delalić's position would substantially narrow the scope of protection afforded by international humanitarian law.[618]

(i) Status Prior to 18 May and as a Co-ordinator from 18 May to 11 July 1992

613. According to the Prosecution, Zejnil Delalić returned to Konjic from abroad at the end of March or beginning of April 1992. As he was relatively wealthy, had business connections, and was willing to put his services and even his own property at the disposal of the "Bosnian cause", he immediately made an impression of being someone with the ability to contribute substantially to the defence of Konjic. It asserts that the evidence indicates that he was, from the beginning, part of the War Presidency of the Konjic municipality, as well as a member of the Armed Forces of Bosnia and Herzegovina, in particular of the Territorial Defence Municipal Headquarters of Konjic. He was actively involved in the seizure of the JNA military facility in Čelebići on 19 April 1992, and he also participated thereafter in the military operations at Donje Selo and Bradina. It is said that the significance of his role in the region is evidenced by a "special authorisation", dated 2 May 1992, which he received prior to his appointment as a co-ordinator. This document, signed jointly by the President of the Konjic War Presidency and the Commander of the Konjic TO Headquarters, authorised Zejnil Delalić to negotiate and conclude contracts and agreements of great importance, including on such matters as arms supplies and joint actions of troops. The Prosecution contends

[617] Prosecution Closing Brief, RP D2833, D2854, D2859-D2860.
[618] Prosecution Closing Brief, RP D2855-D2858.

that the importance of his position at this time is further shown by a mission which he undertook to Zagreb between 5 and 10 May 1992. During this mission, which concerned, *inter alia,* the procurement of weapon supplies, Mr. Delalić gave an extensive interview to a Croatian television talk-show, "Slikom na sliku", in the course of which he was presented as the commander of the TO of Konjic, and behaved, and was treated, as an important military commander. The Prosecution submits that whether or not Mr. Delalić was formally the commander of the TO of Konjic, this suggests, at the very least, that he was already at this time a person of recognised authority.[619]

614. On 18 May 1992, Zejnil Delalić was officially appointed "co-ordinator" of the Konjic Defence Forces by the President of the War Presidency in Konjic, a position which, according to the instrument of appointment, empowered him to "co-ordinate the work of the defence forces of the Konjic Municipality and the War Presidency".[620] The Prosecution emphasises that the term "co-ordinator" is not a usual military function and submits that it was created to deal with the special circumstances present in the Konjic municipality. It notes that, at this time, the military operations in the area were in the process of becoming organised, with tensions and differences existing between the various bodies, including the HVO and the TO. In its view, because of the exceptional nature of the situation and of the creation of this position, it is to be expected that there were no clearly defined formal powers and responsibilities of the "co-ordinator". Instead, it asserts, Mr. Delalić's powers and authority were simply those that he exercised in practice, including those which he assumed for himself under the title of his position. Against this background the Prosecution argues that the evidence indicates that Mr. Delalić as co-ordinator had both military and civilian functions, and that in this position he possessed the authority to issue orders.[621]

615. With specific reference to the authority exercised by Zejnil Delalić over the Čelebići prison-camp, the Prosecution alleges that the evidence demonstrates that he had the power to determine who would, and who would not, be detained in the prison-camp. Among the evidence relied on in support of this contention is the testimony given by Witness D, a member of the Military Investigative Commission which was established to classify the detainees in Čelebići and to determine whether they should be released. Reliance is thus placed, *inter alia,* on this witness' understanding that Mr. Delalić had authority over the Commission and also had powers of decision concerning which detainees should be released, and his evidence of how Mr. Delalić participated in a meeting held by the Commission and there explained the different categories that were to be used

[619] Prosecution Closing Brief, RP D2829-D2833, Prosecution Response to the Motion to Dismiss, RP D5803-D5804.
[620] Exhibit 99-7/5, Prosecution Closing Brief, RP D2854.

to classify the prisoners. It is further noted that this witness reported how, during the time of the Commission's work in the Čelebići prison-camp, he was told by Zdravko Mucić that the decisions on which prisoners were to be released would be made by "commander Delalić". According to the Prosecution, this evidence that Mr. Mucić, as commander of the camp, considered Mr. Delalić his superior, is confirmed by the testimony of Nedeljko Draganić. It is thus noted how, according to this witness Mr. Mucić, in the course of a discussion with members of the witness' family concerning the release of prisoners from the prison-camp, declared that that he would have to ask Mr. Delalić about releases.[622]

616. More generally, the Prosecution relies on evidence showing that Zejnil Delalić made a number of visits to the prison-camp and was treated as a person in authority. Several witnesses testified to having seen Mr. Delalić in the Čelebići prison-camp at the beginning, or mid-part of June 1992. Specifically, the Prosecution notes that the witness Branko Sudar reported that when Mr. Delalić was about to enter Hangar 6, the guards said: "Sit still. The commander is coming".[623] It contends that, although the Defence has suggested that the witnesses might have mixed up Zejnil Delalić with one of his relatives, this suggestion is refuted by Witness N, who recognised both Mr. Delalić and his nephew, and testified that both were present at the camp.[624]

(ii) Status as Commander of Tactical Group 1 from 11 July to November 1992

617. According to the Prosecution, Zejnil Delalić was on 11 July 1992 appointed commander of Tactical Group 1 (hereafter "TG 1") for the area of Hadžići, Pazarić, Konjic and Jablanica, by Sefer Halilović, chief of the Armed Forces Main Staff. Pursuant to a second order, issued by Halilović on 27 July 1992, Zejnil Delalić's authority was extended to include the areas of the Drežnica, Prozor and Igman, with the troops over which he had command expressly designated as "all formations of the Armed Forces of the Republic of Bosnia and Herzegovina in the area".[625] The Prosecution submits that the clear language of this order, conferring Mr. Delalić with authority over all troops in the area, would have included the troops operating in the Čelebići prison-camp. It accordingly contends that these orders of appointment, as well as other documents, show that Mr. Delalić had command authority over Čelebići prison-camp in his capacity as commander of TG 1. At the very

[621] Prosecution Closing Brief, RP D2851-D2854.
[622] *Ibid*., RP D2868-D2869.
[623] Prosecution Closing Brief, RP D2867.
[624] Prosecution Closing Brief, RP D2867-D2869.
[625] Exhibit 99-7/7, Prosecution Closing Brief, RP D2848.

least, it argues, the evidence concerning the organisation of TG 1 demonstrates that the extent of Mr. Delalić's authority in this position was a matter of practice rather than theory. In this respect, it submits, Mr. Delalić's position as commander of TG 1 was the same as when he was co-ordinator, so that under the title of his position and by virtue of his personal influence and authority he was capable of exerting considerable control and influence in the region. Thus, the Prosecution asserts that the evidence shows that Mr. Delalić in his position as commander of TG 1 continued to exercise control over Čelebići prison-camp, with power to determine who would, and who would not, be detained in the prison-camp.[626]

618. Among the evidence on which the Prosecution relies in support of this proposition are the circumstances surrounding the release of the three detainees Dr. Petko Grubač, Witness P and Miro Golubović. In particular, emphasis is placed on the fact that the release forms for these prisoners were all signed by Zejnil Delalić on 17 and 22 July 1992. Noting the Defence assertion that these documents were signed by Mr. Delalić not on his own authority but "for" the investigative body of the War Presidency, the Prosecution contends that the evidence demonstrates that no such investigating committee existed at this time.[627]

619. The Prosecution further places great weight on two written orders signed by Zejnil Delalić concerning the Čelebići prison-camp, which are asserted to provide direct and incontrovertible evidence that he was a superior authority in relation to the camp. The Prosecution thus notes that Mr. Delalić, as commander of TG 1, issued an order on 24 August 1992 directed to the OŠOS (Armed Forces Municipal Command) of Konjic which was copied to the Čelebići prison-camp administrator, containing, *inter alia,* an order concerning the functioning of the Čelebići prison-camp.[628] A second order addressed directly to the Čelebići prison-camp administrator was issued by Mr. Delalić on 28 August 1992.[629] Asserting that no substantial evidence has been given in support of Mr. Delalić's submission that these were exceptional orders issued by him at the request of the Supreme Command, the Prosecution contends that the fact that the Supreme Command may have issued orders to Mr. Delalić which he then passed on, does not indicate that he was not the superior in relation to the Čelebići prison-camp. In contrast, it is said to be a normal function of commanders to pass on orders to their subordinates. Moreover, the Prosecution claims that, even if the contention that these were exceptional orders is accepted, this nevertheless represents a

[626] Prosecution Closing Brief, RP D2870, Response to Motion to Dismiss, RP D5796.
[627] Prosecution Closing Brief, RP D2866-D2867.
[628] Exhibit 99-7/10.
[629] Exhibit 99-7/11.

recognition from the Supreme Command that Zejnil Delalić was in practice, and now formally, the person responsible for the prison-camp. In this respect, the Prosecution notes that the order issued by Mr. Delalić on 24 August 1992 specifically states that the commander of the Konjic OŠOS "is responsible to me for prompt and effective implementation of this order".[630]

620. Moreover, it is asserted by the Prosecution that the evidence shows that Zejnil Delalić, during the relevant period, made a number of visits to the Čelebići prison-camp, and that he was treated there as a person in authority. Thus, it submits that Mr. Delalić twice accompanied representatives of the ICRC when they visited the prison-camp, and that this body subsequently sent its reports to him. It is further noted that a Bosnian television crew made a television report in the prison-camp sometime around mid-August of 1992, and submitted that the evidence of Dr. Grubač and Witness P demonstrates that Mr. Delalić at this time made arrangements for the two doctors to be interviewed as part of this report. The Prosecution notes that Mr. Delalić himself appeared in the report, providing information about the prison-camp. It is argued that the Defence has not been able to offer a credible explanation as to why, if Mr. Delalić had no responsibility for the operation of the Čelebići prison-camp, he would accept to be interviewed in this way about the conditions in it.

621. The Prosecution further relies on a substantial body of documentary evidence seized at what is described as Zejnil Delalić's business premises in Vienna, Austria, in March 1996 (hereafter "Vienna Documents"). It asserts that these documents, many of which are alleged to be authored by Mr. Delalić himself, confirm that he, in his capacity both as co-ordinator and then commander of TG 1, had authority and responsibility for the Čelebići prison-camp. A description of this fairly voluminous material is not warranted at this juncture. The weight to be attached to this evidence will be considered by the Trial Chamber in sub-section 4(c) below.

(iii) Knowledge

622. According to the Prosecution, the evidence establishes beyond reasonable doubt that Zejnil Delalić knew, or must have known, or had information from which he could conclude, that crimes were about to, or had been, committed in the Čelebići prison-camp by guards or those responsible for the administration of the camp. Moreover, the Prosecution contends that

[630] Prosecution Closing Brief, RP D2864-D2865.

Mr. Delalić would in any event have had such information if he had supervised the camp properly, including by establishing an effective system of reporting.

623. Among the evidence relied on by the Prosecution in this context is a document which is described as a report of the Military Investigative Commission at the Čelebići prison-camp, describing maltreatment and physical abuse of the detainees.[631] The Prosecution notes that Zejnil Delalić, in his interview with Prosecution investigators, denied having received this report, but acknowledged that it appears to be addressed to him as the co-ordinator of combat activities. It contends that, given the fact that Mr. Delalić was the person actively involved in the establishment of this commission, he was involved on an ongoing basis with its work. Furthermore, given that the report was accompanied by the resignation of all members of the commission, there can be no reasonable doubt that Mr. Delalić must either have received the report or been aware of its existence.[632]

624. As evidence of Zejnil Delalić's knowledge, the Prosecution further notes, *inter alia*, that he received a report from the ICRC in which Hazim Delić was mentioned as having mistreated prisoners. Reference is further made to Mr. Delalić's admission during his interview with Prosecution investigators that he saw seven to eight wounded prisoners when he visited the infirmary at Čelebići prison-camp. Similarly, the Prosecution asserts that notes written by Mr. Delalić on the release forms of Witness P and Dr. Grubač, requiring the latter to "continue to take care of the injured prisoners",[633] demonstrate that he was aware of the need for the continued presence of two doctors in the camp on a daily basis.[634]

(iv) Failure to Act

625. According to the Prosecution, in view of the authority, control and influence that Zejnil Delalić exercised in the Konjic region, as well as his direct authority over the Čelebići prison-camp and its personnel, there existed a wide range of measures which he would have been in a position to undertake to prevent or punish the crimes committed in the camp. Specifically, it is asserted that the evidence indicates that Mr. Delalić was in a position to use his authority and influence to take at

[631] Exhibit 162.
[632] Prosecution Closing Brief, RP D2842.
[633] Prosecution Closing Brief, RP D2841, D2866.
[634] Prosecution Closing Brief, RP D2840-D2844.

least the following steps:

> (a) initiating appropriate forms of immediate preventive action and constraining measures;
> (b) conducting bona fide investigations and prosecutions, or transferring matters to the relevant national authorities;
> (c) discharging, removing, or demoting the perpetrators (including Mucić);
> (d) devising and implementing internal policies to ensure that violations of international humanitarian law were prevented, and providing clear orders, instructions and training in this regard;
> (e) establishing proper reporting systems;
> (f) registering any complaints or reports of the unlawful activities to higher military or other authorities;
> (g) addressing these matters internally, making interventions, or offering recommendations for their prevention or punishment;
> (h) using his influential position to direct appropriate policy and practice, or taking persuasive action;
> (i) publicly recording condemnation of the illegal activities;
> (j) fully co-operating with relevant external bodies and organisations; and
> (k) resigning from his positions.[635]

626. Furthermore, the Prosecution maintains that, even if Zejnil Delalić's authority and control over the prison-camp as a whole and its commander is not accepted and the arguments of the Defence are thus supported on this point, Mr. Delalić nevertheless possessed authority in respect of the prison-camp, including the ability to classify and release the detainees. It accordingly submits that it is clear that Mr. Delalić, at the very least, could have taken the following action:

> (a) issued orders and instructions to the camp commander and guards to properly and expeditiously determine the detainees' status and ensure that they were treated humanely in the interim in accordance with the provisions of international humanitarian law, especially in situations when they were being mistreated;
> (b) issued orders and instructions to the camp commander and guards to release detainees that were unlawfully confined;
> (c) used his position to make recommendations to improve, and to influence, policy with respect to the camp;
> (d) registered complaints or reports to other or higher military or other authorities;
> (e) demanded further information about the situation in the camp;
> (f) publicly recorded condemnation of the illegal activities;
> (g) resigned from his positions.[636]

627. It is the Prosecution's position that it is not necessary to prove that Zejnil Delalić could have undertaken all of these measures. In contrast, it contends that to demonstrate criminal liability, it is

[635] Prosecution Closing Brief, RP D2836-D2837.
[636] Prosecution Closing Brief, RP D2836.

sufficient to show that he could have done any one or more of them, and failed to do so. As a matter of fact, the Prosecution asserts that Mr. Delalić failed to carry out any such measure.

(b) The Defence

628. According to the Defence[637], Zejnil Delalić at no time had command and control over the prison-camp at Čelebići. It is recognised that Mr. Delalić was appointed co-ordinator on 18 May 1992, and submitted that he remained in this position until 30 July 1992, when he assumed command of Tactical Group 1. Contrary to the assertions of the Prosecution, however, the Defence contends that Mr. Delalić had no command function, or superior authority at all in his position as co-ordinator, and that, in his latter role as commander of TG 1, he possessed no command authority over the prison-camp at Čelebići, its personnel, guards or others.

629. More generally, the Defence contends that the Prosecution, in order to prove the charges against Zejnil Delalić, must demonstrate the chain of command in the legal organs and institutions which existed in the Konjic municipality in 1992. It argues that the evidence in this respect shows that the structures of the legally constituted organs and institutions of Konjic, both before and during the war, existed and functioned according to law. Moreover, it asserts that the evidence establishes that Mr. Delalić was never a member of any of these institutions or structures, that he never was in a position of superior authority to any of these institutions or structures, and that he never received any superior authority or command responsibility in connection with the prison-camp at Čelebići, or its personnel. It further submits that, during the period relevant to the Indictment, there was no confusion in the creation of the armed forces, nor in connection with the chain of command and control. The Defence accordingly asserts that the TO, HVO and MUP all had their respective structures, chain of command and experienced commanding personnel, and that the Joint Command likewise had a full complement of experienced officers and commanders in its structure.[638]

630. On the question of the authority over the Čelebići prison-camp, the Defence avers that, according to the laws that were in effect immediately before the war and for a period at the beginning of the war, civilian prisoners were under the jurisdiction of the Ministry of Justice and

[637] Defence here indicating the Defence for the accused Zejnil Delalić.
[638] Delalić Closing Brief, RP D8540-D8546.

the regular courts. Military prisons were exclusively under the jurisdiction of the JNA, and the TO system did not envisage the establishment of prisons or detention centres. At the beginning of the war in 1992, jurisdiction over prisons and prisoners was clearly defined and shared between the MUP, the HVO and investigating organs created by the Joint Command. Specifically in relation to Čelebići, the Defence argues that the evidence demonstrates that it was the Chief of Police (MUP) in Konjic who, in consultation with the HVO, decided to hold the arrested individuals in the barracks of Čelebići, and that it was the MUP and HVO military police which provided security for the barracks and the prison-camp until the second half of June 1992. The Defence asserts that, from mid-June until mid-July 1992, the guards assigned to Čelebići were subordinate to the command of the TO and the HVO, and that thereafter, particularly from August, most of the guards were members of the TO and under the command of the Municipal TO staff.[639]

(i) Status Prior to 18 May and as Co-ordinator from 18 May to 30 July 1992

631. According to the Defence, Zejnil Delalić arrived in Konjic in April 1992 to attend his brother's funeral. He remained in Konjic when the war began, and returned to Munich, Germany in mid-November 1992. The Defence submits that, from early April until 17 May 1992, Mr. Delalić contributed to the defence efforts in Konjic in the area of logistics, drawing on his expertise as a businessman in negotiating and concluding contracts. His activities included arranging for the procurement of vehicles, radios and uniforms, and the setting up of hospitals and shelters for the civilian population. It maintains that, while it is correct that Mr. Delalić participated in the liberation of the Čelebići barracks in April 1992, he did so as an unarmed volunteer who was given the task of ensuring that the weapons from the Čelebići barracks were transported to a safe location. Contrary to the assertion of the Prosecution, the Defence contends that Mr. Delalić did not participate in the military operation at Donje Selo.[640]

632. On 2 May 1992 Zejnil Delalić received an authorisation from the War Presidency in connection with the procurement of equipment for the preparation of the defence of Konjic. The Defence asserts, however, that such authorisations were common during this period and were not a reflection of influence, authority or importance. It submits that this particular authorisation permitted Mr. Delalić to perform certain logistical tasks in Konjic and Croatia, but did not give any

[639] *Ibid.*, RP D8550.
[640] *Ibid.*, RP D8540-D8546.

military authority or function to him, nor did it confer upon him any command function or position of authority.

633. On 18 May 1992, while he was away in Zagreb, Zejnil Delalić was appointed co-ordinator pursuant to a decision of the War Presidency. The Defence submits that, both according to the terms of this appointment and having regard to his activities as a co-ordinator, Mr. Delalić had in this role no superior authority as alleged in the Indictment. Thus, it notes that the decision expressly appoints Mr. Delalić as "co-ordinator", not as a commander. In the view of the Defence, co-ordination implies, by definition, mediation and conciliation, and does not connote command authority or superior authority. Indeed, the Defence submits that a person appointed to co-ordinate among legally constituted institutions is in a position of subordination to these institutions. It thus points out that the co-ordinator has his functions delegated to him by the body naming him and relies upon the authorisation of the delegator to carry out his duties.

634. More specifically, the Defence argues that Zejnil Delalić was appointed co-ordinator to fill a specific role in relation to the War Presidency and the armed forces in Konjic Municipality. This appointment was given to him because it was thought that he would be effective as a kind of mediator in dealing with problems between the War Presidency, a civilian body, and the different components which composed the defence forces in Konjic. Thus, the Defence contends that Mr. Delalić was, in this position, a mediator who could not independently make decisions or issue orders. It accordingly submits that when Mr. Delalić signed an order as co-ordinator, he did so to signify that he was present as a witness to an agreement. Moreover, it emphasises that the War Presidency did not, and could not, provide Mr. Delalić with any authority it did not possess itself. In this respect the Defence submits that the War Presidency was a civilian body without authority over the military, and could not, therefore, provide Mr. Delalić with any such powers. Similarly, the War Presidency had no authority to arrest or detain persons in custody, nor to establish a prison, and could not, therefore, confer such authority on Mr. Delalić. The Defence maintains that the evidence accordingly establishes that he, in his position as co-ordinator, had no command authority or superior responsibility in relation to any military formation, nor to the Čelebići prison-camp. Instead, it holds that Zejnil Delalić in this role had as his primary responsibility the provision of logistical support in the preparation of the war effort.[641]

[641] *Ibid.*, RP D8525-D8530.

635. According to the Defence, Zejnil Delalić was on 27 June 1992 mobilised into the ranks of the TO and was, from this day until approximately the end of July of that year, involved in fighting in the mountains around the region of Borci, approximately 40 kilometres east of the town of Konjic. It argues that, during this operation, Mr. Delalić was a rank and file soldier who communicated with the town of Konjic in relation to logistics, and submits that he possessed no superior authority or command function in this position.[642]

636. Commenting on the evidence relied on by the Prosecution, the Defence contends that there exists such considerable contradictions and inconsistencies in the testimony given by Witness D so as to cause serious doubts as to the accuracy of his testimony. Moreover, it notes that, contrary to the evidence given by this witness, several Defence witnesses testified that Mr. Delalić never worked with the Military Investigative Commission and possessed no authority over this body. The Defence accordingly submits that when the evidence given by Witness D is seen in light of all the evidence of the case, there is no evidence that Mr. Delalić had any position of authority or superiority within the civil or military structures in Konjic, or that he had any connection to the Military Investigative Commission, the Čelebići prison-camp or its personnel.[643]

637. In relation to the three release forms of detainees from the Čelebići prison-camp, signed by Zejnil Delalić in the latter part of July 1992, the Defence submits that these documents all were issued by the Investigating Body of the War Presidency. Thus, it notes that each form was signed by Mr. Delalić "for" the Head of the Investigating Body, and argues that it is clear from this wording that he in signing the documents was acting not as the person in authority, but on behalf of another person so authorised. Moreover, it maintains that the evidence demonstrates that Mr. Delalić was authorised to sign all three release forms by Midhat Cerovac, the commander of the Konjic TO. The Defence thus submits that, taken as a whole, the release forms and the testimony given in relation to them, demonstrate that Zejnil Delalić had no authority to release prisoners from the Čelebići prison-camp.[644]

(ii) Status as Commander of Tactical Group 1 from 30 July to November 1992

638. According to the Defence, Zejnil Delalić assumed command of Tactical Group 1 on 30 July 1992, his appointment having been issued by the Supreme Command three days earlier. It is

[642] *Ibid.*, RP D8522-D8523.
[643] *Ibid.*, RP D8512.

submitted that, both according to the terms of his appointment and having regard to his activities in this position, the evidence demonstrates that Mr. Delalić, as commander of Tactical Group 1, possessed no superior authority over the Čelebići prison-camp or its personnel.

639. The Defence submits that the central issue in this regard is the composition of Tactical Group 1. It observes that this body was established as a temporary formation, charged with the specific task of lifting the siege of Sarajevo, and asserts that Zejnil Delalić, as the commander of this formation, could only command the units specifically assigned to him by the Supreme Command. In this respect, it maintains that the use of the term "all formations" in Mr. Delalić's appointment of 27 July 1992, was vague and not implementable, and that, accordingly, the evidence demonstrates that Mr. Delalić never was in command of all formations in the municipalities enumerated in this document. It is thus argued that it is clear from the evidence that Mr. Delalić, as commander of TG 1, was not conferred with authority over a geographical region, and possessed no authority over Municipal TO staffs, the MUP, the HVO, Military Police Units and War Presidencies, or over any institutions in the areas from which the Tactical Group received formations for combat operations. Likewise, the Defence contends that TG 1 had no authority over such institutions as prisons, hospitals, military investigation commissions or their personnel. Specifically, it asserts that no guard or member of staff of the prison-camp at Čelebići was ever subordinated to TG 1.[645]

640. In response to the Prosecution's claim that the orders issued by Zejnil Delalić in relation to the Čelebići prison-camp demonstrates that he in fact possessed power of command and control in relation to the prison-camp, the Defence maintains that in 1992 it was common for a commander in the armed forces of Bosnia and Herzegovina to be given additional tasks, such as the transmission of orders, that were not ordinarily part of his functions and duties. It asserts that such an assignment of a specific task did not expand the authority or functions of the subordinate commander. With specific reference to the orders issued by Mr. Delalić on 24 and 28 August 1992,[646] it is argued that it is clear from the preambles of these documents that Mr. Delalić, on these occasions, acted merely as a conduit and that he transmitted these orders pursuant to orders issued to him by the Supreme Command.[647]

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[644] *Ibid.*, RP D8510-D8512.
[645] *Ibid.*, RP D8497-D8505.
[646] Exhibits 99-7/10, 99-7/11.
[647] Delalić Closing Brief, RP D8491-D8494.

(iii) Knowledge

641. According to the Defence, the evidence presented in this case demonstrates that Zejnil Delalić did not possess the requisite knowledge of the crimes alleged in the Indictment to be held criminally liable pursuant to Article 7(3) of the Statute. Among the arguments made in its analysis of the evidence brought by the Prosecution are the following.

642. Recognising that a number of witnesses testified to having seen Zejnil Delalić in the Čelebići prison-camp at some point in 1992, the Defence submits that this establishes nothing more than the fact that he was occasionally present there. Noting that it is well established that the Čelebići barracks were used for a number of things, such as a weapons repair depot and the training and swearing in of troops, it argues in this respect that such presence is consistent with Mr. Delalić's role as co-ordinator. It is asserted that proof of mere presence does not establish that Mr. Delalić had any contact with the prison-camp, nor that he had any information which could lead to a showing of the requisite degree of knowledge pursuant to Article 7(3).[648] The Defence further denies that the release forms for Dr. Grubač and Witness P demonstrate Mr. Delalić's knowledge concerning the commission of the acts alleged in the Indictment. It submits that it is not only unclear whether the notation on these documents that the two doctors continue to care for injured prisoners was written by Mr. Delalić, but, moreover, that there is considerable evidence that those injured persons in the Čelebići prison-camp were thought to have been injured in the course of combat operations.[649] Moreover, it is asserted that there exists a considerable problem of authenticity and reliability in relation to the document which is purported to be the final report of the Investigative Commission.[650] In response to the Prosecution's assertion that this document is addressed to Zejnil Delalić as "Co-ordinator of combat operations", the Defence contends that Mr. Delalić never held this position, and submits that there is no proof that he ever received or saw this document.[651]

(iv) Failure to Act

643. According to the Defence, there is no evidence to show that Zejnil Delalić, between April and November 1992, had the authority or means to prevent the commission of the alleged offences in

[648] Delalić Closing Brief, RP D8389, RP D8398-D8399.
[649] *Ibid*., RP D8396.
[650] Exhibit 162.
[651] Delalić Closing Brief, RP D8393.

the Indictment, or to investigate or punish the perpetrators thereof. It is submitted that the law of command responsibility requires a commander to act reasonably in this respect, having regard to his rank, experience and the extent and level of his command. Asserting, *inter alia*, that there were no investigative or judicial institutions functioning in the region at the time relevant to the Indictment and that Zejnil Delalić as a commander of TG 1 did not have the authority to discipline soldiers under his command, the Defence contends that the specific circumstances in relation to Mr. Delalić are such that even if he had a duty to act, his situation would have precluded him from adopting the required measures.[652]

4. Discussion and Findings

644. The Trial Chamber has set out the relevant arguments of the parties with respect to the criminal liability *vel non* of Zejnil Delalić in respect of the offences with which he is charged. The relevant part of the Indictment and the related counts have also already been set out. It is thus necessary here to discuss the arguments of counsel and to analyse the facts in the issues involved. The gravamen of the issues before the Trial Chamber rests on the determination of whether Zejnil Delalić, the first accused, in the time-period relevant to the Indictment was in a position of superior authority to Zdravko Mucić, Hazim Delić, and Esad Landžo, the second, third and fourth accused persons in the Indictment, respectively, as well as the other guards and those other persons who entered the prison-camp and mistreated the detainees in the Čelebići prison-camp.

(a) Preliminary Issues

645. The Trial Chamber deems it convenient and appropriate to discuss a few preliminary issues which it considers necessary for the elucidation of its reasoning. First, the Trial Chamber observes the complete difference of approach in consideration of the same issue between the Prosecution and the Defence. The Prosecution, in its effort to establish the superior authority of the accused, has relied on several pieces of evidence from which it has inferred the valid exercise of *de facto* authority in the absence of *de jure* authority. The Defence has relied entirely on the establishment of a *de jure* exercise of authority. Secondly, the Prosecution has considered the exercise of superior authority in a general sense without consideration of the nexus giving rise to a superior-subordinate

[652] *Ibid.*, RP D8386-D8389.

relationship. The Defence has, however, insisted on the establishment of the superior-subordinate relationship in the exercise of responsibility. Thirdly, the Prosecution would seem to have ignored the principle of vicarious criminal responsibility which is the basis of the doctrine of command responsibility, the *alter ego* of superior authority.

646. The Prosecution has taken the position that the absence of *de jure* authority is not fatal to a finding of criminal responsibility. It is sufficient if there exists, on the part of the accused, a *de facto* exercise of authority. The Trial Chamber agrees with this view, provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control.

647. The view of the Prosecution that a person may, in the absence of a subordinate unit through which the authority is exercised, incur responsibility for the exercise of superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility. The Trial Chamber is unable to agree with the submission of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority. The expression "superior" in article 87 of Additional Protocol I is intended to cover "only … the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter … is under his control".[653] Actual control of the subordinate is a necessary requirement of the superior-subordinate relationship. This is emphasised in the Commentary to Additional Protocol I.[654]

648. The Prosecution appears to extend the concept of the exercise of superior authority to persons over whom the accused can exert substantial influence in a given situation, who are clearly not subordinates. In other words, it seems to be the Prosecution's position that the perpetrators of crimes for which the superior is to be held responsible need not be subordinates within the meaning of article 87 of Additional Protocol I. The Prosecution relies for this proposition on a passage in the

[653] Commentary to the Additional Protocols, para. 3544.

Hostage case which may be appropriate within its context. It is, however, clearly not applicable to the facts of the instant case.

As cited above in Section III, the tribunal in the *Hostage case* stated as follows:

> The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordination are [sic] relatively unimportant. His responsibility is general and not limited to a control of units directly under his command.[655]

649. The closest to the *dictum* above within which the facts of the case of Mr. Delalić could be brought, is his appointment as Commander of Tactical Group 1 on 27 July 1992, which took effect on 30 July 1992. Otherwise, his appointment as co-ordinator in May 1992, which was a civilian appointment, did not place him in any position of superior authority within the meaning of article 87 of Additional Protocol I. This appointment did not vest any status upon Mr. Delalić. The Prosecution would appear to have relied on the *dictum* in the *Hostage case* for the proposition that the criminal liability of a "superior" is not confined to acts of perpetrators who are directly subordinate in a chain of command. This latter proposition is valid in those cases where a commanding general is charged with the maintenance of peace and order and the punishing of crime and protecting lives and property, where subordination is regarded as relatively unimportant. It would be straining the imagination to uncomfortable limits to aim at bringing Mr. Delalić's activities within this category.

(b) Analysis of the Activities of Zejnil Delalić and the Concept of Superior Responsibility

650. The activities of Zejnil Delalić with respect to the war effort in the Konjic area from the date of his arrival there in April 1992, to his departure towards the end of November 1992, may be discussed under three phases. These are: (a) before 18 May 1992; (b) 18 May to 30 July 1992; and (c) 30 July to 25 November 1992. Each of these periods is significant for the role played by Mr. Delalić in the activities of the war effort in the Konjic area, and the recognition and status he enjoyed by virtue of his contribution - personal, financial and material - to the war effort in Bosnia

[654] Ibid.
[655] United States v. Wilhelm List et al., Vol XI, TWC, 1230, 1260.

and Herzegovina. It is, therefore, convenient for the Trial Chamber, and appropriate for the proper determination of the criminal responsibility of Zejnil Delalić, to here consider these time-periods in turn.

(i) Before 18 May 1992

651. It is important for the purposes of this Judgement to consider critically the evidence relied upon by the Prosecution to demonstrate the ability of Zejnil Delalić in this period to exercise superior authority in the activities of the war effort of Bosnia and Herzegovina in the Konjic area. It is uncontested that Mr. Delalić returned to Konjic from Austria at the end of March or beginning of April 1992.[656] He was recognised as a person with considerable wealth, who contributed generously and substantially to the defence of Konjic. In addition, he had management experience and extensive business connections in western European countries. Mr. Delalić was willing to put his wealth and personal endeavours at the disposal of the authorities organising the war effort in the Konjic area. Evidence of his enthusiasm, and the general recognition and appreciation of the community was given by General Jovan Divjak,[657] Salih Ruvić,[658] Major Šefkija Kevrić,[659] Dr. Rusmir Hadžihusejnović[660] and Brigadier Asim Džambasović.[661] As recognised by the Prosecution, these credentials by themselves did not place Mr. Delalić in a position of superiority. Instead, according to the Prosecution: "[t]his led to his gradual acquisition of authority and influence in the area".[662]

652. As evidence of how Zejnil Delalić acquired authority and influence during this period the Prosecution refers to a document purported to be signed by him in which he described his early involvement in the war.[663] Reference is also made to a War Veterans Association form completed by Mr. Delalić in which he describes himself as a member of the War Presidency of Konjic Municipality.[664] He is also said to have been a member of the Armed Forces of Bosnia and Herzegovina, more specifically the Territorial Defence Municipal Headquarters of Konjic.[665] Mr. Delalić is also credited by some for participating in a significant manner in the seizure of the

[656] *See* Exhibit 99-5, 22 Aug. 1996, p. 5.
[657] *See* T. 8646.
[658] *See* T. 12502-T. 12503.
[659] *See* T. 11127.
[660] *See* T. 11794.
[661] *See* T. 12725-T. 12726.
[662] *See* Prosecution Closing Brief, RP D2858.
[663] *See* Exhibit 124, pp. 1-2.
[664] *See* Exhibit 147A.

JNA facility in Čelebići on 19 April 1992. This was stated in Exhibit 144,[666] one of the Vienna Documents bearing his signature. He confirmed this claim in his interview with Prosecution investigators where he described himself as the leader of the group of 20 to 25 volunteers who carried out the operation.[667] In this statement, Mr. Delalić declared that he was present at the meeting of the War Presidency where the decision was made to conduct an operation under his supervision to take over the Čelebići barracks and seize the weapons that were stored there.[668] The weapons seized were transported to his sister's house in Ovčari for their final distribution.[669] The importance and significance of the participation of Mr. Delalić in these matters has been, however, considerably minimised by the testimonies of Major Šefkija Kevrić[670] and Midhat Cerovac.[671]

653. On 2 May 1992, Zejnil Delalić was, by a "special authorisation" signed jointly by Dr. Rusmir Hadžihusejnović as the President of the Konjic War Presidency and Esad Ramić as Commander of the Konjic TO Headquarters, authorised to negotiate and conclude contracts and agreements of great importance.[672] Between 5 – 10 May 1992, Mr. Delalić undertook a mission to Zagreb for the acquisition of weapons for the Konjic municipality. The evidence before the Trial Chamber demonstrates that although the War Presidency was a civilian institution, Mr. Delalić was at no time a member of this body. In his testimony before this Tribunal, Iljas Hadžibegović stated that "He [Delalić] could only have been invited to attend a meeting of the Presidency, but he certainly was not a member of that Presidency".[673]

a. Seizure of the Čelebići Barracks and Warehouses

654. The seizure of the JNA facility in Čelebići by a group of 20 to 25 persons did not, by itself, attract any official attention and was not accorded any official recognition. There is no evidence that the group made the seizure under the aegis of any of the recognised commands, or that Zejnil Delalić was the commander of the unit. In fact the Defence has pointed out that the correct position of the seizure of the Čelebići barracks and warehouses is that Mr. Delalić did not lead the

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[665] *See* Prosecution Closing Brief, RP D2857.
[666] *See* Exhibit 144, p. 4.
[667] *See* Exhibit 99-5/13-17.
[668] Exhibit 99-5/15.
[669] *See also* T. 12258.
[670] *See* T. 11128-T. 11129, T. 11242-T. 11243.
[671] *See* T. 11631-T. 11632.
[672] *See* Exhibit 99-7/4.
[673] *See* T. 10233.

operation, but rather that he received the task of transporting weapons from Čelebići to a safe location. In his interview with Prosecution investigators, Mr. Delalić declared that the person in charge of commanding the military side of the operation was Midhat Cerovac.[674] In his testimony, Midhat Cerovac stated that the take-over of the Čelebići facility was peaceful. He led a group tasked with engaging in combat if there was any resistance which there was not.[675] Major Šefkija Kevrić, an assistant commander for logistics in the Municipal TO staff said that the task assigned Mr. Delalić was that of transporting weapons found to Kevrić, who was waiting for Mr. Delalić at a farm in Ovčari owned by Zejnil Delalić's sister.[676]

b. Authorisation of 2 May 1992

655. The authorisation of 2 May 1992 is one of the credentials which enabled Zejnil Delalić to exercise some authority. The nature of this authorisation, which is clearly not unique, is to enable Mr. Delalić to procure equipment for the defence of Konjic. The authorisation was signed by Dr. Rusmir Hadžihusejnović, the President of the War Presidency, and Esad Ramić, the Commander of the Municipal TO staff. In his testimony Dr. Hadžihusejnović stated that such authorisation was given to anyone who could be of assistance to the war effort in the procurement of material and supplies required. According to this witness, Zejnil Delalić was a civilian, not a soldier, and was performing a civilian function.[677]

c. Authorisation of 9 May 1992

656. There is a similar authorisation of 9 May 1992 by the Minister of National Defence of Bosnia and Herzegovina, Jerko Doko.[678] This is an authorisation empowering Zejnil Delalić to acquire certain materials for the needs of the defence of the municipality. It is an example of a power of attorney. The authorisation confers no status upon Mr. Delalić, neither does it place the recipient in any hierarchy of authority. Certainly it does not subordinate any officials to the recipient. Accordingly, it does not constitute the creation of a relationship of superior and subordinate.

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[674] *See* Exhibit 99-5, pp. 16
[675] *See* T. 11535-T. 11536.
[676] *See* T. 11128-T. 11129, T.11242-T. 11243; *see also* T. 12258, S. Džumhur.
[677] *See* T. 11786-T. 11788, T.11808-T. 11811, T.11880, Dr. Hadžihusejnović.
[678] *See* Exhibit D145-A9-7/1.

d. Conclusion

657. The position of Zejnil Delalić with respect to the Čelebići prison-camp during the relevant time-period seems to the Trial Chamber to be clear and unarguable. Mr. Delalić was not a member of the unit which took over the JNA facility in Čelebići. Major Cerovac was the commander of this operation and his testimony stands unchallenged. Mr. Delalić was employed in the transaction in a ministerial capacity to transport weapons collected to Major Kevrić, who was waiting at Ovčari. There is clearly no basis for assuming that, in this transaction, he operated as a person of superior authority. It is important to note that, the Prosecution in its submissions in this connection refers to the Čelebići compound as a whole, not that part of it which was subsequently used for the detention of captured Bosnian Serb prisoners, here referred to as the prison-camp.

658. More generally, it seems clear to the Trial Chamber that the transactions in which Zejnil Delalić was involved in this first time-period did not vest or confer on him political or military authority. He did not acquire any civilian status which placed him into any hierarchy of authority creating a relationship of superior and subordinate. Our analysis of the facts resolves the situation into the simple case of a well-placed influential individual, clearly involved in the local effort to contribute to the defence of the Bosnian State. This effort and the recognition which accompanied it did not create a relationship of superior and subordinate between him and those who interacted with him.

(ii) 18 May to 30 July 1992: Zejnil Delalić and the Role of Co-ordinator

a. Appointed Co-ordinator – Meaning and Functions

659. Zejnil Delalić was appointed "co-ordinator of the Konjic Municipality Defence Forces" on 18 May 1992. The instrument of appointment was signed by Dr. Rusmir Hadžihusejnović, President of the War Presidency in Konjic. Mr. Delalić was thus empowered to "directly co-ordinate the work of the defence forces of the Konjic Municipality and the War Presidency".[679] The expression "co-ordinate" used in the appointment is significant. The term used admittedly is not a usual military term, and the function is unusual. The office was created to deal with the special circumstances in the Konjic municipality. The Prosecution has expressed the view that "… in such a fluid situation, in which well-developed structures were lacking, a strong and influential

[679] *See also* Exhibit 99-7/5, Exhibit 99-1, p. 13 and Exhibit 99-5, 23 Aug. 1996, pp. 11-15.

personality like Delalić could have acquired such a significant degree of authority to make him a leading Commander in Konjic".[680]

660. It seems to the Trial Chamber that the Prosecution has overstated the position. The creation of a functionary to reconcile areas where there are difficulties is an exercise to avoid conflicts between the institutions or functionaries. The meaning of the word "co-ordination" implies mediation and conciliation. The expression does not connote, and cannot reasonably be construed to mean, command authority or superior authority over the parties between which he mediates. The general principle is that a co-ordinator has his functions prescribed. He relies upon these functions and works within the given guidelines. On the basis of the guidelines under which Mr. Delalić was to operate, and in the light of the testimony of Dr. Hadžihusejnović, there is no doubt that Mr. Delalić had no command authority or superior responsibility conferred on him. Not being a member of the armed forces, he could not have been in a position of superior authority to any of the armed forces in relation to which he exercised the functions of mediation.

661. The evidence before the Trial Chamber is that the position of co-ordinator was not provided for in the military structures of the SFRY or in the military regulations of the armed forces of Bosnia and Herzegovina in 1992. Accordingly, a co-ordinator appointed by a civilian authority, as Mr. Delalić was, cannot be interposed within the established system of command leadership over the Bosnian forces. Also, it cannot be considered a superior position or a position that vests command authority on an individual functionary.[681] The Trial Chamber recognises the particularly difficult and skilful task of a person assigned the function of mediation. The Trial Chamber, however, does not agree that the appointment was necessitated by any lack of clear organisation in the Konjic area and the frequent changing of the TO Commanders. Apart from the inevitably disruptive activities of the war, the Trial Chamber accepts the submission of the Defence that the "evidence concerning the structures of the legally constituted organs and institutions in Konjic Municipality clearly shows that both before and during the war these bodies existed and functioned according to the law".[682]

662. The Prosecution has relied on functions associated with co-ordination of activities to argue that the exercise of such ancillary functions brings the co-ordinator within the meaning of superior

[680] Prosecution Closing Brief, RP D2854.
[681] *See* Vejzagić Report, pp. 32-33; and Hadžibegović Report, p. 32.
[682] Delalić Closing Brief, RP D8548.

authority. Reference has been made to the signing of orders by Zejnil Delalić.[683] Another purported example of superior authority is that Mr. Delalić carried on his assignment without supervision and apparently without a superior to whom he reported. The Trial Chamber does not share this view. The superior-subordinate relationship is the only *indicium* to determine the exercise of command authority. The Prosecution contends that Mr. Delalić was not only a co-ordinator but, during the same period, was also co-ordinator of combat activities.[684] There is evidence that Mr. Delalić was at sometime both co-ordinator and member of the TO.[685] The Trial Chamber does not discern any conflict in the discharge of the two roles. The only difficulty may arise where the discharge of the functions of co-ordinator *simpliciter* is relied upon for the claim of superior authority. There is no doubt that, if Mr. Delalić were shown to have been appointed to a command position in the TO, such an appointment would satisfy the criterion of superior authority under article 7(3) or articles 77 and 86 of Additional Protocol I. However, the appointment of Mr. Delalić at the relevant time was necessary to fill a gap created by the frictions among the armed forces in their dealings with each other. The particular skill and experience of Mr. Delalić was the immediate answer. Concisely stated, his duties were to operate as an effective mediator between the War Presidency, which is a civilian body, and the Joint Command of the Armed Forces. His regular intervention was designed to facilitate the work of the War Presidency with the different formations constituting the defence forces in Konjic. In this capacity he was not expected to make any independent decisions. Mr. Delalić was accountable to, and would report orally or in writing to, the body within the War Presidency which gave him the task.

663. Zejnil Delalić was not, at any time, a member of the War Presidency. His appointment as co-ordinator did not involve membership rights. By his appointment as co-ordinator, he was not a superior to anyone and he had no subordinates under him. It is clear from the appointment that this position is personal, attaching to no office. Clearly stated, Mr. Delalić never enjoyed any status of command authority or superior authority in the armed forces in Konjic municipality by virtue of his appointment as co-ordinator.[686] The Trial Chamber has heard uncontradicted evidence that Mr. Delalić was not a member of the Joint Command.

664. The primary responsibility of Zejnil Delalić in his position as co-ordinator was to provide logistical support for the various formations of the armed forces. These consisted of, *inter alia*,

[683] *See e.g.* Exhibit 127.
[684] *See* Prosecution Closing Brief, RP D2850
[685] *See* T. 11587-T. 11588.
[686] *See* T. 11133-T. 11134, T. 11042, Šefkija Kevrić.

supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up electricity grids. Mr. Delalić never co-ordinated between the military forces, that is the TO and the HVO. His duties were confined to problems between the civilian and military authorities. The evidence of Arif Sultanić[687] and Šaban Duračić[688] can be relied upon for such a conclusion. Mr. Delalić was, therefore, not in a position of command or a superior in relation to those who worked with him to carry out his duties of providing supplies or repairing much-needed facilities of electric supply to villages in the municipality of Hadžići.[689]

665. The Prosecution relies on the participation of Zejnil Delalić in the military operations at Donje Selo and Bradina as evidence of his exercise of command authority or superior authority. To this end, it notes that Mr. Delalić, in his interview with Prosecution investigators, declared that his main task in these operations "was to co-ordinate all these forces, these three different forces, with the War Presidency of the municipality".[690] This claim is rejected by the Defence, which submits that Mr. Delalić's responsibilities as a co-ordinator were to streamline the relationship between the military on the one part, and the War Presidency on the other. It is accordingly submitted by the Defence that Mr. Delalić, as co-ordinator, had no command authority or superior responsibility in relation to any military activities or military formation. The Trial Chamber has not received any evidence that Mr. Delalić had any military position or task in relation to the Donje Selo and Bradina operations. The testimony of Midhat Cerovac is that the order for the Donje Selo operation was prepared and signed by the Commander of the Joint Command, Omer Borić, and its Chief of Staff, Dinko Zebić.[691] Similarly, on the testimony of Major Šefkija Kevrić, the Bradina operation was carried out by the Joint Command. The combat orders were signed jointly by the Commander of the Joint Command, Omer Borić and his deputy, Dinko Zebić. The Commander of the operations at Bradina was Zvonko Zovko.[692] The testimony of Enver Tahirović[693] and Midhat Cerovac,[694] who were officers and present at each of the operations, was that Zejnil Delalić was not present in either operation, and had neither military position nor task in them. The Prosecution still disputes the claim of Enver Tahirović that Mr. Delalić was not in Konjic at the time, based on the evidence of Witness P[695] and Ahmed Jusufbegović[696] who testified that Mr. Delalić was in his house in

[687] *See* T. 11020-T. 11024, T. 11034-11036.
[688] *See* T. 12591.
[689] *See* T. 12555.
[690] Exhibit 99-1, p. 20.
[691] *See* T. 11541.
[692] *See* T. 11366.
[693] *See* T. 11366-T. 11367.
[694] *See* T. 11542.
[695] *See* T. 4492.

Konjic during the night between 26 and 27 May 1992, and there received Witness P immediately after the latter's arrest in Bradina. Even if this testimony were considered to be an accurate recollection of the relevant time-period, this does not detract from the conclusion that Mr. Delalić had no commanding role in the operations at Bradina and Donje Selo.

b. The Gajret Ceremony

666. The Prosecution further relies on video footage of Zejnil Delalić's presence at a send-off ceremony for a unit of soldiers from Konjic which had been subordinated to TG 1 (the Gajret unit) on or about 15 June 1992, as evidence indicating his exercise of an important military role.[697] At the time of the ceremony, the Gajret unit was under the command of Mustafa Polutak. As co-ordinator, Mr. Delalić provided supplies to this unit, including communications equipment, quartermaster supplies, uniforms and cigarettes. It is, therefore, possible that he was invited to the departure ceremony because of his association with the unit. There is evidence which remains uncontradicted that Mr. Delalić had no command authority or superior authority in his relationship with the Gajret unit or any command position in the forces of the Konjic municipality.[698]

667. In his testimony, General Polutak, the Commander of TG 1 at the time, said that the Gajret unit was subordinated to TG 1 pursuant to orders issued by Esad Ramić, the Commander of the Municipal TO Staff. There is, therefore, no basis for assuming that Mr. Delalić could have exercised any command authority or superior authority either *de facto* or *de jure* over this unit, the footage of the occasion in Exhibit 116 notwithstanding.

c. Participation in the Borći Operation as Co-ordinator

668. Zejnil Delalić's participation in the military operation in the region of Borći between the end of June and the beginning of August 1992 is another basis on which the Prosecution asserts that he exercised command authority. It would seem to the Trial Chamber that the Prosecution completely ignores the evidence before it. It is relevant to point out, as the Defence for Mr. Delalić adumbrated in their reply, that Mr. Delalić was still a co-ordinator during this period, and was saddled with co-

[696] *See* T. 11979.
[697] *See* Exhibit 116.

ordinating activities even though he had just become a rank and file soldier. Mr. Delalić continued to communicate with the town of Konjic in relation to logistics. According to Šefkija Kevrić,[699] Mr. Delalić did not take part in combat activities and was not in a position of superior authority during this period. He was without command functions and could not issue any orders.[700] Midhat Cerovac also testified that Mr. Delalić had no military command, since he was not within the structure of command and control. His military task was simply to provide logistic support from the area of Vranske Stijene. Mr. Delalić did not take part in the military or technical planning of the Borći operation, nor did he issue orders in relation to it. In the preparation for the operation, Mr. Delalić made arrangements for the relevant needs for first aid equipment, transport conveyance and such supplies and facilities as could be provided by the civilian authorities, all consistent with his assignment as a co-ordinator.

d. Superior of the Čelebići Prison-Camp

669. The Prosecution is strongly of the view that the participation of Zejnil Delalić in the administrative processes of the Čelebići prison-camp *per se* makes him a superior of that institution and renders him responsible for the crimes of those working in that institution. The Prosecution evidence before the Trial Chamber attempts to show that Mr. Delalić was, on occasion, influential in the release of persons detained therein, and in suggesting the criteria for the release of persons detained. There is no evidence that the Čelebići prison-camp came under Mr. Delalić's authority by virtue of his appointment as co-ordinator. Analysis of the relevant evidence further demonstrates conclusively the failure of the Prosecution to show that Mr. Delalić was in a position of command authority or superiority in relation to the Čelebići prison-camp and in a superior-subordinate relationship with those who have been alleged to have committed offences therein. The Trial Chamber does not consider the acts of Mr. Delalić, as relied upon by the Prosecution, as an unequivocal exercise of superior authority.

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[698] *See* T. 11157, Šefkija Kevrić; T. 11543-T. 11545, Midhat Cerovac; T. 11812, Dr. Hadžihusejnović; T. 12594, Šaban Duračić; T. 12785-T. 12786,. Mustafa Polutak; T. 12956, Šućro Pilica.
[699] *See* T. 11163-T. 11164.
[700] *See* T. 11381, Enver Tahirović; T. 11813, Dr. Hadžihusejnović; T. 12600, Šaban Duračić.

e. Issue of Orders to Institutions by Zejnil Delalić

670. It is the contention of the Prosecution that Zejnil Delalić could issue orders to various municipal institutions in Konjic and its personnel. The evidence relied upon is the testimony of Witness P. In the presence of this witness, Mr. Delalić telephoned Dr. Ahmed Jusufbegović, Director of the Health Centre, and asked him to treat him so that he could work.[701] In his testimony Dr. Jusufbegović stated that Mr. Delalić, who was very well known to him, telephoned him urging him to find a place in his Medical Centre for Witness P, who is a medical practitioner. The witness was unable to do so because of political problems which made it impossible for Witness P to work in the Medical Centre. Dr. Jusufbegović testified that he was not bound to obey Mr. Delalić, who could not give him orders, not being a superior authority to him. He could only receive orders from the War Presidency.[702] It is obvious from the above evidence that Mr. Delalić could not issue orders to those not subordinate to him.

671. The signature of Zejnil Delalić on orders, along with other signatures, has been construed by the Prosecution as evidence of the exercise of command authority or superior authority by Mr. Delalić. A direct example is an order of 3 June 1992 for the reopening of the railway line between Pazarić and Jablanica.[703] This document was authenticated by Arif Sultanić[704] and by Brigadier Vejzagić.[705] In his comment as to the signature of the co-ordinator in this order, Dr. Rusmir Hadžihusejnović suggested "[y]es, this would happen occasionally, that in some documents his signature would also feature. But this signature only meant that he was present there because he was a person who was supposed to transmit certain information to the War Presidency from the command post or vice-versa. And in no way did that mean that he could take decisions".[706] Brigadier Vejzagić testified "[t]he fact that the co-ordinator has signed it means that he is aware that he has to co-operate with them, because this has to do with his responsibilities regarding materials, manpower, electric power, so the establishment of the railway line itself is more a civilian undertaking …".[707] Similarly, Arif Sultanić stated "[h]is role was to co-ordinate all these activities, together with us, and upon the completion of the task to report back to the municipal authorities and

[701] *See* T. 4494-T. 4495.
[702] *See* T. 11948-T. 11949.
[703] *See* Exhibit 127.
[704] *See* T. 11022-T. 11023.
[705] *See* T. 10549-T. 10550.
[706] *See* T. 11795.
[707] *See* T. 10550.

the TO command, that is, the joint staff of the TO and the HVO, which of course he did".[708] Midhat Cerovac also confirmed that "his principal task was to set in motion the railway line between Jablanica and Pazarić, which was of particular significance for three municipalities".[709]

672. It may accordingly be noted that the general attitude preferred by the Defence is that Zejnil Delalić signed this order as a witness. However, Brigadier Vejzagić acknowledged that the signature of Mr. Delalić was needed to have the order effected quicker.[710] It seems to the Trial Chamber that the signature of Mr. Delalić as co-ordinator did not confer validity on the order, which would have been valid without it. It was merely a formal acknowledgement of the involvement of the co-ordinator. Thus this does not suggest any command authority or superior responsibility on the part of Mr. Delalić.

673. The other two orders signed by Zejnil Delalić as co-ordinator are Exhibits 210 and 211. As with Exhibit 127, Brigadier Vejzagić testified that the co-ordinator merely signed here as witness, because he had to report back to the municipal authorities that the commanders had reached agreement.[711] The Prosecution criticises this reasoning on the ground that there is no distinction between Mr. Delalić and the other signatories on the face of the documents. With due respect to the Prosecution, the essential difference between the co-ordinator and the other functionaries is a difference between executive capacity which the other signatories enjoy, and a merely ministerial status which the co-ordinator has. All the co-ordinator achieves is to complement the position of the other functionaries who are essential signatories. Mr. Delalić as co-ordinator could not sign, therefore, any document as a person in authority, with a power to issue orders. The evidence of Šefkija Kevrić,[712] Midhat Cerovac,[713] Šaban Duračić[714] and Dr. Rusmir Hadžihusejnović[715] unequivocally expressed this. The Trial Chamber accepts the view that the co-ordinator had no power or authority to issue binding orders. The Trial Chamber, therefore, finds that Mr. Delalić, in his position as co-ordinator, did not issue any orders.

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[708] *See* T. 11023.
[709] *See* T. 11574.
[710] *See* T. 10552.
[711] *See* T. 10891.
[712] *See* T. 11151-T. 11154.
[713] *See* T. 11652.
[714] *See* T. 12592.
[715] *See* T. 11794-T. 11795, T. 11917-T. 11918.

f. Zejnil Delalić and the Power to Make Appointments

674. The Prosecution claims that Zejnil Delalić had the authority to make appointments. As an example of the exercise of such authority, reference is made to the appointment of Zdravko Mucić as commander of the Čelebići prison-camp, a 'proposal' made during an informal discussion. It so happened that Mr. Mucić actually took up the position. The Defence rejects this assertion on the ground that a proposal of a name during an informal meeting in no way can amount to the authority to appoint attributed to such a functionary. The Defence suggests that Mr. Delalić had no knowledge as to when and how Mr. Mucić became the Warden of Čelebići prison-camp. The Trial Chamber is of the view that, on the premise that Mr. Delalić had authority to make appointments, it is paradoxical that he would propose the name of Mr. Mucić to someone else for appointment. It is interesting to observe that there is no evidence as to whom the name was proposed, and who actually had the power to appoint. It would also seem that Mr. Delalić had no knowledge of when Mr. Mucić actually became commander of the Čelebići prison-camp.[716]

675. Again, it is suggested that Zejnil Delalić appointed Witness D as a member of the Military Investigation Commission. This contention is rejected by the Defence, who argue that Witness D had testified that he had absolutely no information regarding the duties and authority of Zejnil Delalić.[717] Witness D admitted in his testimony that he was aware that members of the Croatian community in Bosnia and Herzegovina were appointed to their duties and posts by the HVO,[718] and that, while in Konjic, he reported only to Ivan Azinović at the HVO headquarters.[719]

676. The evidence is that Witness D arrived in Konjic from Mostar with a special permit issued by the HVO in Mostar.[720] He reported to the President and the Deputy Commander of HVO, Ivan Azinović, at the HVO headquarters in Konjic.[721] It follows invariably that Witness D was appointed by the HVO. According to the testimony of the witness, which remains uncontradicted, the TO and HVO staff of Konjic Municipality created the Commission and were the bodies with

[716] *See* Exhibit 99-5 p. 45.
[717] *See* T. 5260, T. 5263.
[718] *See* T. 5256.
[719] *See* T. 5316.
[720] *See* T. 5166, T. 5247.
[721] *See* T. 5168.

authority over it.[722] The Commission was a separate institution from the prison-camp at Čelebići, and had no competence or jurisdiction over its operation.[723]

677. Witness D testified that he never released any prisoners and did not know of anyone else specifically authorised to do so.[724] He had several contacts with Zejnil Delalić, by whom he was issued his military uniforms.[725] The issuing of uniforms is consistent with the work of Mr. Delalić in logistics.

678. According to Witness D, he, Zejnil Delalić, and most members of the Military Investigation Commission, met on 1 June 1992 in the Administration Building (Building B) of the Čelebići prison-camp.[726] Mr. Delalić, who appeared to be directing the proceedings, read out some kind of order which had arrived by fax,[727] which he explained to them as indicating how they were to conduct the interrogation of detainees based on a list of categories which Mr. Delalić had established.[728] At the end of the meeting, Witness D received a note from Mr. Delalić addressed to Ivan Azinović requesting that Witness D be issued with a permit enabling him to travel between Konjic and Mostar on private business.[729]

679. The Defence for Zejnil Delalić has criticised the testimony of Witness D as manifesting inconsistencies in the following respects. First, the meeting is said to have taken place on 1 June 1992 while the fax,[730] which Witness D claims was read out by Mr. Delalić at the meeting, is dated 7 June 1992. Surely, if the fax was read out at the meeting it cannot be dated later than 1 June 1992. Either the meeting was held on 7 June 1992 when the fax was received, or there was no meeting at all. The second inconsistency is that Witness D, in his testimony, first stated that Mr. Delalić had established the categories into which the detainees were to be placed, but later denied personal knowledge of who designed the system of categories.[731] Thirdly, the witness, during cross-examination, was no longer certain whether he received the note[732] introducing him to Ivan

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[722] *See* T. 5330.
[723] *See* T. 5371.
[724] *See* T. 5289.
[725] *See* T. 5182.
[726] *See* T. 5174-T. 5175.
[727] *See* Exhibit 160, T. 5176.
[728] *See* T. 5178.
[729] *See* Exhibit 161, T. 5179-T. 5180.
[730] Exhibit 160.
[731] *See* T. 5286-T. 5287.
[732] Exhibit 161.

Azinović, personally from Mr. Delalić at the meeting on 1 June 1992, or whether Mr. Delalić sent the note to him through some other person.[733]

680. These inconsistencies aim at demonstrating the unreliability of the testimony with respect to the authority of Zejnil Delalić over the Commission and his influence in other areas. In the view of the Defence, it is obvious from the evidence that Witness D, being a Croat, could only be appointed to the Military Investigation Commission by the HVO, and definitely not by Mr. Delalić who had no such authority.[734] The note purportedly given to Witness D by Mr. Delalić, was, on his own evidence, worthless as it was not necessary for him to present it to Ivan Azinović to obtain his permit to travel to Mostar.[735]

681. The Trial Chamber recognises the fact that the categories of detainees were read out from the fax dated 7 June 1992. The witness may be rightly cautious in attributing the creation of the categories to Mr. Delalić. The Trial Chamber finds that Witness D was sent to Konjic by the HVO in Mostar and was the HVO member of the Military Investigative Commission in Konjic. Witness D appears to have had no knowledge regarding the duties and responsibilities of Zejnil Delalić or his status *vis-à-vis* the Commission. He knew that the Commission was under the authority of the TO and HVO staff of Konjic to whom the files on detainees prepared by the Commission were sent. The doubts created by this evidence regarding the relationship of Mr. Delalić to the Commission and the prison-camp were cleared by the evidence of Dr. Rusmir Hadžihusejnović, Midhat Cerovac, Šefkija Kevrić, and Enver Tahirović. In their testimony they disclosed that Mr. Delalić never worked with the Military Investigative Commission, and that he had no authority over it. They also testified that Mr. Delalić never had any authority over the prison-camp at Čelebići and that neither the civilian nor the military institutions in Konjic gave any authority to him. Furthermore, Mr. Delalić had no authority to appoint the head of the Military Investigative Commission.[736]

682. The evidence before the Trial Chamber is that the relevant authorities in the Konjic municipality responsible for the Military Investigative Commission and the prison-camp at Čelebići were in place and working. There is no evidence that Zejnil Delalić had any position of authority or

[733] *See* T. 5272-T. 5274.
[734] *See* T. 11804-T. 11805; T. 11603-T. 11604; T. 11275, T. 11202-T. 11203, T. 11328; T. 12267-T. 12268; T. 12593.
[735] *See* T. 5273-T. 5274.
[736] *See* T. 11804-T. 11805; T. 11603-T. 11604.

superiority over any of them. The Trial Chamber, therefore, finds that Mr. Delalić could not exercise any authority over the prison-camp at Čelebići, its commander or its personnel.

683. Even if it is conceded, which it is not, that Zejnil Delalić held the meeting with members of the Military Investigative Commission where the guidelines for detention and release were discussed, this could have been a gratuitous exercise of his enthusiasm to be relevant, demonstrated by his meddlesomeness in a situation where he was not needed. The relevant institutional structures were in place, the personnel were not lacking, and he could therefore not possess even a *de facto* status.

684. As co-ordinator, Zejnil Delalić had no authority to release prisoners. The Prosecution relies on three release orders, signed by him in the latter part of July 1992, being Exhibits 95 (dated 17 July), 154 and 169 (both dated 22 July), relating to the release of Miro Golubović, Witness P and Dr. Petko Grubač, respectively. It is important and pertinent to observe that all the release forms were signed 'for' the Head of the Investigating Body. The Prosecution regards this evidence as relevant because "they are the only three release forms in evidence for the entire period of June and July 1992".[737] It is obvious from the evidence before the Trial Chamber that Mr. Delalić did not sign these orders in his capacity as "co-ordinator". He did so for the Head of the Investigating Body of the War Presidency.

685. The Prosecution has challenged the credibility of the testimony of Midhat Cerovac that he asked Zejnil Delalić to sign the release forms on his behalf, noting that this witness testified unequivocally that he never had authority over the Čelebići prison-camp or authority to release prisoners.[738] Notwithstanding the reasons adduced, it is sufficient for present purposes that Mr. Delalić did not sign the three release forms in his capacity and status as co-ordinator. He had no authority to do so in that capacity. It was, therefore, clear that he was not in a position of superior authority when he was acting upon the orders of Midhat Cerovac to sign the forms. Witness D testified, and it remains uncontradicted, that the TO and HVO staff of Konjic Municipality formed the Military Investigative Commission. They were the competent body with authority over the Commission.[739] There is also uncontradicted evidence that the Commission was a separate institution from the prison-camp at Čelebići. The Commission had no jurisdiction over the operation of the prison-camp.

[737] Prosecution Closing Brief, RP D2867.
[738] *See* T. 11711-T. 11712.

g. Conclusion

686. There is thus no evidence that Zejnil Delalić, as co-ordinator, had responsibility for the operation of the Čelebići prison-camp with superior authority over the prison-camp and its personnel, or that he was in a position of superior authority to the guards and to those other persons who entered Čelebići.

(iii) Zejnil Delalić as Commander of Tactical Group 1

687. Zejnil Delalić was appointed Commander of Tactical Group 1 on 11 July 1992, by the Main Staff of the Armed Forces of Bosnia and Herzegovina. On 27 July, he was appointed commander of "all formations" of the armed forces of Bosnia and Herzegovina in the area of Drežnica-Jablanica-Prozor-Konjic-Pazarić-Hadžići-Igman. Mr. Delalić actually assumed command of TG 1 on 30 July 1992.

688. Tactical Group 1 was one of three temporary formations established to assist the lifting of the siege of Sarajevo. It was strictly a combat formation, and did not include non-combat institutions, such as hospitals, prisons, military training institutions, warehouses or technical workshops.[740]

a. The Meaning of "All Formations"

689. Prosecution and Defence witnesses have been unanimous in describing the use of the expression "all formations" in the order of 27 July 1992 as vague and not implementable. In explaining the expression used in this order, General Divjak testified that pursuant to the Law of Defence of May 1992, the armed forces of Bosnia and Herzegovina comprised three components: the Army of Bosnia and Herzegovina, the HVO and the MUP. According to the witness, this order did not place "all formations" of the three components of the armed forces of Bosnia and Herzegovina from the municipalities of Drežnica, Jablanica, Prozor, Konjic, Pazarić, Hadžići and Igman under Mr. Delalić's command. The witness explained that it is not certain from this appointment which units are part of TG 1, because the expression "all formations" is very vague. The commander of the tactical group cannot order the municipal staff to give formations to his

[739] *See* T. 5330.
[740] *See* Exhibit D143\1, pp. 36-37.

tactical groups unless he is specifically given authority by the Supreme Command in Sarajevo. No such authority was conferred on TG 1 pursuant to the appointment of 27 July 1992.[741] Similarly, Mustafa Polutak in his testimony referred to the phrase "all formations" as vague, illogical and not implementable. As declared by this witness, even the person signing this appointment, Sefer Halilović, the Chief of Staff of the Supreme Command, was not the commander of "all formations" of the armed forces, because the HVO was part of the formations of the armed forces of Bosnia and Herzegovina and yet they were never under the command of the main staff in Sarajevo. Similarly the MUP forces were part of the armed forces of Bosnia and Herzegovina and their formations were not under the command of the main staff in Sarajevo. Thus it would appear that the order was badly drafted. Mr. Delalić could not have been in command of all formations.[742] This evidence was supported by the testimony of Brigadier Asim Džambasović.[743]

690. TG 1 had a small set composition of a maximum of 1,200 troops. This number was seldom fully assigned. The evidence of all who testified before the Trial Chamber was that Zejnil Delalić, as TG 1 commander, was never in command of "all formations".[744] The commander of "all formations" did not exist in the organisational system. Mr. Delalić, as commander of TG 1, never had superior authority over the TO, HVO and MUP.

691. A review and analysis of the evidence presented by the parties in relation to the appointment of 27 July 1992, thus clearly shows that Zejnil Delalić, as commander of TG 1, was not in command of all formations in the municipalities of Drežnica, Jablanica, Prozor, Konjic, Pazarić, Hadžići and Igman. The confused expression used in the first order in the situation was clarified by the subsequent Order for Disposition of 8 August 1992, signed by the President of the Republic of Bosnia and Herzegovina, Alija Izetbegović, appointing Mr. Delalić commander of the temporary war formation TG 1 in the areas of Hadžići, Pazarić, Konjic and Jablanica. This order terminates all previous orders of disposition and appointment in relation to TG 1.[745] The limitations of Mr. Delalić's jurisdiction as commander of TG 1, is further evidenced by the creation of another temporary formation – TG 2 - in July 1992. This formation received units from the municipalities

[741] *See* T. 8459-T. 8461, Gen. Jovan Divjak.
[742] *See* T. 12789-T. 12790, Gen. Mustafa Polutak; T. 12957, T. 13000, Col. Šućro Pilica.
[743] *See* T. 12676-T. 12677.
[744] *See* T. 11592-T. 11594, T. 11606, T. 11664-T. 11665, Midhat Cerovac.
[745] *See* Exhibit D146\1; T. 12799-T. 12800, Gen. Mustafa Polutak; T. 12676-T. 12679, T. 12731-T. 12732, Brigadier Asim Džambasović.

of Hadžići, Hrasnica, Ilidža, Krupac and Turnovo.[746] Thus, it is clear that both TG 1 and TG 2 received units from the municipality of Hadžići.

692. The Prosecution is of the view that Zejnil Delalić had the authority as commander of TG 1 to issue direct orders to the commander of the Čelebići prison-camp. Two orders have been relied upon as incontrovertible examples of the exercise of such authority and evidence that Mr. Delalić was a superior authority regarding the Čelebići prison-camp. The first is an order of 24 August 1992 issued by Mr. Delalić as commander of TG 1, directed to the OŠOS (the Armed Forces Supreme Command Staff) of Konjic and copied to the "Čelebići Prison Administrator", containing, *inter alia,* an order concerning the functioning of the Čelebići prison-camp.[747] Mr. Delalić stated in this order that the "commander of the Konjic OŠOS, BiH, is responsible to me for prompt and effective implementation of these orders".[748] The second order, a follow-up to the first order, which had not been executed, was issued on 28 August 1992, directly to the "Čelebići Prison Administrator".[749] This order noted that the first order of 24 August had not yet been complied with and required the Military Investigating body of the Konjic OŠOS to undertake interrogation of prisoners at Čelebići. It required Zdravko Mucić to establish a commission of three members to undertake the interrogation of prisoners.

b. Nature of Tactical Group 1

693. The Trial Chamber wishes to recall the nature and scope of TG 1. A tactical group is entirely a combat unit without non-combat institutions. The command authority and responsibility of the commander is limited to members of his command. The uncontradicted evidence of General Arif Pasalić and General Jovan Divjak lays down the three key elements of a tactical group as follows:

(a) it is temporary in nature and disbands immediately after its mission is accomplished;
(b) the authority of the commander is limited to the units assigned to it by the Supreme Command and such command did not confer on the commander authority over any other units or over a geographical region; and

[746] *See* T. 12901-T. 12904, T. 12906, Husein Alić; Exhibit D145-A6-6\1; T. 12563-T. 12564, ; Mustafa Dželilović; T. 12778-T 12779, Gen. Mustafa Polutak.
[747] Exhibit 99-7/10.
[748] Exhibit 99-7/10.
[749] Exhibit 99-7/11.

(c) the assignment of specific tasks or missions to the commander of TG 1 over and above his usual authority, by order of the Supreme Command, were specific to the mission and did not expand the authority of the commander beyond the terms of the specific order.[750]

694. The commander of a tactical group does not command a geographic area, but rather specific units assigned to his tactical group.[751] The commander of a tactical group, when so ordered by his superior, must perform missions or tasks outside the scope of his specific authority as a tactical group commander.

695. The Prosecution would seem to have misunderstood the nature of the tactical group when it disputes the actual nature of the orders of 24 and 28 August. The view that the Supreme Command issued orders to Mr. Delalić about the Čelebići prison-camp, which he then passed on to the TO headquarters and the camp commander, does not, by itself, indicate that Mr. Delalić had superior authority over the Čelebići prison-camp.

696. The claim made by Zejnil Delalić in his interview with Prosecution investigators, that these were exceptional orders, issued by him at the request of the Supreme Command,[752] seems to the Trial Chamber to be the more plausible position. These are not the orders of Mr. Delalić, who, as commander of TG 1, could not issue any orders outside those concerning his command. Mr. Delalić was in this case performing as a mere conduit or a ministerial functionary. Mr. Delalić was not a normal commander, but the commander of a tactical group. The Prosecution wants the inference to be drawn that, because the Supreme Command passed a message to the commander of the Čelebići prison-camp through Mr. Delalić, he was the person responsible for the prison-camp. No such inference can or ought to be drawn. The principles governing the commander of a tactical group are clear. The order of the Supreme Command was sent to the relevant institution, that is the OŠOS of Konjic, with command authority. It has always been recognised that a commander can be given an additional assignment by his superior, which is not ordinarily part of his duties, without in any sense enlarging his authority.[753]

697. The Trial Chamber finds that the authority of Zejnil Delalić over TG 1 was not enlarged by the extra orders he was given to discharge by the Supreme Command. Mr. Delalić did not,

[750] *See* T. 8100-T. 81002, T. 8282-T. 8288, Arif Pasalić; T. 8445-T. 8446, Jovan Divjak.
[751] *See* T. 8408, T. 8287-T. 8288, Arif Pasalić; T. 8454, Jovan Divjak.
[752] Exhibit 99-5, 23 Aug. 1996, pp. 44-48.
[753] *See* T. 12693-T. 12694, T.12745.

therefore, acquire any command authority or responsibility over the Čelebići prison-camp and its staff.

c. Not a Regional Commander

698. The evidence before the Trial Chamber demonstrates that the commander of TG 1 was not a regional commander. He had no superior authority over municipal TO staff, MUP units, HVO units, military police units or War Presidencies. The commander of TG 1 had authority only over the formations that were directly subordinated to him by order of the Supreme Command. With regard to the Konjic municipality, members of the municipal TO staff testified that Zejnil Delalić had no superior authority or superior responsibility in relation to members of the municipal TO or to the municipal staff. All military divisions and units artillery and anti-aircraft units in the Konjic municipality were subordinate to the municipal TO staff and not to the commander of TG 1. The municipal TO staff in Konjic had exclusive command and control over its troops.[754] In both Konjic and Jablanica municipalities, Mr. Delalić, as TG 1 commander, was not superior to MUP units.

699. As commander of TG 1, Zejnil Delalić's authority to make appointments, even within his formation, was limited to provisional appointments to the staff of TG 1. The evidence shows that the commander of TG 1 could not appoint his own staff. He could only nominate or select people he would wish to work with and the appointment was then made by the Supreme Command.[755]

700. The Prosecution has relied on the practice whereby the Supreme Command delegates to a commander duties above his ordinary assignment. The delegation of authority by the Supreme Command is regarded as an enlargement of authority. The Prosecution contends that, if Zejnil Delalić did not automatically have authority over the Čelebići prison-camp simply by virtue of his position as Tactical Group commander, he may well have had such authority by virtue of delegation from the Supreme Command. The Prosecution has not led any evidence of such delegation of authority. Reference has been made to the evidence of Defence witnesses who did not know about some orders in August 1992 from Mr. Delalić regarding Čelebići or his contacts with the ICRC or his interviews with journalists about the Čelebići prison-camp.[756] With due respect to the Prosecution the claim made should not be allowed to disappear as a matter of

[754] *See* T. 11592, Midhat Cerovac; T. 12017, Dževad Pasić.
[755] *See* T. 12801-T. 12802, T. 12840-T. 12842, M. Polutak; T. 12948, T. 13006-T. 13007, Šućro Pilica.
[756] *See* T. 11108-T. 11109; T. 11287; T. 13017-T. 13018.

speculation. A delegation of authority is a crucial matter, the burden of proof of which is on the party asserting the delegation. The onus is surely not on the accused but on the Prosecution, who is making the assertion. The Prosecution would wish the assertion to be accepted on the assumption that the extent of Mr. Delalić's authority was not clearly defined and that this was a matter of practice rather than theory. The Trial Chamber cannot be lured into such consideration of the exertion of personal influence for the commission of irregular conduct in the face of express regulations of transactions. It cannot be disputed that the powers and scope of Mr. Delalić's authority were clearly defined in his appointment as co-ordinator. His appointment as commander of TG 1 was clearly governed by law, and it would certainly be absurd to consider the conduct of Mr. Delalić on the basis of his considerable personal influence and authority *de hors* express authorisation. The Trial Chamber declines to accept the invitation.

701. The Prosecution has contended that Zejnil Delalić had, and exercised, command authority over various municipal bodies throughout his geographical area. Reliance for this assertion is placed on Exhibit 224, dated 14 November 1992, in which Mr. Delalić, as commander of TG 1, gave an order to the Konjic municipal Defence Headquarters relating to the strengthening of intelligence. The Prosecution also relies on Exhibit D169/1.[757] In this document Esad Ramić, commander of the TO, formally appointed Šefkija Kevrić as Deputy Commander for Logistics, as stated in the document "[o]n basis [sic] of the appointments made by the Main Staff of the Army of Bosnia and Herzegovina, No. 02/349-343 dated 11 July 1992 and Orders of the Bosnia and Herzegovina Armed Forces".[758] The reference number quoted is that of Mr. Delalić's appointment of 11 July 1992. It is contended by the Prosecution that Esad Ramić relies on that order in making the formal appointment of Major Kevrić. The Trial Chamber rejects both contentions as misconceived.

702. The Trial Chamber starts with the contention of Esad Ramić's purported reliance on Mr. Delalić's appointment of 11 July 1992. Esad Ramić was the commander of the TO. His appointment did not have the constraints of a TG 1 commander. He could in this position make formal appointments. The order relating to intelligence of 14 November 1992 issued by Mr. Delalić, as commander of TG 1, is *sui generis*. It was made pursuant to a standing order of the Supreme Command requiring municipal TO staff to provide intelligence information to tactical groups. It was not an independent order of the commander of TG 1 to the municipal TO staff.

[757] Dated 3 Aug. 1992.
[758] Exhibit D169/1.

According to Colonel Šućro Pilica, this order was a transmission from the Supreme Command to the municipal TO staff. The date of the order corresponds with the period during which an operation to lift the siege of Sarajevo was being prepared.

703. In his testimony Zijad Salihamidžić, the Deputy Staff Head of Intelligence in Konjic, testified that the order of 14 November 1992 was identical to the instructions received from the Supreme Command regarding the obligation of the municipal TO staff to provide intelligence to TG 1 and TG 2. It is well recognised that as commander of TG 1, Zejnil Delalić could not issue orders on his own authority to the municipal TO staff in Konjic.[759] The Trial Chamber is accordingly satisfied that the order of 14 November 1992 relied upon by the Prosecution does not represent the exercise of command authority by Mr. Delalić, as commander of TG 1, over the municipal TO staff of Konjic.

(c) The Vienna Documents

(i) Introduction

704. In the course of these proceedings, a number of documents seized at the premises of the *Inda-Bau* company in Vienna, a firm with which Zejnil Delalić is alleged to have had close links, have featured considerably as part of the case of the Prosecution. Indeed, the Prosecution has relied on these documents as evidence of the superior authority of Mr. Delalić under Article 7(3) of the Statute. These exhibits,[760] consisting of videos and documents, are here referred to as "the Vienna Documents". In the Decision on the Motion of the Prosecution for the Admissibility of Evidence of 21 January 1998, this Trial Chamber stated the attitude towards admissibility of the exhibits and their probative value as follows:

> the Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence.[761]

[759] T. 13019-T. 13020, Šućro Pilica; T. 12860-T. 12863, Mustafa Polutak; T. 12154-T. 12155, T. 12183-T. 12184, Zijad Salihamidžić.
[760] Exhibits 114, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 137, 141, 143, 144, 145, 146, 147A, 147B, 147C.
[761] Decision on the Motion of the Prosecution for the Admissibility of Evidence, 21 Jan. 1998, RP D5423–D5440, RP D5431.

In that Decision the Trial Chamber stated that in the admission of documents the fact that the alleged authors have not appeared as witnesses is a factor to be taken into account at the stage of assessing the weight and probative value of such exhibits. This is because such documents would not have received and survived the scrutiny involved in the cross-examination of a witness.[762]

705. The Trial Chamber considers the Vienna documents in accordance with their probative value and the extent to which they have been established in evidence. *Prima facie* they are all relevant to the consideration of the contention that Zejnil Delalić had command authority by virtue of his transactions in relation to the war effort in Bosnia and Herzegovina, and whether he was, at the period relevant to the Indictment, in a position of superior authority in relation to the institutions in the Konjic municipality; and, in particular, over the Čelebići prison-camp, its commander and guards. The Trial Chamber will here consider the documents in the following three categories. First, there are those which are authenticated (Exhibits 118, 137, 141). Secondly, there are documents of particular relevance (Exhibits 117, 130, 131, 132, 144, 147A). Thirdly, there are documents of general relevance (Exhibits 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 143, 145, 146, 147B, 147C).

(ii) The Authenticated Exhibits

706. Exhibit 118, identical to Exhibits 71 and 99-7/9, is the appointment of Zenil Delalić as commander of TG 1, dated 11 July 1992. However, the evidence of General Mustafa Polutak, the predecessor of Mr. Delalić, and Colonel Šućro Pilica, the Chief of Staff of TG 1 under General Polutak and Mr. Delalić, was that they were never aware of the order of 11 July 1992, and that Mr. Delalić only became aware of his appointment on 30 July 1992. This is consistent with the interview of Mr. Delalić himself with the Prosecution where he stated that he saw his appointment as commander of TG 1 for the first time after 27 July 1992, when he arrived at Igman. This evidence is consistent with the testimony of Arif Sultanić and Major Kevrić that they had personal knowledge of the appointment of Mr. Delalić as commander of TG 1. The Trial Chamber accepts this version of events and finds as a fact that Mr. Delalić became commander of TG 1 on 30 July 1992.

[762] *Ibid.*, at RP D5430-D5431.

707. Exhibits 137 and 141 are documents signed by General Arif Pasalić and admitted through him. They were admitted *prima facie* on the basis that the rank, responsibilities and duties ascribed to the persons indicated therein are accurate. However, the description in Exhibit 137 of Zejnil Delalić as being commander of TG 1 on 7 December 1992 is not correct. Similarly, the description in this document of Edib Saric as Assistant to the Commander of TG 1 for Security, and Nedzad Spago as the Security Officer for TG 1, are incorrect. No such offices indeed existed in the command structure of TG 1. The correct position is that, on 14 August 1992, Edib Saric was appointed Chief of Staff of TG 2 by the Chief of Staff of the Supreme Command, and that he on 20 August 1992 was appointed the Head of Security for the temporary command of the JUG Group.

708. Exhibit 141 describes Zejnil Delalić as the commander of TG 1 directly responsible for the Čelebići prison-camp. In his testimony before the Trial Chamber, General Pasalić admitted he did not conduct any investigation as to the accuracy of the content of the document and that he relied entirely on information given to him by an investigating commission of the functions ascribed to individuals named in Exhibit 141. General Pasalić admitted that he never saw any document confirmatory of the information in Exhibit 141. Neither did he have any information which gave him personal knowledge about the chain of command at Čelebići prison-camp. In his testimony before the Trial Chamber, General Pasalić stated that Mr. Delalić, as commander of TG 1, had no superior authority over the Čelebići prison-camp or its personnel, and that his authority in this position was limited to the formations that were placed temporarily under his command. In the face of such obvious contradictory statements it would seem inevitable that the Trial Chamber will attach no weight to Exhibit 141. The Trial Chamber is strengthened in its view by the fact that General Pasalić's testimony about Mr. Delalić and his relationship with the Čelebići prison-camp is completely supported by the evidence of all other witnesses, both Prosecution and Defence. Exhibit 141 can, therefore, not be relied upon as supporting the proposition that Zejnil Delalić, as commander of TG 1, had authority over the Čelebići prison-camp or its personnel. The correct position, as stated by all witnesses, is that Zejnil Delalić, as commander of TG 1 did not have command authority over the prison-camp and was not in a position of superior authority to its personnel.

(iii) Exhibits 117, 130, 131, 132, 144, 147A

709. There is a peculiar feature of these documents in that, although they are all relevant to the issue at hand, none of them is authenticated as the parties alleged to have created them never gave evidence. Accordingly, it was not possible to expose them to the scrutiny of cross-examination.

For instance, Exhibits 117, 131 and 147A are hand-written and unsigned. Exhibits 130, 132 and 144 are typewritten and only Exhibit 144 is dated. Exhibit 144 is purported to have been signed by Zejnil Delalić. Exhibit 117 is a five-page, undated, unsigned, photocopied, hand-written document. Exhibit 130 is a typed, twelve-page, undated document purported to have been signed by Zradvko Mucić, certified by the Consulate of the Republic of Bosnia and Herzegovina in Vienna. Mr. Mucić did not give evidence at the trial. Consequently, it was not possible to test the authenticity of the document. There is no evidence of the specimen signature to enable determination as to whether Mr. Mucić is the maker of Exhibit 130. This document is undoubtedly unreliable.

710. Exhibit 131 is a hand-written, undated, unsigned two-page document. It was purportedly written by the deputy to the commander of TG 1. Exhibit 132 is a three-page, typed document addressed to the President of the Republic of Bosnia and Herzegovina. The document is unsigned, with the name of Edib Sarib typed in at the end. Once again this exhibit cannot be ascribed any weight. Exhibit 144 is a typed, fourteen-page document, dated 14 December 1992 in Geneva and purportedly signed by Zejnil Delalić. It is clear that on 14 December, when the letter was written, the command of Mr. Delalić had been disbanded and no longer existed. Finally, exhibit 147A is an undated, unsigned, hand-written registration card for the United Association of War Veterans to which no weight can be attached.

(iv) Exhibits 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 143, 145, 146, 147B, 147C

711. Only two of the 16 exhibits indicated above, regarded as being of general relevance in these proceedings, were shown to witnesses**.** These are Exhibits 119 and 127. There is no evidence of the authenticity and the authorship of the remaining documents and they, therefore, lack weight. Exhibit 119 is a hand-written note dated 8 May 1992 in Zagreb, of only one page. This document merely shows that Mr. Delalić was in Zagreb on 8 May 1992. It provides no indication either as to his superior authority or as to his responsibility as a commander.

712. Exhibit 127 is an order dated 3 June 1992, with respect to the opening of a railroad between Jablanica and Pazarić. There is evidence that Zejnil Delalić at this time was acting as co-ordinator with no command authority or superior responsibility. The Trial Chamber does not accept the argument that the fact that Mr. Delalić is a co-signatory of the order made him a commanding authority over the institutions in Konjic municipality. He was a co-ordinator responsible to the War

Presidency for the results of the assignment given to him by that body. Exhibits 125 and 128 both relate to Mr. Delalić. Exhibit 125 mentions his name but does not ascribe to him any rank, responsibilities or duties. Exhibit 128, by implication, suggests that Mr. Delalić was commander of TG 1 on 25 June 1992. The evidence before the Trial Chamber, both oral and documentary, is that Mr. Delalić in fact became commander of TG 1 on 30 July 1992.

713. Exhibits 121, 122 and 123 are all hand-written documents. Exhibit 121 is dated 7 May 1992 and signed "Zejnil". There is no evidence that the signature represents that of Zejnil Delalić nor that he signed it. There is no proof of the authenticity or of the authorship of the document. Exhibits 122 and 123 are undated and unsigned and there is no proof of their authorship. These exhibits cannot be ascribed any weight. They do not tend to establish the guilt of Mr. Delalić with respect to any of the charges against him in the Indictment. Exhibit 145 consists of two type-written and two hand-written pages. Exhibit 146 consists of three pages of hand-written notes. Exhibit 147B is a hand-written, one-page, letter, dated 25 November 1992 in Vienna and signed "Zejnil Delalić". There is no proof of their authorship or the context in which they were written. Exhibit 124 is a four-page, type-written letter dated 8 December 1992 and signed "Oganj, Zejnil Delalić". There is no proof of the authenticity or authorship of the document. The document was doubted by General Arif Pasalić in his testimony, on the ground that the Staff of the Supreme Command was incorrectly designated in the heading and its reference to TG 1 was incorrect because, by 8 December, TG 1 was incorporated into the 4th Corps of the Army of Bosnia and Herzegovina.

714. Exhibit 126 is a five-page, hand-written document, dated 27 April 1993 and signed "Oganj". There is no proof of the authorship or authenticity of this document and no weight can be attached to it. Exhibit 143 is a two-page, type written news release from a news agency in Mostar, dated 7 December. No year is indicated and the document is not authenticated.

(v) The Videos

715. The exhibits recovered at the *Inda-Bau* premises in Vienna included some video-tapes. The videos consist of scenes filmed by, or on behalf of, Mr. Delalić in respect of activities in which he was participating. The videos are a relevant factor because the Trial Chamber has heard evidence that Zejnil Delalić was the victim of a smear campaign in the Croatian Press in 1992 and that his

family and friends in Vienna and Zagreb attempted to counter the negative propaganda against him.[763] This propaganda was that Mr. Delalić was a spy for the Serbs, in the KOS (Intelligence Service in the former Yugoslavia) and that he was a traitor to Bosnia and Herzegovina who freed Serb prisoners and fled Konjic in a Serbian helicopter.

716. Exhibit 116 consists of the video entitled "War in Bosnia-Herzegovina" which was made between mid-January and the end of March 1993. This video consists of edited portions of twenty to thirty videos containing footage from television broadcasts in Croatia, Bosnia and Herzegovina, Serbia and private amateur videos and a text composed by Ekrem Milić.[764] The purpose of this was to counter the negative media campaign against Mr. Delalić in the Croatian press. Ekrem Milić composed fifteen commentaries which are the narrated text of Exhibit 116. The text is an example of a counter campaign that contains many exaggerations in an attempt to respond equally to the smear campaign against Mr. Delalić. The evidence before the Trial Chamber is that Mr. Delalić was not consulted prior to the editing and making of this video. At the time he was living in Munich and only became aware of the project after its completion.

717. The most accurate way to describe Exhibit 116 is to say that it was supposed to be a lie to counter what Ekrem Milić believed to be a lie about Mr. Delalić. It was simply composed to exaggerate the importance of Mr. Delalić in response to the lies that had been propagated against him that he had been a traitor and a spy for KOS and that he had left Bosnia and Herzegovina in a "Chetnik" helicopter for Belgrade.[765] In light of the admission, on oath, by Ekrem Milić that the video "War in Bosnia-Herzegovina", contains untruths and exaggerations created for the express purpose of refuting negative press propaganda, the Trial Chamber cannot give any weight to this evidence, which undoubtedly cannot have any probative value in the determination of the charges against Mr. Delalić.

(vi) Conclusion

718. The Trial Chamber has carefully studied the Vienna Documents. We are satisfied, upon analysis, that these exhibits do not provide reliable evidence of the command authority or superior responsibility of Zejnil Delalić over the prison-camp at Čelebići and its personnel, as alleged.

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[763] *See* T. 12440-T.12443, Ismet Čišo.
[764] *See* T. 12445-T. 12446, T. 12469-T. 12470, Ismet Čišo; T. 13038-T. 13043, Ekrem Milić.
[765] *See* T. 13045-T. 13046, T. 13054-T. 13055, T. 13058-13059, T. 13077, Ekrem Milić; T. 12446-T. 12447, Ismet Čišo.

719. The foregoing arguments have been considered for the determination of whether the Prosecution has established that Zejnil Delalić had, in all his activities in the Konjic municipality and in relation to the armed conflicts which affected the municipality in 1992, command authority over the institutions which interacted with him, in particular whether he had superior authority and responsibility over the prison-camp in Čelebići, its commander and guards. The onus to establish the essential requirement that Zejnil Delalić had command authority vis-à-vis such institutions and that he was a superior of the commander of the prison-camp at Čelebići and the guards, rests entirely on the Prosecution.

720. It is important to reiterate the fact that all the offences with which Zejnil Delalić is charged occurred in the prison-camp at Čelebići. The perpetrators of these offences are alleged to have been the commander of the prison-camp and the guards there. Mr. Delalić has been charged with responsibility for their crimes under Article 7(3) of the Statute. Accordingly, the Prosecution must establish beyond reasonable doubt that Mr. Delalić was the superior of the commander of the prison-camp and the guards, and that they were subordinate to him. The Prosecution has failed to prove this element either through documentary evidence, *de jure*, or by the conduct of Mr. Delalić *de facto* in all his interactions with the personnel at the Čelebići prison-camp and the guards. Having failed to prove this sheet anchor of responsibility of the superior for the acts of his subordinates, *cassus cadit*.

5. Conclusion

721. The judicial precedents considered above in Section III all show that a commander has an affirmative duty to act within, and enforce, the laws of war. This duty includes the exercise of proper control over subordinates. A commander who breaches this duty and fails to prevent or punish the criminal acts of his subordinates may be held criminally liable. The courts have not accepted the proposition that a commander be held responsible for the war crimes of persons not under his command. In the instant case, the Trial Chamber has found that the Prosecution has failed to prove that Mr. Delalić had command authority and, therefore, superior responsibility over Čelebići prison-camp, its commander, deputy commander or guards. Mr. Delalić cannot, therefore, be held responsible for the crimes alleged to have been committed in the Čelebići prison-camp by Zdravko Mucić, Hazim Delić, Esad Landžo or other persons within the Čelebići prison-camp.

D. Superior Responsibility of Zdravko Mucić

1. Introduction

722. On the basis of his alleged position as commander of the Čelebići prison-camp, Zdravko Mucić is charged with responsibility as a superior for all of the offences alleged in the Indictment. In addition to being charged as a participant for the creation of inhumane conditions (counts 46 and 47), the unlawful confinement of civilians (count 48) and the plunder of private property (count 49), Mr. Mucić is accordingly charged in the Indictment with responsibility pursuant to Article 7(3) of the Statute for acts of murder (counts 13 and 14), acts of torture (counts 33 to 35), acts causing great suffering or serious injury to body or health (counts 38 and 39), inhumane acts (counts 44 and 45), the subjection of detainees to inhumane conditions constituting the offences of wilfully causing great suffering or serious injury to body or health and cruel treatment (counts 46 and 47), the unlawful confinement of civilians (count 48), and plunder (count 49).

723. In sub-section F below, the Trial Chamber will make its factual findings in relation to the underlying offences for which the accused is alleged to be criminally liable in this manner. Before proceeding further, however, it must first consider whether, as the Prosecution alleges, Mr. Mucić has been shown *inter alia* to have been in such a position of superior authority in relation to the Čelebići prison-camp that the conditions for the imposition of criminal responsibility pursuant to Article 7(3) of the Statute have been met.

2. The Indictment

724. The relevant general allegations made in the Indictment in relation to the superior responsibility of Zdravko Mucić read as follows:

> 4. Zdravko Mucić, also known as "Pavo", born 31 August 1955, was commander of Čelebići camp from approximately May 1992 to November 1992.
>
> [. . .]
>
> 7. The accused Zejnil Delalić, Zdravko Mucić and Hazim Delić had responsibility for the operation of Čelebići camp and were in positions of superior authority to all camp guards

and to those other persons who entered the camp and mistreated detainees. Zejnil Delalić, Zrdavko Mucić and Hazim Delić knew or had reason to know that their subordinates were mistreating detainees, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. By failing to take the actions required of a person in superior authority, Zejnil Delalić, Zdravko Mucić and Hazim Delić are responsible for all the crimes set out in this indictment, pursuant to Article 7(3) of the Statute of the Tribunal.

3. Arguments of the Parties

(a) The Prosecution

725. According to the Prosecution, Zdravko Mucić was commander of the Čelebići prison-camp from late May or early June until late November 1992, regardless of if, or when, he received any formal written appointment. It contends that in this position he possessed superior authority over the functioning of the prison-camp, with powers of control over its personnel, including the deputy commander and the guards.[766]

726. In support of this position, the Prosecution relies on a large body of oral and documentary evidence which it contends demonstrates Mr. Mucić's superior position. It thus submits that practically all of the former detainees in the Čelebići prison-camp who gave evidence before the Trial Chamber, testified that Mr. Mucić was the camp commander. It maintains that this evidence is confirmed by the testimony of those witnesses who worked in the Čelebići prison-camp, including that of Mr. Mucić's co-accused Esad Landžo, and the evidence given by a number of individuals who visited the camp during the period relevant to the Indictment.[767]

727. Among the documentary evidence offered by the Prosecution are a number of documents from the 4th Corps of the Army of Bosnia and Herzegovina from December 1992, which are said to indicate that Zdravko Mucić was considered to have been commander of the Čelebići prison-camp from at least June 1992.[768] The Prosecution further relies, *inter alia*, on a number of release documents alleged to have been signed by Mr. Mucić,[769] as well as a letter from the ICRC to Zejnil Delalić with a copy addressed to "Commander PAVO Mucić – Commander of the Čelebići

[766] Prosecution Closing Brief, RP D8498-D8510.
[767] Ibid.
[768] Exhibits 75, 84, 158, 159.
[769] Exhibits 137, 141, 143.

Prison".[770] In addition, emphasis is placed on Mr. Mucić's statement in his interview with the Prosecution investigators, where it is said that he himself admitted that he had authority over the camp, at least from 27 July 1992.[771]

728. According to the Prosecution, there can furthermore be no doubt that Zdravko Mucić knew of the crimes being committed in the Čelebići prison-camp by his subordinates. Moreover, it alleges that conditions in the prison-camp were such that Mr. Mucić in any event had reason to know of these offences. In this respect, the Prosecution relies, *inter alia,* on evidence from a number of former detainees, which it asserts demonstrates not only how Mr. Mucić took a leading role in abuse of detainees, but also how conditions in the camp were such that Mr. Mucić should have known of the crimes being committed. Specifically, it is alleged that although the injuries suffered by the detainees were evident, Mr. Mucić made almost no inquiries concerning their medical conditions and made no effort to establish a system such that he would be advised of the conditions in the prison-camp.[772]

729. The Prosecution further maintains that the record establishes that Mr. Mucić, as commander of the Čelebići prison-camp, failed to take any appropriate action to prevent the mistreatment of detainees, or to punish the commission of the crimes committed there. It submits that he did not institute any kind of reliable reporting system in the prison-camp, and that he failed to ensure that the guards and the deputy commander who were known to mistreat prisoners did not have access to the detainees. Moreover, it contends that the evidence shows that, even if Mr. Mucić did issue orders concerning the treatment of prisoners, he failed to ensure that these orders were obeyed. It asserts that, although Mr. Mucić on occasion did intervene to help certain detainees, there is no evidence to support the claim that Mr. Mucić did everything reasonably possible in this respect. Instead, it is the Prosecution's view that any such action which Mr. Mucić may have taken to alleviate the suffering of the victims cannot be a defence, but could only be taken into account as a mitigating circumstance in sentencing.[773]

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[770] Exhibit 192.
[771] Prosecution Closing Brief, RP D8505-D8506.
[772] Prosecution Closing Brief, RP D8494-D8498.
[773] *Ibid.*, RP D8490-D8494.

(b) The Defence

730. The Trial Chamber notes that the Defence for Zdravko Mucić in the course of these proceedings, has adopted different positions in relation to the charges raised against him pursuant to Article 7(3) of the Statute, which appear to be in part conflicting. The Trial Chamber considers it appropriate here to set out those arguments presented by the Defence in its final written and oral submissions, on the understanding that this constitutes its final and definitive position in relation to this matter.

731. According to the Defence, the evidence offered by the Prosecution fails to demonstrate that Zdravko Mucić ever held the position of commander of the Čelebići prison-camp. It contends that it remains unclear what authority or body controlled the prison-camp section of the Čelebići compound at different times in 1992, and submits that it has never been demonstrated from whom the persons present in the camp derived their authority. Specifically noting the absence of any document formally appointing Mr. Mucić to the position of commander or warden of the Čelebići prison-camp, it thus asserts that it has not been shown what authority, powers and duties Mr. Mucić held in relation to the prison-camp and its personnel. Specifically, the Defence asserts that it has not been proven whether Mr. Mucić was a military commander or a civilian warden or administrator, nor what powers were given to him to investigate and punish those who mistreated detainees. In addition, it submits that there is consistent evidence that different military, paramilitary and police units, including MUP units, had easy and frequent access to the prison-camp for a multitude of reasons, and contends that it has not been demonstrated how anyone in the Čelebići prison-camp, let alone Mr. Mucić, had the power to control these entities, or to investigate and punish any crimes committed by them.[774]

732. Moreover, the Defence asserts that there exists no credible evidence that Zdravko Mucić knew in advance that any acts of mistreatment were going to take place, or that he had any duty or authority to punish or prevent such acts.[775] In this respect, the Defence further contends that there is consistent evidence that Mr. Mucić did what he could, within his limited authority as a person who was present in the prison-camp at some juncture, to prevent the commission of crimes, and that he gave orders that detainees were not to be mistreated. It further submits that there is consistent

[774] T. 15631–T. 15635.
[775] *Ibid.,* T. 15648.

evidence that persons engaged in mistreatment took steps to conceal from him what they were doing, and it contends that there was far greater discipline when Mr. Mucić was present in the prison-camp than in his absence. Moreover, there is said to be evidence that Mr. Mucić made inquiries of detainees about mistreatment, but that they refused to provide him with such information on the ground, *inter alia,* that they feared for possible repercussions from the guards.[776] Accordingly, the Defence argues that whatever Mr. Mucić's undefined power was, he could not have taken any action to punish or report those committing crimes in the Čelebići prison-camp, as he could not get beyond the first step of identifying any such perpetrators.[777]

4. Discussion and Findings

733. The Prosecution relies on oral and documentary evidence submitted in these proceedings in order to establish the exercise by Zdravko Mucić of superior authority over the Čelebići prison-camp, his deputy, and the guards. According to the Prosecution, Mr. Mucić was commander of the Čelebići prison-camp from late May or early June 1992, in the absence of a formal written appointment. The Defence rejects this assertion of the Prosecution. It contends, on its part, that it still remains unclear what body or authority was in control of the Čelebići prison-camp at different times in 1992. It is argued that the Prosecution has not demonstrated from whom those administering the prison-camp derived their authority. The Defence further questions the Prosecution's assertions concerning the authority, powers and duties of Mr. Mucić in relation to the camp and its personnel.

734. It is important to emphasise that at the very root of the concept of command responsibility, with the exercise of corresponding authority, is the existence of a superior-subordinate relationship. The criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional international law. It is now a provision of Article 7(3) of the Statute of the International Tribunal and articles 86 and 87 of Additional Protocol I.

735. The Defence has forcefully contended that it has not been proven whether Zdravko Mucić was a military commander, a civilian warden or administrator. The Trial Chamber hastens to point out once more that a construction of the expression "superior authority" in Article 7(3) of the

[776] Mucić Closing Brief, RP D8123-D8124.
[777] Defence Closing Oral Argument T. 15646, Mucić Closing Brief RP D8124.

Statute extends it to persons occupying non-military positions of authority. The use of the term "superior" and the description of criminal responsibility to Heads of State or Government or responsible Government officials in Article 7(2), without doubt extends the concept of superior authority beyond the military, to encompass political leaders and other civilian superiors in positions of authority. Accordingly, as discussed above in Section III, the International Tribunal has jurisdiction over persons in positions of political or military authority who order the commission of crimes falling within its competence *ratione materiae*, or who knowingly refrain from preventing such crimes or punishing the perpetrators thereof.

736. It will further be observed that whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Hence, where there is *de facto* control and actual exercise of command, the absence of a *de jure* authority is irrelevant to the question of the superior's criminal responsibility for the criminal acts of his subordinates.

(a) The Status of Zdravko Mucić as a Commander

737. The evidence which remains uncontradicted is that Zdravko Mucić was the *de facto* commander of the Čelebići prison-camp during the periods relevant to the Indictment. Mr. Mucić was present at the prison-camp during this period and operated effectively as the commander. In his interview with the Prosecution, Mr. Mucić admitted he had authority over the camp, at least from 27 July 1992. However, in the same interview he admitted that he went to the prison-camp daily from 20 May 1992 onwards.[778]

738. In the course of these proceedings, a member of the Military Investigative Commission who worked closely with Mr. Mucić in the prison-camp in the classification of those detained, testified that he was the camp commander. This was supported by the detainees themselves and journalists who visited the camp.

[778] *See* Exhibit 101-1, p. 7 and 10.

739. This testimony was based on the fact that Mr. Mucić was at all times the *de facto* authority in the Čelebići prison-camp. He had subordinate to him his deputy commander, Hazim Delić and the guards, who executed his orders in the prison-camp. The main plank on which Mr. Mucić bases his defence is the absence of a written and formal appointment for the exercise of his superior authority.

740. The Trial Chamber observes the inconsistency in the Defence argument. While rejecting the Prosecution's assertion that Zdravko Mucić exercised *de facto* authority over the Čelebići prison-camp and contending that mere presence in the prison-camp is not evidence of the exercise of superior authority, the Defence proceeds to argue as follows:

> There is consistent evidence that Mr. Mucić did what he could, within his limited authority as a person who was present at the camp at some juncture, to prevent crimes and that he gave orders that detainees were not to be mistreated. There is consistent evidence that persons engaged in mistreatment took steps to conceal what they were doing from Mr. Mucić. There is consistent evidence that Mr. Mucić made inquiries of detainees about mistreatment but that they refused to tell him who had assaulted them either because they were uncertain what his reaction would be or, more usually, what repercussions would be visited upon them by the guards if they named names.[779]

741. There seems to be no doubt from the above that this is a concession that Zdravko Mucić was in a position to assist those detainees who were mistreated if only they had disclosed to him who had mistreated them. If this is not the actual exercise of authority by Mr. Mucić by his presence in the prison-camp it is difficult to comprehend what is. The Defence, after stating the above, goes on to bemoan the lack of formal authority, contending that, "[w]ithout the formal authority, he has no duty to maintain peace and order within Čelebići".[780]

742. For this proposition the Defence relies on the following extract from a recent scholarly comment on the doctrine of command responsibility:

> Where the superior does not have authority over the subordinates in question, it is clearly both unfair and of no deterrent value to impose a duty on that superior to ensure compliance with the law.[781]

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[779] *See* Mucić Closing Brief, RP D8124.
[780] Ibid.
[781] "Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and it's Analogues in United States Law", 38 Harvard International Law Journal, 272 (1997), 292.

The Defence seems to the Trial Chamber to have misunderstood the purport of this statement. There is no ambiguity in the proposition urged. Where the superior has no authority over the subordinates, there is no basis for the exercise of command or superior authority. There is no suggestion, and it is not implicit in the proposition above, that superior authority can only be vested formally in a written form. It does not exclude the acquisition of authority *de facto* by virtue of the circumstances. The Defence misconceives the correct legal position when it assumes that "without the formal authority" Mr. Mucić "has no duty to maintain peace and order within Čelebići". The Trial Chamber has already held in section III above that individuals in positions of authority, whether civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* position as superiors. The mere absence of formal legal authority to control the actions of subordinates should, therefore, not be deemed to defeat the imposition of criminal responsibility.

743. In apparent confirmation of the recognition of the authority of Zdravko Mucić over the prison personnel, the Defence states: "[t]here is consistent evidence that when Mr. Mucić was in the camp there was far greater discipline than when he was absent".[782] Of course, this is an explicit concession that Mr. Mucić, by his presence in the prison-camp was the embodiment of authority. He demonstrated his exercise of authority by his conduct towards the detainees and the personnel of the prison-camp.

744. The Prosecution relies on the testimony of several witnesses before the Trial Chamber as evidence of the actual exercise of authority by Mr. Mucić. The Defence has subjected this evidence to critical analysis with a view to underscoring its worthlessness by demonstrating the unreliability of the witnesses.

745. The Defence is not disputing that there is a considerable body of evidence from the testimony of detainees, guards and others who had transactions with the Čelebići prison-camp, that Zdravko Mucić was the acknowledged commander of the prison-camp. Instead, the Defence submits that the Prosecution has to provide evidence which proves beyond a reasonable doubt the dates during which Mr. Mucić is alleged to have exercised authority in the Čelebići prison-camp. In this respect, it is submitted that the former detainees who testified before the Trial Chamber did not provide any concrete dates as a reference for when they saw him in the Čelebići prison-camp. The Trial Chamber agrees that the Prosecution has the burden of proving that Mr. Mucić was the commander

of the Čelebići prison-camp and that the standard of proof in this respect is beyond reasonable doubt. However, the issue of the actual date on which Mr. Mucić became a commander is not a necessary element in the discharge of this burden of proof. Instead, the issue is whether he was, during the relevant period as set forth in the Indictment, the commander of the prison-camp.

746. Evidence of the actual exercise of authority over the Čelebići prison-camp by Zdravko Mucić was given in the testimony of Witness P, who stated that he was transferred early in June 1992 to the prison-camp, from the "3rd March" School by Mr. Mucić.[783] Similarly, Witness N testified that he knew Mr. Mucić to be the commander of the Čelebići prison-camp and that "he heard that first from the guards and later from Hazim Delić, the deputy, because on several occasions when Pavo was to come to the hangar, Hazim Delić would tell us that the commander was coming…".[784] Testimony to similar effect was given by Stevan Gligorević[785] and Vaso Đorđić.[786] There is other positive evidence acknowledging the status of Mr. Mucić as commander of the prison-camp at Čelebići, or someone in comparative status or authority.

747. The testimony of Mirko Đorđić was that he was so convinced when he saw Mr. Mucić arranging for the transfer of prisoners.[787] Grozdana Ćećez was of a similar view in late May or early in June 1992, when she was interrogated by Mr. Mucić. Branko Sudar stated that he felt the authority of Mr. Mucić when sometime in late May guards stopped mistreating two prisoners when they heard that Mr. Mucić was coming.[788]

748. Witness D, a member of the Military Investigative Commission in the prison-camp who worked closely with Mr. Mucić in the classification of the detainees in the Čelebići prison-camp, testified that Mr. Mucić was the commander and that he had an office in the prison-camp. Zdravko Mucić was present early in June when members of the Commission met to discuss how they would go about their work of the classification of the detainees and consideration for their continued detention or release.[789] There is evidence that Mr. Mucić had a complete list of the detainees, which he brought out for members of the Military Investigative Commission.

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[782] *See* Mucić Closing Brief, RP D8124.
[783] *See* T. 4518.
[784] *See* T. 1924.
[785] *See* T. 1453.
[786] *See* T. 4348-T. 4350.
[787] *See* T. 4795.
[788] *See* T. 5751.

749. Mr. Mucić was presented to journalists as the commander and was interviewed in that capacity in the middle of July 1992. Witness Assa'ad Taha, to whom Mr. Mucić was so introduced, gave evidence before the Trial Chamber.[790] Similarly, the Defence witness Bajram Demić, a Bosnian journalist, testified that he and others who went to the prison-camp had the permission of "Pavo" to film the prison-camp and to interview certain prisoners. Mr. Demić testified that he had the impression that Mr. Mucić was in charge of the place.[791] Similarly, Mr. Mucić was identified as commander of the prison-camp in a letter from the ICRC addressed to Zejnil Delalić, and copied to Zdravko Mucić as Commander of Čelebići Prison, admitted in evidence as Exhibit 192.

750. It seems inescapable, from the testimony of all the detainees, that they acknowledged Zdravko Mucić as the prison-camp commander. The detainees came to this conclusion because Hazim Delić called him commander, or because Mr. Mucić introduced himself as commander or because his behaviour towards the guards was that of a commander. The Trial Chamber considers the last of these factors the most significant for the purposes of ascribing superior authority. Concisely stated, everything about Mr. Mucić contained the indicia and hallmark of a *de facto* exercise of authority. Even in the absence of explicit *de jure* authority, a superior's exercise of *de facto* control may subject him to criminal liability for the acts of his subordinates. Where the position of Mr. Mucić manifests all the powers and functions of a formal appointment, it is idle to contend otherwise.

751. The Defence has challenged the Prosecution testimony, in the view of the Trial Chamber quite unsuccessfully. Evidence that Zdravko Mucić was not in command of the Čelebići prison-camp in June 1992 was given by Sadik Džumhur, who testified that Rale Musinović was the commander of the entire facility, at least up to the middle of June. The Defence argues that Mr. Mucić was not mentioned as being present in the prison-camp.[792] It is also contended that the order issued by the Joint TO and HVO command setting up the Military Investigative Commission for the detention facility was not directed to Mr. Mucić as commander at all.

752. It seems clear from the Prosecution evidence, that Zdravko Mucić exercised *de facto* authority over the Čelebići prison-camp since about the end of May 1992. There is evidence that he was in authority during the middle of June when Rale Musinović was commander of the barracks. Mr.

[789] *See* T. 5175-T. 5176, T. 5189-T. 5190.
[790] *See* T. 5819-T. 5820, T. 5833-T. 5834.
[791] *See* T. 13685.
[792] Mucić Closing Brief, RP D8121.

Mucić was commander of the prison-camp. As noted at the beginning of this Judgement, there is a distinction between the Čelebići compound as a whole and the Čelebići prison-camp.

753. It is important to note that the Čelebići prison-camp was a new institution, established *ad hoc* after the operations in, *inter alia*, Bradina and Donje Selo for the detention of Bosnian Serbs arrested in these areas. It is, therefore, not suprising that Dr. Hadžihusejnović, the President of the Municipal Assembly and the War Presidency of Konjic Muncipality, or Dr. Ahmed Jusufbegović, director of the Konjic Health Centre, never identified Mr. Mucić as the commander of the Čelebići prison-camp**.**

754. As against the evidence that Zdravko Mucić was present in the Čelebići prison-camp in May 1992, the Defence refers to the testimony of Emir Džajić who was an MUP driver in May 1992. This witness stated that he was at the Čelebići compound every day in June 1992 and that he saw Mr. Mucić only once in that time. Mr. Džajić testified that during this period, Rale Musinović was the commander.[793] Further, he did not know Mr. Mucić to be the commander. Even if his evidence is to be believed, it is the opinion of the Trial Chamber that it is not conclusive as it was perfectly possible to visit the Čelebići compound without visiting the prison-camp itself. It is, therefore, not unlikely for Emir Džajić to have seen Mr. Mucić only once in June, even though he was in the compound every day.

755. The Defence rejects the evidence of Grozdana Ćećez concerning Mr. Mucić, regarding it to be of doubtful veracity. As the Trial Chamber notes below, it is not at one with the Defence on this issue. Without doubting the evidence of Branko Gotovac, who stated that he heard Zdravko Mucić was "in charge of Čelebići camp", the Defence asserts that there is no evidence which properly establishes the date when Mr. Mucić took charge. The Defence notes that, like many others, Branko Gotovac received his information that Mr. Mucić was the commander from others, and considers this information to be unreliable.

756. The Defence further considers the evidence and testimony of Stevan Gligorević[794] and Nedeljko Draganić,[795] who saw Mr. Mucić early in June 1992, to be insufficiently specific as to the dates during which Mr. Mucić was commander. Although Milojka Antić claimed that Mucić was

[793] T. 13478.
[794] *See* T. 1453.
[795] *See* T. 1612.

present on her first night in the Čelebići prison-camp, because of her answers in cross-examination, her testimony is regarded by the Defence as lacking in credibility. As will be discussed below, the Trial Chamber finds that Ms. Antić's testimony is generally credible and is unconvinced by this argument.

757. The premium the Defence places on the date of appointment of Zdravko Mucić as commander of the prison-camp is demonstrated by its criticism of the testimony of Witness N. The witness claimed that he knew Mr. Mucić was the commander of the prison-camp but was unable to name the date on which he first saw him. Due to this omission the Defence contends: "This does not prove the date at which Mr. Mucić became commander or that he was in fact commander".[796]

758. Further, there is the testimony of those who saw Zdravko Mucić and were told by others he was the commander of the prison-camp but were unable to say when and how he came to be commander. The testimony of Dragan Kuljanin,[797] Mladen Kuljanin,[798] Novica Đorđic,[799] Witness B,[800] Zoran Ninković,[801] Milenko Kuljanin[802] and Branko Sudar[803] fall into this category. These are the cases regarded by the Defence as insufficient to prove that Mr. Mucić was the commander.

759. The Defence for Zdravko Mucić seeks to strongly criticise the evidence of Witness D. Admitting that this witness served in the investigative commission in the prison-camp, it is curious that the Defence queries who told this witness that Mr. Mucić was the commander. Recalling the antecedent of the witness as a former secret service policeman, and the fact that the work of the investigative commission involved the categorisation of detainees, whom they knew or believed were killed or otherwise maltreated, the Defence submits that his evidence should be viewed with extreme caution. This is because in its view, Witness D should be regarded as an accomplice of those who committed the offences against the detainees in the prison-camp. Accordingly, the Defence argues that this witness has a real motive for giving evidence helpful to the Prosecution and exculpatory of himself. The Trial Chamber is unpersuaded by this argument.

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[796] Mucić Closing Brief, RP D8114.
[797] *See* T. 2350-T. 2351.
[798] *See* T. 2524.
[799] *See* T. 4157.
[800] *See* T. 5043.
[801] *See* T. 5153.
[802] *See* T. 5494.

760. The Trial Chamber has further been presented with testimony relating to the status of Zdravko Mucić from Risto Vukalo,[804] whose testimony is rejected by the Defence on the ground that the witness allegedly claimed at trial that his prior statement to the Prosecution was procured by duress, Witness T,[805] whose testimony is viewed by the Defence with considerable suspicion, Milovan Kuljanin,[806] Witness J,[807] Witness R[808] and Petko Grubač,[809] all of whom knew Mr. Mucić as the commander of the Čelebići prison-camp. The Defence also submits that General Divjak did not know the function of Mr. Mucić in the prison-camp. It is difficult to appreciate the criticism of these various witnesses on this issue.

761. The Trial Chamber is concerned with evidence of the actual exercise of authority by Mr. Mucić as commander in the Čelebići prison-camp. The more complex issue of the precise scope of duties which attached to this status is clearly irrelevant to this question. There is, however, sufficient concrete evidence that Mr. Mucić was, before the end of May 1992, present in the Čelebići prison-camp and was exercising *de facto* authority over the prison-camp and its personnel. The Trial Chamber has critically analysed the evidence and has come to the view that the only issue which concerns us in the testimony is whether Mr. Mucić was the commander of the Čelebići prison-camp during the relevant period.

762. Reliable evidence in this respect was given by Witness D. There is nothing in the personal circumstances of this witness which would render acknowledging the fact that Mr. Mucić was the commander of Čelebići prison-camp advantageous to him. Witness D worked closely with Mr. Mucić in relation to the classification of the detainees. He is thus in a position to know the exact status of Mr. Mucić. The Trial Chamber is completely satisfied that his testimony is credible and not in any sense tainted with self-serving disclosures.

763. The actual exercise of *de facto* authority by Zdravko Mucić was not confined to the areas considered above. Mr. Mucić extended his authority to the control of the Čelebići prison-camp and its personnel. It is a cardinal requirement of the exercise of command authority that there must also be exercise of superior authority over the institution and its personnel.

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[803] *See* T. 5763.
[804] *See* T. 6255-T. 6256.
[805] *See* T. 6673-T. 6674.
[806] *See* T. 7046-T. 7047.
[807] *See* T. 7444.
[808] *See* T. 7808-T. 7809.
[809] *See* T. 5968.

764. There is evidence before the Trial Chamber of the control by Zdravko Mucić of the detainees who would leave or be transferred from the Čelebići prison-camp to another detention facility.[810] Mr. Mucić had the authority to release detainees. Exhibit 75, signed by him, is a release document in respect of the detention of Branko Gotovac.[811] There is also Exhibit 84, signed by Mr. Mucić for Mirko Kuljanin and Exhibit 91, signed by Mr. Mucić which is the release document for Milojka Antić.[812] Mr. Mucić also signed Exhibit 158, a release document for Witness B,[813] and Exhibit 159 which is the release document for Zoran Ninković.

765. Similarly, Zdravko Mucić had authority over the guards. This has been established through the testimony of Dragan Kuljanin[814] and Witness B.[815] Mr. Mucić also had control over visits to the detainees, which were only allowed by his permission.[816] In her testimony before the Trial Chamber, Milojka Antić described the authority of Mr. Mucić as total: "[i]n the camp he was in charge. He was asked about everything".[817]

766. Witness P also testified to the exercise of the authority by Mr. Mucić over the guards. This witness further testified to hearing Mr. Mucić speaking to Major Kevrić as commander of the prison-camp, requesting that additional food be brought to the detainees.[818]

767. Zdravko Mucić had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order. Mr. Mucić himself admits he had all such necessary disciplinary powers. He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters.[819] Further, he could remove guards, as evidenced by his removal of Esad Landžo in October 1992.[820]

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[810] *See* T. 1331.
[811] Dated 30 Aug. 1992.
[812] *See* T. 1814.
[813] *See* T. 5065-T. 5066.
[814] *See* T. 2350-T. 2351.
[815] *See* T. 5044.
[816] *See* Exhibit 110.
[817] *See* T. 1815.
[818] See T. 4574-T. 4575.
[819] *See* Exhibit 101-1, pp. 15, 54-55.
[820] *See* Exhibit 101-1, p. 55.

(b) Knowledge of the Accused

768. The question of the knowledge required for a commander to be held criminally liable for the crimes of his subordinates is well settled in both customary and conventional international humanitarian law. The principles have been articulated in the provisions of Article 7(3) of the Statute and article 86(2) of Additional Protocol I and discussed at length above in section III. Article 7(3), which expresses it in the negative, states simply that the superior is not relieved of criminal responsibility for the acts of his subordinates "if he knew or had reason to know that the subordinate was about to commit such acts, or had done so …". Similarly, article 86(2) of Additional Protocol I states that it "… does not absolve the superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances of the time, that he was committing or going to commit such a breach …".

769. There is a plethora of evidence of the knowledge on the part of Zdravko Mucić that the guards under his command were committing crimes, some of which are specifically alleged in the Indictment. While the Trial Chamber has not yet set out its findings on the individual crimes charged in the Indictment, it is sufficient for the present purposes for us to note that some crimes undoubtedly were committed within the prison-camp by persons subordinate to Mr. Mucić. It is with these findings in mind that the Trial Chamber proceeds with this discussion. Besides his imputed knowledge, as a result of his deliberate absences from duty, which were frequent and regular, he was aware that his subordinates would commit offences during such absences. Mr. Mucić admitted in his interview with the Prosecution that he was aware that crimes were being committed in the prison-camp at Čelebići in June and July 1992 and that he had personally witnessed detainees being abused during this period.[821] He was also informed of the rapes in the camp in July 1992.[822] He did, however, state that after that period detainees were not mistreated when he was present. The claim that there was no mistreatment of detainees when he was present was rejected by Vaso Đorđic who testified that he was interrogated and assaulted by Hazim Delić in the presence of Mr. Mucić.[823] There was also the evidence of Milenko Kuljanin[824] who testified that Mr. Mucić was present when he was taken and placed in a manhole. Similarly,

[821] Exhibit 101-1, p. 44.
[822] Exhibit 101-1, pp. 43, 60.
[823] *See* T. 4355-T. 4356.
[824] *See* T. 5457.

Milovan Kuljanin[825] and Novica Đorđić[826] testified that Mr. Mucić was present on occasions when they were released from this manhole.

770. The crimes committed in the Čelebići prison-camp were so frequent and notorious that there is no way that Mr. Mucić could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him, notwithstanding his knowledge that Hazim Delić, his deputy, had a penchant and proclivity for mistreating detainees.[827] There is no doubt that Mr. Mucić was fully aware of the fact that the guards at the Čelebići prison-camp were engaged in violations of international humanitarian law.

(c) Failure to Act

771. Where a superior has knowledge of violations of the laws of war by his subordinates, he is under a duty to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators and incurs criminal responsibility if he fails to do so. Article 87 of Additional Protocol I requires commanders to prevent and, where necessary, suppress and report to the competent superior, breaches of the Geneva Conventions and Additional Protocol I. They are also required to make their subordinates aware of their obligations under the Conventions and Protocols consistent with their level of responsibility. The superior is expected to initiate such steps as are necessary to prevent those breaches and, where appropriate, initiate penal or disciplinary actions against the violators.

772. Zdravko Mucić did not take reasonable or appropriate action to prevent crimes committed within the Čelebići prison-camp or punish the perpetrators thereof. There is no evidence suggesting that he ever took appropriate action to punish anyone for mistreating prisoners. Indeed, there is evidence demonstrating that the guards were never disciplined. For example, Milovan Kuljanin[828] stated that he never witnessed the punishment of any guard. Similarly, Witness T, who worked at the camp between June and November 1992, testified that he never knew of any investigations into

[825] *See* T. 7028.
[826] *See* T. 4161.
[827] *See* Exhibit 101-1, p. 57.
[828] *See* T. 7163-T. 7164.

the deaths of any of the thirteen prisoners who died whilst he was there.[829] Indeed, there were no disciplinary measures for the mistreatment of prisoners in Čelebići.[830]

773. As stated by Witness T in his testimony, an important gap in any preventive efforts made by Mr. Mucić is that he as commander never gave any instructions to the guards as to how to treat the detainees.[831] Although Mr. Mucić, as commander, was aware of the frequent abuses committed by the guards, he was not usually in the camp at night. As Witness T put it, "he was away rather than there".[832] The net effect of his frequent absences would have been that any orders he did issue concerning the treatment of prisoners would not have been enforced. An example of the impotence of the orders of Mr. Mucić was stated by Witness N, who testified that he heard Mr. Mucić had issued orders that no one should be beaten, but that he was beaten up after those orders had been given.[833] There is evidence that beating of detainees continued after the visit of the ICRC to the prison-camp. Mirko Đorđić testified to the severe beatings he had received in August, September, October and late November 1992.[834]

774. There is no doubt that Zdravko Mucić had the authority to prevent the violations of international humanitarian law in the Čelebići prison-camp. There is no evidence before the Trial Chamber that he made any serious effort to prevent these continued violations or punish his subordinates for such crimes during his tenure. The Trial Chamber is satisfied, on the evidence before it, that Mr. Mucić failed to take the necessary or reasonable measures to prevent or punish the guards who were his subordinates and the perpetrators of the offences charged.

5. Conclusion

775. In its findings in the case against General Tomoyuki Yamashita, the United States Military Commission in Manila, stated as follows:

> where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a

[829] *See* T. 6711.
[830] *See* T. 6715.
[831] *See* T. 6685.
[832] *See* T. 6876.
[833] *See* T. 1993-T. 1994.
[834] *See* T. 4760-T. 4762.

> commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[835]

The facts of the present case fit appropriately into this *dictum*. The conduct of Zdravko Mucić towards the guards renders him criminally liable for their acts. Mr. Mucić was the *de facto* commander of the Čelebići prison-camp. He exercised *de facto* authority over the prison-camp, the deputy commander and the guards. Mr. Mucić is accordingly criminally responsible for the acts of the personnel in the Čelebići prison-camp, on the basis of the principle of superior responsibility.

E. Superior Responsibility of Hazim Delić

1. Introduction

776. It is alleged in the Indictment that Hazim Delić is responsible for offences both as a direct participant and as a superior. He is charged under the Indictment with direct responsibility pursuant to Article 7(1) of the Statute for the alleged offences of: murder and wilful killing (counts 1, 2, 3, 4, 5, 6, 11, and 12); torture and cruel treatment (counts 15 to 29); inhuman treatment and cruel treatment (counts 42 and 43); the subjection of detainees to inhumane conditions constituting the offences of wilfully causing great suffering or serious injury to body or health or cruel treatment (counts 46 and 47); the unlawful confinement of civilians (count 48); and the plunder of private property (count 49). These counts of the Indictment shall be considered below in sub-section F.

777. In addition, the Prosecution alleges that Hazim Delić, along with Zdravko Mucić and Zejnil Delalić, had responsibility for the operation of the Čelebići prison-camp and was in a position of superior authority to all camp guards and to those who entered the camp and mistreated the detainees. It contends that he had reason to know that his subordinates were mistreating detainees and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The Prosecution accordingly asserts that by failing to take the actions required of a person in command authority, Mr. Delić is responsible pursuant to Article 7(3) of the Statute for: wilful killing and murder (counts 13 and 14); torture and cruel treatment (counts 33 to 35); wilfully causing great suffering or serious injury to body or health and cruel treatment (counts 38 and 39); inhumane treatment and cruel treatment (counts 44 and 45); the subjection of

[835] Vol. IV, Law Reports, p. 35.

detainees to inhumane conditions constituting the offences of wilfully causing great suffering or serious injury to body or health and cruel treatment (counts 46 and 47); unlawful confinement of civilians (count 48); and plunder (count 49).

778. By way of preliminary comment, the Trial Chamber notes that under counts 33 to 35, the Prosecution contends, *inter alia*, that Hazim Delić is responsible as a superior for the rapes alleged in paragraph 25 of the Indictment. Further, the Prosecution contends in counts 44 and 45, that Mr. Delić is responsible as a superior for, *inter alia*, inhumane acts involving the use of an electrical device alleged in paragraph 33 of the Indictment. In both of these paragraphs Mr. Delić is the only person alleged to be a direct participant in these acts. Therefore, the Trial Chamber notes that there are no subordinate acts for which he can be held responsible as a superior, even if the allegations in paragraphs 25 and 33 are found to be proven as pleaded.

779. In sub-section F below, the Trial Chamber will make its factual findings in relation to the underlying offences for which the accused is alleged to be criminally liable as a superior. Before proceeding further, however, it must first consider whether the evidence demonstrates, as the Prosecution contends, that Mr. Delić exercised superior authority such that the Trial Chamber may impose criminal liability pursuant to Article 7(3).

2. Arguments of the Parties

(a) The Prosecution

780. The Prosecution seeks to rely, in part, upon a statement Hazim Delić made to Prosecution Investigators on 19 July 1996.[836] In this statement Hazim Delić said that he worked as a locksmith in an enterprise in Konjic prior to the conflict.[837] Upon the outbreak of the armed conflict he was mobilised into a joint military police of the TO and HVO and was serving in the Čelebići prison-camp from early May 1992, before the first prisoners arrived.[838] According to this statement, Mr. Delić served as an administrator in the prison, organising documents and logistics from about

[836] Prosecution Closing Brief, RP D3014-D3015.
[837] Exhibit 103-1, p. 7.
[838] *Ibid.*, p. 7-8.

27 July 1992.[839] From 18 November 1992 until 28 or 30 November 1992 he stated that he served as the commander or manager of the prison-camp.[840]

781. The Prosecution asserts that the evidence indicates that at all material times prior to his appointment as commander of the prison-camp, Mr. Delić was the deputy commander. According to the Prosecution, Article 7(3) does not limit command authority to the most senior commander thereby absolving the deputy commander of liability, as indicated by the use of the term "superior" as opposed to terms such as "commander" or "deputy commander". The central question is whether Hazim Delić was the superior of the individuals committing crimes in the Čelebići prison-camp. The Prosecution makes three main factual allegations, which it contends establish that the accused was a superior of the individuals committing such crimes in the prison-camp.

782. First, the Prosecution argues that the deputy commander is liable to the extent of his or her authority, and that in some instances he may be liable as a commander. In this regard the Prosecution asserts that Zdravko Mucić was often absent from the prison-camp. It is alleged that the evidence shows that when Mr. Mucić was absent, Hazim Delić was in charge and exercised full authority, that is, he was the acting commander in Mr. Mucić's absence. Secondly, the Prosecution contends that Mr. Delić held a superior position over the guards in the prison-camp, which included the ability to give the guards orders. In particular, it is asserted that Mr. Delić's authority over the guards at the camp is demonstrated by the frequency with which he gave orders to them to mistreat the prisoners. Thirdly, it is alleged that the status of Mr. Delić as a superior is demonstrated by his exercise of considerable authority over various practical matters and events that took place in the Čelebići prison-camp.

783. The Prosecution contends that it is not disputed that Hazim Delić knew about the crimes in the camp, and that he took no action to stop the killing and suffering of the detainees. Finally, it is alleged that he did not discipline the guards for their misdeeds, nor did he take action to prevent such acts, notwithstanding his authority and duty to do so. The Prosecution argues that the reason for this failure was that Mr. Delić was an active participant in these crimes. Further, it maintains that by his example, he condoned the commission of similar crimes by others and actually ordered the commission of some of the crimes by those under his control.

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[839] *Ibid.*, p. 24.
[840] *Ibid.*, p. 53.

784. In closing oral submissions, the Prosecution conceded the possibility that Mr. Delić's authority was not entirely unfettered and that he could not have instantly discharged a guard. However, it was clear that he could have taken any number of actions to prevent crimes or punish his subordinates for them, including: re-assigning the guards; confining them to barracks; preventing them from contact with the detainees; notifying superiors; recommending the guards be court-martialled; and resigning.[841]

785. In reply to its submissions, the Prosecution contends that the Defence for Hazim Delić essentially advances a single legal argument in response to the charges of superior authority namely, that Article 7(3) of the Statute only applies to "commanders" and not to "deputy commanders" or "staff officers" who lack the authority to prevent or punish subordinates.

786. The Prosecution submits that the concept of superior in Article 7(3) of the Statute is clearly not limited to persons described as "commanders". Thus, within a single chain of command, a person described as "commander" may be the superior of a person described as "deputy commander", but it is also evident that the person described as "deputy commander" can be the superior of the person next in the chain of command, and so on. Accordingly, the Prosecution's position is that, within an organisational unit, superior responsibility is not confined to the person who is at the head of the unit as a whole, but can apply to anyone in the unit who is a "superior" of anyone else in the unit.

787. The Prosecution submits that the evidence establishes the contrary of the Defence contention that the position of Hazim Delić was equivalent to that of a staff officer. According to the Prosecution, the evidence establishes that Mr. Delić was part of a chain of command, situated below the camp commander and above the camp guards.

(b) The Defence

788. The Defence characterises the Prosecution's command responsibility case against Hazim Delić as resting on two premises, one legal and the other factual. The legal foundation is said to be that a non-commander can be found criminally liable under a theory of command responsibility. With respect to this premise, the Defence argues that superior responsibility is

[841] T. 15540.

limited to commanders and civilian leaders with military command-like authority over subordinates. It submits that the use of the word "superior" in Article 7(3) of the Statute denotes only such persons. This Article cannot extend criminal liability to non-commanders simply because they hold a higher rank than that of the perpetrator of a particular crime.[842]

789. In support of this proposition the Defence draws a distinction between the status of "command" and that of "rank". It refers to United States army regulations when it contends that command is a right exercised by virtue of office, the key elements of which are authority and responsibility. Military rank, on the other hand, is characterised as the relative position or degree of precedence granted military persons marking their stations in military life, and confers *eligibility* to exercise command or authority within the limits of the law.

790. By reference to a number of commentators, the Defence contends that staff officers may be distinguished from commanders on the basis that they have no authority to command and do not prescribe policies, basic decisions or plans, as this responsibility rests with the commander. Thus, when it becomes necessary for a staff officer to issue an order in the name of a commander, responsibility remains with the commander even though he or she may have never have seen a written order or heard it given orally. With respect to the chain of command, the Defence quotes a commentary that defines this as the most fundamental and important organisational technique used by the army, which describes the succession of commanders, superior to subordinate through which command is exercised. It extends from the Commander in Chief down through the various grades of rank to the enlisted person leading the smallest army elements. Staff officers are not in the chain of command. Regardless of rank, only commanders can be in a chain of command. The issue of whether a non-commander is the superior, in terms of relative military rank, of someone in command of a subordinate unit, is irrelevant to the concept of command authority.

791. On the basis of the foregoing, the Defence states that commanders are persons specifically designated to command a military unit whereas others, that is those who are not commanders, assist the commander in carrying out the unit's mission under the commander's direction. In support of this argument, the Defence submits that the "commander" in the Army of Bosnia and Herzegovina, and the former JNA, had the authority to issue orders in his own name and bore responsibility for his unit's performance. Others, including staff officers and deputy commanders, assisted the

[842] Delić Closing Brief, RP D8239.

commander. In this regard, the Defence seeks to rely upon the testimony of Generals Arif Pasalić[843] and Jovan Divjak,[844] who testified as witnesses for the Prosecution.

792. The Defence states that, despite the Prosecution's allegation that Hazim Delić was deputy commander of the Čelebići prison-camp at all relevant times, he cannot be convicted under the concept of command responsibility for the simple reason that he was not a commander. It is submitted that only commanders command and that, therefore, only they have the authority to punish or prevent violations of international humanitarian law. Since only commanders have the authority to take the steps necessary to avoid criminal liability for the acts of subordinates, only they should face criminal sanctions for the violations of subordinates.

793. The Defence also argues that the case of the Prosecution rests on the factual premise of the authority of Zdravko Mucić. In this regard, the Defence contends that whatever Mr. Mucić's authority, the authority of Hazim Delić, as his deputy, could not be greater. In the absence of proof about the extent of the authority of Mr. Mucić, it is submitted that the Trial Chamber cannot determine whether Mr. Mucić acted reasonably within his authority to prevent and punish violations of international humanitarian law. Thus, the Defence contends that the Trial Chamber cannot find beyond reasonable doubt that Mr. Delić failed to carry out his responsibilities. The implication of this argument is that Mr. Delić's authority as an alleged deputy commander is relative to that of Mr. Mucić, the alleged commander. Accordingly, a failure by the Prosecution to establish the extent of superior authority and thus criminal responsibility of Mr. Mucić, necessarily means that such a determination may not be made with respect to Mr. Delić.

794. In addition, the Defence seeks to refute the submission of the Prosecution that when Zdravko Mucić was absent, Hazim Delić was the superior responsible as commander. The Defence states that even if this assertion is legally correct, that is the deputy assumes command during a temporary absence of a commander who stays in communication with his command, the argument fails for lack of proof. It is submitted that the Prosecution, must prove that Mr. Mucić was in fact absent at the time of each alleged offence and that Mr. Delić was, in fact, the commander of the prison-camp at those times, under the law of Bosnia and Herzegovina. The Defence submits that the Prosecution has failed to meet this burden.

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[843] T. 8218.
[844] T. 8495-T. 8500.

3. Discussion and Findings

795. The Trial Chamber has found, as noted in Section III above that a position of command is a necessary condition for the imposition of superior responsibility under Article 7(3) of the Statute. However, the existence of such a position cannot be determined by reference to formal status alone. The determining factor is the actual possession of power or control over the actions of subordinates.

796. Notwithstanding the submissions of the Defence, the Prosecution does not argue that the doctrine of command responsibility applies to those who do not exercise command and asserts as a *matter of fact* that the evidence demonstrates that Hazim Delić did exercise command in the Čelebići prison-camp. Thus, the determination of the command responsibility of Mr. Delić depends on a factual determination as to the powers of command he did, or did not, possess in his position as "deputy commander" of the prison-camp. As such, the Trial Chamber must determine whether the evidence establishes beyond reasonable doubt that Mr. Delić's position made him part of the chain of command in the Čelebići prison-camp, thus providing him with the authority to issue orders and to prevent or punish the alleged criminal acts occurring in the prison-camp.

797. In a statement given to Prosecution investigators, Hazim Delić maintained that he was a member of the military police under joint TO and HVO command and as such, acted as a guard at the prison-camp, from early May 1992 until 27 July 1992.[845] Up until this time he contended that he had exactly the same duties and position as other guards.[846] After this date he stated that he was appointed as officer for personnel and logistics in the prison-camp.[847]

798. Numerous witnesses testified before the Trial Chamber as to the role played by Hazim Delić in the Čelebići prison-camp. He was variously described in the following manner: "I think that he was Pavo's deputy";[848] "I cannot be exact, but I think he was the superior of the guards";[849] "[w]e heard that Pavo was the most important, Pavo Mucić, and he [Delić] was his deputy";[850] "commander of the guards";[851] "deputy-commander of the camp";[852] "[f]rom what I could

[845] Exhibit 103-1, p. 7-8 and 10.
[846] *Ibid.,* p. 34.
[847] *Ibid.,* p. 38.
[848] T. 7464, Witness J.
[849] T. 7046, Milovan Kuljanin.
[850] T. 514, Grozdana Ćećez.
[851] T. 5033, Witness B.
[852] T. 2521, Mladen Kuljanin; T. 4564, Witness P; T. 6253, Risto Vukalo; T. 4793, Mirko Đordić and T. 1451, Stevan Gligorević.

observe, he was some kind of a commander. Whether he was a guard commander or something like that…";[853] " I asked, "who is this man ?, and the people who were already sitting there said it was Hazim Delić, he is number two, he is God and your life depends on him";[854] "[t]hey called him the Commander of the Guard and also the Deputy Commander….I am not familiar with what he was, but anyway that is what he was called".[855] On this issue of Mr. Delić's role in the prison-camp, Witness F stated,[856]

> The role of Mr. Delić…I don't know what it was, but I know that when he would appear, we had to get up, and the guards told us when he would appear. They said: "Here comes the boss", and he would come every morning, and based on that I think that most probably he was the Deputy Commander of the camp.

799. Dr. Petko Grubač testified that Hazim Delić was the "assistant warden" or the "deputy warden".[857] Later in his testimony he stated that the accused was the deputy commander of the camp on the basis that the guards addressed him as such.[858] The witness explained that the detainees were not officially told what people's positions were and that they learnt this from the behaviour and the attitudes of the persons who were in charge and from the way in which the guards addressed them.[859]

800. Thus, the evidence indicates that the detainees, while not in a position to precisely identify the rank of the accused, in general regarded him as a person who had influence over them and the guards, and as the deputy commander of the prison-camp at all relevant times. While this evidence is relevant to the Trial Chamber's consideration, it is not dispositive of Mr. Delić's status. The issue before the Trial Chamber is whether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command. In order to do so the Trial Chamber must look to the actual authority of Hazim Delić as evidenced by his acts in the Čelebići prison-camp.

801. The witness who gave the most detailed evidence in this regard was Esad Landžo, a co-accused. He testified that when Zdravko Mucić was not present Hazim Delić was in charge of the

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[853] T. 1612, Nedeljko Draganić.
[854] T. 7702, Witness R.
[855] T. 997, Branko Gotovac.
[856] T. 1329, Witness F.
[857] T. 5959.
[858] T. 5998.
[859] T. 5998.

camp.[860] More specifically, he testified that the guards did not receive written orders, but received oral orders by which they had to abide.[861] In relation to orders given by Mr. Delić, he stated that "I carried out all the orders out of fear and also because I believed I had to carry [sic], execute them".[862] In his testimony Mr. Landžo alleged that Mr. Delić had ordered him to mistreat[863] and to even kill detainees.[864] To the extent that these allegations are relevant to the specific incidents alleged in the Indictment, they shall be discussed below.

802. The Trial Chamber notes that, during his testimony, Esad Landžo admitted to previously telling lies about the events in the Čelebići prison-camp. In addition, it was part of his defence that, during the relevant period of the Indictment, he suffered from a personality disorder which diminished his capacity to exercise free will and caused him to seek approval of authority figures by following their instructions. Accordingly, testimony that indicates that he was ordered by Mr. Delić to mistreat prisoners would support and be consistent with his defence of diminished mental capacity. It is for these reasons that the Trial Chamber cannot rely upon the evidence of this co-accused on the issue of the superior responsibility of Hazim Delić, unless such testimony is supported by other independent evidence.

803. Further evidence regarding the relationship that Hazim Delić had with the guards was given by Grozdana Ćećez when she testified that she "just noticed that they all feared him".[865] Witness M further stated that he thought that Mr. Delić's role "was one of command, of somebody that the guards and prisoners feared, somebody who gives the orders".[866] Branko Sudar testified that Mr. Delić occasionally severely criticised guards and shouted at them just as he shouted at the prisoners[867] and that when Mr. Mucić was absent Mr. Delić would give the orders.[868] Stevan Gligorević also stated that he believed the reasons for Mr. Delić's visit to Hangar 6 was to control his guards, to control the detainees and to abuse them[869] and that all the detainees had to obey him and all the guards had to obey him "and they were even afraid of him."[870]

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[860] T. 15338.
[861] T. 15251.
[862] T. 15088.
[863] *See* e.g. T. 15375 and T. 15067.
[864] T. 15044-T. 15045.
[865] T. 514.
[866] T. 4913.
[867] T. 5761.
[868] T. 5760.
[869] T. 1454.
[870] T. 1451.

804. Further, the Prosecution alleges that Hazim Delić ordered the guards to mistreat detainees. It provides an example of one occasion when he allegedly ordered the guards to beat the detainees from Bradina for breakfast, lunch and dinner, after the killing of Muslims near Repovci in 1992. Upon examination of the evidence, this allegation is inconclusive on the issue of the command authority of Mr. Delić. Witness R gave evidence that two or three days after Bradina burnt down for the second time Mr. Delić ordered that all people from Bradina be beaten three times during *that* day and these beatings were administered by either the guards or Mr. Delić himself.[871] Witness F, gave more detailed testimony and stated that Mr. Delić cursed and beat detainees after the Repovci incident and then said to Mr. Landžo "[t]his is what the people from Bradina are to get for breakfast, lunch and dinner".[872] The witness then testified that Mr. Landžo continued with this beating every day for a prolonged period of time.[873] Later in his testimony the witness conceded that Mr. Landžo would beat prisoners "on his own as well, even when Mr. Delić was not around",[874] that is, without being told to do so by Mr. Delić. The evidence with respect to this allegation suggests that Mr. Delić conducted a vindictive beating of the people from Bradina on one particular day and then told at least one other guard, Mr. Landžo to continue this beating. However, it is not proven that the beatings that followed from that day or were "ordered" by Mr. Delić.

805. Further, the Prosecution alleges that after the visit of the ICRC to the prison-camp Mr. Delić ordered the guards to beat the prisoners. Witness F[875] and Mirko Đorđić[876] testified to this incident and indicated that Mr. Delić "ordered" or was "commanding" the guards in this collective beating.

806. In conclusion, this evidence is indicative of a degree of influence Hazim Delić had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees. However, this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and is not, on the facts before this Trial Chamber, of itself indicative of the superior authority of Mr. Delić sufficient to attribute superior responsibility to him.

807. The Trial Chamber now turns to a consideration of the other tasks that Hazim Delić performed in the Čelebići prison-camp in order to determine whether such tasks demonstrate the

[871] T. 7801.
[872] T. 1323.
[873] Ibid,.
[874] T. 1378-T. 1379.
[875] T. 1337.
[876] T. 4760.

exercise of actual superior authority. Witness D, a member of the Military Investigative Commission, testified that the Commission would receive a list of detainees in the prison-camp from Zdravko Mucić. Then, the Commission would write out a list of people to be "interviewed". He stated that they would give the list of detainees to Mr. Mucić, and if he was not there to Mr. Delić.[877] Indeed, he stated that Mr. Mucić told the Commission members that they should give the list to Mr. Delić so that he could take further action.[878] Finally, he confirmed that of the prison-camp staff, only Mr. Mucić and Mr. Delić had access to the Commission files.[879] It is clear from his testimony that the role of Mr. Delić was to assist Mr. Mucić by organising and arranging for detainees to be brought to interrogations.

808. Witness R also confirmed that Hazim Delić's role in the prison-camp was organisation when he stated that he was the commander in the "sense of everyday life, everyday organisation and checking of presence and being together with the guards, in the sense that Mr. Delić was the daily organiser of everything happening in Čelebići."[880] Further, both Petko Grubač[881] and Witness P[882] confirmed they would provide requests for the medicine they required for the detainees in the prison-camp and that Mr. Delić would attempt to acquire them.

809. This evidence indicates that Hazim Delić was tasked with assisting Zradvko Mucić by organising and arranging for the daily activities in the Čelebići prison-camp. However, it cannot be said to indicate that he had actual command authority in the sense that he could issue orders and punish and prevent the criminal acts of subordinates.

810. After having reviewed the relevant evidence before it, the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt, that Hazim Delić lay within the chain of command in the Čelebići prison-camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates. Accordingly, he cannot be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute. Having made this finding, the Trial Chamber need not consider the other elements of criminal responsibility of superiors under the Statute.

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[877] T. 5183.
[878] T. 5189-T. 5190.
[879] T. 5188.
[880] T. 7936.
[881] T. 5974.
[882] T. 4525.

F. Factual and Legal Findings Relating to Specific Events Charged in the Indictment

1. Introduction

811. The Trial Chamber, having made its factual and legal findings on the superior responsibility of Zejnil Delalić, Zdravko Mucić and Hazim Delić shall now consider each of the counts of the Indictment in turn in order to make its findings on the acts alleged therein.

812. Before continuing with a consideration of the facts, it should finally be noted that counts 13, 14, 33 to 35, 38, 39, 44 and 45 of the Indictment charge Zejnil Delalić, Zdravko Mucić and Hazim Delić with superior responsibility for the criminal acts of their subordinates, including murder, torture, causing great suffering or serious injury and inhumane acts. Counts 42 and 43 of the Indictment charge Hazim Delić with direct participation in inhumane acts. The factual allegations set forth in the Indictment in support of these counts contain references to specific criminal acts, as well as references to unspecified criminal acts alleged to have occurred in the Čelebići prison-camp. In consideration of the rights enshrined in Article 21 of the Statute, and in fairness to the accused, the Trial Chamber does not regard the unspecified criminal acts referred to in the above-mentioned counts as constituing any part of the charges against the accused. Accordingly, in its findings in relation to these counts, the Trial Chamber will limit itself to a consideration of those criminal acts specifically enumerated in the Indictment.

2. Killing of Šćepo Gotovac - Counts 1 and 2

813. Paragraph 16 of the Indictment alleges that two of the accused – Hazim Delić and Esad Landžo – were responsible for the killing of Šćepo Gotovac, an elderly Serb detainee in the Čelebići prison-camp. This alleged killing is charged in counts 1 and 2 of the Indictment as follows:

> Sometime around the latter part of June 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others selected Šćepo GOTOVAC, aged between 60 and 70 years. **Hazim DELIĆ, Esad LANDŽO** and others then beat Šćepo GOTOVAC for an extended period of time and nailed an SDA badge to his forehead. Šćepo GOTOVAC died soon after from the resulting injuries. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 1. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 2. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

(a) Prosecution Case

814. In support of the allegations contained in these two counts, the Prosecution brought and examined twelve witnesses, namely, Mirko Babić, Branko Gotovac, Witness F, Stevan Gligorević, Witness N, Dragan Kuljanin, Mirko Đorđić, Witness B, Branko Sudar, Risto Vukalo, Rajko Draganić and Witness R. In its Closing Brief, the Prosecution does not seek to rely on the testimony of Mr. Gligorević.

(b) Defence Case

815. In his interview with Prosecution investigators, given on 19 July 1996 (Exhibit 103), Hazim Delić admitted that Šćepo Gotovac had been killed in the Čelebići prison-camp, but denied that he had been involved in causing his death. He did, indeed, blame another guard for it. In its Closing Brief, the Defence for Mr. Delić does not make any specific arguments in relation to these counts apart from its general challenges to the credibility of the Prosecution witnesses.

816. On the other hand, Esad Landžo, while appearing as his own witness, admitted that he had participated in the beating which led to the death of Šćepo Gotovac. However, in mitigation of his actions, he contended that he had done so at the instance of Zdravko Mucić and Hazim Delić. He alleged that they had given him a piece of paper bearing the name of Mr. Gotovac and directed that this person should leave the prison-camp on the following day with his "feet forward", which he took to mean that they intended him to be killed. In its Closing Brief, the Defence for Mr. Landžo challenges the accounts given by the Prosecution witnesses in relation to these counts.

(c) Discussion and Findings

817. It will be noticed that the Defence[883] does not dispute that Šćepo Gotovac died in the Čelebići prison-camp, by violence, while he was a detainee there. According to most of the witnesses, in the early afternoon of the relevant day, which was in mid to late June 1992, Hazim Delić and Esad Landžo approached Mr. Gotovac, who sat near the door inside Hangar 6, and Hazim Delić accused him of having killed two Muslims in 1942. Mr. Delić informed him that these Muslims had been killed in the prison-camp itself. Hazim Delić further referred to some old enmity between their families and told Mr. Gotovac that he should not hope to remain alive. Šćepo Gotovac denied these allegations, whereupon Hazim Delić started to beat him. He was then taken out of the Hangar and the sound of blows and his moaning could be heard inside the Hangar. After some time, he was dragged back into the Hangar.

818. A few hours later, in the evening, he was once more taken out of the Hangar and Hazim Delić and Esad Landžo again administered a severe beating. As a result of this, he could not even walk back to his place inside and was carried into the Hangar by two of the other detainees. A metal badge, possibly bearing the insignia of the SDS, had been pinned to his head and Esad Landžo threatened the rest of the inmates of the Hangar by saying that he would kill anyone who dared remove it. As a consequence of this second beating, Šćepo Gotovac died in the Hangar a few hours later.

819. Although there are some variations in the statements of the witnesses to these events, the basic features of their testimony remains the same. While appreciating their evidence, it has to be borne in mind that they were speaking about an incident which had occurred five years earlier and that they were confined in a place where physical violence was not an uncommon event.

820. It is true that Šćepo Gotovac was beaten outside Hangar 6, while the witnesses were seated inside and could not, therefore, see the person or persons who were actually beating him. However, in view of what they saw and heard inside the Hangar, it could reasonably be said that they were in

[883] Here meaning the Defence for Hazim Delić and Esad Landžo.

a position to know what was happening outside. For example, they:

(a) saw Hazim Delić walking up to Šćepo Gotovac and accusing him of killing two Muslims in 1942, and, on his denial, hitting him;
(b) saw Hazim Delić and Esad Landžo taking Šćepo Gotovac outside Hangar 6;
(c) heard the sound of blows, as well as the cries and moans of Mr. Gotovac, immediately after he was taken out;
(d) saw Šćepo Gotovac being brought back into the Hangar in a poor condition;
(e) saw him again being taken out of Hangar 6 at about evening time;
(f) heard the sound of blows and the moans and cries of Mr. Gotovac, coming from outside the Hangar;
(g) saw Šćepo Gotovac being carried into the Hangar after a short time;
(h) saw that a metal badge was stuck on his forehead;
(i) heard Esad Landžo shouting that anyone who removed the badge would be similarly treated; and
(j) found Šćepo Gotovac dead in the morning.

821. These circumstance, when considered together, leave no room for doubt with regard to the persons who were responsible for causing the death of Šćepo Gotovac. On the basis of the evidence on record, it is clear that both Hazim Delić and Esad Landžo participated in the beating which resulted in the death of the victim.

822. The testimony of Esad Landžo that he was asked by Zdravko Mucić and Hazim Delić to kill Šćepo Gotovac, has no support on the record. By his own admission, Mr. Landžo has told lies in the past and the Trial Chamber considers him to be an unreliable witness concerning events within the Čelebići prison-camp. It is therefore not safe to accept any part of his story which does not find support from other independent evidence. We would, accordingly, reject his allegation that he had beaten and killed Mr. Gotovac at the instance of Zdravko Mucić and Hazim Delić.

823. On the basis of these facts and the previous discussion of the offences of wilful killing and murder under the Statute, the Trial Chamber finds that the killing of Šćepo Gotovac was a clear case of such wilful killing and murder. As stated above, a person commits wilful killing under Article 2 and murder under Article 3, when he has the intention to kill his victim or when he inflicts serious injuries upon him in reckless disregard of human life. In this case, Hazim Delić and Esad Landžo twice beat up a man of about 70 years, within a space of four to five hours, so mercilessly that on the first occasion he was left moaning in the Hangar, and on the second occasion he could not make his way back inside by himself. He died a few hours later on account of the injuries that he had thus received.

824. For these reasons, the Trial Chamber finds both Hazim Delić and Esad Landžo guilty, under counts 1 and 2 of the Indictment, of wilful killing and murder, as charged.

3. Killing of Željko Milošević - Counts 3 and 4

825. Paragraph 17 of the Indictment states that:

> Sometime around the middle of July 1992 and continuing for several days, Željko MILOŠEVIĆ was repeatedly and severely beaten by guards. Sometime around 20 July 1992, **Hazim DELIĆ** selected Željko MILOŠEVIĆ and brought him outside where **Hazim DELIĆ** and others severely beat him. By the next morning, Željko MILOŠEVIĆ had died from his injuries. By his acts and omissions, **Hazim DELIĆ** is responsible for:
>
> **Count 3. A Grave Breach** punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and
>
> **Count 4. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

(a) Prosecution Case

826. In support of the allegations in these two counts of the Indictment, the Prosecution seeks to rely principally on the evidence of Miro Golubović, Novica Đorđić, Milenko Kuljanin and Risto Vukalo. The Prosecution also called and examined Witness P, Witness J and Fadil Zebić who gave evidence in relation to these counts.

827. The Prosecution relies mainly upon the evidence of Milenko Kuljanin and Novica Đorđić in support of its allegations. It alleges that Željko Milošević was subjected to various serious beatings and mistreatment before he was killed by Hazim Delić. The Prosecution alleges that on one of these occasions Željko Milošević was beaten with a piece of electrical cable and that on another occasion he was partially submerged in a manhole full of water for one night. Finally, the Prosecution alleges that after Željko Milošević, in the presence of journalists visiting Čelebići prison-camp, refused to make "confessions" that he had raped and tortured Muslims Hazim. Delić called him out of Tunnel 9, beat him, and that he died as a result. In support of its allegation, the Prosecution seeks to rely on Exhibit 185, a funeral certificate relating to Željko Milošević.

(b) Defence Case

828. Hazim Delić was the only accused charged as a direct participant in the acts alleged in these counts. In the Motion to Dismiss,[884] his Defence submits, that on the facts, only two witnesses testified from personal knowledge regarding the alleged killing of Željko Milošević, and their accounts differ. It is contended that Novica Đorđić stated that when Arab journalists visited the prison-camp, Željko Milošević and an other prisoner, had been asked to confess that they were snipers and that they had killed Muslims, and as a result of their refusal to do so, they were beaten by Hazim Delić and Esad Landžo, in the presence of the journalists. The Defence contends that Milenko Kuljanin had a sharply different story, in that the confession sought was in relation to the rape and torture of Muslim women and the torture and killing of children. Upon his refusal to do so, Željko Milošević was returned to Tunnel 9. The Defence points out that, on the night that Željko Milošević died, both of these witnesses were inside Tunnel 9 and thus could not observe what was occurring outside. Further, the Defence notes that, while both witnesses heard screams and moans, only one claims to have heard a shot. Finally, the Defence alleges that the evidence presented by the Prosecution is insufficient to prove that the beatings to which Željko Milošević had been subjected to prior to the night of his death were severe.

829. Further, in a statement made by Mr. Delić in an interview with the Prosecution, on 19 July 1996, he stated that Željko Milošević was killed in the prison-camp by another guard, whilst denying that he participated in causing his death (Exhibit 103).

(c) Discussion and Findings

830. The Defence does not dispute that Željko Milošević died in the Čelebići prison-camp. According to a number of Prosecution witnesses including Miro Golubović, Novica Đorđić, Milenko Kuljanin, Witness P, Risto Vukalo and Witness J, Željko Milošević was subjected to a series of interrogations, beatings and other mistreatment during his detention in Tunnel 9. These were inflicted both inside and outside the tunnel, by Hazim Delić and Esad Landžo, because he was suspected of being a Serb sniper. On one occasion, he was called outside of Tunnel 9 and severely beaten with a piece of electrical cable by Mr. Delić. On another occasion, he was submerged in a manhole filled with water for a whole night.

831. Prior to his death, journalists had visited the prison-camp and Željko Milošević was taken out of Tunnel 9 by Hazim Delić and asked to make "confessions" in front of these journalists, which he refused to do. After this incident, Željko Milošević was called out of Tunnel 9 by Hazim Delić at night and the door of Tunnel 9 was closed. Mr. Delić spoke to Željko Milošević and then inflicted a vicious beating upon him. Željko Milošević did not return to Tunnel 9 that night. The following morning the motionless body of Željko Milošević was observed by a number of Prosecution witnesses, lying near the hole where the prisoners had been taken to urinate.

832. With respect to the all of the allegations relating to these counts and particularly the incident which finally lead to the death of Željko Milošević, the Trial Chamber lends particular credence to the testimony of Novica Đorđić and Milenko Kuljanin. Novica Đorđić was situated only a very short distance from the door of Tunnel 9. He was in a position to see and hear what was occurring outside the door, as it was open during the beatings leading up the final one occasioning Željko Milošević's death. This witness conceded that he did not see the final beating, as the door of Tunnel 9 was closed. However, he heard Mr. Delić call the victim out, after which he heard a discussion, then beatings and finally a shot. This is consistent with and supported by the testimony of Milenko Kuljanin, who testified that Hazim Delić called and personally took Željko Milošević out of Tunnel 9, after which he heard the victim screaming, moaning and crying out for over an hour, indicating the severity of the beating inflicted upon him. The following morning Milenko Kuljanin, Novica Đorđić and Witness J observed the victim's dead body near the place where they were taken to urinate. Further, Milenko Kuljanin gave testimony relating to Hazim Delić's state of mind. This witness stated that, after the journalists had visited the prison-camp and the victim had failed to make the confessions sought of him, Mr. Delić came back into Tunnel 9, bringing with him Željko Milošević and the others who had previously been taken out to be interviewed. He threatened them by saying that they "would remember him well".[885] In addition, Milenko Kuljanin testified that, the day before, Hazim Delić had "forewarned him [Željko Milošević] of what was to come and told him to be ready" at one in the morning.[886] Although there are some variations between the testimony provided by the witnesses to these events, the fundamental features of this testimony, as it relates to Željko Milošević's last evening of life, are consistent and credible.

[884] Motion to Dismiss, RP D5657-D5659.
[885] T. 5481.
[886] T. 5483.

833. The Trial Chamber finds that in July 1992, after inflicting numerous beatings, Hazim Delić deliberately and severely beat Željko Milošević for a period of at least an hour. The beatings leading up to and including the last prolonged and serious beating, and Mr. Delić's threats to the victim prior to the last beating, demonstrate an intent to kill on the part of Mr. Delić. The Trial Chamber is further convinced that the beating inflicted on this occasion caused the death of the victim.

834. For these reasons, the Trial Chamber finds Hazim Delić guilty of wilful killing, under count 3 of the Indictment and of murder, under count 4 of the Indictment.

4. Killing of Simo Jovanović - Counts 5 and 6

835. In paragraph 18 of the Indictment, Hazim Delić and Esad Landžo are again alleged to be responsible for the killing of one of the detainees in the Čelebići prison-camp, Simo Jovanović. The acts of these two accused in this respect are charged in counts 5 and 6 as follows:

> Sometime in July 1992 in front of a detention facility, a group including **Hazim DELIĆ** and **Esad LANDŽO** over an extended period of time severely beat Simo JOVANOVIĆ. **Esad LANDŽO** and another guard then brought Simo JOVANOVIĆ back into the detention facility. He was denied medical treatment and died from his injuries almost immediately thereafter. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:
>
> **Count 5. A Grave Breach** punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and
>
> **Count 6. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

(a) Prosecution Case

836. In support of these charges, the Prosecution relies in its Closing Brief upon the testimony of twelve of its witnesses, namely, Mirko Babić, Mirko Đorđić Witness F, Stevan Gligorević, Nedeljko Draganić, Witness N, Witness P, Witness B, Branko Sudar, Rajko Draganić, Milovan Kuljanin and Witness R. It also refers to the oral testimony of Esad Landžo. It should be

noted that Petko Grubač, Branko Gotovac and Fadil Zebić also testifed in relation to these allegations

(b) Defence Case

837. In his oral testimony before the Trial Chamber, Esad Landžo admitted that, on the relevant evening, he had taken Simo Jovanović from Hangar 6, but that he had done so at the instance of some other guards who informed him that they had obtained permission from the authorities in this regard. Mr. Landžo denied that he had taken part in the beating of Mr. Jovanović, and his Defence argued, in its Closing Brief, that no witness was able to claim to have seen who actually carried out the beating which led to his death.

838. Hazim Delić, in his interview with Prosecution investigators on 19 July 1996 (Exhibit 103), conceded that Simo Jovanović had been killed whilst in the Čelebići prison-camp, but denied that he had played any role in causing his death. The Defence for Mr. Delić, in its Closing Brief, made no particular submissions in relation to this incident.

(c) Discussion and Findings

839. Simo Jovanović was a Bosnian Serb of about 60 years of age who had lived in the village of Idbar, in Konjic municipality. It seems that, prior to the war, he was the owner of a fish farm in the municipality, in addition to being involved in the running of a construction company in the town of Konjic. It appears from the testimony of some witnesses that he may have been arrested and detained by the MUP for a period prior to his transfer to the Čelebići prison-camp. As a consequence of his mistreatment during this time, he was in need of medical treatment when he arrived at the prison-camp. He was, however, confined to Hangar 6 up until the time of his death. Each of the abovementioned witnesses for the Prosecution, with the exception of Witness P, were also kept in Hangar 6 at the relevant time and were thus in a position to depose about the circumstances relating to his death.

840. It appears that there were some guards employed in the Čelebići prison-camp who came from the same village as Mr. Jovanović and who had personal scores which they wished to settle with him. Thus, these individuals, with the assistance of Esad Landžo, would often take him out of the

Hangar during the night and beat him severely. As a result, Mr. Jovanović remained in a poor physical condition at all times.

841. Sometime at the end of June or beginning of July 1992, Esad Landžo called Simo Jovanović out of the Hangar, as on previous occasions. There is some variation in the accounts of the witnesses on whether Mr. Landžo was alone on this occasion, or whether he was accompanied by some other guard or guards. In any case, Mr. Jovanović was taken behind Hangar 6 and given a severe beating by a number of persons. His moans, cries and appeals for mercy could be heard inside the Hangar by the witnesses. After about 15 to 20 minutes he was brought back inside and died a few hours later.

842. As has been noted above, Esad Landžo admits that he took Simo Jovanović out of Hangar 6 on the relevant evening, but denied that he joined the others in beating him. However, this version of events is not convincing. All of the witnesses testified that Mr. Landžo had taken Mr. Jovanović out of the Hangar on previous occasions, during which he was also mistreated by other guards who knew him from his home village. It appears the Mr. Landžo did not report these incidents to the relevant persons in the prison-camp. Furthermore, there is witness testimony that Mr. Landžo himself had, on occasion, beaten the deceased inside the Hangar. In addition, on the day in question, at the very least, Mr. Landžo must have known why the other guards wished Simo Jovanović called from the Hangar and he willingly lent his hand to the assailants. Therefore, even if his explanation that he did not personally hit the deceased were to be accepted, Esad Landžo cannot absolve himself of responsibility for his death as he clearly, at the very least, was in the position of facilitating the perpetration of the offence. As has been previously discussed individual criminal responsibility arises where the acts of the accused contribute to, or have an effect on, the commission of the crime and these acts are performed in the knowledge that they will assist the principal in the commission of the criminal act. Mr. Landžo himself stated that he had been posted outside of the Hangar to guard the detainees therein and there can be little doubt that he was aware of the intentions of Mr. Jovanović's assailants and that, without his help, they could not have laid their hands on said victim.

843. In relation to Hazim Delić, there is insufficient evidence to show that he was connected in any way with the killing of Simo Jovanović. The only witness who mentions his presence at the time when the fatal beating was administered is Branko Sudar. According to this witness, he heard the voice of Mr. Delić coming from outside the Hangar, giving orders and, on a couple of occasions,

saying "enough, stop the beating". It is to be noticed that this witness was present inside the Hangar while the beating was taking place outside.

844. It is not safe to ascribe responsibility to Hazim Delić for this incident, merely on the basis of voice recognition, when no other witness was able to confirm that they heard his voice at the time when Simo Jovanović was fatally beaten. The only other witness who mentions Mr. Delić in relation to the victim is Witness P, who testified that, a few days before the death, he told Mr. Delić that Mr. Jovanović's condition was very poor and that he needed treatment in Building 22, which was not given. The conclusion cannot be reached that Mr. Delić was a party to the killing of Mr. Jovanović on the basis that he did not follow this advice.

845. On the basis of the above discussion, the Trial Chamber finds that the death of Simo Jovanović as a result of the injuries inflicted upon him during a prolonged and vicious beating, amounts to wilful killing and murder. Due to his participation in this beating, at the very least as an aidor and abettor who knowingly facilitated the beating inflicted by others, Esad Landžo is thus found guilty under counts 5 and 6 of the Indictment. On account of the lack of evidence brought concerning the participation of Hazim Delić in the acts causing the death of Mr. Jovanović, the Trial Chamber finds him not guilty under these counts.

5. Killing of Boško Samouković - Counts 7 and 8

846. Paragraph 19 of the Indictment further alleges that the accused Esad Landžo is responsible for the killing of Boško Samouković, a detainee in the Čelebići prison-camp, who was 60 years of age and confined in Hangar 6. This alleged killing is charged in counts 7 and 8 of the Indictment as follows:

> Sometime in July 1992, **Esad LANDŽO** beat a number of detainees from Bradina with a wooden plank. During the beatings, **Esad LANDŽO** repeatedly struck Boško SAMOUKOVIĆ, aged approximately 60 years. After Boško SAMOUKOVIĆ lost consciousness from the blows, he was taken out of the detention facility and he died soon after from his injuries. By his acts and omissions, **Esad LANDŽO** is responsible for:
>
> **Count 7. A Grave Breach** punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 8. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

(a) Prosecution Case

847. The Prosecution contends that, a few days after an incident in July 1992 when a number of Bosnian military policemen were attacked and killed near the village of Bradina, Esad Landžo selected Boško Samouković from among the detainees in the Čelebići prison-camp and so mercilessly beat him that he died around 15 to 20 minutes later in the so-called infirmary within the prison-camp.

848. In support of these allegations, the Prosecution relies upon the testimony of several of its witnesses, namely, Mirko Babić, Stevan Gligorević, Nedeljko Draganić, Dragan Kuljanin, Mladen Kuljanin, Petko Grubač, Risto Vukalo, Mirko Đorđić, Rajko Draganić and Witnesses F, N, P, M, B, and R. The Prosecution also refers to the testimony given by Esad Landžo in his own defence. It should also be noted that Miro Golubović, Branko Sudar and Branko Gotovac provided further testimony in relation to the death of Mr. Samouković.

(b) Defence Case

849. In his oral testimony before the Trial Chamber, Esad Landžo admitted that he had beaten Boško Samouković, but denied that he had ever intended to kill him. In this context he pointed out that he himself had taken Mr. Samouković to the so-called infirmary in the prison-camp and had asked the doctor to cure him. In justification of his mistreatment of the deceased, Mr. Landžo referred to an incident which occurred on 12 July 1992, in which a patrol party containing members of the local military police was ambushed near Bradina by armed Serbs and, as a result, all of the party were killed. Mr. Landžo stated that the assailants had mutilated the bodies of these military policemen, among whom were persons close to him, and, having seen their dead bodies, he felt extremely perturbed. Immediately thereafter and in this state of mind, he had inflicted the beating on Mr. Samouković.

(c) Discussion and Findings

850. Boško Samouković was a Bosnian Serb from the village of Bradina, who was about 60 years of age and worked as a railway worker. He was arrested along with his two sons shortly after the forces of the Bosnian government wrested control of the village from the Bosnian Serbs who had been holding it. Upon his arrest he was detained in Hangar 6 in the Čelebići prison-camp.

851. It is not disputed by the Defence for Mr. Landžo that Boško Samouković was beaten inside Hangar 6. In addition, with the exception of Witness P and Dr. Petko Grubač, all of the other witnesses mentioned above were confined in the same Hangar and were in a position to see the beating inflicted upon Mr. Samouković. These witnesses have stated, with minor variations, that Esad Landžo walked up to the deceased, asked him his name and ordered him to stand up. Mr. Landžo then began beating him with a wooden plank, which was around one metre long and five or six centimetres thick, and which was ordinarily used to secure the door of the Hangar. This beating lasted for some time, until, ultimately, Boško Samouković fell down. He was then carried to the makeshift infirmary in Building 22, where he succumbed to his injuries.

852. At the so-called infirmary the two doctors who were housed there examined Mr. Samouković. They observed that he was finding it difficult to breathe and had some broken ribs. Witness P testified that, on his inquiry, Mr. Samouković told him that he had been beaten by Esad Landžo. He further deposed that, before the arrival of the deceased in the infirmary, he had been hearing cries and the sound of blows from elsewhere in the prison-camp for about 20 minutes. Both Witness P and Dr. Grubač stated that Boško Samouković died within 20 minutes of his arrival in the infirmary.

853. From the testimony of Witness P it would seem that the arrival of Esad Landžo at the infirmary was not out of any concern for the health of Boško Samouković. This witness stated that Mr. Landžo in fact issued him with a threat, saying that Mr. Samouković should be "ready" by 6 o'clock or he (that is, the witness) should be "ready". Witness P understood this threat as implying that Boško Samouković should be made ready for a another beating by the evening or he himself should get ready to receive a beating instead.

854. According to Dr. Grubač, Hazim Delić also came to the infirmary and, when he saw the condition of Boško Samouković, he sent for Esad Landžo and inquired from him what he had done.

Thereupon Esad Landžo asked the doctor to see that Mr. Samouković was treated and, indeed, to "cure" him.

855. Even should it be conceded that Mr. Landžo's request to Dr. Grubač is evidence of some remorse for his actions, rather than a mere expression of his fear of recriminations from Mr. Delić, this can hardly detract from the gross nature of his conduct in mercilessly beating an elderly person with a heavy implement. It appears that the only reason for his assault on Mr. Samouković was that the latter was a Serb from Bradina and thus somehow deserving of punishment for the acts of other Serbs from Bradina in killing several Bosnian police officers. The ferocity of the attack can further be gauged from the fact that the victim did not survive for more than half an hour afterwards. Such a brutal beating, inflicted on an old man and resulting in his death, clearly exhibits the kind of reckless behaviour illustrative of a complete disregard for the consequences which this Trial Chamber considers to amount to wilful killing and murder. In these circumstances, any subsequent pleas to the doctor cannot detract from the gravity of Mr. Landžo's inhuman conduct.

856. For the reasons stated above, the Trial Chamber finds Esad Landžo guilty under counts 7 and 8 of the Indictment for the wilful killing and murder of Boško Samouković.

6. Killing of Slavko Šušić - Counts 11 and 12

857. In paragraph 21 of the Indictment, Hazim Delić and Esad Landžo are alleged to be responsible for the killing of Slavko Šušić, another of the detainees in the Čelebići prison-camp. The acts of these two accused in this respect are charged in counts 11 and 12 as follows:

> Sometime around the latter part of July, or in August 1992, a group including **Hazim DELIĆ** and **Esad LANDŽO** repeatedly selected Slavko ŠUŠIĆ for severe beatings. **Hazim DELIĆ**, **Esad LANDŽO** and others beat Slavko ŠUŠIĆ with objects, including a bat and a piece of cable. They also tortured him using objects including pliers, lit fuses, and nails. After being subjected to this treatment for several days, Slavko ŠUŠIĆ died from his injuries. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:
>
> **Count 11. A Grave Breach** punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and
>
> **Count 12. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

(a) Prosecution Case

858. In respect of these two counts, the Prosecution brought and examined seven witnesses, namely, Grozdana Ćećez, Miljoka Antić, Miro Golubović, Novica Đordić, Milenko Kuljanin, and Witnesses J and P. Relying on these witnesses, the Prosecution contends that Slavko Šušić was tortured to death by Hazim Delić and Esad Landžo in order to obtain information about a radio transmitter which he was suspected of having in his possession and using for guiding Serb gun-fire on his village.

(b) Defence Case

859. Both Hazim Delić and Esad Landžo have denied that they had killed Slavko Šušić in the Čelebići prison-camp. However, neither of these two accused dispute that Mr. Šušić died while detained in the prison-camp as a result of violence. The position taken by Hazim Delić in his interview with the Prosecution investigators of 19 July 1996 (Exhibit 103), is that Mr. Šušić was killed by a fellow Serb, who was also confined in Tunnel 9. For his part, Esad Landžo admitted during his oral testimony that he had once hit Mr. Šušić in the back, by way of a push as he was being led by some guards into the Tunnel, but did not make any statement concerning the death of Mr. Šušić. The Defence for Mr. Landžo, in its Closing Brief, seeks to attribute responsibility for this killing to another of the detainees in the prison-camp.

(c) Discussion and Findings

860. Slavko Šušić was from the village of Čelebići, where he was a teacher. After his arrest in June 1992, he was confined in the Čelebići prison-camp, in Tunnel 9, which was apparently utilised to house those detainees considered to be the most dangerous.

861. It appears from the testimony of the Prosecution witnesses listed above that Hazim Delić and Esad Landžo mistreated Slavko Šušić on one particular day in July 1992, over a continuous period, in order to extract information from him in respect of a radio transmitter. According to Milenko Kuljanin, Hazim Delić even deputed Zara Mrkajić, another of the detainees, to try to persuade Mr. Šušić to disclose the location of the transmitter, but this had no success. As a result of further serious mistreatment by Mr. Delić and Esad Landžo, including being beaten with a heavy

implement, Mr. Šušić apparently finally offered to identify the place where the transmitter was lying hidden, whereupon Hazim Delić and some other guards accompanied him to his house. On the failure there to recover the transmitter, Mr. Šušić was brought back to the prison-camp and subjected to a further severe beating.

862. Milenko Kuljanin also testified that he had seen Esad Landžo pulling the tongue of Slavko Šušić with pliers, tying fuses round his legs and waist and then lighting them. He further stated that, while thus mistreating Mr. Šušić, Esad Landžo was questioning him about the whereabouts of the abovementioned radio transmitter. It should be noted that Tunnel 9 had an iron door, which Mr. Kuljanin claimed was open at the time when Mr. Landžo was thus mistreating Mr. Šušić. However, it is difficult to believe that, from the position that he occupied in the tunnel, Milenko Kuljanin could be in a position to see what was happening outside the door. It is to be noticed that the tunnel was below ground level and sloped downwards. There were also several steps in front of the door. A person who did not sit right beside the door thus could not have a clear view of what was occurring outside. There were six persons sitting between Mr. Kuljanin and the entrance to the tunnel and so his position was a short distance down the slope of the tunnel floor. The Trial Chamber is not convinced that from this location he would have been able to have a clear sight of the mistreatment meted out to Slavko Šušić.

863. Of the witnesses examined by the Prosecution only three, namely, Novica Đorđić, Milenko Kuljanin and Witness J, were confined in Tunnel 9. Mr. Đorđić testified that he was inside the tunnel when Hazim Delić and Esad Landžo took Slavko Šušić away. He deposed that, after a long time, Mr. Šušić was pushed back into the tunnel and died shortly afterwards. Witness J claimed that, at the relevant time, he was present outside Tunnel 9 as he had been ordered to clear cigarette butts from the area. From this location he saw Slavko Šušić with Esad Landžo, Zara Mrkajić and a guard apparently by the name of Focak. Witness J testified that these persons were pulling out Mr. Šušić's tongue with some kind of implement. Unlike Milenko Kuljanin, this witness made no mention of the use of fuses to mistreat Mr. Šušić. Milenko Kuljanin also deposed that the body of Mr. Šušić remained in the tunnel for two nights and a day after his death. This is contrary to the version of the other witnesses from the tunnel, who stated that the body of the deceased was removed on the morning following the events leading to his death.

864. Grozdana Ćećez testified before the Trial Chamber that she had seen Hazim Delić beating Slavko Šušić from a window of the reception building (Building A) where she was detained and that there was another guard with him at that time. Although she did not recognise this second

guard, she thought that his name was Makaron. She further stated that, on the next day, she learnt from another guard that Slavko Šušić had been killed by Zara Mrkajić. Milojka Antić also testified that she had seen Hazim Delić beating Mr. Šušić and Delić had another guard with him at that time, whom she did not know. Another witness, Miro Golubović, stated that, at the relevant time, he was confined in Building 22 and from there he saw Hazim Delić beating Slavko Šušić. This witness mentioned the presence of Esad Landžo on the occasion and stated that as Slavko Šušić fell on the concrete floor, Esad Landžo dragged him by the arms. Witness P further testified that he saw Hazim Delić and Esad Landžo beating Slavko Šušić from the window of Building 22 and that Hazim Delić had a blunt weapon with him. He also stated that he saw Mr. Šušić in the tunnel when he visited that place to give a penicillin injection to a prisoner there and that Mr. Šušić was in extremely bad shape and appeared exhausted. Later, Witness P heard that Mr. Šušić had been killed by one Macic.

865. Despite the varying nature of the testimony of its witnesses in relation to these charges, the Prosecution maintains that Slavko Šušić died inside Tunnel 9 as a result of the injuries inflicted upon him by Hazim Delić and Esad Landžo. However, as observed above, the testimony of the three witnesses from the tunnel itself, who were examined in support of this allegation, is not entirely consistent in relation to the events leading to the death of Slavko Šušić. Although there is strong suspicion that Mr. Šušić died as a result of the severe beating and mistreatment inflicted upon him by Hazim Delić and Esad Landžo, it is not absolutely clear who inflicted the fatal injuries upon him and some of the Prosecution witnesses have indeed attributed the killing to other persons. In these circumstances, the Trial Chamber cannot be certain that the direct cause of the death of Slavko Šušić was the beating and mistreatment given to him by these two accused.

866. Nonetheless, it is clear that Mr. Delić and Mr. Landžo were, at the very least, the perpetrators of heinous acts which caused great physical suffering to the victim and, while they are not charged in this manner, it is a principle of law that a grave offence includes a lesser offence of the same nature. Accordingly, the Trial Chamber finds Hazim Delić and Esad Landžo not guilty of the charges of wilful killing and murder but finds them guilty of wilfully causing great suffering or serious injury to body or health, a grave breach of the Geneva Conventions of 1949 punishable under Article 2 of the Statute, and cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute.

7. Various Murders in Paragraph 22 of the Indictment - Counts 13 and 14

867. Paragraph 22 of the Indictment states that:

> With respect to the murders committed in Čelebići camp, including: the murder in June 1992 of Milorad KULJANIN, who was shot by guards, one of whom said they wished a sacrifice for the Muslim festival of Bairaim; the murder of Željko ĆEĆEZ, who was beaten to death in June or July 1992; the murder of Slobodan BABIĆ, who was beaten to death in June 1992; the murder of Petko GLIGOREVIĆ, who was beaten to death in the latter part of May 1992; the murder of Gojko MILJANIĆ, who was beaten to death in the latter part of May 1992; the murder of Željko KLIMENTA, who was shot and killed during the latter part of July 1992; the murder of Miroslav VUJIČIĆ, who was shot on approximately 27 May 1992; the murder of PERO MRKAJIĆ, who was beaten to death in July 1992; and including all the murders described above in paragraphs sixteen to twenty-one...

Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged as superiors who knew or had reason to know that their subordinates were about to commit the above alleged acts or had done so, and had failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrator thereof. Accordingly, they are charged as follows:

> **Count 13. A Grave Breach** punishable under Article 2(a)(wilful killings) of the Statute of the Tribunal; and
>
> **Count 14. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murders) of the Geneva Conventions.

868. The Trial Chamber's findings as to the offences alleged in paragraphs 16 to 19 and 21 of the Indictment, as charged here, have been set out above.[887] Further, as discussed above, the Trial Chamber restricts itself to addressing the specific allegations in the Indictment and will, accordingly, limit itself to a consideration of the following eight factual allegations of murder.

(a) Murder of Milorad Kuljanin

869. The Indictment alleges that Milorad Kuljanin was shot by guards in the Čelebići prison-camp in June 1992. In seeking to establish the facts in relation to this charge, the Prosecution relies

principally upon the evidence given by Witness R, who testified that he could observe the killing from a point "maybe one step away" from where the act occurred .[888] Witness R testified that he saw Milorad Kuljanin being called out of Hangar 6 and questioned by one of the guards. He was then ordered to lie face down in a canal filled with urine, where, after being questioned further, he was shot in the head at close range. In his testimony, Witness R stated that Milorad Kuljanin's death had occurred on Bairam, because he recalled that the guards, for several days prior to this incident, had repeatedly threatened that if they did not "slaughter ten of you [the detainees] for Bairam we are no [sic] good Muslims".[889] The Prosecution submits that Witness R's account of Mr. Kuljanin's death is supported by the testimony of Stevan Gligorević, Witness N, Dragan Kuljanin, Witness M, Mladen Kuljanin and Mirko Đorđić. The Prosecution also relies upon Exhibit 185, a funeral certificate, to establish the alleged victim's death.

870. The Defence[890] contends that the evidence in relation to the present charge is so widely at variance that no reliance properly can be put upon it. It submits in this respect, *inter alia*, that the accounts of the killing of Milorad Kuljanin given by Witness N and Witness R, who both testified to having witnessed the incident, contain irreconcilable discrepancies. It further notes the existence of discrepancies in the evidence before the Trial Chamber as to the identity of the guard who called Milorad Kuljanin out of Hangar 6 prior to his death, and to the number of shots subsequently fired. On this basis, the Defence submits that the Prosecution has failed to prove the killing of Milorad Kuljanin beyond a reasonable doubt.

871. In addition to the seven witnesses relied upon by the Prosecution, evidence in relation to the present charge was given by the Prosecution witnesses Risto Vukalo and Witness F. The testimony of these nine witnesses is consistent as to the fact that Milorad Kuljanin was killed in the Čelebići prison-camp on or around the religious holiday of Bajram in 1992. The Trial Chamber notes, however, that there exist significant inconsistencies in the evidence as to the precise circumstances surrounding this man's death. In his testimony before the Trial Chamber, Witness R gave a detailed account of the killing of Milorad Kuljanin, which he stated he had observed from a very short distance. According to this witness, he was part of a group of five or six persons who were outside Hangar 6 in order to relieve themselves, when he observed Milorad Kuljanin being taken out of the

[887] As noted previously, the Trial Chamber by an Order of 21 April 1997 granted a request by the Prosecution to withdraw all charges relative to paragraph 20 of the Indictment.
[888] T. 7,787.
[889] T. 7784.
[890] The Defence here and in the following sub-sections referring to the Defence for Zejnil Delalić, Zdravko Mucić and Hazim Delić.

Hangar by guards. Milorad Kuljanin was then subjected to questioning immediately in front of the group, forced to lie down in a ditch filled with urine where, after further questioning, he was shot three times from a distance of 20 to 30 centimetres. The Trial Chamber has not found it possible to reconcile this version of events with that provided by Witness N. In testimony, this witness described how he was in a group of ten other detainees who were visiting the latrines when they passed Milorad Kuljanin. The witness stated that four or five of the detainees who were in front of the group were forced to hit Milorad Kuljanin and that one of the guards thereafter pointed a gun at the victim's forehead and fired two shots directly into his head. It will be noted that these two accounts differ in significant respects not only as to the events said to immediately precede the killing of Milorad Kuljanin, but also with respect to the number of detainees present on this occasion. In the latter respect, Mirko Đorđić, in contrast to the foregoing accounts, testified that there were only three detainees outside Hangar 6 at the relevant time.

872. In view of these divergent accounts with respect to fundamental aspects of the alleged events, the Trial Chamber finds there exists a sufficient degree of uncertainty concerning the circumstances surrounding Milorad Kuljanin's death as to prevent it from reaching any conclusive factual findings in relation to this charge. Accordingly, the Trial Chamber finds that it has not been proved beyond a reasonable doubt that the killing of Milorad Kuljanin constitutes wilful killing under Article 2 or murder under Article 3.

(b) Murder of Željko Ćećez

873. The Indictment alleges that Željko Ćećez was beaten to death in the Čelebići prison-camp in June or July 1992. In establishing the facts in relation to this event, the Prosecution relies on the testimony of Witness R. According to the testimony of this witness, Željko Ćećez was called out of Hangar 6 in the evening of the same day that Milorad Kuljanin was killed. From his position inside the Hangar, the witness could then, for a period of about half an hour, hear the sound of a human body being beaten, together with the cries and moans of Željko Ćećez. The witness testified that Željko Ćećez was then brought back into the Hangar, where he first lay moaning but soon fell silent. The following morning, the witness had an opportunity to observe Željko Ćećez's lifeless body at close range for more than an hour. The body was covered in bruises and had an ash grey colour "as if there was never a drop of blood in that body".[891] The body was carried out of the

[891] T. 7792.

Hangar by a detainee the same morning. The Prosecution submits that corroboration of this testimony is provided by the testimony of Witness N, Dragan Kuljanin, Mladen Kuljanin, Risto Vukalo, Witness F, Stevan Gligorević, and Mirko Đorđić, who were all present inside Hangar 6 at the time of the alleged events. In order to establish the death of the victim, the Prosecution further relies on Exhibit 185, a funeral certificate. The Prosecution further submits that the evidence suggests that Željko Ćećez may have been killed because he had been a witness to the killing of Milorad Kuljanin. It relies in this respect on the testimony of Witness R, Witness F and Witness M.

874. The Defence submits that the Prosecution's evidence in support of this alleged killing contains numerous inconsistencies. It thus observes that two of the Prosecution witnesses, Witness F and Mladen Kuljanin were unable to identify the individual who called Željko Ćećez out of Hangar 6, while three other Prosecution witnesses, Mirko Đorđić, Risto Vukalo and Witness R, testified that it was Esad Landžo who called him out. It further notes that the witnesses' accounts of how Željko Ćećez was brought back into the Hangar after the alleged beatings also differ. For example, while Stevan Gligorević and Mladen Kuljanin assert that, after the beating, Željko Ćećez was carried back to the Hangar by detainees, Witness N and Mirko Đorđić contend that he was simply thrown back into the Hangar, whereas Witness R asserts that he was brought back by some guards who were accompanied by Esad Landžo.

875. With respect to the present charge, Witness R and Mirko Đorđić have provided precise and fundamentally consistent accounts, barring insignificant discrepancies, of the incident alleged in the Indictment. This evidence, which the Trial Chamber accepts as accurate and truthful, is further supported in all material respects by the testimony of Witness N, Dragan Kuljanin, Mladen Kuljanin, Risto Vukalo, Witness F, Stevan Gligorević, and Witness M. While noting the inconsistencies in the Prosecution's evidence as pointed out by the Defence, the Trial Chamber does not believe them to be significant for the purposes of its findings in relation to this offence, recognizing that the type of incident herein described is alleged to have occurred with some frequency in the Čelebići prison-camp and considering the period of time that elapsed between the events at issue and the witnesses' testimony.

876. Based upon this evidence, the Trial Chamber finds it proven beyond reasonable doubt that Željko Ćećez, on the relevant day, was called out of Hangar 6 in the Čelebići prison-camp by one or more of the prison-camp guards. Outside the Hangar he was subjected to a prolonged and severe beating. Thereafter, Željko Ćećez was taken back to the Hangar where, as a result of the injuries thus inflicted upon him, he died later that same night. The severity of the beating inflicted on

Željko Ćećez is attested to by the extent of the bruising on his body, as observed by Witness R the morning after his death.

877. In relation to the present charge and on the basis of the foregoing facts, the Trial Chamber finds that the act of severely beating Željko Ćećez over a prolonged period of time evidences an intent to kill or to inflict serious injury in reckless disregard of human life. Accordingly, and as we have been left in no doubt that the injuries inflicted upon Željko Ćećez in the course of the beatings led directly to his death, the Trial Chamber finds that the killing of Željko Ćećez, as described above, constitutes the offence of wilful killing under Article 2 and murder under Article 3 of the Statute.

(c) Murder of Slobodan Babić

878. The Indictment alleges that Slobodan Babić was beaten to death in June 1992 in the Čelebići prison-camp. The Prosecution acknowledges that Slobodan Babić was severely injured when he was brought to the prison-camp, and that these injuries would have contributed to his death. However, the Prosecution submits that, since the victim was detained in the Čelebići prison-camp for several days without receiving any kind of medical care, during which time he was subjected to additional beatings, the Trial Chamber may conclude that a proximate cause of Mr. Babić's death was his treatment in the prison-camp.

879. In order to establish the facts in relation to these allegations, the Prosecution notes that while various witnesses stated that when Mr. Babić arrived at the Čelebići prison-camp he was in very poor physical condition, Mirko Babić testified that he did not see anyone in the Čelebići prison-camp provide Slobodan Babić with medical care. The Prosecution further relies on the testimony of Witness N, who recounted that he observed Slobodan Babić being beaten in Building 22 by people in uniform soon after he was brought to the Čelebići prison-camp. The Prosecution alleges that Mr. Babić was thereafter transferred to the "3rd March" School. Witness P, who treated Mr. Babić at the "3rd March" School, testified that Mr. Babić was severely injured when he arrived and remained unconscious until his death, a few days later. Witness P's testimony in this respect was supported by that of Dr. Petko Grubač. The Prosecution also relies upon Exhibit 185, a funeral certificate, to establish Slobodan Babić's death.

880. With reference to the testimony of Mirko Babić, Branko Gotovac, Witness N and Risto Vukalo, the Defence notes the weight of evidence to suggest that Slobodan Babić had been severely beaten and injured before his arrival at the Čelebići prison-camp. Specifically, it contends that the beatings described by Risto Vukalo are consistent with the injuries described in the evidence given by Witness P and Dr. Petko Grubač. Conversely, the Defence contends that there is no evidence that Slobodan Babić died as a result of any injuries or lack of treatment he received in the Čelebići prison-camp.

881. In his testimony before the Trial Chamber, Risto Vukalo described how Slobodan Babić, prior to his arrival at the Čelebići prison-camp, was subjected to severe physical abuse which resulted in serious injuries. This evidence is supported by the testimony of Mirko Babić. Further, Branko Sudar, Witness N, and Branko Gotovac all testified as to the poor physical condition of Slobodan Babić during his detention in the Čelebići prison-camp. For example, Branko Sudar testified that, upon his arrival in Building 22, he saw Slobodan Babić "covered in blood and lying on the floor."[892]

882. The foregoing evidence is not disputed between the parties. Moreover, the Defence does not dispute the testimony of Witness P and Dr. Petko Grubač, that Slobodan Babić died a few days after being transferred to the temporary medical centre at the "3rd March" School.

883. In relation to the treatment to which Slobodan Babić was subjected in the Čelebići prison-camp itself, Witness N testified as to how uniformed men entered the building where he and Slobodan Babić were detained, and hit the latter several times. According to this witness "though he [Slobodan Babić] was half dead, they continued hitting him".[893]

884. The Trial Chamber finds that Slobodan Babić, as a result of physical mistreatment following his arrest, was seriously injured prior to his arrival in the Čelebići prison-camp. He was detained in the prison-camp for a period of several days, during which time he was, on one occasion, hit repeatedly by a number of uniformed men. He was subsequently transferred to the temporary medical clinic at the "3rd March" School, where he remained until his death a few days later.

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[892] T. 5919.
[893] T. 1881.

885. In relation to the present charge and on the basis of the foregoing facts, the Trial Chamber cannot exclude the possibility that Slobodan Babić's death was caused by perpetrators unconnected to the Čelebići prison-camp after his transfer to the "3rd March" School. Accordingly, the Trial Chamber finds that the charge of wilful killing and murder of Slobodan Babić has not been proven beyond reasonable doubt.

(d) Murder of Petko Gligorević

886. The Indictment alleges that Petko Gligorević was beaten to death in the latter part of May 1992 in the Čelebići prison-camp. In establishing the facts in relation to this incident, the Prosecution relies on the testimony of four witnesses. Stevan Gligorević testified that, upon his arrival at the Čelebići prison-camp, he and the other new detainees were forced to stand up against a wall with their hands raised. They were subjected to verbal abuse and severe beatings with rifle butts, sticks, and other objects, by several groups of uniformed men, over a period of many hours. The witness testified that he saw that Petko Gligorević had died as a result of the beatings. The Prosecution further relies on the supporting accounts provided by Mladen Kuljanin, Zoran Ninković and Witness F, all of whom belonged to the group of detainees who were subjected to the beatings, and each of whom was able to confirm that Petko Gligorević died as a result of those beatings. Mladen Kuljanin specfically testified to seeing how "[a]t one point, he [Petko Gligoervić] fell down from the beating and some soldiers came over and ordered two prisoners to pull him up. Then he got up. When the next group came over to beat us, Petko fell down again and never got up again."[894] Mladen Kuljanin further identified Hazim Delić as one of the people participating in the beatings.[895] Similarly, Zoran Ninković testified that at one point during the beatings he observed Hazim Delić standing in the area where the beatings occured.[896]

887. The Defence contends that the Prosecution has presented no evidence demonstrating that any person associated with the Čelebići prison-camp participated in the alleged collective beating or any other act which may have lead to the death of Petko Gligorević.

[894] T. 2481.
[895] T. 2479.
[896] T. 5139.

888. The Trial Chamber finds the testimony of the four witnesses relied upon by the Prosecution to be trustworthy. All four were present during the events leading up to the death of Petko Gligorević and their respective accounts are, in all material respects, consistent.

889. The Trial Chamber finds that Petko Gligorević, upon his arrival at the Čelebići prison-camp, was forced to stand against a wall with his hands raised, along with the other new detainees. Thereafter, he was subjected to savage beatings by several groups of uniformed men. The perpetrators used rifle butts and other wooden and metal objects to beat the detainees. The beatings continued for a period of several hours and, for at least a part of this period, Hazim Delić was present. As a direct result of the injuries he sustained from these beatings, Petko Gligorević died sometime during the beatings, or soon thereafter.

890. Considering the severity of the beatings to which Petko Gligorević was subjected and the fact that the perpetrators used metal and wooden objects to inflict the blows, the Trial Chamber finds that the beatings were administered with an intent to kill or to inflict serious injury in reckless disregard of human life. Accordingly, as we have been left in no doubt that the injuries inflicted upon Petko Gligorević in the course of the beatings led directly to his death, the Trial Chamber finds that the killing of Petko Gligorević, as described above, constitutes wilful killing under Article 2 and murder under Article 3 of the Statute.

(e) Murder of Gojko Miljanić

891. The Indictment alleges that Gojko Miljanić was beaten to death in the Čelebići prison-camp in the latter part of May 1992. The Prosecution alleges that this victim died as a result of injuries sustained in a collective beating which commenced upon his arrival at the Čelebići prison-camp. The Prosecution contends that this was the same incident in which Petko Gligorević was killed. In order to establish the facts in relation to this incident, it relies on the evidence of Witness N, Stevan Gligorević, Witness F, Mladen Kuljanin and Zoran Ninković. The latter four of these witnesses formed part of the group of prisoners that were subjected to beatings on this occasion and in their testimony they described the nature and duration of the beatings they were forced to endure. Stevan Gligorević, Mladen Kuljanin and Witness F also testified to having seen Gojko Miljanić in Hangar 6 after the beatings and stated that he died the next morning as a result of the severe injuries he had sustained. Witness N also stated that he saw the victim die in his son's arms in the Hangar.

892. The Defence contends that the Prosecution has presented no evidence showing that any person associated with the Čelebići prison-camp participated in the alleged collective beating or any other act which may have lead to the death of Gojko Miljanić.

893. As stated above, in connection with the Trial Chamber's findings in relation to the killing of Petko Gligorević, the Trial Chamber finds the firsthand accounts of Zoran Ninković, Stevan Gligorević, Witness F and Mladen Kuljanin to be trustworthy with respect to the collective beating as a result of which Gojko Miljanić is alleged to have died. Further, the Trial Chamber accepts the testimony of the latter three witnesses, as supported by Witness N, as to the death of Gojko Miljanić in Hangar 6 sometime during the following 24 hour period. Accordingly, the Trial Chamber finds that Gojko Miljanić, upon his arrival at the Čelebići prison-camp, was subjected to a collective beating in the same manner as found for the killing of Petko Gligorević. After the beatings, Mr. Miljanić was taken back to Hangar 6, where he subsequently died as a result of the injuries he sustained.

894. Considering the severity of the beatings to which Gojko Miljanić was subjected and the fact that the perpetrators used rifle butts and other metal and wooden objects to inflict the blows, the Trial Chamber finds that the beatings were administered with an intent to kill or to inflict serious injury in reckless disregard of human life. Accordingly, as we are convinced that the injuries inflicted upon Gojko Miljanić in the course of the beatings led directly to his death, the Trial Chamber finds that the killing of Gojko Miljanić, as described above, constitutes wilful killing under Article 2 and murder under Article 3 of the Statute.

(f) Murder of Željko Klimenta

895. The Indictment alleges that Željko Klimenta was shot and killed during the latter part of July 1992 in the Čelebići prison-camp. To establish the facts in relation to this incident, the Prosecution relies upon the testimony of eight witnesses, including that of Vaso Đorđić, who provided an eyewitness account of this killing. The Prosecution further relies on the supporting accounts of this killing as provided by a number of witnesses who were inside the Hangar at the relevant time, including Mirko Babić, Nedeljko Draganić, Dragan Kuljanin, Mladen Kuljanin, Mirko Đorđić and Witness R. These witnesses all described hearing Željko Klimenta being called out of the Hangar. Several minutes later they heard a shot. Soon thereafter, one or more of the other detainees entered the Hangar to announce that Mr. Klimenta had just been killed. Further, Witness N and Mladen

Kuljanin testified to having seen Željko Klimenta's body near the Hangar soon afterwards. The Prosecution also relies upon Exhibit 185, a funeral certificate, to establish the death of the victim.

896. The Defence notes that the Prosecution evidence in relation to the instant charge contains numerous inconsistencies. It submits, *inter alia*, that contradictory accounts have been given by Milovan Kuljanin and Vaso Đorđić, who both claim to have been eyewitnesses to the killing. It contends that it is impossible to reconcile the different accounts given by these two witnesses and that, therefore, their evidence cannot be relied upon. In addition, the Defence seeks to impeach the testimony of Vaso Đorđić by pointing out inconsistencies between his testimony and his previous statement made to the Prosecution as regards the circumstances surrounding the killing of Mr. Klimenta. The Defence further contest the Prosecution's assertion that the killing was intentional, submitting that there is some evidence to suggest that it could have been accidental and that the Prosecution has therefore failed to carry its burden of proving beyond a reasonable doubt that the killing of Željko Klimenta constitutes wilful killing or murder.

897. The Trial Chamber heard evidence from 18 witnesses in relation to the circumstances surrounding the death of Željko Klimenta. The testimony of these witnesses was uniformly consistent with respect to the fact that Željko Klimenta was shot by a guard in the Čelebići prison-camp and died as a result of his injuries soon thereafter. Indeed, the Defence for Zejnil Delalić concedes this much in its final submissions.[897] However, the accounts of these witnesses as to the details of the circumstances surrounding Željko Klimenta's death conflict in a number of ways. Most critically, the testimony of the two witnesses who stated that they had personally observed the killing differs significantly as to the circumstances surrounding this event. In his testimony, Vaso Đorđić described how he and Željko Klimenta were ordered to take the latrine bucket out of Hangar 6. According to this witness, he and the victim were engaged in cleaning the bucket at the toilet behind the Hangar when a guard called to Željko Klimenta to approach him. After the guard and Željko Klimenta had lit up cigarettes, the latter started moving towards the Hangar. The guard aimed his rifle at him and called out, telling the victim not to run or he would kill him, whereupon Željko Klimenta started running towards the Hangar. The guard then fired his rifle at Željko Klimenta, hitting him in the small of the neck. In contrast, Milovan Kuljanin testified that Mr. Klimenta went outside Hangar 6 in order to relieve himself and that as he was walking towards the latrine ditch, a guard fired at him, hitting him in the back of the head and killing him instantly.

898. While the Trial Chamber has been left in no doubt that Željko Klimenta was killed whilst being detained at the Čelebići prison-camp, the nature of the inconsistencies in the evidence presented on this issue prevents the Trial Chamber from reaching any conclusive factual findings concerning the specific circumstances surrounding his death. Accordingly, the Trial Chamber finds that it has not been proven beyond a reasonable doubt that the killing of Željko Klimenta constitutes wilful killing under Article 2 or murder under Article 3.

(g) Murder of Miroslav Vujičić

899. The Indictment alleges that Miroslav Vujičić was shot in the Čelebići prison-camp on approximately 27 May 1992. The Prosecution alleges that Miroslav Vujičić was shot and killed by a guard after attempting to escape a collective beating to which he, among others, was subjected immediately upon his arrival in the Čelebići prison-camp. It is alleged that this was the same incident in which Petko Gligorević died and that Hazim Delić was present during the beatings. The Prosecution seeks to establish the facts in relation to this count by relying on the testimony of Witness F, Stevan Gligorević, Witness N, Mladen Kuljianin, Zoran Ninković and on Exhibit 185.

900. The Defence attempts to cast doubt on the testimony of the Prosecution's witnesses relating to this count by pointing out that their accounts of the killing differed as to the number of shots fired.

901. As stated above, in connection with the Trial Chamber's findings in relation to the killing of Petko Gligorević, the Trial Chamber accepts as trustworthy the firsthand accounts of Stevan Gligorević, Witness F, Mladen Kuljanin and Zoran Ninković with respect to the collective beating in connection with which Miroslav Vujičić is alleged to have been killed. Specifically in relation to the present charge, Witness F testified how, at one point during the beating Miroslav Vujičić was taken out of the line up, made to lie down on the ground and hit several times. Miroslav Vujičić then got up and started running away from the scene of the beatings, whereupon shots were fired, killing him. This account is supported by the testimony of Witness F and Stevan Gligorević. While the latter of these witnesses stated that he was unable observe these events, he testified to hearing shots being fired and later seeing the victim's body lying in the grass. The death of Miroslav Vujičić was further supported by Exhibit 185, a funeral certificate.

[897] *See* Delalić Closing Brief, RP D8462.

902. Accordingly, the Trial Chamber finds that a group of detainees were collectively beaten in the same manner as found for the killing of Petko Gligorević upon arrival at the Čelebići prison-camp. At some point during this beating, Miroslav Vujičić started to run away from the scene of this physical abuse, whereupon he was shot and killed by one of the individuals participating in the collective beatings.

903. In the instant case it is established that Miroslav Vujičić was shot and killed by one of the individuals participating in the collective beating, as described above, in the Čelebići prison-camp. The Trial Chamber finds that, under these circumstances, the use of a firearm against an unarmed individual demonstrates an intent to kill or to inflict serious injury in reckless disregard of human life. Accordingly, the Trial Chamber finds that the killing of Miroslav Vujičić constitutes the offences of wilful killing under Article 2 and murder under Article 3 of the Statute.

(h) Murder of Pero Mrkajić

904. The Indictment alleges that Pero Mrkajić was beaten to death in July 1992. In seeking to establish the facts in relation to this charge, the Prosecution relies upon the testimony of five witnesses. Both Dragan Kuljanin and Witness F testified that, upon his arrival at the Čelebići prison-camp, Pero Mrkajić was in a serious medical condition. Dragan Kuljanin further testified that Mr. Mrkajić was beaten outside Hangar 6. This was supported by the testimony of Dr. Petko Grubač. Both Witness P and Dr. Grubač, who worked in the makeshift prison-camp infirmary, attested to the extensive bruising and injuries on Mr. Mrkajić's body and confirmed the fact that Mr. Mrkajić died in this infirmary. The Prosecution further relies on Exhibit 185, a funeral certificate.

905. Noting the existence of evidence that Pero Mrkajić was already badly injured upon his arrival at the Čelebići prison-camp, and that he suffered from diabetes, the Defence contends that both or either of these facts caused his death, rather than any unlawful act committed by a person in the Čelebići prison-camp.

906. In his testimony before the Trial Chamber, Dragan Kuljanin described how Pero Mrkajić was severely beaten prior to his arrival at the Čelebići prison-camp. This evidence is consistent with that given by Witness F, who testified that Pero Mrkajić was in a very poor physical condition when he arrived at the Čelebići prison-camp. Dragan Kuljanin further testified that Pero Mrkajić, like

himself, had been subjected to beatings outside Hangar 6. This evidence is supported by the testimony of Dr. Petko Grubač, who stated that Pero Mrkajić told him that he had been beaten up, and that his injuries had been inflicted in Hangar 6. Dr Petko Grubač and Witness P, who both had an opportunity to observe the medical condition of the victim, testified that he died some days after his arrival at the infirmary. In his testimony, Dr. Grubač clearly stated that, in his opinion, Pero Mrkajić did not die as a result of his diabetic condition.

907. Based upon this evidence, the Trial Chamber finds that Pero Mrkajić was already seriously injured when he arrived at the Čelebići prison-camp. Despite the serious nature of his medical condition, Mr. Mrkajić was subjected to further beatings during his period of detention within the prison-camp. He was subsequently transferred to the so-called infirmary, where he remained until his death a few days later.

908. In relation to the present charge and based upon the foregoing facts, the Trial Chamber finds that the act of beating Pero Mrkajić, given the serious nature of his medical condition, demonstrates an intent on the part of the perpetrators to kill or to inflict serious injury in reckless disregard of human life.

909. The Trial Chamber notes that it is a well-recognised legal principle that a wrongdoer must take the victim as he finds him. Thus, if a perpetrator by his acts shortens the life of his victim, it is legally irrelevant that the victim may have died shortly thereafter from another cause. To establish criminal liability in situations where there are pre-existing physical conditions which would cause the victim's death, therefore, it is only necessary to establish that the accused's conduct contributed to the death of the victim. Based upon the facts set out above, the Trial Chamber is convinced that this test is satisfied in relation to the present charge. Accordingly, the Trial Chamber finds that the killing of Pero Mrkajić constitutes the offence of wilful killing under Article 2 and murder under Article 3 of the Statute.

(i) Responsibility of the Accused

910. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. As set out above, Zejnil Delalić and Hazim Delić have respectively been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber

finds Zejnil Delalić and Hazim Delić not guilty of wilful killings and murders, as charged in counts 13 and 14 of the Indictment.

911. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić in this position knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the findings made above, the Trial Chamber finds Zdravko Mucić responsible pursuant to Article 7(3) of the Statute for the wilful killing and murder of Željko Ćećez, Petko Gligorević, Gojko Miljanić, Miroslav Vujičić and Pero Mrkajić. Also on the basis of the findings made above, the Trial Chamber finds that Zdravko Mucić is not responsible for the wilful killing and murder of Milorad Kuljanin, Slobodan Babić and Željko Klimenta, as alleged in Indictment.

912. In his position as a superior, Zdravko Mucić is further responsible for the wilful killing and murder of Šćepo Gotovac, Željko Milošević, Simo Jovanović and Boško Samouković, as alleged in paragraphs 16, 17, 18 and 19 of the Indictment, and found proven by the Trial Chamber above. The Trial Chamber finds that Zdravko Mucić is not responsible for wilful killing and murder of Slavko Šušić as alleged in paragraph 21 of the Indictment. However, in accordance with the findings made above, Zdravko Mucić is responsible for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Slavko Šušić.

8. Torture or Cruel Treatment of Momir Kuljanin - Counts 15, 16 and 17

913. In paragraph 23 of the Indictment, Hazim Delić and Esad Landžo are alleged to be responsible for the torture or cruel treatment of Momir Kuljanin, a detainee at the Čelebići prison-camp. The acts of these two accused in this respect are charged in counts 15, 16 and 17 as follows:

> Sometime beginning around 25 May 1992 and continuing until the beginning of September 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others repeatedly and severely beat Momir KULJANIN. The beatings included being kicked to unconsciousness, having a cross burned on his hand, being hit with shovels, being suffocated, and having an unknown corrosive powder applied to his body. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 15. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal; [and]

Count 16. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (torture) of the Geneva Conventions; or alternatively

Count 17. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

914. The Prosecution relies on the testimony of Witness M, Witness P, Dragan Kuljanin, Mirko Đorđić, Milenko Kuljanin, Witness R, Stevan Gligorević and Mladen Kuljanin in support of the allegations made in these counts of the Indictment. In addition, it places emphasis on the admissions made by Esad Landžo while appearing as a witness in his own defence. Witness N and Milovan Kuljanin also provided testimony about these alleged incidents, although the Prosecution does not seek to rely upon them in its Closing Brief.

(b) Defence Case

915. Hazim Delić has denied that he tortured or cruelly treated Momir Kuljanin in the Čelebići prison-camp. In his interview with the Prosecution investigators, Mr. Delić took the position that he did not even know Mr. Kuljanin, although he might be able to recognise him if he saw him.

916. Esad Landžo admitted before the Trial Chamber that he had on occasion burnt Momir Kuljanin's hand, but stated that he had done so at the instigation of an unidentified "muslim" from the village Homolje and under the orders of Hazim Delić. According to Mr. Landžo, this "muslim" had some prior grudge against Momir Kuljanin and had approached Hazim Delić, who then ordered Landžo to "teach the Chetnik a lesson and to burn a bit his hands so that he wouldn't be touching in connection with some women [sic]".[898]

[898] T. 15067.

(c) Discussion and Findings

917. Momir Kuljanin is a Bosnian Serb who lived in the village of Bradina and was employed in the marketing section of the Yugoslav railway company. He was also the treasurer of the local branch of the SDS and belonged to the local police force reserves. When the joint forces of the TO, HVO and MUP launched their operation to regain control of Bradina in May 1992, Mr. Kuljanin took part in the resistance mounted by the local Bosnian Serbs, but on the successful conclusion of the operation he surrendered to these Bosnian government forces with the automatic rifle which he possessed as a member of the reserve police, and was taken to the Čelebići prison-camp for detention. To begin with, he was confined in Tunnel 9 but was later moved to Hangar 6.

918. In support of these counts, the main witness for the Prosecution was the victim himself, who stated that he was beaten almost daily whilst in the prison-camp. In addition, on one particular occasion Hazim Delić and Esad Landžo took him out of the Hangar and, while Delić walked over to his car parked around 10 metres away, Landžo started kicking and hitting the victim with karate chops, which rendered him unconscious. Esad Landžo then collected some papers, which he set on fire and over which he heated a knife. Mr. Landžo forced Momir Kuljanin to hold the heated knife in his hand, the result of which was the infliction of a serious burn on his palm. Mr. Landžo then cut two lines across Mr. Kuljanin's hand with the same knife. The resulting blisters led to the swelling of his hand and, due to the lack of medical attention, the wound subsequently became septic.

919. The victim testified that, on another occasion, Hazim Delić and Esad Landžo took him out of Hangar 6 and, in the presence of some other guards, a gasmask was put on his head and the screws tightened. With this mask on he could hardly breathe. His trousers were then taken off up to the knees and some powder was applied on his body which did not hurt him at that time. He was then taken to a manhole where water was thrown on him and he experienced terrible pain and a burning sensation. With the mask still in place, he also felt choked and became unconscious. He was then thrown back into the Hangar. He also stated that, as a result of the beatings that he received at that time, five of his ribs were fractured.

920. Momir Kuljanin was twice examined in the so-called infirmary in Building 22, by Witness P. In his testimony, Witness P referred to the burnt hand of Mr. Kuljanin, but made no mention of his broken ribs. It seems unlikely that Witness P would have failed to mention that such further injuries had also occurred and this discrepancy therefore indicates that there may be some doubt

cast on the accuracy of this part of the victim's testimony. Thus, the Trial Chamber cannot safely rely upon his testimony without other evidence in support of it.

921. Insofar as the burning of his hand is concerned, there is sufficient additional evidence available from the testimony of some of the other detainees confined in Hangar 6 at the relevant time. In this context we may refer particularly to the statements of Dragan Kuljanin, Mirko Đorđić, Milenko Kuljanin and Witness R. According to these witnesses, Esad Landžo took Momir Kuljanin out of the Hangar and, when he returned, he had burns on his hand. Stevan Gligorević also saw the burnt hand of Mr. Kuljanin. It should also be noted that Esad Landžo himself has admitted that he had inflicted the burns on Mr. Kuljanin's hand.

922. With regard to the other allegations contained in the three counts, concerning the beatings, use of the gasmask to choke the victim, and application of a corrosive powder, the Trial Chamber has not been presented with any evidence in support of the testimony of the victim himself and, in light of the discrepancy noted above, considers it unsafe to hold that these allegations are also proven.

923. There is, furthermore, no evidence on the record which supports the assertion of Esad Landžo that he burnt the hand of Momir Kuljanin at the instance of an unidentified "muslim" or under the direction of Hazim Delić. The actions of Mr. Landžo are clearly of a cruel nature, inflicted with the intent of causing severe pain and suffering to Mr. Kuljanin, and for the purposes of punishing and intimidating him, as well as contributing to the atmosphere of terror reigning in the camp and designed to intimidate all of the detainees. Furthermore, Mr. Landžo's acts were perpetrated in his role as a guard at the Čelebići prison-camp and, as such, he was an official of the Bosnian authorities running the prison-camp.

924. Accordingly, the Trial Chamber finds Esad Landžo guilty of torture under counts 15 and 16 of the Indictment. Count 17 is thus dismissed, being charged in the alternative to count 16. On the basis of the lack of sufficient evidence of his participation in the acts alleged, the Trial Chamber finds Hazim Delić not guilty under any of the three counts.

9. Torture and Rape of Grozdana Ćećez - Counts 18, 19 and 20

925. Paragraph 24 of the Indictment states that:

> Sometime beginning around 27 May 1992 and continuing until the beginning of August 1992, **Hazim DELIĆ** and others subjected Grozdana ĆEĆEZ to repeated incidents of forcible sexual intercourse. On one occasion, she was raped in front of other persons, and on another occasion she was raped by three different persons in one night. By his acts and omissions, **Hazim DELIĆ** is responsible for:
>
> **Count 18. A Grave Breach** punishable under Article 2(b) (torture) of the Statute of the Tribunal;
>
> **Count 19. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively
>
> **Count 20. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

926. In support of these counts, the Prosecution relies on the testimony of Ms. Ćećez, the victim of the multiple rapes alleged, and that of Witness P, Witness D, Dr. Grubač and Witness T. Ms. Ćećez testified before the Trial Chamber that, after her arrival in the Čelebići prison-camp, on 27 May 1992, she was taken to a room in Building B, where Hazim Delić, who was using a crutch at the time, interrogated her about the whereabouts of her husband. She further stated that she was then required to go to another room where she was raped by Mr. Delić in front of two other men. On her third night in the Čelebići prison-camp, and her first night in Building A, she testified that she was raped by four other men, one of whom was a witness for the Prosecution and who denied this allegation during his testimony. Ms. Ćećez also testified that she was raped by another man at the end of July 1992.

927. The Prosecution contends that the following witnesses, including Defence witnesses, confirmed that Mr. Delić was using a crutch at the time in question: Mirko Đorđić, Dr. Grubač, Witness T, Dr. Jusufbegović, Agan Ramić, Nurko Tabak and Emir Džajić. Further, it seeks to rely

on a medical report showing the period when Mr. Delić was in hospital, between 21-25 May 1992, for an injury to his right leg.[899]

928. The Prosecution submits that other witnesses support the account given by Ms. Ćećez. Witness D, one of the members of the Military Investigative Commission working in the prison-camp, reported that a typist at the prison-camp had told him that the guards were boasting of having raped women prisoners, including Ms. Ćećez. This testimony was, in the view of the Prosecution, confirmed by a 1992 document signed by members of the Commission which stated they had learned from the female detainees that they had each been taken out during the night but they did not want to say what had happened to them. Further, this document stated that some members of prison-camp security had stated that the women had been sexually abused.[900] Further, the Prosecution seeks to rely on Witness T, who testified that Hazim Delić had boasted to him that he had raped 18 Serb women and it was his intention to rape more in the future, and the testimony of Esad Landžo, who said that Delić had bragged to him, while they were in prison together, that he had raped both Ms. Ćećez and Ms. Antić. The Prosecution also refers to the evidence of Dr. Grubač, who testified that he was informed by Ms. Ćećez that the women in the prison-camp were being raped.

929. Ms. Ćećez testified that, during the rape, Hazim Delić told her she was in the Čelebići prison-camp because of her husband and that she would not have been there if he had been around. Further, she testified that Zdravko Mucić had asked about the whereabouts of her husband. The Prosecution submits that the evidence of Witness D supported this, by stating that Ms. Ćećez had to stay in the Čelebići prison-camp because there was information that her husband was hiding in the vicinity of Konjic.

(b) Defence Case

930. Hazim Delić was the only accused charged as a direct participant in these counts of the Indictment and, as such, only his Defence made submissions in relation to them.[901] The Defence for Mr. Delić submits that the only direct evidence of the rapes comes from the alleged victim, and that the remainder of the evidence is indirect. It is submitted that the testimony of Ms. Ćećez is

[899] Exhibit D106/3.
[900] Exhibit 162, para. 7.
[901] Delić Closing Brief, RP D8186-D8193.

unsatisfactory and evasive and, if she was in fact telling the truth, her evidence cast severe doubt on her ability to recall and recount past events.

931. In his interview with the Prosecution investigatiors, given on 19 July 1996, Mr. Delić denied having raped Ms. Ćećez. He admitted that Ms. Ćećez was brought to the Čelebići prison-camp because of her husband but that he only ever had coffee with her. Mr. Delić denied that he had heard reports that Ms. Ćećez had been raped.[902]

932. The Defence contends that there is no evidence that the purpose of the alleged rapes was to elicit information from Ms. Ćećez. At trial, Ms. Ćećez gave evidence that she was raped on 27 May 1992 by Mr. Delić, after which he mentioned her husband as the reason that she was in the prison-camp, but not as the reason for the alleged rape. Further, the Defence argues that the interrogation regarding her husband ended before the alleged rape began and was not resumed after the rape, which, in the view of the Defence, would have to be proven if the purpose of the alleged rape was to obtain information. There is no evidence that information had been sought or given prior to the other alleged rapes.

933. Further, the Defence maintains that Ms. Ćećez had identified Hazim Delić as a perpetrator of rape on the basis that he was using a crutch but was unable to identify the accused in the Prosecution's photo array.

934. The Defence additionally submits that the testimony of Ms. Ćećez lacks credibility for a number of other reasons. First, she made corrections to the statements she had previously made to the Prosecution and was, accordingly, contradicting facts she had formerly asserted as being true. Secondly, she claimed she was unable to recall having spoken to Belgrade TV, and the Defence claims that it is extraordinary that she would forget such an incident. Thirdly, Ms. Ćećez testified to having had contraceptive pills in the Čelebići prison-camp, which she stated had been prescribed by her doctor, but her doctor denied this. Similarly, Ms. Antić testified that Ms. Ćećez provided her with contraceptive pills, but Ms. Ćećez denied this. Fourthly, Ms. Ćećez alleged that a machine gun had been fired near her. Such an incident would not be easily forgotten and the fact that she mentioned it for the first time at trial, in the opinion of the Defence, indicates that she had manufactured this evidence.

[902] Exhibit 103-1, p. 90-91.

935. With respect to the supporting evidence, the Defence states that Witness P testified that he deduced that Ms. Ćećez had been raped based upon certain statements made by Mr. Delić, but he provided no explanation as to how or why he had drawn this conclusion. Secondly, statements by Ismeta Pozder, the typist in the prison-camp, relating to a rape by Mr. Delić and introduced into evidence by Witness P and Witness D, represents hearsay evidence. Thirdly, the fact that Witness D claimed not to know who to report the rape to, despite being a former police officer and secret policeman was incredible and casts serious doubt on his evidence as a whole. Fourthly, Emir Džajić, a witness for the Defence, asserted that Ms. Ćećez had never complained to him about having been subjected to sexual assaults and denied having been present when such assaults took place. Furthermore, he denied that rape was part of the normal interrogation process in the Čelebići prison-camp.

(c) Discussion and Findings

936. The Trial Chamber notes that sub-Rule 96(i) of the Rules provides that no corroboration of the testimony of a victim of sexual assault shall be required. It is alleged in the Indictment that Ms. Ćećez was raped by Hazim Delić and by other persons. The Trial Chamber finds the testimony of Ms. Ćećez, and the supporting testimony of Witness D and Dr. Grubač, credible and compelling, and thus concludes that Ms. Ćećez was raped by Mr. Delić, and others, in the Čelebići prison-camp.

937. Ms. Ćećez, born on 19 April 1949, was a store owner in Konjic until May 1992. She was arrested in Donje Selo on 27 May 1992, and taken to the Čelebići prison-camp. She was kept in Building B for the first two nights of her detention and was then taken to Building A on the third night, where she stayed until her release on 31 August 1992. Upon her arrival at the prison-camp she was taken by a driver, Mr. Džajić, to a room where a man with a crutch was waiting, whom she subsequently identified as Hazim Delić. Another man subsequently entered the room. Ms. Ćećez was interrogated by Mr. Delić, who asked her about the whereabouts of her husband and slapped her. She was then taken to a second room with three men, including Mr. Delić. Hazim Delić who was in uniform and carrying a stick, then ordered her to take her clothes off. He then partially undressed her, put her face down on the bed and penetrated her vagina with his penis. He subsequently turned her over on to her back, took off the remainder of her clothes and again penetrated her vagina with his penis. During this time, Mr. Džajić was lying on another bed in the same room and the other man present was standing guard at the door of the room. Mr. Delić told her that the reason she was there was her husband, and that she would not be there if he was. Later

that evening Zdravko Mucić came to the room where she was being kept and asked about the whereabouts of her husband. He noticed her appearance and asked her whether anyone had touched her. She did not dare to say anything as Delić had instructed her not to do so. However Mr. Mucić "could notice that I [Ms. Ćećez] had been raped because there was a big trace of sperm left on the bed".[903]

938. The effect of this rape by Hazim Delić was expressed by Ms. Ćećez, when she stated: "… he trampled on my pride and I will never be able to be the woman that I was".[904] Ms. Ćećez lived in constant fear while she was in the prison-camp and was suicidal. Further, Ms. Ćećez was subjected to multiple rapes on the third night of her detention in the prison-camp when she was transferred from Building B to a small room in Building A. After the third act of rape that evening she stated "[i]t was difficult for me. I was a woman who only lived for one man and I was his all my life, and I think that I was just getting separated from my body at this time."[905] In addition, she was subjected to a further rape in July 1992. As a result of her experiences in the prison-camp Ms. Ćećez stated that "[p]sychologically and physically I was completely worn out. They kill you psychologically."[906]

939. The fact that Ms. Ćećez was being kept in the Čelebići prison-camp was supported by the evidence of Witness D, a member of the Investigative Commission, who stated that Ms. Ćećez had to be kept there due to information from the field that her husband was armed and hiding in the vicinity of Konjic. In further evidence in support of these counts, Witness D was also told by a typist in the prison-camp that the guards had boasted of having raped Ms. Ćećez. Witness D then testified that he told the typist that she should advise Zejnil Delalić and she stated that she would do so. Further credence is added to the evidence of Ms. Ćećez by Dr. Grubač, a fellow inmate, who testified that he had observed that the women in the prison-camp were crying, in a difficult condition and that he had the impression that they were ashamed. When Dr. Grubač asked Ms. Ćećez what was wrong with them, she told him that women were being taken out and raped each night.

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[903] T. 496.
[904] T. 494.
[905] T. 503.
[906] T. 551.

940. The Trial Chamber finds that acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape. These acts were intentionally committed by Hazim Delić who was, an official of the Bosnian authorities running the prison-camp.

941. The purposes of the rapes committed by Hazim Delić were, *inter alia*, to obtain information about the whereabouts of Ms. Ćećez's husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband. The fact that these acts were committed in a prison-camp, by an armed official, and were known of by the commander of the prison-camp, the guards, other people who worked in the prison-camp and most importantly, the inmates, evidences Mr. Delić's purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness. In addition, the violence suffered by Ms. Ćećez in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.

942. Finally, there can be no question that these rapes caused severe mental pain and suffering to Ms. Ćećez. The effects of the rapes that she suffered at the hands of Hazim Delić are readily apparent from her own testimony and included living in a state of constant fear and depression, suicidal tendencies, and exhaustion, both mental and physical.

943. For these reasons, the Trial Chamber finds Hazim Delić guilty of torture, under count 18 and count 19 of the Indictment for the rape of Ms. Ćećez. As count 20 of the Indictment is charged in the alternative to count 19, it is dismissed in light of the guilty finding for count 19 of the Indictment.

10. Torture and Rape of Witness A - Counts 21, 22 and 23

944. Paragraph 25 of the Indictment states that:

> Sometime beginning around 15 June 1992 and continuing until the beginning of August 1992, **Hazim DELIĆ** subjected a detainee, here identified as Witness A, to repeated incidents of forcible sexual intercourse, including both vaginal and anal intercourse. **Hazim DELIĆ** raped her during her first interrogation and during the next six weeks, she was raped every few days. By his acts and omissions, **Hazim DELIĆ** is responsible for:

Count 21. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 22. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 23. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

945. Ms. Milojka Antić is referred to in the Indictment as Witness A. During the hearing and prior to her testimony, the Prosecution advised the Trial Chamber that she was not a protected witness and on this basis she has been subsequently referred to by her full name.

(a) Prosecution Case

946. The Prosecution submits that Ms. Antić was raped on three separate occasions in the Čelebiči prison-camp. Ms. Antić testified that, upon her arrival at the Čelebiči prison-camp on 15 June 1992, she was taken to Building A and interrogated with another detainee, by persons including Hazim Delić and Zdravko Mucić. Subsequently, during her first night in the prison-camp, she was called out and brought to Mr. Delić, who interrogated her once again and raped her. In addition to her testimony, the Prosecution relies upon the statement of Ms. Ćećez, who said, "Hazim Delić raped Milojka that first night. The girl cried for 24 hours. She could not stop."[907]

947. Ms. Antić further testified that she was raped a second time by Hazim Delić. On this occasion, she said that she was ordered by Mr. Delić to go to Building B with Ms. Ćećez, to take a bath. She stated that she complied with this order, and was then taken to the same room where she had been raped previously. She testified that Delić started to rape her anally causing her great pain and her anus to bleed. She stated that he turned her on to her back and raped her vaginally. Ms. Antić also testified that she was raped a third time by Hazim Delić. On this occasion he came to the door of her room in Building A and ordered Ms. Ćećez to go out into the corridor, after which he raped her. Further supporting testimony was presented by the Prosecution through Ms. Ćećez's

[907] T. 511.

testimony that "Delić would make me go to the front room and he raped her [Ms. Antić] in broad daylight".[908]

948. The Prosecution refers to other supporting evidence in relation to these counts. This includes the testimony of Witness P, who stated that the typist in Building B had told him that Hazim Delić had said that he was keeping Ms. Antić for himself and that she was a virgin; the testimony of Witness T, who informed the Trial Chamber that Mr. Delić had boasted of raping Serb women; the testimony of Esad Landžo, who said that Mr. Delić had boasted of raping Ms. Ćećez and Ms. Antić; the testimony of Witness D, who testified that the typist told him that women in the prison-camp were being raped; the testimony of Dr. Grubač, who stated that he had been told by Ms. Ćećez that women were being raped; and Exhibit 162, a report from the Military Investigative Commission which reported that female detainees were being sexually abused.

(b) Defence Case

949. Hazim Delić is the only accused charged as a direct participant in these counts and, as such, only his Defence counsel made submissions in relation to them.[909] The Defence for Mr. Delić submits that the only eyewitness evidence to the alleged acts came from the alleged victim, and that the remainder of the evidence was indirect. This evidence cannot, therefore, provide a basis for a finding of guilt beyond reasonable doubt.

950. In his interview with Prosecution investigators, on 19 July 1996, Mr. Delić claimed that he did not know Ms. Antić. He asserted that he had never raped anybody and that he did not know of any women being raped at the Čelebići prison-camp.[910]

951. The Defence submits that the Prosecution has presented no evidence that the purpose of the first alleged rape was to elicit information. While Ms. Antić testified that she was first raped after being interrogated by Mr. Delić, she did not allege that the interrogation was resumed after the rape, which, in its view, would have been the logical course of events if its purpose was to secure answers to interrogation. Further, the Defence seeks to discredit Ms. Antić's evidence on the first

[908] T. 535.
[909] Delić Closing Brief, RP D8182-D8186.
[910] Exhibit 103-1, p. 91.

rape on the basis that she did not mention it to anyone, whereas Ms. Ćećez claimed that Ms. Antić had told her of rape. Thus, the Defence contends that both accounts can not be correct.

952. Concerning the alleged second rape, the Defence submits that Ms. Antić's testimony contradicted the evidence of Ms. Ćećez. While Ms. Antić testified that she had a bath before being raped for a second time, Ms. Ćećez's testimony does not support this claim.

953. The Defence also makes a number of general submissions in order to discredit the alleged victim's evidence. First, Ms. Antić failed to inform either of the doctors who examined her - Witness P and Dr. Grubač - that she had been raped. Secondly, Ms. Antić was unable to identify the accused from a photo array, although she mentioned that one of the images looked familiar and she recognised the forehead, nose and mouth, whereas one would expect the perpetrator's face to be imprinted on her mind. Thirdly, Ms. Antić had previously told the Prosecution's investigators that she had been raped every two or three days during her first six weeks at the Čelebići prison-camp. This is inconsistent with the evidence she gave at trial, where she said she was raped on three occasions. Fourthly, Ms. Antić gave evidence at trial that she had overheard Zdravko Mucić referring to her as the "right type for you" to Mr. Delić, but she did not include this in her prior statement to the Prosecution's investigators.

954. Further, Ms. Antić testified that she had been offered contraceptive pills by Ms. Ćećez, but that she had refused them as unnecessary. According to the Defence, this was denied by Ms. Ćećez and contradicts an earlier statement made by Ms. Antić where she stated that she had taken the contraceptive pills as she was afraid of becoming pregnant. In fact, Ms. Antić had undergone a hysterectomy some years before the conflict and could not therefore have been at risk from pregnancy. When questioned at trial regarding this inconsistency in her testimony, Ms. Antić said she hadn't known the results of the operation. Thereafter, Dr. Jusufbegović, a medical practitioner, testified that it was unlikely that a doctor would not disclose, nor a woman ask about, the success of such an operation. In this regard, the Defence submits that her testimony is wholly contradictory.

(c) Discussion and Findings

955. Ms. Antić is a Bosnian Serb born in 1948. In 1992, she lived in the village of Idbar with her mother. She was arrested in her village on 15 June 1992 and taken to the Čelebići prison-camp. After her arrival, she was detained in Building A along with other women, where she was kept until

her release on 31 August 1992. Upon her arrival at the Čelebići prison-camp, she was immediately interrogated together with another woman, by Hazim Delić, Zdravko Mucić and another person. In answer to a question by Mr. Mucić, she stated that she was not married, at which point Mr. Mucić said to Mr. Delić, "[t]his is just the right type for you".

956. The Trial Chamber notes that Sub-rule 96(i) of the Rules, provides that no corroboration of the victim's testimony shall be required. It agrees with the view of the Trial Chamber in the *Tadić Judgment*, quoted in the *Akayesu Judgement*, that this sub-Rule:

> accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long been denied to victims of sexual assault by the common law.[911]

957. Despite the contentions of the Defence, the Trial Chamber accepts Ms. Antić's testimony, and finds, on this basis, and the supporting evidence of Ms. Ćećez, Witness P and Dr. Petko Grubač, that she was subjected to three rapes by Hazim Delić. The Trial Chamber finds Ms. Antić's testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanour in the court room in general and, particularly, under cross-examination. The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Antić. She consistently stated under cross-examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had "kept inside for so many years".[912] Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.

958. The Trial Chamber thus finds that Ms. Antić was raped for the first time on the night of her arrival in the prison-camp. On this occasion she was called out of Building A and brought to Hazim Delić in Building B, who was wearing a uniform. He began to interrogate her and told her that if she did not do whatever he asked she would be sent to another camp or she would be shot. Mr. Delić ordered her to take her clothes off, threatened her and ignored her crying pleas for him not to touch her. He pointed a rifle at her while she took her clothes off and ordered her to lie on a bed. Mr. Delić then raped her by penetrating her vagina with his penis, he ejaculated on the lower part of her stomach and continued to threaten and curse her.

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[911] *Tadić Judgment*, para. 536 and *Akayesu Judgement*, para. 134.
[912] T. 1825 and T 1837.

959. She was brought back to her room in Building A in tears, where she stated that she exclaimed, "Oh, fuck you, God, in case you exist. Why did you not protect me from this?"[913] The following day, Hazim Delić came to the door of the room where she was sleeping and she began crying upon seeing him. He then said to her "[w]hy are you crying? This will not be your last time". Ms. Antić stated during her testimony "I felt so miserably [sic], I was constantly crying. I was like crazy, as if I had gone crazy."[914] The rape and the severe emotional psychological suffering and injury experienced by Ms. Antić was also reported by Ms. Ćećez and Dr. Grubač.

960. The second rape occurred when Hazim Delić came to Building A and ordered Ms. Antić to go to Building B to wash herself. After doing so, she was led to the same room in which she was first raped, where Delić, who had a pistol and a rifle and was in uniform, was sitting on a desk. She started crying once again out of fear. He ordered her to take her clothes off. She kept telling him that she was sick and asking him not to touch her. Out of fear that he would kill her she complied with his orders. Mr. Delić told her to get on the bed and to turn around and kneel. After doing so he penetrated her anus with his penis while she screamed from pain. He was unable to penetrate her fully and she started to bleed. Mr. Delić then turned her around and penetrated her vagina with his penis and ejaculated on her lower abdomen. After the rape Ms. Antić continued crying, felt very ill and experienced bleeding from her anus, which she treated with a compress, and was provided with tranquillisers.

961. The third rape occurred in Building A. It was daylight when Hazim Delić came in, armed with hand grenades, a pistol and rifle. He threatened her and she again said that she was a sick woman and asked him not to touch her. He ordered her to undress and get on the bed. She did so under pressure and threat. Mr. Delić then pulled his trousers down to his boots and raped her by penetrating her vagina with his penis. He then ejaculated on her abdomen.

962. The Trial Chamber finds that acts of vaginal penetration by the penis and anal penetration by the penis, under circumstances that were undoubtedly coercive, constitute rape. These rapes were intentionally committed by Hazim Delić who was an official of the Bosnian authorities running the prison-camp.

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[913] T. 1780.
[914] T. 1777-T. 1780.

963. The rapes were committed inside the Čelebiči prison-camp and on each occasion Hazim Delić was in uniform, armed and viciously threatening towards Ms. Antić. The purpose of these rapes was to intimidate, coerce and punish Ms. Antić. Further, at least with respect to the first rape, Delić's purpose was to obtain information from Ms. Antić, as it was committed in the context of interrogation. In addition, the violence suffered by Ms. Antić in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.

964. Finally, there can be no question that these rapes caused severe mental and physical pain and suffering to Ms. Antić. The effects of the rapes that she suffered at the hands of Hazim Delić, including the extreme pain of anal penetration and subsequent bleeding, the severe psychological distress evidenced by the victim while being raped under circumstance where Mr. Delić was armed and threatening her life, and the general depression of the victim, evidenced by her constant crying, the feeling that she was going crazy and the fact that she was treated with tranquilizers, demonstrate most emphatically the severe pain and suffering that she endured.

965. For these reasons, the Trial Chamber finds Hazim Delić guilty of torture under count 21 and count 22 of the Indictment for the multiple rapes of Ms. Antić. As count 23 of the Indictment was charged in the alternative to count 22, it is dismissed in light of the guilty finding for count 22 of the Indictment.

11. Torture or Cruel Treatment of Spasoje Miljević - Counts 24, 25 and 26

966. In paragraph 26 of the Indictment, Hazim Delić and Esad Landžo are alleged to be responsible for the torture of Spasoje Miljević, another detainee in the Čelebići prison-camp. The acts of these two accused in this respect are charged in counts 24, 25 and 26 as follows:

> Sometime beginning around 15 June 1992 and continuing until August 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others mistreated Spasoje MILJEVIĆ on multiple occasions by placing a mask over his face so he could not breath, by placing a heated knife against parts of his body, by carving a Fleur de Lis on his palm, by forcing him to eat grass, and by severely beating him using fists, feet, a metal chain, and a wooden implement. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:
>
> **Count 24. A Grave Breach** punishable under Article 2(b) (torture) of the Statute of the Tribunal; [and]

Count 25. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (torture) of the Geneva Conventions; or alternatively

Count 26. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

967. In support of the allegations made in relations to these counts, the Prosecution relies primarily on the testimony of Witness N, along with that of Branko Gotovac, Dragan Kuljanin, Branko Sudar, Risto Vukalo, Rajko Draganić and Witnesses F, R, and P. The Prosecution also makes reference to the testimony of Mr. Landžo himself.

(b) Defence Case

968. In his interview with Prosecution investigators on 19 July 1996 (Exhibit 103), Hazim Delić denied that he had taken part in the mistreatment of Spasoje Miljević and, in fact, stated that he did not even know that Spasoje Miljević was a detainee in the Čelebići prison-camp. Mr. Delić told the Prosecution investigators that, if Mr. Miljević had been tortured in the camp, there should have been a report about it in the camp commander's office.

969. During his oral testimony Esad Landžo admitted before the Trial Chamber that he had beaten and caused burns to Spasoje Miljević. Apparently in justification, he stated that he had once caught Mr. Miljević stealing food intended for the elderly detainees and that it was on this occasion that he had beaten the victim. As regards the infliction of burns to Mr. Miljević, Mr. Landžo contended that he had been instructed by Hazim Delić to inflict them.

(c) Discussion and Findings

970. Spasoje Miljević is a Bosnian Serb from the village of Homolje who, in May 1992, was working in a restaurant in the neighbouring village of Viniste, several kilometres away from Konjic town. He was arrested on 23 May 1992 by the forces of the Bosnian government and was taken to

the Čelebići prison-camp that evening. There he was confined in Building 22. The victim testified that he was severely beaten by some persons in uniform in the prison-camp on the morning of 24 May while being questioned, as result of which his jaw was cracked and some teeth knocked out and he could not eat anything, nor was he able to stand up unassisted. He stayed in Building 22 for around 13 days and was then moved to Hangar 6. While he was detained in the Hangar, Hazim Delić and Esad Landžo continued to mistreat him.

971. Apart from his general mistreatment, which consisted of frequent beatings and kickings, the victim referred during his testimony to three specific incidents. He stated that, on 15 July 1992, Esad Landžo took him out of the Hangar and made him sit on the floor behind an adjoining building. Mr. Landžo put a gasmask on his head, tightened the screws such that he felt suffocated, and then repeatedly heated a knife and burnt the victim's hands, left leg and thighs. When he had finished inflicting these burns upon the victim, Esad Landžo removed the mask and proceeded to kick and hit him on the way back to the Hangar. On this same occasion, Mr. Landžo also forced the victim to eat grass, as well as filling his mouth with clover and forcing him to drink water. The burns thus inflicted subsequently became septic, and were bandaged several days later in Building 22.

972. Describing a later incident, the victim stated that Esad Landžo called him out of the Hangar, put a mask on his head to stop him from making noise and covered the front of the mask with a piece of white cloth to ensure that he could not see his tormentors. Mr. Landžo and several other persons then started beating him with a baseball bat. He thought (although he was not sure) that Hazim Delić had been present and watched this incident. The victim also testified that, on yet another occasion, Esad Landžo took him out of the Hangar, along with Branko Gotovac and his two sons, and beat them with a wooden plank, as well as placing a lit match underneath the victim's thumb nail.

973. Branko Gotovac provided testimony in support of this latter incident, stating that he and his two sons were taken out of Hangar 6 at the same time as Spasoje Miljević, on one of the occasions of the latter's mistreatment. He was thus in a position to see that Mr. Miljević had a mask put on his head by Mr. Landžo, as did one of his sons, and they were hit. Witness F, Dragan Kuljanin and Witness R were inside the Hangar when the incident relating to the burning of Spasoje Miljević took place. They stated that on this occasion Spasoje Miljević was taken out of the Hangar and when he returned they could see that he had burns on his hands. Risto Vukalo testified that he had been told by the victim that Esad Landžo had heated a knife and burnt his hands. Branko Sudar and

Rajko Draganić further stated that Spasoje Miljević was burnt inside the Hangar, although this testimony is contrary to that of the victim himself and the other witnesses. Witness P testified that he had treated Spasoje Miljević for his burn injuries which were on the lower parts of his legs as well as on the portion just above the knees.

974. As already stated, Esad Landžo has admitted that he had caused the burn injuries to the legs of Spasoje Miljević. Thus, on this basis and that of the testimony of the other witnesses, this part of the case of the Prosecution stands established. In addition, there is no reason to disbelieve the testimony of the victim when he said that Esad Landžo had placed a gasmask on his head, had forced him to eat grass, had filled his mouth with clover and water and had beaten him.

975. Insofar as Hazim Delić is concerned, the victim stated that he had seen him standing by the tin wall of the Hangar on one occasion when he was being taken out by Esad Landžo for the purpose of mistreatment. He was not, however, sure if Hazim Delić actually viewed the mistreatment. In these circumstances and in the absence of other substantiating evidence from the Prosecution, it is not safe to hold that Hazim Delić was a party to the mistreatment of Spasoje Miljević at the hands of Esad Landžo. Moreover, the victim himself testified that, sometime after Esad Landžo had caused burns on his person, Hazim Delić inquired from him if Mr. Landžo had "played" with him. This apparently provocative query by Mr. Delić suggests that he may have been unaware of the precise circumstances in which the victim was burnt.

976. The contention of Esad Landžo that he had caused the burn injuries to Spasoje Miljević under the directions of Hazim Delić stands entirely unsupported by any other evidence on record. The Trial Chamber therefore has no hesitation in rejecting it as unsubstantiated. As in the case of other acts of mistreatment perpetrated by Mr. Landžo, the Trial Chamber is appalled by the cruel nature of his conduct, which was clearly intended to cause severe pain and suffering to Spasoje Miljević, for the purposes of punishing and intimidating him, as well as contributing to the atmosphere of terror reigning in the prison-camp and designed to intimidate all of the detainees. Furthermore, Mr. Landžo's acts were perpetrated in his role as a guard at the Čelebići prison-camp and, as such, he was an official of the Bosnian authorities running the prison-camp.

977. For the reasons recorded above the Trial Chamber finds Esad Landžo guilty of torture under counts 24 and 25 of the Indictment. Count 26 is accordingly dismissed, being in the alternative to count 25. Due to the insuffiency of evidence relating to the participation of Hazim Delić in these acts of torture , the Trial Chamber finds Hazim Delić not guilty under any of these three counts.

12. Torture and Cruel Treatment of Mirko Babić - Counts 27, 28 and 29

978. In paragraph 27 of the Indictment, Hazim Delić and Esad Landžo are alleged to be responsible for the torture of Mirko Babić, a detainee in the Čelebići prison-camp. The acts of these two accused in this respect are charged in counts 27, 28 and 29 as follows:

> Sometime around the middle of July 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others mistreated Mirko BABIĆ on several occasions. On one occasion, **Hazim DELIĆ**, **Esad LANDŽO**, and others placed a mask over the head of Mirko BABIĆ and then beat him with blunt objects until he lost consciousness. On another occasion, **Esad LANDŽO** burned the leg of Mirko BABIĆ. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:
>
> **Count 27. A Grave Breach** punishable under Article 2(b) (torture) of the Statute of the Tribunal; [and]
>
> **Count 28. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (torture) of the Geneva Conventions; or alternatively
>
> **Count 29. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

979. In relation to these charges, the Prosecution brought and examined six witnesses to support the testimony of the victim himself, Mirko Babić. These witnesses were Branko Gotovac, Witnesses N and R, Branko Sudar, Risto Vukalo and Rajko Draganić.

(b) Defence Case

980. Hazim Delić, in his interview with Prosecution investigators, on 19 July 1996, (Exhibit 103) denied that he had tortured or cruelly treated Mirko Babić. Esad Landžo also made a similar denial in testimony before the Trial Chamber. Both stated that they did not even know Mr. Babić. However, in his interview with Prosecution investigators, recorded on 18 July 1996, (Exhibit 102) Esad Landžo did admit that he knew Mirko Babić but repudiated the allegations of maltreatment.

981. As discussed below, the Defence for Mr. Landžo also relied on the testimony of Ramo Salihović as well as a photograph provided by a doctor who examined Mr. Babić in the Netherlands (Defence Exhibit D2/4), which was discussed also by the Defence witness, Dr. Eduardo Bellas.

(c) Discussion and Findings

982. Mirko Babić is a Bosnian Serb from Bjelovčina, a village about 15 kilometres from Konjic town, and was 59 years of age at the time relevant to the Indictment. He was a forest guard and a member of the SDS, although, according to his own testimony, not an active one. According to the testimony of the victim himself, the forces of the Bosnian government engaging the Bosnian Serbs in the region entered Bjelovčina on 21 May 1992, whereupon Mr. Babić fled into the forest, carrying a revolver which he owned. He was, however, arrested on the following day by soldiers in green camouflage uniforms, whom he identified as bearing the insignia of the TO. Upon his arrest, he was taken to his house and severely beaten and mistreated. He was then, on the evening of 23 May, taken to the Čelebići prison-camp. There, he was kept in Building 22, which was extremely overcrowded, for the first 20 days. During that time he did not receive any physical mistreatment. He was then transferred to Hangar 6 and finally was released from the prison-camp on 1 September 1992.

983. Mr. Babić appeared as the primary witness for the Prosecution in relations to these counts of the Indictment and testified that Hazim Delić and Esad Landžo had mistreated him on several occasions while he was confined in Hangar 6. On one particular occasion, these two accused took him out of the Hangar to a place about 15 metres away, where they put some kind of mask on his head and, together with some other person or persons, started beating him. As a consequence of this beating and being hit with a wooden plank, he lost consciousness. Mr. Babić further deposed that some days later, around 20 July 1992, Esad Landžo once again took him out of the Hangar to the same place and asked him to lie down and bare his legs up to the knees. Mr. Landžo then poured some petrol on his right leg and set it alight. His leg was thus seriously burnt and later developed blisters.

984. In relation to this particular burning incident, Mr. Babić made a prior written statement to Prosecution investigators which differed slightly from his oral testimony (Exhibit D1/4). In this prior statement, he told the Prosecution that Esad Landžo had ripped off his trousers with a knife

and, as a result, he became naked. Before the Trial Chamber, his relation of these events was that Esad Landžo made him lie down on the floor and asked him to roll up his trousers and bare his leg before burning him.

985. Branko Gotovac is from a neighbouring village to that where Mirko Babić resided and, according to the testimony of the former, they were very close to each other. It is, therefore, surprising that, in his evidence before the Trial Chamber, Mr. Gotovac does not refer to the burning of the leg of Mirko Babić. Similarly, Branko Sudar and Risto Vukalo say nothing in respect of this incident. Witness N, during his testimony, stated first that he had seen Mr. Babić's leg burning when he returned to the Hangar, but later this witness contradicted this statement by testifying that he had seen only the scar of the burn on Mr. Babić's leg. Rajko Draganić, on the other hand, stated that Mirko Babić was burnt inside the Hangar, which is contrary to the testimony of the victim himself. Witness R deposed that Esad Landžo took Mirko Babić out of the Hangar and when the latter returned after some time, his trousers were burning. However, according to the prior written statement of Mirko Babić, the fire on his leg was extinguished within 20 seconds of being lit. If this statement is accepted, Witness R could not have seen Mr. Babić's trousers burning.

986. The Defence for Mr. Landžo led evidence to show that at some time prior to 1992, Mirko Babić had burnt his leg in an accident and he was seen by a number of persons at that time with a bandaged leg. The most important Defence witness in this regard is Ramo Salihović, who was also from Bjelovčina and was the neighbour of Mirko Babić. Mr. Salihović testified that, around 1980 or 1981, a lime pit where Mirko Babić was working caught fire and burnt a number of persons, including Mr. Babić. After this accident the witness used to see Mr. Babić walking with a bandaged leg. This witness also stated that Mirko Babić was the President of the local branch of the SDS and thus not "inactive" as Mr. Babić himself testified.

987. It may also be noted that, at the request of the Defence for Mr. Landžo, Dr. Bellas, an expert witness for the Defence of Hazim Delić, examined in the courtroom a photograph of the leg of Mirko Babić at the time of his testimony before the International Tribunal. This photograph (Exhibit D2/4) does show a healed scar, the age of which, in the view of the doctor, could not be determined. It will be noticed that the presence of an old scar on Mr. Babić's leg is not inconsistent with the position advocated by the Defence.

988. For these reasons, there remains a reasonable doubt as to whether Esad Landžo inflicted burns on the leg of Mirko Babić, as alleged in the Indictment. The testimony of Mirko Babić that Hazim Delić and Esad Landžo took him out of Hangar 6, put a mask on his head and, together with some others, beat him with blunt objects, has not been supported by any other witness. In light of this fact and that the Trial Chamber does not consider Mr. Babić's own account of the mistreatment which he received wholly reliable, it is not possible, in the absence of such supporting evidence, to establish the verity of this account.

989. For these reasons, the Trial Chamber finds Hazim Delić and Esad Landžo not guilty under counts 27, 28 and 29 of the Indictment.

13. Torture or Cruel Treatment of Mirko Đorđić - Counts 30, 31 and 32

990. In paragraph 28 of the Indictment, Esad Landžo is alleged to be responsible for the torture of Mirko Đorđić, another of the detainees in the Čelebići prison-camp. The alleged acts of Esad Landžo in this respect are charged in counts 30, 31 and 32 as follows:

> Sometime around the beginning of June 1992 and continuing to the end of August 1992, **Esad LANDŽO** subjected Mirko ĐORĐIĆ to numerous incidents of mistreatment, which included beating him with a baseball bat, forcing him to do push-ups while being beaten, and placing hot metal pincers on his tongue and in his ear. By his acts and omissions, **Esad LANDŽO** is responsible for:
>
> **Count 30. A Grave Breach** punishable under Article 2(b) (torture) of the Statute of the Tribunal; [and]
>
> **Count 31. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (torture) of the Geneva Conventions; or alternatively
>
> **Count 32. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

991. To support the testimony of the victim himself, the Prosecution relies on the statements of ten witnesses, namely, Steven Gligorević, Mladen Kuljanin, Vaso Đorđić, Novica Đorđić and Witnesses F, N, B, T, R and P.

(b) Defence Case

992. Esad Landžo denied the allegations contained in this part of the Indictment and said that he did not know Mirko Đorđić, although he did not rule out the possibility that something may have happened to him in the Čelebići prison-camp at the instigation of other prison-camp guards.

(c) Discussion and Findings

993. Mirko Đorđić is a Bosnian Serb from the village of Bradina, who was 36 years of age at the time relevant to the Indictment. He was a waiter and worked in Konjic town. According to his own testimony, he participated in the resistance mounted by the Bosnian Serb residents of Bradina when the village was the target of operations by the Bosnian government forces towards the end of May 1992. He possessed an automatic rifle, but when the government forces overcame the Bosnian Serbs in the village, he fled with his family towards Serb-held territory, leaving his rifle behind. A patrol party of soldiers, apparently bearing the insignia of the HVO, TO and possibly also the HOS, subsequently captured him in the evening of 28 May 1992 and he was transferred to the Čelebići prison-camp on the evening of 30 May 1992, where he was confined in Hangar 6. He remained in the Hangar in the prison-camp until 21 August 1992, when he was transferred to the Musala sports hall in Konjic town, which was also being used as a detention facility. After 10 days he was returned to the Čelebići prison-camp, where he remained until December 1992. He was finally released from detention in the sports hall in Konjic in October 1994, as part of an exchange of prisoners.

994. Mirko Đorđić testified before the Trial Chamber that, in the second part of June 1992, Esad Landžo, who was carrying a baseball bat at the time, took him out of Hangar 6 to another hangar. Mr. Landžo made him lean against a wall and asked him about the whereabouts of some hand grenades and pistols. When Mr. Đorđić was unable to provide him with any information in

respect of these items, Esad Landžo put a piece of metal in his mouth so that he could not make any noise and then started hitting him with the baseball bat on his legs and rib cage. This went on for a long time and Mr. Đorđić fell down and fainted many times. When this occurred, Esad Landžo would make him stand once more and again start beating him. Ultimately, Mr. Landžo allowed Mr. Đorđić to return to the Hangar. This beating was so severe that he could not get up unassisted and he remained immobile for quite some time. Subsequently, one of the other inmates of the Hangar told him that he had received about 200 to 250 blows.

995. Mirko Đorđić further testified that Esad Landžo was extremely harsh to him throughout his entire stay inside Hangar 6, for, whenever he passed by him, he would give him a kick or two. Mr. Landžo would also force him to perform ten full push-ups and sometimes to do as many as fifty. In the process of attempting to do these, Mr. Landžo would often kick him. Mr. Đorđić also testified about another particular occasion, towards the middle of July 1992, when Esad Landžo took him to a corner of Hangar 6, forced him to open his mouth, and placed a pair of heated pincers on his tongue. As a result, his mouth, lips and tongue were burnt. Mr. Landžo then put these heated pincers into Mr. Đorđić's ear.

996. All of the abovementioned witnesses who testified for the Prosecution in relation to these counts of the Indictment claimed that they had seen burns on the face of Mirko Đorđić and some testified that they had seen Esad Landžo inflict them upon him. In this regard, the testimony of Witness P is the most important, for it was he who treated Mr. Đorđić for his burns. Witness P deposed that he saw that Mr. Đorđić's lips and tongue had been burnt and that pincers had been placed in his ear, from which pus was being excreted. The Trial Chamber finds no reason not to believe the testimony of Mirko Đorđić that Esad Landžo had caused these injuries.

997. The allegation of Mirko Đorđić that Esad Landžo would force him to do push-ups finds support from the testimony of Stevan Gligorević and Witness B, although the latter of these witnesses made an allegation of a general nature in this regard, without naming any particular victim. There is no reason why this part of the case of the Prosecution should not be accepted as true, supported as it is by the evidence of the victim and two other witnesses who were confined in the same place.

998. For the above reasons, the Trial Chamber is satisfied that Esad Landžo did cause serious injury to Mirko Đorđić by burning his lips, tongue and ear with heated pincers, as well as subjecting him to more general mistreatment. This particular injury and mistreatment was inflicted with the

intent to cause severe pain and suffering to the victim and with the purposes of punishing and intimidating him, as well as contributing to the atmosphere of terror reigning in the prison-camp, which was designed to intimidate all of the detainees. Furthermore, Mr. Landžo's acts were perpetrated in his role as a guard at the Čelebići prison-camp and, as such, he was an official of the Bosnian authorities running the prison-camp. The Trial Chamber therefore finds Esad Landžo guilty of torture under counts 30 and 31 of the Indictment. Count 32 is hereby dismissed, being charged in the alternative to count 31.

14. Responsibility of Superiors for Acts of Torture - Counts 33, 34 and 35

999. Paragraph 29 of the Indictment contains the following factual allegations:

> With respect to the acts of torture committed in Čelebići camp, including placing Milovan KULJANIN in a manhole for several days without food or water, and including those acts of torture described in paragraphs twenty-three to twenty-eight, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators.

In connection with the foregoing allegations, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged as superiors as follows:

> **Count 33. A Grave Breach** punishable under Article 2(b) (torture) of the Statute of the Tribunal;
>
> **Count 34. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively
>
> **Count 35. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

1000. The Trial Chamber's findings as to the offences alleged in paragraphs 23-28 of the Indictment, as charged here, are contained above. Further, as discussed above, the Trial Chamber restricts itself to addressing the specific allegations in the Indictment and therefore will not consider the numerous other acts of torture for which evidence was led during trial, but which are not

specifically alleged in the Indictment. Accordingly, the Trial Chamber will here limit itself to considering the factual allegations as they relate to one victim - Milovan Kuljanin.

(a) Prosecution Case

1001. The Indictment alleges that in the Čelebići prison-camp, Milovan Kuljanin was placed in a manhole for several days without food or water. The Prosecution further alleges that Mr. Kuljanin, upon leaving the manhole, was taken to Building 22 where he was beaten and subsequently questioned. To establish the facts in relation to this charge, the Prosecution relies principally on the victim's own testimony. The Prosecution submits that Mr. Kuljanin's account in relation to this charge is substantially supported by the testimony of Miro Golubović, who stated that he and Mr. Kuljanin were ordered into the manhole together. In further support of these allegations, the Prosecution cites the interview with Hazim Delić conducted by Prosecution investigators on 19 July 1996 (Exhibit 103), as well as the testimony of Esad Landžo and witnesses, P, R, and T.

(b) Defence Case

1002. The Defence[915] contends that the two eyewitness accounts provided by Mr. Kuljanin and Miro Golubović as to the events preceding their imprisonment in the manhole, contain irreconcilable discrepancies. The Defence further seeks to impeach Mr. Kuljanin's testimony by pointing out prior inconsistent statements made by Mr. Kuljanin, including the date on which he was first taken prisoner and the sequence of events upon his arrival at the Čelebići prison-camp.

(c) Discussion and Findings

1003. The Trial Chamber finds the testimony of Milovan Kuljanin to be trustworthy. The Trial Chamber is unpersuaded by the efforts on behalf of the Defence to impeach Mr. Kuljanin's testimony by reference to any prior inconsistent statements he may have made regarding his experiences in the Čelebići prison-camp. As the Prosecution pointed out, most of the prior statements cited by the Defence were taken in the Čelebići prison-camp under circumstances that necessarily call their voluntary nature into question. Further, the significance of any opportunity

Mr. Kuljanin may have had to revise his statements must be assessed in light of his own admission in that context that he did not believe he could add the entire and complete truth to the statements he gave to the Bosnian authorities.[916]

1004. The Trial Chamber further finds that, although some discrepancies exist between the statements of the two eyewitnesses in respect of the events preceding their alleged imprisonment in the manhole, the testimony is consistent with respect to the material facts. In this respect, the Trial Chamber further notes that the events to which these witnesses are testifying occurred over five years ago. Therefore, in reliance on the testimony of Mr. Kuljanin and the supporting evidence of Miro Golubović, the Trial Chamber makes the following findings with respect to the acts alleged in paragraph 29 of the Indictment.

1005. Soon after Mr. Kuljanin's arrival at the Čelebići prison-camp, he was taken, by Hazim Delić and others, to a manhole. There, Hazim Delić ordered that he and another detainee, Miro Golubović, descend into the manhole using a ladder, whereupon the iron lid of the manhole was closed and locked. As described by Mr. Kuljanin in his testimony, the manhole was set vertically into the ground with dimensions of approximately 2.5 metres depth and 2.5 metres width. The manhole was dark and had insufficient air. The Trial Chamber finds that Mr. Kuljanin was kept in this manhole for at least a night and a day, during which time he was not provided with either food or water. Hazim Delić and Mr. Zdravko Mucić were present when Mr. Kuljanin was allowed to leave the manhole. Mr. Kuljanin testified that, on emerging from the manhole, he suffered a period of blurred and distorted vision. Mr. Golubović's account of the conditions in the manhole fully supports Mr. Kuljanin's testimony.[917]

1006. Based upon the testimony of Mr. Kuljanin, the Trial Chamber further finds that, subsequent to his release from the manhole, he was taken to Building 22, where he was beaten with a number of objects, including shovels and electric wires, by some of the camp guards. Following the beatings, Mr. Kuljanin was taken for formal questioning by two individuals. Hazim Delić entered the room once during the inteview, carrying a wooden object which he used to strike Mr. Kuljanin.

1007. The Trial Chamber finds that the act of imprisoning Mr. Kuljanin in a manhole for at least a night and a day without food or water constitutes torture. A person commits torture when he, as an

[915] The Defence here referring to the Defence for Zejnil Delalić, Zdravko Mucić and Hazim Delić.
[916] *See* T. 7119.

official, or as an individual acting in an official capacity, intentionally inflicts severe pain or suffering for a prohibited purpose. Here, Hazim Delić, an individual acting in an official capacity imprisoned Milovan Kuljanin in an unlit manhole with insufficient air and without food or water for at least a night and a day. In his testimony, Mr. Kuljanin recalled his condition on emerging from the manhole as "helpless."[918] It is evident that the victim suffered severely during the course of his confinement. The fact that he was beaten and then questioned soon after being released from the manhole demonstrates that the reason for incarcerating Mr. Kuljanin in this manner was to intimidate him prior to interrogation.

1008. For the reasons stated above, this Trial Chamber finds the offence of torture under Articles 2 and 3 of the Statute in respect of Milovan Kuljanin to be proven beyond reasonable doubt.

(d) Responsibility of the Accused

1009. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. The Indictment does not charge Hazim Delić as a direct participant in the torture of Milovan Kuljanin. As set out above, Zejnil Delalić and Hazim Delić have respectively been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić and Hazim Delić not guilty of torture or cruel treatment, as charged in counts 33 to 35 of the Indictment.

1010. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić, in this position, knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the finding made above, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for the torture of Milovan Kuljanin. In his position as superior, Zdravko Mucić is further responsible for the torture of Momir Kuljanin, Grozdana Ćećez, Milojka Antić, Spasoje Miljević and Mirko Đorđić, as alleged in paragraphs 23, 24, 25, 26 and 28 of the Indictment, and found proven by the Trial Chamber

[917] T. 2110.
[918] T. 7028.

above. On the basis of the findings made above, the Trial Chamber further finds that Zdravko Mucić is not responsible for torture of Mirko Babić, as alleged in paragraph 27 of the Indictment.

1011. For the foregoing reasons, the Trial Chamber finds Zdravko Mucić guilty of torture under Article 2 and 3 of the Statute, as charged in counts 33 and 34 of the Indictment. Count 35 of the Indictment, which is charged in the alternative to count 34, is accordingly dismissed.

15. Wilfully Causing Great Suffering or Serious Injury to, and Cruel Treatment of, Nedeljko Draganić - Counts 36 and 37

1012. In paragraph 30 of the Indictment, Esad Landžo is alleged to be responsible for causing great suffering or serious injury to body or health and the cruel treatment of Nedeljko Draganić, a detainee at the Čelebići prison-camp. The alleged acts of the accused Esad Landžo in this respect are charged in counts 36 and 37 as follows:

> Sometime beginning around the end of June 1992 and continuing until August 1992, **Esad LANDŽO** and others repeatedly mistreated Nedeljko DRAGANIĆ by tying him to a roof beam and beating him, by striking him with a baseball bat, and by pouring gasoline on his trousers, setting them on fire and burning his legs. By his acts and omissions, **Esad LANDŽO** is responsible for:
>
> **Count 36. A Grave Breach** punishable under Article 2(c) (wilfully causing great suffering or serious injury) of the Statute of the Tribunal; and
>
> **Count 37. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

1013. In support of these allegations the Prosecution relies primarily on the testimony of Nedeljko Draganić himself. In addition, the Prosecution finds further support from the testimony of 11 other witnessses, namely, Branko Gotovac, Mladen Kuljanin, Mirko Đorđić, Branko Sudar, Petko Grubač, Milovan Kuljanin and Witnesses F, N, B, P and R. With the exception of Witness P and Petko Grubač, these witnesses were all confined in Hangar 6 at the relevant time and were thus in a position to observe the treatment meted out to Nedeljko Draganić.

(b) Defence Case

1014. When testifying in his own defence, Esad Landžo stated that he knew Nedeljko Draganić from his school days and that he had seen Mr. Draganić after he had been beaten by the other guards in a "workshop" in the Čelebići prison-camp.[919] He had denied that he knew anything about burns to Mr. Draganić, but he did notice that Mr. Draganić walked slowly when going to the toilet in the prison-camp. In his interview with the Prosecution investigators, given on 18 July 1996 (Exhibit 102), Mr. Landžo also stated that he knew that Mr. Draganić had been beaten, but did not identify the perpetrators.

(c) Discussion and Findings

1015. Nedeljko Draganić is from the village Cerići, which is at a short distance from Konjic town, and was arrested on 23 May 1992, when he was 19 years of age, after his village had been shelled by the forces of the Bosnian government. Upon his arrest, he was taken to the Čelebići prison-camp, where he was kept for the first three days in Tunnel 9. Thereafter, he was first moved to Building 22 and then to Hangar 6. He was released from the prison-camp at the end of August 1992.

1016. Nedeljko Draganić himself testified that on one occasion towards the end of June or beginning of July 1992, while he was confined in the Čelebići prison-camp, Esad Landžo and three other guards took him to another hangar, where they tied his hands to a beam in the ceiling and started hitting him with wooden planks and rifle butts, while asking him disclose where a rifle, which they believed him to own, was hidden, and during which he fainted two or three times. Thereafter, he was beaten almost every day by Esad Landžo, usually with a baseball bat and he was also forced, along with other detainees, to drink urine from the area where they were taken to urinate. On another occasion, Mr. Draganić testified that Esad Landžo took him to the same building and made him sit on the floor, against the wall, with his legs close together. Mr. Landžo then poured some gasoline on the lower part of his trousers and set them alight. As a consequence, his legs were badly burnt and, for lack of subsequent medical attention, the blisters caused by the burning became septic, requiring him to be taken to the so-called infirmary in Building 22 for treatment about a week later.

1017. While Esad Landžo claimed not to remember these incidents of mistreatment during his oral testimony, the Trial Chamber finds no reason to disregard the sworn testimony of Nedeljko Draganić. His allegations in relation to the burning of his trousers and legs are supported by the evidence of Branko Gotovac, Witnesses F, N and R, Mirko Đorđić, Branko Sudar and Milovan Kuljanin. These witnesses all saw Mr. Draganić's burnt legs and Witnesses F, R, Mirko Đorđić, and Branko Sudar also saw Esad Landžo taking Mr. Draganić out of Hangar 6 some time before he returned with the burn injuries. In Building 22, Witness P treated Mr. Draganić and he testified that he founds burns on the lower and upper parts of his legs.

1018. The Trial Chamber finds no reason not to believe Mr. Draganić's further testimony about being beaten by Mr. Landžo on several occasions and being forced to drink urine. These forms of mistreatment, it will be noted, were favoured by Mr. Landžo in relation to several of the detainees in the prison-camp. All of these abovementioned forms of mistreatment clearly caused serious mental and physical suffering to the victim and there is, therefore, enough reliable evidence available on the record to substantiate the charges of wilfully causing great suffering or serious injury to body or health, and the cruel treatment of, Nedeljko Draganić, contained in counts 36 and 37 of the Indictment. The Trial Chamber accordingly finds Esad Landžo guilty under both of these counts.

16. Responsibility of Superiors for Causing Great Suffering or Serious Injury - Counts 38 and 39

1019. Paragraph 31 of the Indictment contains the following factual allegations:

> With respect to the acts causing great suffering committed in Čelebići camp, including the severe beatings of Mirko KULJANIN and Dragan KULJANIN, the placing of a burning fuse cord around the genital areas of Vukašin MRKAJIĆ and Duško BENĐO, and including those acts causing great suffering or serious injury described above in paragraph thirty...

Zejnil Delalić, Zdravko Mucić, Hazim Delić are charged as superiors who knew or had reason to know that their subordinates were about to commit the above alleged acts or had done so, and had failed either to take the necessary and reasonable steps to prevent those acts or to punish the

[919] T. 15072.

perpetrator. Accordingly, they are charged as follows:

> **Count 38. A Grave Breach** punishable under Article 2(c) (wilfully causing great suffering or serious injury) of the Statute of the Tribunal; and
>
> **Count 39. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3((1)(a)(cruel treatment) of the Geneva Conventions.

1020. The Trial Chamber's findings as to the events alleged in paragraph 30 of the Indictment, as charged here, are set out above. Further, as discussed above, the Trial Chamber restricts itself to addressing the specific allegations in the Indictment and therefore will not consider the other acts of wilfully causing great suffering or serious injury to body or health, and cruel treatment, for which evidence was led during trial, but which are not specifically alleged in the Indictment. Accordingly, the Trial Chamber here limits itself to considering the factual allegations as they relate to Mirko Kuljanin, Dragan Kuljanin, Vukašin Mrkajić, and Duško Bendo.

1021. The Trial Chamber notes that, while the present paragraph of the Indictment further provides that "[w]ith respect to those counts above where Hazim Delić is charged as a direct participant, he is also charged here as a superior", no charge of criminal responsibility pursuant to Article 7(1) of the Statute has been made against Hazim Delić with respect to the acts for which superior responsibility is charged under the present counts.

(a) Mirko Kuljanin

1022. The Indictment alleges that Mirko Kuljanin was severely beaten in the Čelebići prison-camp. In order to establish the facts in relation to this charge, the Prosecution relies on the testimony of Mirko Kuljanin and Witness F.

1023. The Defence[920] contends that the worst beatings to which Mr. Kuljanin was subjected occurred outside of the Čelebići prison-camp and that he was not really beaten severely inside the camp. The Defence further submits that it is not clear from the Prosecution's evidence that the individuals who participated in the alleged beatings were under the command of the Čelebići prison-camp commander.

[920] The Defence in this section referring to the Defence for Zejnil Delalić, Zdravko Mucić and Hazim Delić.

1024. In his testimony, Mirko Kuljanin declared that the most severe beatings he received were administered prior to his arrival at the Čelebići prison-camp. He further testified that, upon his arrival in the Čelebići prison-camp, he was taken to a wall inside the camp, where he and the other newly arrived detainees were beaten. However, Mr. Kuljanin stated that he was not really beaten on this occasion, as he was already unable to stand. He testified: "Maybe they hit me three times. Somebody hit me three times and then some people pulled me inside. I was not really severely beaten there."[921] Witness F testified to seeing Mr. Kuljanin in Hangar 6 sometime thereafter, in a seriously injured condition. The Trial Chamber finds the testimony of these two witnesses to be credible in relation to this charge.

1025. Accordingly, the Trial Chamber finds that, upon his arrival in the Čelebići prison-camp, Mr Kuljanin was seriously injured, having previously been subjected to severe beatings. He and the other newly arrived detainees were taken in a van to a wall inside the camp compound. There, they found many other detainees with their hands up against the wall, being beaten. Mr. Kuljanin testified that he could hear moans and cries from outside the van. The van was then opened and he and the other detainees were told to get out. At this point, Mr. Kuljanin's distress was so acute that he tried to commit suicide by attempting to drive a nail through his head. At the wall, Mr Kuljanin, who was unable to stand on account of his previously inflicted injuries, was hit several times before being pulled away from the scene of the beatings into Tunnel 9.

1026. The Trial Chamber finds that it has not been presented with sufficient evidence to enable it to assess whether the nature of the beatings to which Mr. Kuljanin was subjected inside the Čelebići prison-camp caused him suffering or injury of the character required to constitute the offence of wilfully causing great suffering or serious injury to body or health. However, in the Trial Chamber's view, the act of hitting an individual who is so seriously injured that he is unable to stand, necessarily entails, at a minimum, a serious affront to human dignity. Accordingly, on the basis of the foregoing facts, the Trial Chamber finds that the physical mistreatment of Mirko Kuljanin constitutes the offence of inhuman treatment under Article 2, and cruel treatment under Article 3 of the Statute.

[921] T. 1178.

(b) Dragan Kuljanin

1027. The Indictment alleges that Dragan Kuljanin was subjected to severe beatings in the Čelebići prison-camp. In seeking to prove this factual allegation the Prosecution relies upon the testimony of Dragan Kuljanin and Witness R.

1028. The Defence submits that, as regards the incident wherein Dragan Kuljanin alleges he was forced to pass between two rows of people while they inflicted blows upon him, the Prosecution evidence does not establish that the individuals who participated in the beatings were under the command of the Čelebići prison-camp commander. The Defence further seeks to undermine Dragan Kuljanin's testimony by reference to prior inconsistent statements made by him to the Prosecution.

1029. In his testimony, Mr. Kuljanin provided detailed descriptions of the beatings he received inside the Čelebići prison-camp. In reliance upon Mr. Kuljanin's testimony, the Trial Chamber makes the following findings.

1030. When Dragan Kuljanin first arrived at the prison-camp between ten and fifteen people were lined up in two rows between the vehicle, from which he and other newly arrived detainees were emerging, and the entrance to Hangar 6. Each of the detainees in turn was then forced to pass between the lines of people, while repeated blows were inflicted upon them. Mr. Kuljanin testified that, when his turn came, he was kicked and beaten for about fifteen minutes. The perpetrators used sticks and chains to inflict the blows. Hazim Delić was present for at least some period during the beatings.

1031. On a separate occasion, a guard called Salko took Mr. Kuljanin out behind Hangar 6 and kicked him several times in the ribs. The guard then proceeded to hit Mr. Kuljanin with his rifle butt. The beating lasted for about ten or fifteen minutes. On his way back to the Hangar, Mr. Kuljanin encountered Esad Landžo, who hit him five or six times in the chest with his rifle butt.

1032. On two further occasions, Esad Landžo came into the Hangar and forced Mr. Kuljanin to do push-ups, while inflicting blows to his body, once with kicks and a second time with a baseball bat.

1033. The severity of the physical injuries sustained by the victim is illustrated by the fact that Mr. Kuljanin testified that even now, five years after the events, he still suffers certain physical consequences of the ill-treatment he received in the Čelebići prison-camp. Specifically, Mr. Kuljanin testified to experiencing the following clinical problems: "Sometimes I urinate blood. I don't hear well on my left ear. . . . I have pains and it impedes my speech. Sometimes I have kidney pains."[922]

1034. The foregoing facts demonstrate that Dragan Kuljanin was subjected to deliberate ill-treatment on numerous occasions during his detention in the Čelebići prison-camp. The Trial Chamber finds that the beatings described above caused Mr. Kuljanin serious suffering and physical injury. Accordingly, with respect to each separate act of ill-treatment found above, the Trial Chamber finds that the offences of wilfully causing great suffering or serious injury to body or health under Article 2, and cruel treatment under Article 3 of the Statute, have been proven beyond a reasonable doubt.

(c) Vukašin Mrkajić

1035. The Indictment alleges that, on one occasion, Vukašin Mrkajić had a burning fuse placed around his genital area. In addition to this specific allegation, the Prosecution asserts that Vukašin Mrkajić, on numerous occasions, was beaten by guards and others in the Čelebići prison-camp. In support of this allegation, the Prosecution relies on the testimony of the following ten witnesses: Stevan Gligorević, Mirko Đorđić, Risto Vukalo, Witness F, Mirko Kuljanin, Dragan Kuljanin, Branko Sudar, Mladen Kuljanin, Witness N and Rajko Draganić. The Prosecution also called and examined Witness R who gave evidence relating to the present charge.

1036. In relation to the present charge, the Defence for Zejnil Delacić concedes that the Prosecution has presented consistent evidence that Vukašin Mrkajić was assaulted by having a fuse tied round him and set alight by Esad Landžo. However, the Defence further appears to argue that one of the elements of the offences with which the accused are charged under the present counts, is the showing of a prohibited purpose, and, further, that the Prosecution has failed to prove that the acts alleged were carried out with such a purpose.[923]

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[922] T. 2356.
[923] Delalić Closing Brief, RP D8416.

1037. The evidence presented to the Trial Chamber demonstrates that Vukašin Mrkajić, during his period of detention in the Čelebići prison-camp, was repeatedly subjected to physical mistreatment by several of the guards. In their evidence, Mirko Đorđić, Witness R and Stevan Gligorević gave consistent and reliable accounts of how Vukašin Mrkajić was one of the prisoners targeted for beatings by Hazim Delić, who would hit him "almost every time he would come to the hangar".[924]

1038. With respect to the act specifically alleged in the Indictment, Branko Sudar, Risto Vukalo, Rajko Draganić, Witness R, Mirko Đorđić, Witness N, Witness F and Mladen Kuljanin all testified to having witnessed an incident when Esad Landžo placed a burning fuse around Vukašin Mrkajić's body. In his detailed account of this event, Mirko Đorđić described how Esad Landžo removed Vukašin Mrkajić's trousers and placed a slow-burning fuse against his bare skin around his waist and genitals. He ordered the victim to put the trousers back on, whereupon he set light to the fuse. Rajko Draganić and Mladen Kuljanin both testified that Vukašin Mrkajić was forced to run around between the rows of prisoners inside Hangar 6, while screaming from the pain of the burning fuse. While there is some variation in the accounts given of this incident, the foregoing version of events is, in all material respects, supported by the other witnesses who testified to this incident. In his testimony, Witness R described how he could observe that Vukašin Mrkajić, as a result of this ill-treatment, developed blisters filled with liquid, which later developed into open wounds. This witness further stated that Vukašin Mrkajić was never given any medical treatment for his injuries.

1039. Based upon this evidence, the Trial Chamber finds that on one occasion during the victim's detention in the Čelebići prison-camp, Esad Landžo placed a burning fuse-cord directly against Vukašin Mrkajić's bare skin in the genital area, thereby inflicting serious pain and injury upon him.

1040. Although the Defence contends otherwise, the Trial Chamber has found that it is not a necessary element of the offence of wilfully causing great suffering or serious injury to the body or health that the harmful act be perpetrated for any particular purpose. Accordingly, in relation to the present charge, the Trial Chamber finds that the intentional act of placing of a burning fuse cord against Vukašin Mrkajić's bare body caused the victim such serious suffering and injury that it constitutes the offence of wilfully causing great suffering or serious injury to body or health under Article 2, and cruel treatment under Article 3 of the Statute.

[924] T. 4764.

(d) Duško Benđo

1041. The Indictment alleges that, on one occasion in the Čelebići prison-camp, a burning fuse cord was placed around the genital area of Duško Benđo. In support of its allegations of serious mistreatment of this victim, the Prosecution relies on the testimony of the following twelve witnesses: Witness R, Witness F, Mirko Đorđić, Dragan Kuljanin, Mladen Kuljanin, Witness N, Vaso Đordić, Dr. Petko Grubač, Branko Gotovac, Witness B, Branko Sudar and Rajko Draganić. The Prosecution also called and examined Stevan Gligorević, Nedeljko Draganić and Witness B, who gave evidence relating to this incident.

1042. Relying, *inter alia,* on the testimony of Witness R, the Prosecution alleges that Duško Benđo on one occasion received burns to his legs. With reference to the evidence given by Vaso Đorđić, it further contends that on another occasion, Esad Landžo burned Duško Benđo with a heated knife. The Prosecution concedes that there is some ambiguity concerning whether Dusko Benđo, in addition to this mistreatment, also had a burning fuse put around him, as alleged in the Indictment. The Prosecution asserts, however, that, given that there can be no doubt that Duško Benđo was burned, the exact manner in which this mistreatment was perpetrated should not be considered to be legally dispositive. Submitting that the evidence demonstrates that prison-camp personnel subjected the victim to severe pain and caused him great suffering or serious injury, it accordingly contends that all the elements necessary for the crime of causing great suffering and cruel treatment have been met.

1043. The Defence, noting the existence of evidence that Duško Benđo was beaten regularly and that he was set on fire, contends that the testimony relied upon by the Prosecution differs as to where the latter act occurred. It submits that this discrepancy casts doubt upon the reliability of the witnesses and upon the truth of the incident itself.

1044. The Trial Chamber heard evidence from 15 witnesses in relation to the present charge. All but two of these witnesses testified that Duško Benđo, during his detention in the Čelebići prison-camp, suffered severe burns. While Vaso Đorđić, in his testimony, described how Esad Landžo used a heated knife to burn Duško Benđo's body, Witness R, Mirko Đorđić, Rajko Draganić, Mladen Kuljanin, Witness N and Stevan Gligorević all variously described how Esad Landžo set the victim's trousers on fire, causing serious burns to his legs.

1045. The Trial Chamber notes, however, that there is no allegation in the Indictment with respect to the incidents recounted by these witnesses. Conversely, the Prosecution has presented no evidence in relation to the alleged placing of a burning fuse cord around the genital area of Duško Bendo. As discussed above, where evidence has been led at trial in relation to alleged criminal acts not specified in the Indictment, the Trial Chamber, in fairness to the accused, does not consider the unspecified acts to form part of the charges against the accused. In the instant case, the Prosecution has failed to present any evidence in support of the acts specifically alleged in the Indictment. Accordingly, the Trial Chamber must conclude that the present charge of wilfully causing great suffering or serious injury to body or health, and cruel treatment, as alleged in the Indictment, has not been proven.

(e) Responsibility of the Accused

1046. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. As set out above, Zejnil Delalić and Hazim Delić have been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić and Hazim Delić not guilty of wilfully causing great suffering or serious injury to body or health and cruel treatment, as charged in counts 38 and 39 of the Indictment.

1047. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić, in this position, knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the finding made above, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Dragan Kuljanin and Vukašin Mrkajić, and the inhuman treatment and cruel treatment of Mirko Kuljanin. On the basis of the finding made above, the Trial Chamber finds that Zdravko Mucić is not responsible for the acts alleged in the Indictment in respect of Duško Bendo.

1048. In his position as a superior, Zdravko Mucić is further responsible for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Nedeljko Draganić, as alleged in Paragraph 30 of the Indictment, and found proven by the Trial Chamber above.

17. Inhumane Acts Involving the Use of Electrical Device - Counts 42 and 43

1049. Paragraph 33 of the Indictment states that:

> Sometime beginning around 30 May 1992 and continuing until the latter part of September 1992, **Hazim DELIĆ** used a device emitting electrical current to inflict pain on many detainees, including Milenko KULJANIN and Novica ĐORĐIĆ.

In relation to this factual allegation, Hazim Delić is charged as direct participant as follows:

> **Count 42. A Grave Breach** punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and
>
> **Count 43. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

1050. In seeking to prove these counts of the Indictment, the Prosecution relies upon the evidence of the following witnesses: Stevan Gligorević, Novica Đordić, Witness P, Witness B, Milenko Kuljanin and Witness R. The Prosecution alleges that, during the months of July and August 1992, Hazim Delić frequently used a painful device which emitted an electrical current, upon a great number of detainees in the Čelebići prison-camp including Milenko Kuljanin and Novica Đordić. It contends that the shocks that this device emitted were so severe that victims suffered convulsions and burns. In addition, it submits that Hazim Delić derived pleasure from the use of this device. On the basis of the foregoing, the Prosecution submits that Mr. Delić inflicted severe pain, suffering and indignity, out of proportion to the treatment expected of one human being of another.

(b) Defence Case

1051. Hazim Delić is the only accused charged as a direct participant in the acts alleged in this section of the Indictment. In the Motion to Dismiss, his Defence submits that the Prosecution has

failed to satisfy the general requirements of Articles 2 and 3 of the Statute.[925] In his interview with Prosecution investigators, on 19 July 1996, Mr. Delić claimed that there never was an electrical device such as that described in the Čelebići prison-camp.[926] However, apart from general attempts to impeach the credibility of Prosecution witnesses, no other direct factual allegations have been specifically made by the Defence in respect of these counts.

(c) Discussion and Findings

1052. The Trial Chamber is persuaded by the volume and consistency of the Prosecution evidence in relation to these counts. It finds that, during the months of July and August 1992, Hazim Delić used a device which emitted an electrical current and inflicted pain and injury upon detainees in the Čelebići prison-camp.

1053. The device used by Mr. Delić, which emitted electric shocks, was variously described as "an electric prod for cattle",[927] "a device used …when cattle were slaughtered",[928] "a device for horses … it produces strong electrical shocks",[929] "a gadget which produced electric shocks",[930] and "a device that causes electrical shocks".[931] Witness P described the device as an electric stick about the size of two cigarette packets, with a button. Milenko Kuljanin, upon whom this device was used, described it in the most detail and stated that it was an electrical device in the form of a packet of cigarettes but much larger, with two wires on the top that were connected to a button.

1054. The Trial Chamber finds that this device was used on both Milenko Kuljanin and Novica Đorđić. On one occasion Mr. Delić walked into Tunnel 9 and gave Milenko Kuljanin two electric shocks on his chest just below his neck. On another occasion, Mr. Delić took prisoners from Tunnel 9 outside and selected Novica Đorđić, who was made to sit on a stone block, naked from the waist up, while Delić applied the device to his chest, despite his pleas for mercy. After the shock, the victim fell off the block whereupon Mr. Delić caught him by the leg and kept the device on his chest for a prolonged period of time.

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[925] Motion to Dismiss, RP D5528-D5527.
[926] Exhibit 103-1, p. 93.
[927] T. 7782, Witness R.
[928] T. 4560, Witness P.
[929] T. 4197, Novica Đordić.
[930] T. 1455, Stevan Gligorević.

1055. In addition, Witness B stated that Hazim Delić had used the device upon him. Stevan Gligorević and Witness R testified that he had used it upon Davor Kuljanin and Novica Đorđić stated that the device was inflicted upon Vukašin Mrkajić. Witness P, testified of its use by Mr. Delić upon Risto Žuža. Milenko Kuljanin also stated that Delić used this device on five named detainees from Tunnel 9. This was supported by the evidence of Witness B, who said that Mr. Delić used the device on many prisoners; Novica Đorđić, who testified that Mr. Delić used the device on most of the prisoners in Tunnel 9; and Witness R, who stated that Mr. Delić had developed a habit or custom of placing it against the shoulder or neck of prisoners and turning it on. Thus, the evidence before the Trial Chamber consistently shows that Hazim Delić inflicted this electrical device on numerous prisoners, primarily from Tunnel 9, and on numerous occasions in the Čelebići prison-camp.

1056. The electric shocks emitted by the device caused pain, burns, convulsions and scarring, and frightened the victims and other prisoners. Novica Đorđić testified that the device inflicted a small burn, like the burn from a cigarette, but that the electrical charge was very high and would frighten the victim to the point where he felt he would not be able to survive. In relation to the occasion when the device was used on Novica Đorđić, the victim testified that Hazim Delić kept the device on his skin for a long time. This caused a large burn, which subsequently became infected and as a result of which he bears a scar. Milenko Kuljanin also stated that the device caused horrible and terribly unpleasant pain, convulsions and twitching, and that he suffered a burn and scarring as a result of its use on him. In addition, Witness B testified that when Mr. Delić used the device on prisoners, they would go into spasms. This is supported by Witness P, who testified that when Mr. Delić used the device on Risto Žuža he had a spasm and was thrown into the corner of Tunnel 9.

1057. The evidence further establishes that Hazim Delić derived sadistic pleasure from the use of this device. Novica Đorđić, stated that it was like a "toy" for Mr. Delić[932] and Witness B testified that Delić found the use of this device "very amusing".[933] Milenko Kuljanin testified that when Mr. Delić was using the device on him, he laughed and found it funny. In addition, he stated that

[931] T. 5047, Witness B.
[932] T. 4197.
[933] T. 5047.

when Delić was using the device on some of the other prisoners he,

> talked during this and laughed at them as he was applying the device. Some of them begged him as they were in pain and unpleasant pain not to torture them, not to maltreat them, but he even hit some of them when they begged him to cease torturing them. *He merely laughed.*[934]

1058. The Trial Chamber finds that Hazim Delić deliberately used an electric shock device on numerous prisoners in the Čelebići prison-camp during the months of July and August 1992. The use of this device by Mr. Delić caused pain, burns, convulsions, twitching and scaring. Moreover, it frightened the victims and reduced them to begging for mercy from Mr. Delić, a man who derived sadistic pleasure from the suffering and humiliation that he caused. Accordingly, the Trial Chamber finds that Mr. Delić, by his acts, intentionally caused serious physical and mental suffering, which also constituted a clear attack upon the human dignity of his victims.

1059. For these reasons, the Trial Chamber finds Hazim Delić guilty of inhuman treatment, under count 42 of the Indictment and of cruel treatment, under count 43 of the Indictment, with respect to the use of a device emitting an electrical current on Milenko Kuljanin and Novica Đorđić.

18. Responsibility of Superiors for Inhumane Acts - Counts 44 and 45

1060. Paragraph 34 of the Indictment contains the following factual allegations:

> With respect to the incidents of inhuman acts committed in Čelebići camp, including forcing persons to commit fellatio with each other, forcing a father and son to slap each other repeatedly, and including those acts described above in paragraph thirty-three, **Zejnil DELALIĆ**, **Zdravko MUCIĆ** and **Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary or reasonable steps to prevent those acts or to punish the perpetrators.

In connection with the foregoing allegations, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged as superiors as follows:

> **Count 44. A Grave Breach** punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and

[934] T. 5455 (Emphasis added).

Count 45. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

1061. The Trial Chamber's findings as to the offences described in paragraph 33 of the Indictment, as charged here, are set out above. Further, as discussed above, the Trial Chamber restricts itself to addressing the specific allegations in the Indictment and therefore will not consider the other numerous acts of ill-treatment alleged to have occurred at the Čelebići prison-camp, but not specifically alleged in the Indictment. Accordingly, the Trial Chamber here limits itself to considering the factual allegations as they relate to the incidents wherein persons were forced to commit fellatio with each other and where a father and son were forced to slap each other repeatedly.

(a) Forcing Persons to Commit Fellatio with Each Other

1062. The Indictment alleges that, on one occasion, certain of the detainees were forced to perform fellatio on each other. In order to establish the facts in relation to this count, the Prosecution relies on the testimony of eleven witnesses, in addition to the testimony of the accused, Esad Landžo. Vaso Đorđić gave an account of the incident, whereby Esad Landžo allegedly forced him and his brother to commit fellatio with each other in Hangar 6 in full view of the other detainees. The Prosecution submits that this account is supported by the testimony of various other witnesses, including Witness N, Mladen Kuljanin, Witness R, Rajko Draganić, Dragan Kuljanin, Mirko Đorđić, Witness M, Witness B, Witness F and Risto Vukalo. In addition, the Prosecution relies on the admission of the accused, Esad Landžo, that he forced the Đorđić brothers to commit fellatio with one another and that he put a burning fuse around their genitals. The Prosecution also relies on the testimony of Esad Landžo and the supporting testimony of Rajko Draganić to prove that Hazim Delić was present during the incident, giving instructions to Esad Landžo.

1063. The Defence notes that the accounts of the Prosecution witnesses are inconsistent as to the date on which this incident is alleged to have occcurred.

1064. The Trial Chamber finds the testimony of the victim and the supporting evidence of Witness F, Witness N, Dragan Kuljanin, Witness B, Risto Vukalo, Rajko Draganić, Witness R and Mirko Đorđić to be trustworthy as regards the act of forcing two brothers to commit fellatio as alleged in these counts. This incident is alleged to have taken place insider Hangar 6, and as such,

many of the former detainees who testified were able to observe the incident from their vantage point inside the Hangar. Further, Esad Landžo, provided a full confession as to his participation in this incident in his testimony before this Trial Chamber. The Trial Chamber has previously stated that it finds the testimony of Esad Landžo to be generally unreliable. However, in relation to the present count, where his testimony is consistent with that of so many additional witnesses, the Trial Chamber accepts Mr. Landžo's admission.

1065. Accordingly, on the basis of the foregoing evidence, the Trial Chamber finds that, on one occasion, Esad Landžo ordered Vaso Đorđić and his brother, Veseljko Đorđić, to remove their trousers in front of the other detainees in Hangar 6. He then forced first one brother and then the other to kneel down and take the other one's penis into his mouth for a period of about two to three minutes. This act of fellatio was performed in full view of the other detainees in the Hangar.

1066. The Trial Chamber finds that the act of forcing Vaso Đorđić and Veseljko Đorđić to perform fellatio on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhuman treatment under Article 2 of the Statute, and cruel treatment under Article 3 of the Statute. The Trial Chamber notes that the aforementioned act could constitute rape for which liability could have been found if pleaded in the appropriate manner.

(b) Forcing a Father and Son to Slap Each Other Repeatedly

1067. The Prosecution alleges that, on one occasion, a father and son, Danilo and Miso Kuljanin, were forced to slap each other repeatedly. In order to establish the facts in relation to this count, the Prosecution relies on the testimony of Mirko Đorđić.

1068. The Defence has made no submissions in relation to this factual allegation in the Indictment.

1069. The Trial Chamber finds the testimony of Mirko Đorđić in relation to this count to be trustworthy. Accordingly, it finds that, on one occasion, Esad Landžo came into Hangar 6 and ordered a father and son, Danilo and Miso Kuljanin, to get up and start hitting each other. Esad Landžo then ordered them to hit each other harder and so, for a period of at least ten minutes, Mr. Kuljanin and his son were forced to beat each other.

1070. The Trial Chamber finds that, through being forced to administer a mutual beating to one another, Danilo and Miso Kuljanin were subjected to serious pain and indignity. Accordingly, the Trial Chamber finds that the deliberate act of forcing Danilo Kuljanin and Miso Kuljanin, father and son, to beat one another repeatedly over a period of at least ten minutes constitutes inhuman treatment under Article 2 of the Statute and cruel treatment under Article 3 of the Statute.

(c) Responsibility of the Accused

1071. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. As set out above, Zejnil Delalić and Hazim Delić have been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić and Hazim Delić not guilty of inhuman and cruel treatment, as charged in counts 44 and 45 of the Indictment.

1072. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić, in this position, knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the findings made above, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for inhuman treatment and cruel treatment of Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin and Miso Kuljanin. In his position as a superior, Zdravko Mucić is further responsible for inhuman treatment and cruel treatment of Milenko Kuljanin and Novica Đorđić, alleged in paragraph 33 of the Indictment and found proven by the Trial Chamber above.

19. Inhumane Conditions - Counts 46 and 47

1073. Paragraph 35 of the Indictment sets forth the following factual allegation:

> Between May and October 1992, the detainees at Čelebići camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as

> sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma…

In connection with this factual allegation, Zdravko Mucić, Hazim Delić and Esad Landžo are charged with responsibility pursuant to Article 7(1) of the Statute for having directly participated in creating the alleged conditions. In addition, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors, pursuant to Article 7(3) of the Statute. The accused are charged in these capacities as follows:

> **Count 46. A Grave Breach** punishable under Article 2(c)(wilfully causing great suffering) of the Statute of the Tribunal; and
>
> **Count 47. A Violation of the Laws or Customs of War** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

1074. In support of the allegation contained in the Indictment, the Prosecution relies on a large body of evidence given by former detainees who, in their testimony before the Trial Chamber, described the conditions under which they were detained in the Čelebići prison-camp. Based upon this evidence, the Prosecution, in its submissions, more specifically identified the following factors, which it alleges contributed to the inhumane conditions that have prevailed in the Čelebići prison-camp.

1075. According to the Prosecution, a fundamental aspect of the inhumane conditions in the prison-camp was the all-pervasive atmosphere of terror to which the detainees were constantly subjected. In this respect, it is submitted that, even when not themselves subjected to such treatment, detainees frequently witnessed the mistreatment or killing of other prisoners. The Prosecution contends that ample evidence demonstrates that this atmosphere of terror was purposely maintained, and that this element by itself, even without the other inadequacies in the conditions prison-camp, would be sufficient to constitute inhumane conditions.

1076. With respect to the alleged deprivation of food and water, the Prosecution notes that many witnesses testified about the inadequacy of the food provided to the detainees, and that there were some protracted periods in which no food was provided at all. Similarly, it is submitted that the evidence demonstrates that, while there was no shortage of water, prisoners were denied access to

drinking water in sufficient quantities. It further notes that, according to some witnesses, the detainees were forced to drink non-potable water. It is contended that, as a result of these conditions, many detainees suffered serious weight loss and a weakened physical state during their detention.

1077. According to the Prosecution, the testimony from the detainees further demonstrates that there was little medical care provided in the prison-camp. It submits that, although the prison-camp had a makeshift infirmary, it was very poorly equipped and was clearly inadequate to meet the substantial medical needs of the detainees. Further, the Prosecution contends that the evidence demonstrates that the detainees were often denied access to the limited medical facilities that were in fact available.

1078. The Prosecution further alleges that the sleeping conditions provided for the detainees were seriously inadequate. More specifically, it submits that the evidence demonstrates that the detainees imprisoned in Hangar 6 sat and slept in their assigned positions, on a concrete floor. They were not provided with beds or mattresses, and blankets were scarce. It is contended that the situation in Tunnel 9 was even more difficult and that conditions there were so cramped that it was almost impossible for the detainees to lie down. As in Hangar 6, no bedding was provided.

1079. The Prosecution also asserts that the detainees' access to toilet facilities was limited and, more generally, that the standard of hygiene in the prison-camp fell seriously below acceptable standards. In this respect, it submits that the evidence shows that the toilet facilities available to the detainees in Hangar 6 consisted of an outside septic tank and a ditch, to which the detainees were allowed only restricted access during the day. It is further noted that, at some stage at least, one or two buckets were provided for the detainees to use as toilet facilities during the night, the capacities of which were clearly inadequate. As to the conditions in Tunnel 9, it is submitted that the evidence shows that the detainees were forced to relieve themselves at the bottom of the tunnel, with some of the prisoners being compelled to sit in the rising tide of excrement.

1080. The Prosecution further maintains that the arguments raised by the Defence cannot provide any defence to the charges of inhumane conditions. It thus submits, as a matter of law, that a detaining power which is not in a position to comply with the minimum standards of detention as prescribed by international humanitarian law, is under an obligation to release some, or all, of the prisoners in order to allow humane conditions to be created for those detained. Furthermore, it submits that the evidence contradicts the Defence claim that the conditions in the Čelebići prison-

camp were in fact the best that could be provided at the time. In this respect it notes that no justification based on lack of resources could possibly be provided for the constant physical abuse, the refusal to allow the detainees to avail themselves of the existing water supply, or the failure to provide acceptable toilet and hygiene facilities.

(b) Defence Case

1081. In response to the allegations made in the Indictment, the Defence contends that a State may lawfully detain individuals under conditions which fall below the minimum requirements of international humanitarian law, provided that a good faith effort is made to ensure that the conditions of detention are as humane as possible under the circumstances. It accordingly asserts that if, in view of the available resources, the conditions of confinement are the best that can be provided, no criminal liability can attach to the individuals who act on behalf of the detaining State. On this basis, the Defence contends that the standard by which the acts of the accused should be measured is whether they acted reasonably in providing food, shelter and other facilities to the detainees in the Čelebići-prison-camp. Noting the very difficult conditions which prevailed in the Konjic municipality at the time, it submits that the Prosecution has failed to demonstrate that the quantities of food supplied to the detainees of the Čelebići prison-camp, or the physical facilities available to them, could reasonably have been increased or improved at the time the prison-camp was in operation.

1082. With respect to the actual conditions of confinement in the Čelebići prison-camp, the Defence notes that several witnesses testified to the efforts made to ensure that the detainees were properly fed, despite the extremely difficult situation which existed in Konjic in 1992. The Defence relies in this respect on the evidence of Šefkija Kevrić, the assistant commander of logistics in the Municipal TO staff in Konjic, Zlatko Ustalić, a driver who delivered food to the Čelebići prison-camp, and Emir Džajić, a driver for the MUP who was stationed in the prison-camp in May and June 1992. In particular, the Defence observes that, according to the latter of these two witnesses, food for the staff and detainees of the Čelebići prison-camp was delivered three times a day. According to the Defence, the two groups ate the same food, which for breakfast consisted of tea, coffee with milk, some eggs and for a while some honey. For lunch there were such things as lentils and beans. Further, it submits that each detainee received one quarter loaf of bread per day, and that the food supplies delivered to the prison-camp also included rice, macaroni and tins of meat.

1083. In response to the allegation that the health care provided for the detainees in the prison-camp was inadequate, the Defence observes, *inter alia*, that an infirmary was established in the Čelebići prison-camp. This was situated in Building 22 and was staffed by two doctors, Dr. Petko Grubač and Witness P. The Defence further submits that the logistics body of the Municipal TO in Konjic provided the prison-camp with medicine. This was done through the Health Centre in Konjic, which Hazim Delić personally visited once a week to collect medication and bandages for the infirmary.

1084. More generally, the Defence notes that the Čelebići barracks were not designed to accommodate a large number of people. This complex of bindings was intended as a storage facility, manned by a relatively small number of troops and, consequently, had only a limited number of toilets, showers and other facilities. Relying on the testimony of Emir Džajic and Nurko Tabak, the Defence submits that, despite these limitations, conditions in the camp were not of the character alleged by the Prosecution. Thus, the Defence contends that the detainees in the so-called infirmary in Building 22 and the women in Building A used the toilet facilities in Building 22, and that the toilet facilities outside Hangar 6 and Tunnel 9 were similar to field toilets used in the military. It submits that there was a sufficient supply of clean water in the prison-camp, and that the same water was supplied both to the personnel and the detainees. Similarly, it asserts that the sleeping facilities for the detainees were not crowded. With reference to the conditions in Tunnel 9, the Defence asserts that the detainees there had blankets, food and water, and were permitted to use the toilet upon request. In addition, it is contended that family members were allowed to visit the prison-camp three times a week to bring food and clothing to the detainees.

(c) Discussion and Findings

1085. The Indictment characterises the conditions prevailing in the Čelebići prison-camp as "inhumane" and alleges that the exposure of the detainees to these conditions constitutes the offences of wilfully causing great suffering or serious injury to body or health, and cruel treatment. The Trial Chamber here considers the different aspects of these alleged conditions in turn.

(i) Atmosphere of terror

1086. During the course of these proceedings, the Trial Chamber was presented with extensive evidence regarding the physical and psychological abuse to which the detainees in the Čelebići

prison-camp were continually subjected. This evidence clearly demonstrates that those individual acts specifically alleged in the Indictment, and found proven by the Trial Chamber, in no way represent the totality of the cruel and oppressive acts committed against the detainees in the Čelebići prison-camp. However, from the evidence reviewed above, it is already clear that the detainees in the Čelebići prison-camp were continuously witnessing the most severe physical abuse being inflicted on defenceless victims. This evidence further demonstrates how the detainees in crowded conditions of detention were obliged to helplessly observe the horrific injuries and suffering caused by this mistreatment, as well as the bodies of detainees who had died from the abuse to which they were subjected. In his testimony, Mirko Đorđić gave the following description of how he was in this way confronted with the lifeless body of Željko Ćećez, who had died as a result of the ill-treatment to which he was subjected: "We were all shivering with fear. We didn't dare even look, because few of us had contact with dead people. We are [sic] afraid of corpses. He lay there in our midst for three or four hours, maybe even longer".[935]

1087. It is clear that, by their exposure to these conditions, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse. This psychological terror was compounded by the fact that many of the detainees were selected for mistreatment in an apparently arbitrary manner, thereby creating an atmosphere of constant uncertainty. For example, Witness M, when asked whether he was generally given a reason as to why he had been selected for mistreatment responded: "Sometimes yes, sometimes no."[936] Similarly, Witness N, who in his testimony described how he repeatedly was subjected to severe physical abuse, declared that he had no knowledge as to why he, in particular, was subjected to this kind of mistreatment.[937] Further, Branko Sudar, in his evidence, explained that "[t]he guards beat us to tell you the truth. They beat us, it depended. Sometimes somebody would go out and get hit, someone else would not get hit. It all depended."[938]

1088. Many of the former detainees testified directly as to the fear they had experienced during their detention in the Čelebići prison-camp on account of the frequency with which ill-treatment was arbitrarily meted out. In his evidence, Witness F; stated: "I was afraid of everyone down there. Whoever walked in, I was afraid of them, and prayed to God not to be taken out, because I was not

[935] T. 4780-T. 4781.
[936] T. 4901.
[937] T. 1902.
[938] T. 558.

sure that I would come back alive if I were taken out".[939] This witness further testified that whenever the detainees in Hangar 6 heard the voice of Esad Landžo they grew terrified: "When he [Esad Landžo] was speaking outside, we knew immediately that he was coming, and we were already in fear".[940] Witness N provided supporting testimony as to the fear inspired amongst the detainees by Esad Landžo: "I just know that he [Esad Landžo] beat people, that he came, that he was there during that period non-stop. We were all afraid."[941] Similarly, Mirko Babić, speaking of Hazim Delić's daily visits to Hangar 6, testified that when Hazim Delić entered the Hangar "everybody was in fear. Almost - your heart would almost burst".[942] Grozdana Ćećez and Risto Vukalo also gave accounts of the fear experienced during their detention, the latter declaring that he was "terrified and thinking only how I could avoid beatings".[943]

1089. The evidence further demonstrates that the guards in the Čelebići prison-camp would often threaten to kill the detainees, thereby aggravating their sense of physical insecurity and fear. For example, Witness M stated: "I was mistreated and threatened with death, that I would be sentenced to death."[944] Similarly, Risto Vukalo testified to one occasion on which he and Damir Gotovac were called out of the hangar. He described how he

> saw Damir there, Zenga [Esad Landžo] was hitting him and he fainted and fell to the ground. Then Zenga told me to kill him, I mean to beat him to death. I said I could not do that. Let him kill me. Then they started hitting me, Zenga was there and Osman Dedic as well. They started hitting me and then they ordered Damir to kill me.[945]

Novica Đorđić described one occasion on which he went to collect food for the detainees in Tunnel 9 and where he lost consciousness after being kicked by a guard. He further testified: "I couldn't fully comprehend that this was happening and the guard threatened to kill me if I didn't get up."[946] A further example of such threatening behavior was provided by Witness R who, in his testimony, described how, when confronted with a request for medical care by a detainee, Hazim Delić would respond "sit down, you have to die anyway, whether you are given medical assistance or not".[947]

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[939] T. 1348.
[940] T. 1378.
[941] T. 2038.
[942] T. 281.
[943] T. 6371.
[944] T. 4902.
[945] T. 6285.
[946] T. 4150.

1090. The atmosphere of terror which pervaded the Čelebići prison-camp, is further demonstrated by evidence showing that the detainees were afraid to report or complain about the mistreatment they received. Thus, Witness J described how he and other detainees, during the visit to the prison-camp by a delegation of the International Committee of the Red Cross, denied having been subjected to beatings: "[A]s soon as we saw them [the ICRC delegation], we all went numb. We were terrified, because we thought it would have been better if they had not come, because we thought we would be beaten again".[948] In his evidence, Witness N similarly described how detainees would be beaten if they complained about their treatment, and how as a result "nobody dared say that they were beaten up to anyone".[949] This account is consistent with the testimony of Miro Golubović and Milovan Kuljanin, who both described how they, when asked by Zdravko Mucić, were too afraid to identify those who had mistreated them.[950] Further, Witness P, who worked as a doctor in the so-called infirmary, testified how his fear of mistreatment affected his ability to fulfill this role: "I was unable to do any X-rays. That was not allowed, because I too was a detainee, and if I asked for anything, I would get beaten more, so that I had to protect myself too".[951]

1091. Accordingly, the Trial Chamber finds that the detainees in the Čelebići prison-camp were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse. Through the frequent cruel and violent deeds committed in the prison-camp, aggravated by the random nature of these acts and the threats made by guards, the detainees were thus subjected to an immense psychological pressure which may accurately be characterised as "an atmosphere of terror".

(ii) Inadequacy of Food

1092. Many of the witnesses who appeared before the Trial Chamber provided testimony concerning the inadequacy of the food provided to the detainees in the Čelebići prison-camp. Although it appears from this evidence that the size and quality of the rations varied somewhat during the relevant time-period, the Trial Chamber has been left in no doubt that the food supplied to the detainees fell far short of any acceptable standard. In their consistent testimonies, Witness F, Grozdana Ćećez, Witness R, Milenko Kuljanin, Stevan Gligorević, Mirko Đorđić, Branko Gotovac,

[947] T. 7774.
[948] T. 7501.
[949] T. 1900.
[950] T. 2123, T.7120.

Mirko Kuljanin, Mladen Kuljanin, Witness J, Nedeljko Draganić and Risto Vukalo, all variously described how the food given to the detainees mostly consisted of small amounts of bread, with one loaf being divided between as many as 15 to 17 persons. This was complemented by small quantities of thin soup, vegetables or other cooked food of inferior quality. It is clear that the absence of adequate food was further aggravated by the lack of acceptable facilities for eating. As described by Witness R: "Occasionally we would get some cold soup, which would be several days old, but the problem was how to eat the soup in Hangar number 6 in which there were between 250 and 270 prisoners; there were only five spoons". Similarly, Mirko Babić testified that,

> there were five spoons for the 250 of us [the detainees in Hangar 6]. Five would go and eat. Sometimes it was something cooked, and this meal took about two hours. Somebody would take a little more. Then the next person had nothing. There was very little bread. We were all hungry.[952]

These accounts are further supported by the evidence of Stevan Gligorević and Nedeljko Draganić.

1093. On the basis of the evidence on record, it is further clear that, on at least one occasion, no food at all was provided to the detainees for a period of several days. In their testimony, Mirko Babić, Milojka Antić, Stevan Gligorević, Mirko Đorđić, Witness J, Nedeljko Draganić and Dr. Petko Grubač all recalled having experienced an incident where there was no food for about three days. In this regard, Milojka Antić described how "[f]or three days we did not eat anything. So that I was completely weakened, and I was unable to stand up on my feet. Grozda [Grozdana Ćećez] had to take me to the toilet".[953] Similarly, Stevan Gligorević stated that "[p]eople turned into skeletons. You could hardly recognise them. Many could not even stand up. They had to lean against something, and if they stood up against something, they would fall down".[954] This evidence is further consistent with the evidence of Vaso Đorđić, who recalled several occasions upon which the detainees were forced to go without food for two days in a row.

1094. The effects of this insufficient diet were described by a number of witnesses who, in their testimony, gave consistent accounts of the weight loss and weakened physical states suffered by themselves and other detainees. According to the testimony of Witness J, "the conditions were poor, so that we almost starved. We could not even move in the end. I weighed 95 kilos when I

[951] T. 4536.
[952] T. 274.
[953] T. 1798.
[954] T. 1440.

was brought in and then, when I finally left the camp, I weighed 58 kilos, so it was terrible".[955] Similarly, Witness B testified that his weight was 90 kilograms before the war, and some 50 kilograms when he was released from the prison-camp. This witness also described the detainees as "living corpses", and stated that many were so weakened by the lack of food that they would faint when they got up to go to the toilet.[956] In their evidence, Grozdana Ćećez and Branko Sudar provided similar accounts, and stated that they lost around 30 kilograms in weight during their detention.

1095. In light of the consistent evidence of these witnesses, the Trial Chamber cannot accept the accounts given by Defence witnesses, Šefkija Kevrić, Zlatko Ustalić and Emir Džajić concerning the quantity and type of food provided to the detainees in the Čelebići prison-camp. Further, to the extent that the Defence is arguing that the unsatisfactory diet provided by the prison-camp authorities was sufficiently compensated by the fact that family members were permitted to bring food to the detainees, the Trial Chamber finds that the evidence is to the contrary. In this respect, the evidence of Witness F, Witness P and Grozdana Ćećez indicates that such food did not always reach the intended recipients. In any event, the evidence on record clearly demonstrates that any such extra supplies that in fact were made available in this way to the detainees, were insufficient to ensure that they received adequate nourishment during their detention in the prison-camp.

1096. Based upon the evidence reviewed above, the Trial Chamber accordingly finds that the detainees in the Čelebići prison-camp were deprived of adequate food.

(iii) Lack of Access to Water

1097. The Trial Chamber heard compelling evidence from numerous witnesses as to the restrictions placed on the detainees' access to water inside the Čelebići prison-camp. Witness R, a former detainee in the Čelebići prison-camp, testified that, although at first people were allowed to keep water in plastic bottles inside Hangar 6, after a while this practice was abolished. He further testified that, thereafter, access to water was increasingly restricted until it reached a stage where "under threat of heavy beatings and even death, not a drop of water could be brought in without the knowledge and permission of the deputy commander Hazim Delić."[957] Mirko Đorđić testified that during this latter period, water was distributed to the detainees in Hangar 6 twice or three times a

[955] T. 7445.
[956] T. 5037.

day. The amounts were such that seven or eight detainees would be forced to share one bottle, and many of the witnesses testified that their intake of water invariably failed to meet their hydration needs. For example, Branko Sudar testified that the daily portions of water for the detainees amounted to "a spoonful of water, a ladleful."[958] Similarly, Milko Kuljanin stated that "[w]ater was the biggest problem. . . . [y]ou couldn't always get as much as you wanted and as much as you needed."[959] In Tunnel 9, Miro Golubović testified that, although the water supplied to the detainees was clean, "[t]he quantity wasn't sufficient."[960]

1098. The detainees' dehydration was exacerbated by the high temperatures that prevailed inside Hangar 6 on hot days. As Stevan Gligorević stated: "Konjic is very hot in the summer. We perspired a lot. We needed quite a lot of liquid and we did not have that."[961] Dragan Kuljanin testified that inside Hangar 6 "[p]eople were almost fainting from thirst."[962] These accounts were supported by the testimony of Nedeljko Draganić[963] and Witness N, the latter of whom testified to the extreme conditions inside Hangar 6: "It was hot. The walls were steel, so we lacked water. We didn't have enough."[964]

1099. Although there is some evidence to suggest that the water given to the detainees to drink was non-potable, the Trial Chamber finds that the weight of the evidence does not demonstrate that the water was of poor quality. The Trial Chamber further notes the testimony of Mirko Kuljanin, suggesting that the absence of sufficient drinking water for the detainees did not stem from an inadequate supply, as there was plenty of water available in the camp.[965] Indeed, even the Defence acknowledges that the water supply in the prison-camp was sufficient.

1100. Accordingly, based on the foregoing evidence, the Trial Chamber finds that the strict limits placed on the amount of water the detainees were permitted to drink rendered the detainees' intake of water inadequate. This restriction placed on the detainees' access to water appears to have been a deliberate policy on behalf of the prison-camp authorities rather than one borne of necessity, as there was no shortage of water in the prison-camp.

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[957] T. 7706-T. 7707.
[958] T. 5757.
[959] T. 1215.
[960] T. 2117.
[961] T. 1537.
[962] T. 2462.
[963] T. 1615.
[964] T. 1893.
[965] T. 1260.

(iv) Lack of Proper Medical Care

1101. The Trial Chamber heard evidence as to the availability and quality of the medical care in the Čelebići prison-camp from several former detainees, including two doctors who worked in the makeshift camp infirmary during the period of their detention in the prison-camp. The doctors, Witness P and Dr. Petko Grubač, testified as to the inadequacy of the medical care they were able to provide for the detainees. Witness P testified about the limited supplies at the infirmary. "We had a drum with gauze. We had one pincers [sic]. We had one scissors [sic], and I think that was all as far as the equipment was concerned, and some medicine."[966] He further testified that, although there was a procedure for requesting additional medicine, they usually received only a very small portion of what they had requested.[967] This evidence was supported by the testimony of Dr. Petko Grubač, who confirmed that the infirmary was very poorly equipped. Further, Witness N and Miro Golubović both testified as to the paucity of medical supplies in the prison-camp infirmary. Witness N stated: "They changed the bandage that I had on my arm. They did not have any other supplies to do anything further,"[968] while Miro Golubović testified: "They just tried to treat my ear, nothing else, because they didn't have anything."[969]

1102. The Trial Chamber notes that Ahmed Jusufbegović, director of the Health Centre in Konjic in 1992, testified that Hazim Delić, in June 1992, visited the Health Centre at least once a week to collect medicines and bandages. While this witness described the types of supplies requested by Mr. Delić on these occasions, he did not provide any specific information as to the types and amounts of medical supplies that actually were provided to the prison-camp. In light of the consistent testimony regarding the inadequacy of the medical supplies available in the prison-camp infirmary, therefore, this evidence cannot affect the Trial Chamber's finding that the medical facilities available to the detainees suffered from a serious lack of basic medical supplies.

1103. In his testimony, Dr. Grubač further emphasised that, in the prison-camp, he was not permitted to exercise his medical discretion freely. Rather, the limits of his role as a doctor were defined by the camp authorities. "We had no power to decide as to the way the injured would be treated, nor when they were brought in or taken away or taken to any other institution. . . . [we]

[966] T. 4524.
[967] T. 4525.
[968] T. 2000.
[969] T. 2165.

were prisoners like everyone else."[970] Witness P supported this, testifying that he was never permitted to send anyone to a real hospital for diagnosis.[971] Further, Dragan Kuljanin, in his testimony, commented on the limitations imposed on the doctors in the infirmary in providing medical care for the detainees. "About ten times I looked for help and the doctor would come and see me and he would just shrug his shoulders and say: 'There's nothing I can do.' He would whisper this to me. 'It's not up to me,' he would say."[972]

1104. Further, the Trial Chamber was presented with substantial evidence demonstrating that the detainees were often denied access to the limited medical facilities that were available. Nedeljko Draganić, who was injured stated that "whenever I would ask to go there [the infirmary] so that they could clean the wound, very often Delić would not allow me to go. He often told me not to go and said 'You don't need that. You won't last very long.'"[973] Similarly, Witness R testified that "Vukašin Mrkajić was never given any kind of medical care or treatment and when he addressed Mr. Delić, if he had occasion to do that, the answer he was given would be 'you have to die anyway, so sit down.'"[974] Mirko Đorđić and Witness M both testified that, despite receiving serious injuries during their detention in the Čelebići prison-camp, they were not provided with any medical treatment.[975] Similarly, Risto Vukalo testified: "I was beaten many times [while in the camp] and never was any medical assistance extended to me."[976]

1105. Accordingly, based on the foregoing evidence, the Trial Chamber finds that the medical care provided for the detainees in the Čelebići prison-camp was clearly inadequate, especially in light of the serious injuries suffered by many of the detainees during their detention. Further, the Trial Chamber finds that the detainees were often denied access to the basic medical facilities that were available.

(v) Inadequacy of Sleeping Facilities

1106. The Trial Chamber heard testimony from many of the former detainees in the Čelebići prison-camp regarding the conditions under which they were compelled to sleep. This testimony was

[970] T. 5975, T. 5991.
[971] T. 4526.
[972] T. 2317.
[973] T. 1630.
[974] T. 7771.
[975] T. 4720, T. 4910.
[976] T. 6283.

overwhelmingly consistent as to the inadequacy of the sleeping facilities for detainees in the prison-camp. For example, Witness R, who was incarcerated in Hangar 6, testified that, in order to sleep, the detainees would "just sort of stretch out on the concrete, in the same position at which we sat."[977] Similarly, Mirko Kuljanin, Witness F, Nedeljko Draganić, Witness N, Mirko Đorđić and Branko Sudar all testified that in Hangar 6 the detainees were required to sleep in their assigned positions on the bare concrete floor. Nedeljko Draganić further testified that one section of Hangar 6 always leaked when it rained and that the detainees in that area were consequently compelled to sleep in wet conditions.

1107. In Tunnel 9, the inadequacy of the sleeping facilities was exacerbated by the overcrowding of the detainees. Novica Đorđić, who was detained in Tunnel 9 for some time, testified that the conditions in the tunnel were so cramped that sleeping was virtually impossible. In order to get any rest, the detainees had to lie parallel to the slope of the tunnel, each turned on his side, packed closely together to enable all the bodies to fit. According to his testimony, "[w]hen somebody couldn't bear it any longer, then we would all have to wake up and turn round to the other side."[978] These sleeping conditions evidently compounded the suffering of those detainees who were injured.

1108. The evidence presented to the Trial Chamber further shows that none of the detainees were provided with beds or mattresses on which to sleep and, at least initially, few of them had blankets. According to Branko Gotovac, people used whatever they had, like coats and pieces of blankets to cover themselves at night.[979] Mirko Kuljanin stated that he just slept in his shirt and trousers until he managed to find a piece of blanket.[980] As noted by the Defence, there is evidence that Hazim Delić at one point ordered that the available blankets be cut into half, so as to be divided more evenly among the detainees. However, the evidence shows that even after the blankets were shared in this way, all the detainees were not provided with adequate sleeping facilities. Further, in light of the considerable weight of evidence to the contrary, the Trial Chamber cannot place reliance on Emir Džajić's testimony that the sleeping facilities for the detainees were not crowded and that all the detainees held in Tunnel 9 had blankets. Accordingly, the Trial Chamber finds that the sleeping facilities afforded to the detainees in the Čelebići prison-camp were inadequate.

[977] T. 7751.
[978] T. 4146-T. 4147.
[979] T. 986.
[980] T. 1216.

(vi) Inadequacy of Toilet Facilities

1109. Many witnesses testified as to the inadequacy of the toilet facilities in the Čelebići prison-camp and, further, as to the restrictions placed on the detainees' use of these basic facilities. This evidence suggests that the detainees initially were generally free to relieve themselves in an outside ditch and a septic tank behind Hangar 6. It is clear, however, that the detainees' access even to these rudimentary toilet facilities subsequently was limited to twice a day, once in the morning and once in the evening. Moreover, the evidence shows that on these occasions, the detainees were afforded only a very brief time in which to relieve themselves. Mirko Đorđić described the procedure in the following way:

> "Hazim Delić would force us to go to urinate in a group of 30-40 people. We had to run there. Upon his command he would say: 'Take it out. Stop.' This was very short, the time we had. We just ran out and had to run back, so that there were people who just didn't have enough time to finish."[981]

Similar accounts of this practice were provided by Witness R, Branko Sudar, Risto Vukalo and Dragan Kuljanin.[982] From the testimony of Witness N, Milovan Kuljanin and Mirko Babić, it is further clear that at night the detainees in Hangar 6 were limited to the use of one or two toilet buckets.

1110. The evidence further shows that those detainees kept in Tunnel 9 were not permitted to leave the tunnel at all in order to relieve themselves. Witness R, testifying to his experience in Tunnel 9 stated: "We were not allowed to go out and relieve ourselves."[983] Similarly, Mirko Kuljanin testified that the detainees in Tunnel 9 "often asked to be taken out, but they would not allow that."[984] Miro Golubović stated that, at one point, a toilet bucket was placed at the end of Tunnel 9 in which detainees could relieve themselves.[985] However, the weight of the evidence presented demonstrates that any such container was either subsequently removed or proved to be woefully inadequate, as the detainees were eventually forced to relieve themselves at the bottom of the tunnel. Over time, the detainees who were positioned at the end of the tunnel were compelled to sit in the rising tide of excrement and the resulting stench in the rest of the tunnel became unbearable. One of the former detainees in Tunnel 9, Witness J, described the situation: "It is true that people

[981] T. 4726.
[982] T. 7752, T. 5758, T. 6275, T. 2317.
[983] T. 7695.
[984] T. 1188.
[985] T. 2116.

were sitting in their excrement, because it was not cleaned, and as people relieved themselves, there was more and more of it and it climbed up."[986] Similarly, Witness R testified that "people relieved themselves at the bottom of this tunnel, and as time went on, this excrement accumulated, and also that liquid started rising."[987] In light of this testimony, the Trial Chamber cannot accept Emir Džajić's statement that the detainees in Tunnel 9 were permitted to visit the toilet whenever they wanted.

1111. The Defence, relying on the testimony given by Emir Džajić, submits that the toilet facilities outside Hangar 6 and Tunnel 9 were similar to field toilets commonly used by the military. The Trial Chamber does not find it necessary to determine whether this is an accurate characterisation, as the evidence clearly demonstrates that unreasonable restrictions were placed upon the detainees' use even of these rudimentary facilites. Accordingly, based on the foregoing evidence, the Trial Chamber finds that the detainees in the Čelebići prison-camp were not provided with adequate toilet facilites.

(d) Legal Findings

1112. As described above, the Trial Chamber has heard compelling testimony from many former detainees regarding the inhumane conditions under which they were compelled to live during their detention in the Čelebići prison-camp. Taken as a whole, their testimonies paint a vivid portrait of a group of people stretched both psychologically and physically to the very limits of human endurance.

1113. The evidence clearly demonstrates that, whilst incarcerated in the Čelebići prison-camp, the detainees were deprived of even the most basic of human needs. Water, though apparently plentiful in the prison-camp, was only made available to the detainees in insufficient quantities. This was particularly true for the detainees in Hangar 6 who, on hot days, were forced to endure searing temperatures inside the Hangar, thereby aggravating their considerable thirst. Similarly, food rations for the detainees were grossly inadequate. Over time, the detainees, unable to sustain themselves on this impoverished diet, grew thin and weak.

[986] T. 7593.
[987] T. 7695.

1114. The evidence shows that the detainees were forced to sleep on the bare concrete, with very little to cover themselves. The conditions in Tunnel 9 were so cramped that, in order to lie down, people had to turn on their sides and attempt to sleep pressed up against one another. Further, the detainees' access to the camp's rudimentary toilet facilities was severely restricted, often to less than a minute, twice a day. Those held in Tunnel 9 were forced to relieve themselves at the end of the tunnel giving rise to a mounting pool of excrement.

1115. The evidence demonstrates that, although the prison-camp did have a makeshift infirmary, it was very poorly equipped and lacked even the most basic diagnostic facilities and medicine. The two detainees who worked as doctors in the so-called infirmary were severely limited in their roles, both by the chronic inadequacy of the medical supplies and, directly, by the camp authorities, who did not permit the doctors to exercise their medical judgement freely in respect of the detainees who sought treatment. Further, the detainees were often denied access to the medical treatment that was available.

1116. In addition to these harsh physical deprivations, the detainees were forced to endure constant psychological torment. As discussed above, the frequency with which arbitrary acts of violence occurred in the Čelebići prison-camp gave rise to an all-pervasive atmosphere of terror, in which the detainees lived in mortal fear of being either beaten or killed.

1117. Before proceeding to determine whether these conditions constitute the offences alleged by the Prosecution, the Trial Chamber must here address the principle argument advanced by the Defence. It is the position of the Defence that, in light of the overall situation in the Konjic municipality at the time, no criminal liability can attach to the accused, as the conditions prevailing in the Čelebići prison-camp were the best that could reasonably be provided. The Trial Chamber must, as a matter of law, reject this view. As set out above, the legal standards here at issue are absolute, not relative. They delineate a minimum standard of treatment, from which no derogation can be permitted. Accordingly, it is the Trial Chamber's view that a detaining power, or those acting on its behalf, cannot plead a lack of resources as legal justification for exposing individuals to conditions of detention that are inhumane.

1118. Furthermore, the Trial Chamber cannot, as a matter of fact, accept the assertion made by the Defence that the conditions in the Čelebići prison-camp were the result of the lack of resources available at the time. Even if the Trial Chamber were to accept this view in respect of the lack of food, medical supplies and adequate sleeping facilities in the camp, no such justification could

possibly be provided for the mistreatment to which the detainees were subjected. Similarly, the refusal to allow the detainees sufficient water, or access to the existing toilet and medical facilities, clearly indicates that the inhumane conditions inflicted upon the detainees were the product of design, not necessity.

1119. The Trial Chamber finds that the chronic physical deprivation and the constant fear prevailing in the Čelebići prison-camp caused serious mental and physical suffering to the detainees. Moreover, for the purposes of the offence of cruel treatment, exposure to these conditions clearly constituted an attack upon the human dignity of the detainees. Accordingly, on the basis of the foregoing evidence, the Trial Chamber finds that the creation and maintenance of an atmosphere of terror in the Čelebići prison-camp, by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilites and medical care, constitutes the offence of cruel treatment under Article 3 of the Statute, and wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute.

(e) Responsibility of the Accused

1120. In the counts of the Indictment here under consideration, Zdravko Mucić, Hazim Delić and Esad Landžo are charged with responsibility as direct participants pursuant to Article 7(1) of the Statute. In addition, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute.

1121. As set out above, Hazim Delić has been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds that Hazim Delić cannot be held responsible as a superior, pursuant to Article 7(3) of the Statute, for the inhumane conditions that prevailed in the Čelebići prison-camp. However, the Trial Chamber finds that, by virtue of his direct participation in those specific acts of violence with which he is charged in the Indictment and which the Trial Chamber has found proven above, Hazim Delić was a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison-camp. Accordingly, the Trial Chamber finds Hazim Delić guilty pursuant to Article 7(1) of the Statute of the offence of wilfully causing great suffering or serious injury to body or health, under Article 2 of the Statute, and cruel treatment, under Article 3 of the Statute, as charged in counts 46 and 47 of the Indictment.

1122. The Trial Chamber further finds that, by virtue of his direct participation in those specific acts of violence with which he is charged in the Indictment and which the Trial Chamber has found proven above, Esad Landžo was a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison-camp. Indeed, Esad Landžo in his testimony before this Trial Chamber admitted that he participated in the existence of an atmosphere of terror in the prison-camp.[988] Accordingly, the Trial Chamber finds Esad Landžo guilty, pursuant to Article 7(1) of the Statute, of the offence of wilfully causing great suffering or serious injury to body or health, under Article 2 of the Statute, and cruel treatment, under Article 3 of the Statute, as charged in counts 46 and 47 of the Indictment.

1123. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. The Trial Chamber finds that Zdravko Mucić by virtue of this position was the individual with primary responsibility for, and the ability to affect, the conditions in the prison-camp. By omitting to provide the detainees with adequate food, water, health care and toilet facilites, Zdravko Mucić participated in the maintenance of the inhumane conditions that prevailed in the Čelebići prison-camp. Accordingly, he is directly liable for these conditions, pursuant to Article 7(1) of the Statute. Furthermore, in his position of superior authority Zdravko Mucić knew, or had reason to know, how the detainees, by the violent acts of his subordinates, were subjected to an atmosphere of terror, but failed to prevent these acts or to punish the perpetrators thereof. Accordingly, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for the atmosphere of terror prevailing in the Čelebići prison-camp. For the foregoing reasons, the Trial Chamber finds Zdravko Mucić guilty of wilfully causing great suffering or serious injury to body or health, under Article 2 of the Statute, and cruel treatment, under Article 3 of the Statute, as charged in counts 46 and 47 of the Indictment.

1124. As set out above, Zejnil Delalić has been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić not guilty of wilfully causing great suffering or serious injury to body or health, under Article 2, and cruel treatment, under Article 3, as charged in counts 46 and 47 of the Indictment.

[988] T. 15345.

20. Unlawful Confinement of Civilians - Count 48

1125. Paragraph 36 of the Indictment alleges that Zejnil Delalić, Zdravko Mucić and Hazim Delić are responsible for the unlawful confinement of numerous civilians in the Čelebići prison-camp. The three accused are charged with direct participation in the unlawful confinement of civilians, pursuant to Article 7(1) of the Statute, as well as with responsibility as superiors pursuant to Article 7(3) of the Statute. This alleged unlawful confinement is charged in count 48 of the Indictment as follows:

> Between May and October 1992, **Zejnil DELALIĆ, Zdravko MUCIĆ**, and **Hazim DELIĆ** participated in the unlawful confinement of numerous civilians at Čelebići camp. **Zejnil DELALIĆ, Zrdavko MUCIĆ**, and **Hazim DELIĆ** also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, **Zejnil DELALIĆ, Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:
>
> **Count 48. A Grave Breach** punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

(a) Prosecution Case

1126. The Prosecution contends that the confinement of numerous civilians in the Čelebići prison-camp was unlawful under international humanitarian law. According to the Prosecution, the population of detainees in the Čelebići prison-camp was not limited to individuals who had been armed or participated in military activities. It thus submits that many of those detained could not reasonably have been suspected of participating in any activities that could have justified their confinement under the provisions of Geneva Convention IV. The Prosecution accordingly contends that the confinement of civilians in the Čelebići prison-camp was a collective measure aimed at a specific group of persons, based only on their ethnic background, and not a legitimate security measure. The Prosecution further contends that the confinement of civilians in the Čelebići prison-camp was unlawful on the basis that most of the detainees were never informed as to why they had

been arrested, and that their confinement was never properly and regularly reviewed in accordance with the provisions of Geneva Convention IV.[989]

1127. The Prosecution relies primarily on the testimony of thirteen witnesses to establish the facts in relation to these allegations, namely Grozdana Ćećez, Branko Gotovac, Witness P, Nedeljko Draganić, Dragan Kuljanin, Novica Đorđić, Vaso Đorđić, Zoran Ninković, Witness D, Milenko Kuljanin, Branko Sudar, Petko Grubač and Gordana Grubač.

(b) Defence Case

1128. The Defence denies that the persons detained in the Čelebići prison-camp were protected persons under article 4 of Geneva Convention IV. However, the Defence asserts that, even if the persons confined in the Čelebići prison-camp were protected persons pursuant to Geneva Convention IV, it still must be proven beyond a reasonable doubt that their confinement was illegal, that is, that the fact of incarceration itself, regardless of the conditions of the detention, was in violation of international law.[990] In this respect, the Defence submits that the detainees were incarcerated after an armed confrontation on Bosnian soil with officials of the duly constituted Bosnian government. According to the Defence, there is no evidence that it is impermissible under international law to confine an individual awaiting trial, or while an investigation is being conducted, to determine if there is evidence to indicate that the person has committed a crime.[991] Furthermore, the Defence submits that the incarceration of those confined in the Čelebići prison-camp was lawful under Bosnian law.[992]

1129. The Defence for Hazim Delić submits that the persons confined in the Čelebići prison-camp were given at least minimal due process rights, including a hearing conducted by a commission of the Bosnian government, to determine whether they had borne arms against Bosnia and Herzegovina, or otherwise had given aid and comfort to its enemies.[993] The Defence for Zejnil Delalić argues that there is no evidence that Mr. Delalić had any command authority over the Čelebići prison-camp, or that he participated in the unlawful confinement of civilians. Similarly,

[989] Prosecution Closing Brief, RP D2890.
[990] Motion to Dismiss, RP D5514.
[991] Motion to Dismiss, RP D5511.
[992] Delalić Closing Brief, RP D8368.
[993] Delić Pre-Trial Brief, RP D2799.

the Defence for Hazim Delić asserts that Mr. Delić did not have superior authority over the Čelebići prison-camp.[994]

(c) Discussion and Findings

1130. It is clear that a considerable number of prisoners were detained in the Čelebići prison-camp between the period of April and December 1992. The Trial Chamber has already determined that these individuals were civilians, protected under Article 4 of Geneva Convention IV. It is irrelevant for the determination of the instant charge whether, as alleged by the Defence, this detention was in conformity with Bosnian domestic law. The question that the Trial Chamber must address is instead whether the confinement of these civilians was justified under the relevant rules of international humanitarian law.

1131. The evidence before the Trial Chamber indicates that a number of the civilians detained in the Čelebići prison-camp at the time of their capture were in possession of weapons which could have been used, or were in fact used, against the forces of Bosnia and Herzegovina in the Konjic area. It is difficult to ascertain precisely how many of those detained in the Čelebići prison-camp in this way participated in acts of resistance against the TO, HVO and MUP forces and, therefore, arguably could have been lawfully detained. According to several witnesses, 100 to 105 detainees admitted in interviews conducted after their detention that they were in possession of weapons and that they participated actively in the defence of their villages.[995] As previously noted by the Trial Chamber, the security measures which detaining forces are entitled to take are not specified in the relevant provisions of the Geneva Conventions, and the measure of activity deemed prejudicial to the internal or external security of the detaining power which justifies internment is therefore left largely to the discretion of the authorities of the detaining power itself. The Trial Chamber accordingly refrains from determining whether the confinement of this category of civilians actually was necessary for the security of the detaining forces, and therefore justifiable under international humanitarian law.

1132. However, it is clear that the confinement of a number of the civilians detained in the Čelebići prison-camp cannot be justified by any means. While it must be recognised that a detaining power is given a large degree of discretion to determine the behaviour which it deems detrimental to its

[994] Delić Pre-Trial Brief, RP D2815-D2816.

security, it is clear to the Trial Chamber that several of the civilians detained in the Čelebići prison-camp cannot reasonably have been considered to pose any sufficiently serious danger to the detaining forces as to warrant their detention.

1133. This applies to, for example, Ms. Grozdana Ćećez, a 42 year old mother of two children, who testified that she was neither armed nor a member of any armed group at the time of the military operation against her village.[996] She testified that she was informed that she was detained in the Čelebići prison-camp until her husband was found, that is, she was detained as a kind of a hostage.[997] Various other witnesses who had been detained in the prison-camp testified that they had not participated in any military activity, and posed no genuine threat to the forces that occupied the area. Thus Branko Gotovac denied that he had ever been politically active in his life, and said that the only reason he ever heard for his detention in the prison-camp was that he was a Serb.[998] Witness P denied that he was involved in the defence of his village or that he had any weapon.[999] Nedeljko Draganić testified that he took no part in the defence of his town and that he was not armed.[1000] Dragan Kuljanin said that he had no weapon when his village was attacked, and that neither he nor any of the other members of the group he was with at the time of his arrest had a weapon.[1001] Vaso Đorđić testified that he had no weapon at the time of his arrest, was not a member of any party, did not in any way take part in the defence of his village, and was not told why he was arrested.[1002] Similarly, Petko Grubač denied that he was involved in the defence of his village or that he had any weapon, and stated further that he did not know how to use any armaments.[1003]

1134. The Trial Chamber is of the opinion that there is no reason to question the testimonies of these witnesses. In light of this evidence, the Trial Chamber cannot accept the Defence's contention that all persons detained in the Čelebići prison-camp were members of an armed rebellion against the Bosnian authorities. The Trial Chamber does not deem it necessary to decide whether all of the persons detained in the Čelebići prison-camp were to be considered as "peaceful" civilians, not constituting any threat to the security of the detaining forces. However, the Trial

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[995] T. 5292, Witness D; T. 10701, Witness Begtašević; Vejzagić Report, p. 44.
[996] T. 481-T. 482.
[997] T. 532-T. 533.
[998] T. 980, T. 1009.
[999] T. 4482-T. 4483.
[1000] T. 1600-T. 1602.
[1001] T. 2421-T. 2422.
[1002] T. 4346.
[1003] T. 5951.

Chamber is convinced that a significant number of civilians were detained in the Čelebići prison-camp although there existed no serious and legitimate reason to conclude that they seriously prejudiced the security of the detaining power. To the contrary, it appears that the confinement of civilians in the Čelebići prison-camp was a collective measure aimed at a specific group of persons, based mainly on their ethnic background, and not a legitimate security measure. As stated above, the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him.

1135. Even were the Trial Chamber to accept that the initial confinement of the individuals detained in the Čelebići prison-camp was lawful, the continuing confinement of these civilians was in violation of international humanitarian law, as the detainees were not granted the procedural rights required by article 43 of Geneva Convention IV. According to this provision, the decision to take measures of detention against civilians must be "reconsidered as soon as possible by an appropriate court or administrative board".

1136. The evidence before the Trial Chamber shows that the War Presidency in Konjic municipality decided to form an investigatory commission for the crimes allegedly committed by the persons confined in the Čelebići prison-camp. In May 1992, the Joint Command formed such an organ for Investigations - the Military Investigations Commission. Several witnesses testified to the establishment and organisation of this Commission, which consisted of five members, one of which was Witness D. These members were representatives of the MUP and the HVO, as well as of the TO, and were appointed by their respective commanders. The evidence before the Trial Chamber shows that the Commission ceased to function as early as the end of June 1992, when its members resigned from their positions.

1137. It appears, particularly from the testimony of Witness D, that the members of the Commission took their task seriously. However, it is clear to the Trial Chamber that this Commission did not have the necessary power to finally decide on the release of prisoners whose detention could not be considered as being justified for any serious reason. To the contrary, the power of this Commission was limited to initiating investigations of the prisoners and conducting interviews with prisoners in order to obtain relevant information concerning other individuals suspected of armed rebellion outside the prison-camp. The members of the Commission did not have any possibility to supervise the actual release of prisoners who were suggested for release by its members.

1138. The evidence before the Trial Chamber further shows that the members of the Commission, after becoming aware of the conditions in the prison-camp, including the mistreatment of detainees and the continued incarceration of persons who were peaceful civilians, in June 1992 prepared a report detailing the problems and their inability to correct them.[1004] In this report, the Commission stated, *inter alia*:

> Detainees were maltreated and physically abused by certain guards from the moment they were brought in until the time their statement was taken i.e. until their interview was conducted. Under such circumstances, Commission members were unable to learn from a large number of detainees all the facts relevant for each detainee and the area from which he had been brought in and where he had been captured. We do not know whether this was the reason why certain guards and other people who were allowed into the barracks compound conducted private investigations while Commission members were absent…. [I]n the last ten days almost every dawn brought another dead detainee.… Commission members also interviewed persons arrested outside the combat zone; the Commission did not ascertain the reason for these arrests, but these detainees were subjected to the same treatment…. Persons who were arrested under such circumstances stayed in detention even after it had been established that they had been detained for no reason and received the same treatment as persons captured in the combat zone.… Because self-appointed judges have appeared, any further investigation is pointless until these problems are solved.[1005]

1139. Similarly, Witness D, in his testimony before the Trial Chamber provided the following description of the role of the Commission:

> We all realised that this was just a facade, this whole Commission, which was supposed to sort of provide some semblance of lawfulness to all this, but it was, in fact, nothing.[1006]

In addition, it is clear from the evidence on record that the way interviews and interrogations were conducted by no means respected the basic procedural rights of the concerned detainees. For example, Witness D testified that he saw how one detainee during interrogation was tied with a rope which interrupted the blood circulation in his hands.[1007]

1140. For these reasons, the Trial Chamber finds that this Commission did not meet the requirements of article 43 of Geneva Convention IV.

[1004] Exhibit 162. *See also* T. 5203.
[1005] Exhibit 162/A.
[1006] T. 5226.
[1007] T. 5213.

1141. The Trial Chamber notes that, according to other witnesses, a second investigatory commission to examine the detainees in the Čelebići prison-camp was established towards the end of 1992. However, the Trial Chamber does not deem it necessary to discuss the role and functioning of this commission in further detail, as it is clear from the above that during most of the period during which the Čelebići prison-camp existed, from April until December 1992, there was no judicial body reviewing the detention of prisoners. Furthermore, the period after October 1992 falls outside the relevant period of the Indictment and is, therefore, not of relevance to the instant charge.

1142. For the reasons set out above, the Trial Chamber finds that the detention of civilians in the Čelebići prison-camp was not in conformity with the relevant provisions of Geneva Convention IV. Accordingly, on the basis of the foregoing evidence, the Trial Chamber finds that this detention constitutes the offence of unlawful confinement of civilians, under Article 2 of the Statute.

(d) Responsibility of the Accused

1143. In the count of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility for the unlawful confinement of civilians, both as direct participants pursuant to Article 7(1) of the Statute, and as superiors pursuant to Article 7(3) of the Statute.

1144. Zejnil Delalić and Hazim Delić have respectively been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds that these two accused cannot be held criminally liable as superiors, pursuant to Article 7(3) of the Statute, for the unlawful confinement of civilians in the Čelebići prison-camp. Furthermore, on the basis of these findings, the Trial Chamber must conclude that the Prosecution has failed to demonstrate that Zejnil Delalić and Hazim Delić were in a position to affect the continued detention of civilians in the Čelebići prison-camp. In these circumstances, Zejnil Delalić and Hazim Delić cannot be deemed to have participated in this offence. Accordingly, the Trial Chamber finds that Zejnil Delalić and Hazim Delić are not guilty of the unlawful confinement of civilians, as charged in count 48 of the Indictment.

1145. The Trial Chamber has established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. The Trial Chamber finds that Zdravko Mucić, by virtue of

this position, was the individual with primary responsibility for, and had the ability to affect, the continued detention of civilians in the prison-camp. Specifically, Zdravko Mucić, in this position, had the authority to release detainees. By omitting to ensure that a proper inquiry was undertaken into the status of the detainees, and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucić participated in the unlawful confinement of civilians in the Čelebići prison-camp. Accordingly, the Trial Chamber finds Zdravko Mucić guilty, pursuant to Article 7(1) of the Statute, of the unlawful confinement of civilians, as charged under count 48 of the Indictment.

21. Plunder of Private Property - Count 49

1146. Paragraph 37 of the Indictment contains the following allegations:

> Between May and September 1992, **Zdravko MUCIĆ** and **Hazim DELIĆ** participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp. **Zdravko MUCIĆ and Hazim DELIĆ** also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the plunder of public property, or had already committed those acts, and failed either to take the necessary and reasonable steps prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, **Zdravko MUCIĆ, and Hazim DELIĆ** are responsible for:
>
> **Count 49. A Violation of the Laws or Customs of War** punishable under Article 3(e) (plunder) of the Statute of the Tribunal.

(a) Prosecution Case

1147. The Prosecution submits that the plunder of private property that took place in the Čelebići prison-camp between May and September 1992, was carried out on a systematic basis, and that it concerned relatively large amounts of money or jewellery of significant monetary or sentimental value for most of the victims.[1008] Accordingly, the offences alleged amount to a serious violation of international humanitarian law and fall within the subject matter jurisdiction of the Tribunal.

[1008] Prosecution Response to the Motion to Dismiss, RP D5760.

1148. In order to establish the facts in relation to the allegations set forth in paragraph 37 of the Indictment, the Prosecution relies on the evidence given by a considerable number of former detainees of the Čelebići prison-camp who, in their testimony, described how, either immediately upon their arrival in the prison-camp or subsequently during their detention, any valuable property in their possession was taken from them. The Prosecution relies on the testimony provided by Witness J, Witness M, Witness B, Witness P, Mladen Kuljanin and Rajko Draganić, who all described how, upon their arrival in the prison-camp, they and other newly arrived detainees were forced to hand over items, such as money, watches and gold to the guards. In particular, Witness M stated that he was forced to relinquish a chain, a ring, his wallets and the keys to his apartment, Witness P testified that his wallet, money, bank card and a signed cheque were taken, and Witness B stated that his watch was taken from him upon arrival and a ring about a month later. The Prosecution also refers to the testimony of Petko Grubač, who stated that his personal possessions were confiscated prior to his arrival at the Čelebići prison-camp, in the police building in Konjic.

1149. The Prosecution also relies on the testimony of Mirko Babić, Mirko Kuljanin, Witness N, Milenko Kuljanin and Witness R, who gave accounts of how property was taken from them and others during the period of their detention in the Čelebići prison-camp. In his evidence, Witness N described an incident where money and gold watches were taken from the prisoners detained in Building 22 by two persons in uniform. Mirko Kuljanin and Witness R described a similar incident in which the detainees in Tunnel 9 were ordered to put their valuables into a helmet that was passed around. Witness R observed that the property taken included watches, rings, bracelets, chains, crosses, and old Yugoslav money, a currency no longer used in Bosnia and Herzegovina. These witnesses testified to having had the following personal possessions confiscated; Mirko Kuljanin was forced to hand over a watch; Witness N handed over the money which he was carrying, Milenko Kuljanin had a ring and bracelet taken from him; and Witness R was made to surrender his wedding ring and a watch.

1150. In addition, the Prosecution relies on the testimony of Risto Vukalo, who described how Esad Landžo forced him to remove a ring from the finger of a detainee who had recently been killed and hand it over to him. Further, the Prosecution relies on the statement of Witness T, a guard at the Čelebići prison-camp, who testified as to his participation in the taking of valuables from the detainees in Tunnel 9. According to this witness, the property taken in this manner from the detainees was subsequently returned, with the exception of a few old watches and a perhaps few gold rings, which had been sold to buy cigarettes. However, the Prosecution further refers to the

testimony of Witness N, Mladen Kuljanin, Witness P, Witness M, Witness B, Milenko Kuljanin, Rajko Draganić and Petko Grubač, who all declared that the property taken from them was never returned.

(b) Defence Case

1151. According to the Defence[1009] there is no evidence that Mr. Mucić or Mr. Delić were principals in any plunder of property in the Čelebići prison-camp. More generally, the Defence argues that, even if the acts alleged by the Prosecution occurred - which is not admitted - such acts do not amount to a serious violation of international humanitarian law. Accordingly, the Defence contends that the International Tribunal lacks subject matter jurisdiction over the alleged offences under Article 1 of the Statute.[1010] The Defence relies in this respect on the *Tadić Jurisdiction Decision,* in which the Appeals Chamber specified as one of the conditions to be fulfilled for an offence to be subject to prosecution before the International Tribunal under Article 3 of its Statute that:

> 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. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious" violation of international law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by an army occupying an enemy territory;[1011]

1152. The Defence submits that, based on the Prosecution's evidence, the facts of the instant case are legally identical to the hypothetical example provided by the Appeals Chamber. Submitting that it appears from the record that the property taken was of little or no value, it thus asserts that there is no evidence that the loss of any property taken from the detainees in the Čelebići prison-camp constitutes a breach of a rule protecting important values or that it involved grave consequences for the victims.[1012] In this connection, the Defence refers *inter alia* to the evidence given by Witness M who, in his testimony stated that the Yugoslav money taken from him and

[1009] The Defence here indicating the Defence for Mr. Delić and Mr. Mucić.
[1010] Motion to Dismiss, RP D5508, *cf.* Mucić Closing Brief, RP D8094-D8096.
[1011] Tadić Jurisdiction Decision, para. 94.
[1012] Motion to Dismiss, RP D5506-D5508, Mucić Closing Brief, RP D8094-D8096.

other detainees at the time of his arrival at the prison-camp was of no value, but "simply a pile of paper circulating".[1013]

(c) Findings

1153. The Defence has challenged the Trial Chamber's jurisdiction under Article 1 of the Statute on the ground that the allegations made by the Prosecution in relation to the charge of plunder do not display a serious violation of international humanitarian law. Accordingly, it is to this preliminary matter which the Trial Chamber first must address its attention.

1154. The Trial Chamber notes that it is in full agreement with the Appeals Chamber that in order for a violation of international humanitarian law to be "serious" within the meaning of the Statute, two elements must be fulfilled. First, the alleged offence must be one which constitutes a breach of a rule protecting important values. Secondly, it must also be one which involves grave consequences for the victim. As set out in greater detail above, it is the Trial Chamber's view that the prohibition against unjustified appropriation of private or public property constitutes a rule protecting important values. However, even when considered in the light most favourable to the Prosecution, the evidence before the Trial Chamber fails to demonstrate that any property taken from the detainees in the Čelebići prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims. Accordingly, it is the Trial Chamber's opinion that the offences, as alleged, cannot be considered to constitute such serious violations of international humanitarian law that they fall within the subject matter jurisdiction of the International Tribunal pursuant to Article 1 of the Statute. Count 49 of the Indictment is thus dismissed.

1155. Having thus considered each of these counts of the Indictment in detail, and having made its findings in relation to the criminal responsibility of each of the accused, as charged, the Trial Chamber must finally address the special defence of diminished responsibility, which has been raised by Esad Landžo. Upon completing its discussion of this special defence, the Trial Chamber proceeds, in Section V, to consider the matter of sentencing.

[1013] T. 5032.

G. Diminished Responsibility

1156. In his defence and pursuant to sub-Rule 67(A)(ii)(b) of the Rules, Esad Landžo has advanced the pleas of diminished responsibility and limited physical capacity. A plea of diminished responsibility is to be distinguished from a plea of insanity which, in this case, was expressly disavowed by the Defence for Mr. Landžo. It should be noted, however, that both pleas are founded on an abnormality of mind. In the case of the plea of insanity, the accused is, at the time of commission of the criminal act, unaware of what he is doing or incapable of forming a rational judgement as to whether such an act is right or wrong. By contrast, the plea of diminished responsibility is based on the premise that, despite recognising the wrongful nature of his actions, the accused, on account of his abnormality of mind, is unable to control his actions.

1157. In every criminal act there is a presumption of sanity of the person alleged to have committed the offence. Thus, every person charged with an offence is presumed to be of sound mind and to have been of sound mind at any relevant time until the contrary is proven.[1014] Sub-Rule 67(A)(ii)(b) refers to special defences available to the accused, including that of diminished or lack of mental responsibility. It is important to observe that the phrase "special defence" is not defined in Rules 2 or 67, or in any other part of the Rules. The special defences referred to in sub-Rule 67(A)(ii)(b) may be construed *ejusdem generis* to be limited to special defences of the category relating to lack of mental capacity. If thus construed, mental incapacity resulting from insanity and partial delusion will be included. However, since the Rule is expressed as requiring a special defence without qualification or limitation, the expression cannot be so limited. It should be construed to include any special defence relied upon by the accused. The expression "includes" used in an enactment is one of enlargement and cannot be construed restrictively to deprive the accused of any special defence properly available.[1015]

1158. In this instance, the most favourable meaning for the accused that can be read into sub-Rule 67(A)(ii)(b) is that a special defence is one apart from the general defence open to accused persons and is peculiar to the accused in the circumstances of a given case. Accordingly, the facts relating to a special defence raised by the accused are those peculiarly within his knowledge and should be established by him. In other words, he is to rebut the presumption of sanity.

[1014] *See* for example, Section 27 Criminal Code of Nigeria. Cap. 42 Laws of Nigeria 1958.

1159. The Defence for Esad Landžo has criticised the Trial Chamber for its failure to lay down the legal test to be applied in a defence of diminished mental responsibility, to enable counsel to prepare the evidence of the accused to be presented to the Trial Chamber in respect of the defence. It is alleged that, in the absence of an explicit legal test, the accused has been prejudiced in the presentation of his case pursuant to Article 20(1) of the Statute. It has further been contended that the attitude of the Trial Chamber constitutes a violation of Articles 21(b) and 21(e) of the Statute. These Articles contain guarantees for an accused to have adequate time and facilities for the preparation of his defence and the right to examine, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Defence submits that it was forced to present its evidence as to the special defence without an understanding of the burden of proof.[1016]

1160. In this respect, it is important to observe that the Defence for Mr. Landžo, in its submissions, concedes that the Trial Chamber has ruled that the burden of proof for a defence advanced pursuant to sub-Rule 67(A)(ii)(b) lies on the accused, and that the standard of proof is by a balance of probabilities.[1017] What the Trial Chamber has omitted to do, and we believe should not do, is to outline the evidence which the Defence should adduce to satisfy this burden. The Trial Chamber is convinced that the evidence to support a special defence involves matters peculiarly within the knowledge of the accused and is thus a matter which the Trial Chamber cannot know until the evidence is adduced. The Trial Chamber has provided the accused with the necessary guidance for the defence it relies upon, namely, the nature of the burden and the required standard of proof.

1161. It is well settled that an interpretation of the Articles of the Statute and provisions of the Rules should begin with resort to the general principles of interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties.[1018] Further, and as discussed above, the rules of interpretation of national legal systems may be relied upon, where applicable, under general principles of law. However, where national rules of interpretation are inconsistent with the plain language of the Statute and Rules and their object and purpose, their application becomes irrelevant. In the instant case, where the concept at issue is not defined in the Statute but is clearly defined and

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[1015] See Tadić Jurisdiction Decision, para. 87.
[1016] *See* Landžo Closing Brief, RP D9183-D9184.
[1017] Landžo Closing Brief, RP D9185.
[1018] *See Prosecutor v. Erdemović*, Judgement, Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997, paras. 3-5; Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against *Theoneste Bagasora and 28 others*, Case No. ICTR-98-37-A, App. Ch. 8 June 1998, paras. 28-29; *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, T.Ch. I, 10 August 1995, para. 18.

articulated in the laws of several national legal systems, in various forms, it is permissible to resort to such national legal systems in elucidation of the concept as expressed in the Rules.

1162. The plea of diminished responsibility is recognised in different forms, with varying legal consequences, in many national jurisdictions. It is usually hedged with a number of qualifications and does not offer the accused complete protection from the penal consequences of his criminal acts. In some States it merely reduces the gravity of the offence with which a defendant pleading such a defence may be charged. For example, in England and Wales a person who is found to have diminished responsibility may not be tried for murder, but must take a plea for manslaughter.[1019] In a number of European countries a person suffering from such a disorder will only qualify for mitigation of sentence.[1020]

1163. The closest analogy in law to the special defence provided for in sub-Rule 67(A)(ii)(b) would appear to be Section 2 of the English Homicide Act 1957 (hereafter "Homicide Act").[1021] However, there are several significant differences between the two provisions which render such interpretation by analogy misleading. Section 2 of the Homicide Act provides as follows:

> (1) Where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is, by virtue of this section, not liable to be convicted of murder.
> (3) A person who, but for this section, would be liable, whether as principal or as accessory, to be convicted of murder, shall be liable instead to be convicted of manslaughter.
> (4) The fact that one party to a killing is, by virtue of this section, not liable to be convicted of murder, shall not affect the question whether the killing amounted to murder in the case of any other party to it.

1164. It is obvious from these provisions that only Section 2(2) is directly related to the special defence which is provided for in sub-Rule 67(A)(ii)(b) of the Rules. The requirement of sub-Rule 67(A)(ii)(b) is terse and merely refers to a defence of diminished or lack of mental responsibility. It does not refer to "abnormality of mind" and the conditions giving rise to it, as prescribed in Section 2(1) of the provision of the Homicide Act reproduced above. Sub-Rule 67(A)(ii)(b) is not

[1019] *See* section 2(1) of the Homicide Act of 1957.
[1020] *See e.g.* section 122 of the French New Criminal Code, section 21 of the German Criminal Code and section 89 of the Italian Code Penal. The South African Criminal Procedure Code contains a similar provision in section 78(7).

referable, directly or by implication, to the concept used in the Homicide Act. Sub-Rule 67(A)(ii)(b) would indeed appear to suggest a complete defence since the words are without qualification or limitation.

1165. The provisions of Section 2 of the Homicide Act are a direct descendant of the recommendations by witnesses to the English Royal Commission on Capital Punishment in 1950.[1022] The extension of the new defence of diminished responsibility, which already existed in Scotland, to England, was intended to restrict the application of the capital penalty. The purpose of the law was to avoid the inevitability of a judge passing the death sentence in situations of insanity falling outside the McNaughten Rules. The principal aim was to give a measure of legal recognition to diminished responsibility resulting from mental abnormality short of insanity. Thus, on a verdict founded on diminished responsibility, a judge could award such terms of imprisonment or other punishment or treatment as he thinks fit. The essential requirements of the defence are clearly articulated in Section 2(1) of the Homicide Act which only permits the defence when:

> [the accused] was suffering from such abnormality of mind (whether arising from a condition of arrested or related development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

1166. Thus, the accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury. These categories clearly demonstrate that the evidence is restricted to those which can be supported by medical evidence. Consequently, killings motivated by emotions, such as those of jealousy, rage or hate, appear to be excluded.

1167. The expressions, "abnormality of mind"[1023] and "substantially impaired mental responsibility"[1024] occupy a central place in the definition of the concept of diminished mental responsibility within Section 2 of the Homicide Act. The first attempt to define the phrase "abnormality of mind", within the meaning of Section 2, was in *R. v. Byrne,* where Lord

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[1021] *See* 5 & 6 Eliz. 2. C. 11.
[1022] Royal Commission on Capital Punishment 1950.
[1023] *R. v. Byrne* [1960] 3 WLR 440.
[1024] *R. v. Lloyd* (1967) 50 Cr. App. R. 61.

Parker C.J., delivering the judgement of the court, stated as follows:

> ... it means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.[1025]

1168. This simplistic definition is one of common sense. It avoids fastening the condition to any particular kind of mental abnormality. As Lord Parker stated: "It appears to us to be wide enough to cover the mind's activities in all its aspects . . . [including] the ability to exercise will power to control physical acts".[1026] It has been held that, for this section to apply, an individual's inability to exercise his will to control his physical acts need not be congenital, provided that it is due to an abnormality of the mind as defined in Section 2 of the Homicide Act.[1027]

1169. It is, however, an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions. Thus, the Homicide Act requires the impairment of responsibility to be substantial, although it need not be total. The question of the substantiality of impairment is subjective and is one of fact. It is pertinent to observe that the ability to exercise self-control in relation to one's physical acts, which is relevant to the defence of diminished responsibility, is distinct from the ability to form a rational judgement which must mean that it is distinct from the level of intelligence of the accused.

1170. The defence of diminished responsibility is more likely to be accepted if there is evidence of mental abnormality. The evidence of the defence psychiatrist must be to say that the accused suffers from abnormality of mind, as defined in Section 2 of the Homicide Act. It will assist in the determination of the responsibility of the accused in a defence of diminished mental responsibility if the medical expert is able to testify as to whether the accused's abnormality of mind has substantially impaired his mental responsibility.

1171. The English law relating to diminished mental responsibility in Section 2 of the Homicide Act has been adopted in some common law countries. These include Australia (the Australian Capital Territory,[1028] the Northern Territory,[1029] New South Wales[1030] and Queensland[1031]), South

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[1025] *R. v. Byrne* [1960] 3 WLR 440.
[1026] Ibid.
[1027] *See R. v. Gomez*, 48 Cr. App. R. 310, CCA.
[1028] Crimes Act 1900 s. 14 applying to the Australian Capital Territory, New South Wales, Northern Territory and Queensland.
[1029] Halsburys Laws of Australia, Volume 9, Title 130.
[1030] Ibid.

Africa,[1032] Hong Kong,[1033] Singapore,[1034] Barbados[1035] and the Bahama Islands.[1036] Similarly, in varying degrees of difference, France,[1037] Germany[1038] and Italy[1039] have passed legislation providing for this defence. By contrast, the United States has no analogous provision. The provisions of Article 4 of the American Law Institute Model Penal Code are not *in pari materia*.[1040]

1. Burden of Proof on the Defence in Relation to Diminished Mental Responsibility

1172. The provisions of Section 2 of the Homicide Act specifically require the issue of diminished mental responsibility to be raised as a matter of defence. Accordingly, the defence must be established according to a standard of proof not as heavy as the prosecutor's burden in establishing the guilt of the accused. The accused is required to establish the defence of diminished mental responsibility on the balance of probabilities.[1041] This is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence.

2. Factual Findings

1173. To substantiate his plea of diminished responsibility, Esad Landžo called three forensic psychiatrists to testify on his behalf as expert witnesses. They were Dr. A.M.H. Van Leeuwen from the Netherlands, Dr. Marco Laggazi from Italy and Dr. Edward Gripon from the United States. The Trial Chamber also heard testimony from an Italian forensic psychiatrist, Dr. Alfredo Verde. These experts had the opportunity to meet with Esad Landžo a number of times at the Detention Unit in The Hague and hold long interviews with him before compiling their reports. In rebuttal, the Prosecution examined Dr. Landy Sparr, a psychiatrist from the United States who had similarly held fairly extensive sessions with Mr. Landžo.

[1031] Ibid.
[1032] Criminal Procedure Act, s. 78(7).
[1033] Ordinance 339.3.
[1034] Penal Code of Singapore, s. 300, Exception 7.
[1035] Offences Against the Persons Act 1868 (Amdt.) 1973, *Walton v. Queen* [1978] AC. 788.
[1036] Bahama Islands Homicide Act 1957 s.2 (1).
[1037] New Criminal Code, Art. 122-1.
[1038] Criminal Code, para. 21.
[1039] Code Penal, Art. 89.
[1040] ALI Model Penal Code 1962, Art. 4, Section 4.02, 4.03.
[1041] *See R. v. Dunbar* [1958] 1 QB 1; *R. v. Grant* [1960] Crim. L.R. 424.

1174. All of the Defence expert witnesses were of the opinion that Esad Landžo suffered from a personality disorder. Dr. Van Leeuwen's expert opinion was that Mr. Landžo suffered from a mixed personality disorder with dependent and schizoid traits.[1042] Further, Dr. Van Leeuwen contended that Mr. Landžo's mental disorder could be described as an abnormality of mind leading to diminished capacity to exercise his free will. The following extract from the transcript of the testimony of Dr. Lagazzi, however, gives a slightly different impression:

> Question: Did his [Landžo] abnormality of mind influence his inability in the setting as a guard in Čelebići in 1992 from the forensic point of view?
>
> Answer: With the qualification which I have already given I think I can say that in general, with respect to that particular period of time that is a probability that it did influence his behaviour. But we would have to go into discussion with the individual facts with him in order to give a more considered opinion.[1043]

1175. Dr. Van Leeuwen also stated that, at the time the criminal acts with which he is charged are alleged to have been committed, Mr. Landžo was able to distinguish between right and wrong. Dr. Van Leeuwen thus did not rule out the possibility that some of the acts attributed to Mr. Landžo were the result of his own volition.[1044]

1176. Dr. Alfredo Verde performed several psychiatric tests, on the basis of which he concluded that Esad Landžo had a

> …state of mind that can be called marginal, borderline state....That does not mean in the DMS 4 sense, but it shows that the personality is functioning in a very complex and not well suited way. And that means that we are in the presence of a disorder, of a mental disorder. And that--there are lot of problems in the patient, yes. It is called borderline--borderline personality organisation.[1045]

1177. He went on to say that this disorder (which he also described as an abnormality of mind) had its origin in Mr. Landžo 's childhood and was present in 1992, when he was serving as a guard in the Čelebići prison-camp. Dr. Verde also opined that Mr. Landžo's personality disorder influenced his ability to control his behaviour in his position as a guard. Consequently, during this period, Esad Landžo was in a state of diminished responsibility.[1046]

[1042] *See* T. 14264.
[1043] T. 14573.
[1044] T. 14288-T. 14289.
[1045] T. 14399-T. 14400.
[1046] *See* T. 14404.

1178. Dr. Gripon was of the view that Esad Landžo exhibited a personality disorder which he called schizoid. In the United States, this disorder is associated with antisocial personality disorder and, under the International Code compiled by the World Health Organisation, with dissocial personality disorder.[1047] Dr. Gripon further testified that persons with such a disorder are frequently aggressive and, if they are given authority over others, very unpleasant results will generally follow.[1048] He also stated that Mr. Landžo would not have been in a position to resist an order given to him by his superior if the schizoid disorder from which he was alleged to be suffering was compounded by post traumatic stress disorder.[1049]

1179. Dr. Laggazi was of the opinion that Esad Landžo suffered from a personality disorder which crossed well over the pathological threshold on the abnormality/behaviour curve.[1050] He further stated that this disorder meant that Mr. Landžo displayed the additional traits of dependency and narcissism,[1051] with the result that his ability to exercise his free will in relation to the orders that he received was restricted.[1052]

1180. Dr. Sparr took the view that the abnormality of personality which Esad Landžo exhibited had no pathological component, but merely reflected his personality traits.[1053]

1181. It need hardly be pointed out at this stage that, for the purpose of assessing Esad Landžo's diminished responsibility defence, the Trial Chamber must be concerned with the period during which he served as a guard in the Čelebići prison camp. It is only for this period that it is relevant to determine whether Mr. Landžo suffered from an abnormality of mind that rendered him incapable of controlling his actions. Although the experts appearing for the Defence testified that the features of Mr. Landžo's personality developed long before his tenure at the prison-camp, they were obviously suffering from the natural handicap of having to render their assessment approximately six years after the relevant period. Furthermore, by their own admission, the experts based their findings upon what Mr. Landžo himself told them, without having an opportunity to verify his story from any other sources. Dr. Gripon did visit Konjic to make some local inquiries, but he too admitted that he had based his report on what he had been told by Mr. Landžo himself.

[1047] *See* T. 15155.
[1048] *See* T. 15158.
[1049] *See* T. 15172-T. 15173.
[1050] T. 14561.
[1051] T. 14565.
[1052] T. 14586.
[1053] *See* T. 15414-T. 15415.

1182. The Trial Chamber finds that the information provided by Esad Landžo relating to his own background cannot be relied upon. In this regard, the Trial Chamber notes that Mr. Landžo told the experts several stories about himself which he later changed or disowned. Indeed, there are so many such instances that it would be tedious to reproduce them all. For example, in his discussions with the various experts he took up the position that, while serving in the prison camp he would drink heavily and take pills to enhance the effect of the alcohol. However, in his testimony before the Trial Chamber he denied this.[1054] Similarly, before the experts, he recounted an incident where he allegedly threw a hand grenade into a room where some girls were present. Again, in his testimony, he changed this story, stating that he had merely fired a gun into the ceiling when he found some soldiers present in a room he had chosen for his use.[1055]

1183. Dr Van Leeuwen's expert opinion was that Mr. Landžo's personality disorder was compounded in the Čelebići prison-camp by the experience he allegedly underwent in a Croatian training camp. This opinion was based upon Esad Landžo's unsupported account of running away in the summer of 1991 with a friend, to avoid a call-up from the JNA for compulsory military service. According to Mr. Landžo's account, he and his friend spent the night in a village near the Croatian border. In the morning, their host took them to a Croatian training camp, where they spent the following 20 to 25 days. As part of the training, live demonstrations were held to show how to kill human beings.[1056]

1184. The Trial Chamber finds this account to be unreliable for the following reasons. Firstly, it appears somewhat unlikely that a person who had fled from his home in order to avoid being conscripted into mandatory military service would promptly join another military training facility. Further, Mr. Landžo was unable to recall either the name of the village where the training camp was located, or the true names of those who instructed him, even though, according to him, he spent 20 to 25 days there. The accused further contends that, after the training, he returned to his home town despite the fact that he had defied the JNA call-up notice. These considerations seriously compromise the reliability of this account and, in the absence of any independent support, the Trial Chamber is not convinced of its authenticity. Consequently, the opinion expressed by some of the experts that, while serving in the prison camp Mr. Landžo's personality disorder was compounded by post traumatic stress disorder arising out of his experience in the Croatian training camp, loses

[1054] *See* T. 15117.
[1055] *See* T. 15267.
[1056] *See* Exhibit D46/4.

much of its validity. Indeed, Dr. Van Leeuwen stated that, in his opinion, Mr. Landžo did not suffer from a post traumatic stress disorder during the relevant period.[1057]

1185. As noted above, in his testimony, Dr Laggazi referred to the aspect of Mr. Landžo's personality disorder which meant that he displayed dependency traits. In this context, he explained that an individual possessing a dependency trait will often conjure up in his mind a false self upon which to model his behaviour. Thus, Esad Landžo considered that, to be regarded as a good soldier, he had to obey the orders of his superiors. This diminished his ability to exercise his free will in relation to orders he received from his superiors.[1058] As to the facts of the instant case, the Trial Chamber is not convinced that the criminal acts attributed to Esad Landžo were not the product of his own free will, or that they were influenced by his desire to seek the approbation of others. Further, in the absence of independent supporting evidence, the Trial Chamber cannot accept Esad Landžo's statement that he committed some of the criminal acts with which he is charged on the direction of his co-accused, Hazim Delić. In fact, Mr. Landžo admitted to Dr. Gripon that he would inflict pain and suffering on the prisoners for two reasons, being, first, because he was ordered to do so, and, secondly, because he was bored and frustrated. He further stated that he never experienced any difficulty in doing such things, that he actually enjoyed it and that he cannot explain why he found it to be not at all unpleasant.[1059] In this context, the Trial Chamber finds it relevant to note that, according to the expert opinion of Dr. Sparr, individuals who possess the personality traits exhibited by Esad Landžo have a tendency to blame others for their own faults.[1060]

1186. For the reasons stated, the Trial Chamber is not persuaded by the defence of diminished responsibility as canvassed on behalf of Esad Landžo. The Defence does not contend that, at the relevant time, Esad Landžo was unable to distinguish between right and wrong. Although it does appear from the testimony of the experts that Mr. Landžo suffered from a personality disorder, the evidence relating to his inability to control his physical acts on account of abnormality of mind, is not at all satisfactory. Indeed, the Trial Chamber is of the view that, despite his personality disorder, Esad Landžo was quite capable of controlling his actions.

[1057] T. 14243.
[1058] *See* T. 14570-T. 14572.
[1059] *See* T. 15230.
[1060] *See* T. 15415 and T. 15421.

1187. As regards the plea of limited physical capacity, it seems that the accused did experience breathing problems and suffered from some form of impairment to his hand. However, he himself admitted to killing detainees, causing injuries and kicking and beating them. In the circumstances, this plea has lost all relevancy.

1188. This concludes the Judgement of the Trial Chamber on the criminal responsibility of the accused, as charged in the Indictment.

1189. On 1 September 1998, the Trial Chamber concluded the hearing in this case and adjourned for judgement. Subsequently, on 18 September 1998, the Trial Chamber issued a scheduling order requiring the Prosecution and the Defence to submit written submissions in respect of sentencing, to be filed on 1 and 5 October 1998 respectively.[1061] A four day hearing was thereafter held, commencing on 12 October 1998. These proceedings became necessary as a result of the amendments to the Rules relating to sentencing, adopted by the Judges of the Tribunal in their 18th Plenary session on 9-10 June 1998. As discussed above in section I, whereas the previous Rules provided for a separate hearing on the matter of sentencing to be held after the rendering of the judgement as to the innocence or guilt of the accused, the new procedure adopted at the plenary enables sentence to be pronounced at the time of the delivery of the judgement. The effect of these amendments is that all evidence relating to sentencing, including evidence in mitigation or aggravation, is to be part of the main proceedings, thus eliminating the erstwhile procedure of pre-sentencing proceedings after the delivery of the judgement.

1190. By the provisions of Rule 6, an amendment of the Rules takes effect immediately. However, such an amendment is not to operate to prejudice the rights of the accused in a pending case.[1062] The present proceedings were pending at the time of the relevant amendment. The Trial Chamber, cognisant of Article 20 and 21 of the Statute, considers it proper, and in the interests of justice, to apply the Rules, as amended.

[1061] Scheduling Order, Case No. IT-96-21-T, 10 Sept. 1998 (RP D9643-D9646).
[1062] Rule 6(C).

V. SENTENCING

A. Applicable Provisions

1191. The provisions of the Statute and Rules hereinbelow stated are applicable to the present section of this Judgement.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 85
Presentation of Evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
[…]
(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.
[…]

Rule 101
Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial 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;
(iv) the extent to which any penalty imposed by a court of any State on the convicted
(v) person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

1192. The provisions of Article 24(2) of the Statute which require the Trial Chamber to take the gravity of the offence and the individual circumstances of the convicted person into account, and the provisions of Rule 101 of the Rules, would appear to include as many varied factors and situations as would be necessary for consideration in the imposition of sentences upon conviction. However, Article 24(1) of the Statute and sub-Rule 101(B)(iii) have gone further to direct the Trial Chamber to "have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia", and "to take into account … such factors as … the general practice regarding prison sentences in the courts of the former Yugoslavia". It would appear to the Trial Chamber that these provisions aim at uniformity of the length of sentences, not necessarily the consideration of their imposition, which is based on factors such as gravity of the offences and other factors. The expression "other factors" cannot be exhaustive and are not limited to those named, but are within the discretion of the Trial Chamber.

1193. The statutory provisions of the International Tribunal speak of prison sentences in the courts of the former Yugoslavia. These provisions are discussed in greater detail in sub-section 1 below. At all times material to this case, capital punishment was in existence in the Penal Code of the Socialist Federal Republic of Yugoslavia. By constitutional amendment in 1977 capital punishment was abolished in some of the republics of the SFRY other than Bosnia and Herzegovina. In the Social Federal Republic of Yugoslavia imprisonment, as a form of punishment, was limited to a term of 15 years or, in cases for which the death penalty was prescribed as an alternative to imprisonment, to a term of 20 years.[1063] This provision seems to be in contradiction to sub-Rule 101(A) which provides that a person convicted by the Tribunal may be sentenced to imprisonment for a term "up to and including the remainder of the convicted person's life."

Rule 101 was made under, and by virtue of, Article 15 of the Statute and should be read in this light. So construed, sub-Rule 101(A) is not in violation of Article 24 (1) which merely requires the Trial Chamber to have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

1194. The governing expression in Article 24(1) is "have recourse to" which, to the Trial Chamber, is an ordinary English expression and not a term of art. The Concise Oxford Dictionary[1064] defines the word "recourse" as "resorting to a possible source of help". This suggests that the source of help to which recourse is had need not be mandatory and binding. The general view is that it is a mere aid to elucidation of the principles to be followed.

1195. There is no doubt that reference to the penal practice of the law of the former Yugoslavia relating to sentencing is unprecedented. It is true that international law has not developed a sentencing pattern of its own and must rely on the experience of domestic jurisdictions for its guidance. In this case, the legal system of the former Yugoslavia is the most appropriate jurisdiction from which to seek guidance. The reference immediately raises two broad issues. First, does recourse to the general practice mean recourse to legislative prescriptions, or recourse to the actual sentencing practices of judges and courts in the former Yugoslavia? The plain literal meaning of the expression in Article 24(1) suggests that recourse should be had to the actual sentences imposed. Secondly, it will be observed that there is an obvious discrepancy and conflict in the sentencing regimes of the International Tribunal and that of the courts of the former Yugoslavia. There is no provision for the Tribunal to impose a sentence of death. It can impose a life sentence. In contrast, the SFRY Penal Code allowed the imposition of a sentence of death in certain cases. However, the courts of the former Yugoslavia were not allowed to impose a prison term of more than 20 years, even for criminal offences involving the death penalty. Where such differences or discrepancies exist between the Statute and Rules of the International Tribunal and the SFRY Penal Code concerning maximum or minimum sentences, how should it be resolved? This raises difficult questions of interpretation of the governing expression in Article 24(1) of the Tribunal's Statute.

[1063] *See* Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted by the SFRY Assembly at the session of the Federal Council held on September 28, 1976 (Unofficial translation on file with Tribunal Library) (hereafter "SFRY Penal Code") at Article 38.

[1064] The Concise Oxford Dictionary of Current English, Eighth Edition, Edited by R. E. Allen.

1196. This provision was considered by Trial Chamber I in its judgement on sentencing in *The Prosecutor v. Dražen Erdemović* of 29 November 1996,[1065] where recourse to the general practice regarding sentences applied by the courts of the former Yugoslavia was held to be "in fact, a reflection of the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity…".[1066] The sentencing judgment in *The Prosecutor v. Duško Tadić,*[1067] referred to the expression "recourse" in the sense of reference that the Trial Chamber had "recourse to the statutory provisions governing sentencing in the former Yugoslavia and to the sentencing practice of its courts".[1068] In each case, the practice in the courts of the former Yugoslavia was consulted as an aid to determination of the appropriate sentence.

1197. The Defence for Hazim Delić has submitted that the penal sanctions in the SFRY Penal Code to which recourse shall be had were in existence before the Security Council, through the creation of this Tribunal, established another enforcement mechanism with its own penal sanctions. It is argued that Article 24(1) of the Statute does not vest the Tribunal with the authority to impose the death penalty. It also does not set a minimum or maximum penalty for any offence. Rule 101 allows the imposition of life imprisonment upon conviction for any offence. It is, accordingly, submitted by the Defence for Mr. Delić that, under the principles of legality and *nullum crimen sine lege*, the International Tribunal cannot impose a sentence exceeding 15 years imprisonment. It is argued that any such sentence would be greater than that authorised at the time of the offence and therefore in violation of the *nullum crimen sine lege* principle. This view appears to suggest that the International Tribunal, through Article 24(1) of the Statute, is bound by the law of the former Yugoslavia relating to sentences.

1198. Chapter 16 of the SFRY Penal Code, entitled "Criminal Acts against Humanity and International Law" is the part of the Penal Code most relevant to the present proceedings. Article 142 therein proscribes a number of criminal acts, including killing, torture, inhumane treatment of the civilian population, causing great suffering or serious injury to body and health, unlawful forced

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[1065] *Sentencing Judgement*, Case No. IT-96-22-T, 29 Nov. 1996 (RP D1/472*bis*-D58/472*bis*) (hereafter "*Erdemović Sentencing Judgement, 29 November 1996*"). Following a Judgement by the Appeals Chamber, remitting the case to a different Trial Chamber, a second sentencing Judgement was issued on March 5 1998. *See Sentencing Judgement*, Case No. IT-96-21-T*bis*, filed on 5 March 1998 (RP D481-D515) (hereafter "*Erdemović Sentencing Judgement, 5 March 1998*").

[1066] See Erdemović Sentencing Judgement, 29 Nov. 1996, RP D41/472bis.

[1067] *Sentencing Judgment*, Case No. IT-94-1-T, 14 July 1997 (RP D17971-D18012) (hereafter "*Tadić Sentencing Judgment*").

[1068] See Tadić Sentencing Judgment, RP D18008.

transfer of populations, use of measures of intimidation and terror, and the unlawful taking to concentration camps and other unlawful confinements. A minimum term of imprisonment of not less than five years is to be imposed on conviction of each of these offences. The express words are "shall be punished by imprisonment for not less than five years or by the death penalty".

1199. Article 41(1) of the SFRY Penal Code sets out the various factors to be taken into account in the determination of an appropriate sentence. Summarily stated, this provision directs the relevant courts to consider: (a) the degree of criminal responsibility and motives for the commission of the offence, the intensity of threat or injury to the protected object and the circumstances of the commission of the offence; (b) the perpetrator's past life, his personal circumstances and his behaviour after the commissioning of the offence; and (c) other circumstances relating to the personality of the perpetrator.

1200. It may be justifiably argued that the guidelines prescribed in Article 41(1) of the SFRY Penal Code for the determination of sentences after conviction, are more comprehensive than the criteria prescribed in a combined reading of Article 24 (2) of the Statute and sub-Rule 101(B) of the Rules. Accordingly, whilst resort may be had to the sentencing practices of the courts in the former Yugoslavia, such practice cannot be determinative. This Trial Chamber agrees completely with the opinion expressed in the *Erdemović Sentencing Judgement, 29 November 1996*, that:

> [g]iven the absence of meaningful national judicial precedents and the legal and practical obstacles to a strict application of the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber considers that the reference to this practice can be used for guidance, but is not binding. ...
>
> Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction. [1069]

1201. In this context it may further be observed that the statute of the ICTR, in its provision on penalties, similarly provides that recourse shall be made to the general practice regarding prison sentences in the courts of Rwanda in determining terms of imprisonment.[1070] In the recent case of *The Prosecutor v. Jean Kambanda* it was held that such practices were not binding upon the ICTR but were only one of the factors to be taken into account.[1071]

[1069] Erdemović Sentencing Judgement, 29 November 1996, RP D40/472bis – D41/472bis.
[1070] Statute of the International Criminal Tribunal for Rwanda, Art. 23, para. 1.
[1071] *The Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, 4 Sept. 1998, para. 23.

1202. In addition to recourse to the general practice of the courts of the former Yugoslavia with regard to sentencing, it is crucial to bear in mind the fact that the offences being punished are offences under international humanitarian law and the purpose for the exercise of this *ad hoc* jurisdiction. Whereas judicial precedents may be lacking in international jurisdictions, the motives for establishing the International Tribunal under Chapter VII of the United Nations Charter barely five years ago should not be ignored.

1203. The recent dictum of Trial Chamber I of the ICTR would appear to be an echo of the universal attitude towards those found guilty by it and this Tribunal. Trial Chamber I of the ICTR stated that:

> [i]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.[1072]

This is a policy in support of punishment reflecting both general and particular deterrence. The policy of the United Nations in matters concerning internal strife has not abandoned efforts of reconciliation. Wherever the evidence demonstrates the possibility of reconciliation, it is the obligation of the Trial Chamber to accentuate such factors and give effect to them.

1. Applicable SFRY Penal Code Provisions on Sentencing

1204. As has been discussed above, Article 24 (1) of the Statute requires the Trial Chamber to have recourse to the sentencing practice of the courts of the former Yugoslavia. It is, therefore, appropriate to consider such relevant laws in terms of this provision. Articles 38 and 48 of the SFRY Penal Code therefore deserve consideration.

[1072] *Ibid.,* para. 28.

Imprisonment

Article 38

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.

(2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.

(3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute.

(4) The punishment of imprisonment is imposed in full years and months, but prison terms not exceeding six months may also be measured in full days.

(5) A term of imprisonment is served in closed, semi-open or open institutions for serving sentences.

(6) A convicted person who has served half of his term of imprisonment, and exceptionally a convicted person who has served a third of his term, may be exempted from serving the rest of his term on the condition that he does not commit a new criminal act by the end of the period encompassed by his sentence (parole).

Combination of criminal acts

Article 48

(1) If an offender by one deed or several deeds has committed several criminal acts, and if he is tried for all of the acts at the same time (none of which has yet been adjudicated), the court shall first assess the punishment for each of the acts, and then proceed with the determination of the integrated punishment (compounded sentence) for all the acts taken together.

(2) The court shall impose the integrated punishment by the following rules:

(i) if capital punishment has been inflicted by the court for one of the combined criminal acts, it shall pronounce that punishment only;
(ii) if the court has decided upon a punishment of 20 years imprisonment for one of the combined criminal acts, it shall impose that punishment only;
(iii) if the court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 years imprisonment;
(iv) if for the combined criminal acts several punishments of imprisonment have been decided upon which taken together do not exceed three years, the integrated punishment may not exceed a period of eight years of imprisonment;

(v) if fines have been determined by the court for the combined criminal acts, the court shall increase the highest fine determined, but it may neither exceed the total of all punishments decided upon nor 50,000 dinars, that is to say 200,000 dinars when one or more of the criminal acts have been committed for the purpose of obtaining gain;

(vi) if the court has fixed punishments of imprisonment for some of the combined criminal acts, and fines for others, it shall impose one punishment of imprisonment and one fine under provisions set forth in items 3 to 5 of this paragraph.

(3) The court shall impose an accessory punishment if it is prescribed for any one of the combined criminal acts, and if it has decided upon several fines it shall impose one compound fine under provisions set forth in item 5, paragraph 2 of this article.

(4) If the court has decided upon punishments of imprisonment and juvenile custody for the combined criminal acts, it shall impose a punishment of imprisonment as the compound sentence, following the rules set forth in items 2 to 4, paragraph 2 of this article.

1205. Explaining the sentencing provisions of the former SFRY, Dr. Zvonimir Tomić, an expert witness for the Defence, pointed out that, by virtue of the provisions of article 38(1), prison sentences in the SFRY could not be shorter than 15 days, nor longer than 15 years. Thus, there was a mandatory minimum and maximum period of sentence which the courts could impose. This kind of punishment was described as the closed sentencing model. A second model, which was described as the half-open sentencing frame, was one where there existed a prescribed maximum or minimum. In a third model the courts could sentence within a scale from five to 15 years.

1206. Dr. Tomić explained that prison sentences could be imposed for offences involving capital punishment. This was where circumstances of mitigation rendered capital punishment an improper sentence. In such circumstances a maximum prison sentence of 20 years could instead be imposed. Accordingly, for such offences, the courts could impose capital punishment, or 20 years imprisonment, or, as an alternative, a prison sentence ranging from five to 15 years. A 20 year prison term could only be imposed for the most serious types of criminal offences.[1073]

1207. In response to questions by counsel for the Defence referring to the correctness of the sentence of 20 years imprisonment imposed in the case of *The Prosecutor v. Duško Tadić*, Dr. Tomić explained:

> [t]he Court always had the possibility to substitute the capital punishment with a 20-year prison sentence. So at the beginning, it was possible for the court to determine a 20-year sentence for all criminal offences for which capital punishment was provided for. The court always had the choice. It could either determine the capital punishment or 20-year

[1073] T. 15924-T. 15930.

> prison sentence. That was one possibility. The other possibility was, even if it did determine capital punishment, a higher court, an appeals court could substitute that punishment with a 20-year prison sentence, but the first solution was commonly used.[1074]

1208. There is still an aspect of sentencing policy which has raised some controversy. There is no question that the International Tribunal should have recourse to the practice of the courts of the former Yugoslavia in the sentencing of convicted offenders. However, for crimes which would receive the death penalty in the courts of former Yugoslavia, the International Tribunal may only impose a maximum sentence of life imprisonment, consistent with the practice of States which have abolished the death penalty. This is consistent with the commitment of States progressively to abolish the death penalty under the Second Optional Protocol to the ICCPR.[1075] This is the meaning given to the relevant provisions of the Statute by members of the Security Council.[1076]

1209. In the *Tadić Sentencing Judgment*, Trial Chamber II held, following the provisions of the SFRY Penal Code, that "[i]mprisonment as a form of punishment was limited to a term of 15 years, or, in cases for which the death penalty was prescribed as an alternative to imprisonment, to a term of 20 years".[1077] It may, on this basis, be contended that for the International Tribunal to impose a sentence beyond 20 years would be contrary to law. This view is held by Professor Bassiouni, who has written that the principles of legality and *nullum crimen sine lege* prohibit the International Tribunal from imposing a sentence of more than 20 years. According to this author:

> A more serious problem arises in that penalties for international crimes, such as those contained in Articles 2 through 5, are only punishable by a maximum of 20 years under the applicable national criminal codes. A higher penalty, which appears to be authorized by Rule 101(A), would violate principles of legality and the prohibition of *ex post facto* laws. Consequently, Rule 101 should be amended.[1078]

1210. The Trial Chamber disagrees with the above opinion as representing an erroneous and overly restrictive view of the concept of *nullum crimen sine lege*. This concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.

[1074] T. 15927-T. 15928.
[1075] G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) p. 207 U.N. Doc. A/44/49 (1989) which came into force on 11 July 1991.
[1076] *See* Statement by Mrs. Madeleine Albright to the Security Council, *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, 25 May 1993, U.N. Doc. S/PV. 3217, p. 17.
[1077] Tadić Sentencing Judgment, RP D18008.
[1078] Cherif Bassiouni, The Law of the International Tribunal for the Former Yugoslavia, New York 1996, p. 702.

1211. The Trial Chamber accordingly rejects the submission of the Defence for Hazim Delić that since neither the Statute nor the Rules were in force during the times applicable to this case, the Trial Chamber should not impose a sentence longer than 15 years imprisonment for any offence committed prior to the adoption of the Statute of the International Tribunal. The principle on which this submission is based is the awareness of the nationals of Bosnia and Herzegovina of the maximum punishment of 15 years or death, which could be commuted to 20 years.

1212. The Trial Chamber is of the opinion that the governing consideration for the operation of the *nullum crimen sine lege* principle is the existence of a punishment with respect to the offence. As has been stated by the Appeals Chamber in the *Tadić Jurisdiction Decision*:

> . . . violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[1079]

The fact that the new punishment of the offence is greater than the former punishment does not offend the principle. Furthermore, the contention that the *Tadić Sentencing Judgment*, which imposed a sentence of 20 years imprisonment,[1080] was wrong for not following the former Yugoslavian sentencing procedure would appear to the Trial Chamber to be misconceived. There is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia. Article 24(1) of the Statute does not so require. Article 9(2), which vests primacy in the Tribunal over national courts, indeed implies the contrary.

2. General Principles Relevant to Sentences Imposed by the Tribunal

1213. Sentencing practices in national systems are generally intended to protect the interests of those subject to the jurisdiction of the national legal system. These practices include a broad range of possibilities, which often change from time to time with the aims of sentencing that are paramount in most national systems. In respect of the International Tribunal, Article 24(2) of the

[1079] Tadić Jurisdiction Decision, para. 135.
[1080] Trial Chamber II imposed sentences of various lengths for the crimes which Mr. Tadić had been found guilty of. Of these, the greatest sentence was that of 20 years, and all the sentences were set to run concurrently.

Statute provides that the gravity of the offence and the individual circumstances of the convicted person shall be taken into account in imposing sentences. In accordance with sub-Rule 101(B) of the Rules, the Trial Chamber is further required to consider any aggravating circumstances, mitigating circumstances, including substantial cooperation with the Prosecution by the convicted person before or after conviction, and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served. It is in this regard that the evidence of the Prosecution and the Defence becomes relevant. Whereas the Prosecution is entitled to lead all relevant evidence that may assist the Trial Chamber in determining an appropriate sentence in the event that the accused is found guilty on one or more of the charges in the Indictment, it is expected to observe the fundamental principle of the presumption of innocence to which the accused is still entitled until convicted.

1214. On the other hand, the Defence is presumed in its evidence in mitigation to assume that the accused has been found guilty of the offence. This is a very curious situation in which to place the Trial Chamber, which should avoid any prejudicial factors likely to affect the case of an accused presumed to be innocent. It is, in such a situation, somewhat complex to maintain the delicate balance between observance of the full rights of the accused, and the enforcement of the procedural rules relating to sentencing before conviction. The Trial Chamber is expected to disabuse from its consideration all prejudicial evidence in aggravation or mitigation, which would affect its determination of the guilt or innocence of the accused person.

1215. The nature of the relevant information required by the Statute is unambiguously provided in sub-Rule 85(A)(vi). It is "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment". The language of the provision would appear to be all inclusive to the extent that it suggests the admission of evidence inadmissible at trial for the purpose of determining the guilt or innocence of the accused. This is the view of the Prosecution, which submits that the Trial Chamber should be entitled to consider a broad array of information, without necessarily according the same weight to all the evidence tendered by the Prosecution or the Defence. Sub-Rule 85(A)(vi) would appear to support this submission.

1216. In many civil law jurisdictions, and the United States, almost all information may be considered relevant for this purpose and very little limitation is placed on what the court properly

may take into account when imposing sentence:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.[1081]

The Canadian Criminal Code provides as follows:

> In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.[1082]

1217. There seems to be no uniformity in the characterisation of conduct at trial in relation to the effect on the administration of justice. In most systems, both common and civil law, the behaviour of an accused concerning the administration of justice and during trial, may be considered a factor relevant to the determination of sentence, if convicted. For instance, sub-Rule 77(A)(ii) makes it a contempt of the Tribunal and, therefore, an aggravating factor, for any accused to interfere with or intimidate a witness. Furthermore, an accused person who persists in disruptive conduct may, by order of the Trial Chamber, be removed from the courtroom following a warning from the Trial Chamber.[1083] These could constitute aggravating circumstances, though not expressly so recognised, and would be considered in the evaluation of the accused's character. In the federal courts of the United States, obstruction of justice is regarded as an aggravating circumstance, providing for the enhancement of sentence. Included in this category are, *inter alia*, intimidation of witnesses, or otherwise unlawfully influencing a co-defendant or witness, perjury or suborning perjury.[1084]

1218. Although sub-Rule 85(A)(vi) enables consideration of a broad variety of factors in the determination of the appropriate sentence on conviction, the most relevant factors are those central to the circumstances of the crime for which the accused has been found guilty. Thus, though evidence is tendered by the parties, including those collateral to the proceedings and relating to the circumstances of the accused, the issue of mitigation or aggravation only becomes relevant after guilt has been determined. This is because the question of sentence must depend on the particular

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[1081] *See* 18 U.S.C. §3661 (1998).
[1082] *See* Canadian Criminal Code, section 726.1.
[1083] Rule 80(B).
[1084] *See* Commentary to the United States Sentencing Guidelines, 18 USCS Appx. §3C1.1 (1998).

circumstances of the crime itself and the role of the accused therein. In the absence of a conviction, no consideration of aggravating or mitigating circumstances arises.

1219. Criminal responsibility and culpability within the Statute of the International Tribunal is considered both in terms of the exercise of superior authority and of direct participation in the commission of the crimes charged. The sentencing provisions of Article 24 and Rule 101 do not make such a distinction. This is probably because of the evident truth on which the concept of command responsibility is based, which is the maxim *qui facit per alium facit per se*, and the fact that offences are committed by individual human beings and not by abstract entities. The Trial Chamber has already stated that the issue of sentencing arises only after guilt has been established. Accordingly, as submitted by the Prosecution in this case, "there can be no absolute rule regarding the manner in which an accused's position as a superior affects his sentence. . .".[1085] The general view is that "[t]he punishment meted out, like the question of guilt itself, will depend on the circumstances of each case".[1086]

1220. The finding of guilt on the basis of the exercise of superior authority depends upon knowledge of the crimes committed and the failure to prevent their commission, or punish the perpetrators. The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt. There is no doubt that abuse of positions of authority or trust will be regarded as aggravating. Where the circumstances of the superior and the exercise of authority could be regarded as far from actual knowledge, but guilt is determined on the basis of constructive knowledge, this could be a mitigating factor.

1221. As has been pointed out, an accused may be charged for the commission of an offence in his individual and personal capacity as one of the actual perpetrators of the offence in accordance with Article 7(1) of the Statute, and/or in his capacity as a superior authority with respect to the commission of the offence in accordance with Article 7(3). The Defence for Hazim Delić has submitted that it would be improper to impose double sentences on an accused charged and found guilty on both counts. The contention is that both counts are mutually exclusive. A charge under Article 7(1) is based on a theory of acts, whereas a charge under Article 7(3) is based on omission and failure to perform a duty to prevent and/or punish war crimes.

[1085] Sentencing Submission of the Prosecution, Case No. IT-96-21-T, 1 Oct. 1998 (RP D9660-D9787) (hereafter "Sentencing Submission of the Prosecution"), RP D9779.
[1086] Law Reports, Vol. IV, p. 95.

1222. Whilst the proposition in theory appears to be unimpeachable, in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate. For instance, consider the situation where the commander or person exercising superior authority personally gives orders to his subordinates to beat the victim to death, and joins them in beating the victim to death. There is here criminal liability under Article 7(1) as a participant in the perpetration of the offence, and under Article 7(3) as a superior. Liability in this case is not mutually exclusive, since the exercise of superior authority in this case is not only the result of an omission to prevent the commission of the crime. It is a positive act of knowledge of the crime and participation in its commission.

1223. The question is whether the crime attracts only one sentence in respect of a superior who participates in the offence charged. Ideally a superior who participates in the actual commission of a crime should be found guilty both as a superior and also as a direct participant as any of the other participants who did so in obedience to his orders. However, to avoid the imposition of double sentencing for the same conduct, it should be sufficient to regard his conduct as an aggravating circumstance attracting enhanced punishment.

1224. A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his or her life. In determining sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute and sub-Rule 101(B) of the Rules, as well as such factors as the age of the accused, his antecedents including his general reputation, and such other matters as would enable the Trial Chamber to determine the appropriate sentence consistent with the gravity of the offence. The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently. Furthermore, credit shall be given to the convicted person for the period, if any, during which he was detained in custody pending surrender to the International Tribunal or pending trial or appeal.

1225. Article 24(2) and sub-Rule 101(B) by themselves contain all the indicia necessary for the determination of the appropriate sentence after a finding of guilt. By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence. It is necessary to reiterate the fact that the Tribunal is vested with jurisdiction over *serious* violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the present case, the offences committed include several acts of murder, torture, sexual assaults of the most revolting types, multiple rapes, severe beatings, cruel treatment and inhumane conditions. In the *Tadić Sentencing Judgment*, Trial Chamber II appears to have

taken into account the specific harm caused to the victims (and their families) by the accused.[1087] Similarly, Trial Chamber I, in the *Erdemović Sentencing Judgement, 29 November 1996*, recognised that the suffering of the victims may be considered in determining the appropriate penalty to impose.[1088] The Prosecution has urged the Trial Chamber, in evaluating the gravity of the relevant offences, to take into consideration the suffering of the victims who ultimately died in the Čelebići prison-camp.

1226. The gravity of the offences of the kind charged has always been determined by the effect on the victim or, at the most, on persons associated with the crime and nearest relations. Gravity is determined *in personam* and is not one of a universal effect. Whereas the guilt of the accused may be related to the specific and general harm of the victim and his relations, it would be too remote to ascribe every woe of the surrounding neighbourhood to the guilty accused. However, in the situation of the Čelebiči prison-camp it is possible that the conduct of the guilty accused may have resulted in the deaths of, or injury to, other detainees in the prison-camp other than those in relation to whom specific findings have been made above. The Trial Chamber is, however, not to engage in speculation and should be bound by the evidence before it. The Trial Chamber adopts the same view in respect of detained persons who survived but suffer from the effects of prolonged incarceration.

1227. The gravity of the offence and the individual circumstances of the accused are typically to be considered with respect to the particular and, if need be, the peculiar circumstances of each case. Thus, the circumstances of the accused would determine the factors the Trial Chamber will take into account as matters of aggravation or mitigation. In the *Tadić Sentencing Judgment*, the willing involvement of the accused in violent ethnic cleansing was regarded as an aggravating circumstance.[1089] In the *Erdemović Sentencing Judgement, 29 November 1996*, after observing that express consideration of aggravating circumstances in crimes against humanity was not necessary, since these crimes are *per se* of extreme gravity, the Trial Chamber went on to suggest possible circumstances surrounding the commission of the offence which might preclude leniency.

1228. Sub-Rule 101(B)(ii) provides that the Trial Chamber, in determining the sentence, shall take into account mitigating factors "including the substantial cooperation with the Prosecutor by the convicted person before or after conviction". The use of the term "including", which is an

[1087] Tadić Sentencing Judgment, RP D17981.
[1088] Erdemovic Sentencing Judgement, 29 November 1996, RP D40/472bis.
[1089] Tadić Sentencing Judgment, RP D17980-D17981.

expression of expansion, suggests that this provision is not exhaustive. Accordingly, other such factors may be taken into consideration by the Trial Chamber in the determination of sentence.

1229. In the *Tadić Sentencing Judgment*, the minor leadership role of the accused was taken into account in determination of the sentence.[1090] In the sentencing of Dražen Erdemović factors such as obedience to superior orders and substantial cooperation with the Prosecution were taken into account. While duress was rejected as a complete defence for the charge of crimes against humanity and/or a war crime involving the killing of innocent human beings, it was taken into account by way of mitigation.[1091]

1230. Article 33 of the SFRY Penal Code prescribed three reasons for the imposition of criminal sanctions, to be taken into account in the determination of sentence. These reasons were:

> (1) preventing the offender from committing criminal acts and his rehabilitation;
> (2) rehabilitative influence on others not to commit criminal acts;
> (3) [. . .] influence on the development of citizens' social responsibility and discipline.

The Trial Chamber agrees that these are reasons worth considering in the determination of sentence. In addition to retribution and deterrence, relied upon by the Prosecution, the Trial Chamber here briefly discusses protection of society, rehabilitation and motive as factors to be taken into consideration in the determination of sentence.

(a) Retribution

1231. The theory of retribution, which is an inheritance of the primitive theory of revenge, urges the Trial Chamber to retaliate to appease the victim. The policy of the Security Council of the United Nations is directed towards reconciliation of the parties. This is the basis of the Dayton Peace Agreement by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.

[1090] See Tadić Sentencing Judgment, RP D17979-D17980.

(b) Protection of Society

1232. The protection of society from the guilty accused is an important factor in the determination of appropriate sentence. The policy of protection depends upon the nature of the offence and the conduct of the accused. The protection of society often involves long sentences of imprisonment to protect society from the hostile, predatory conduct of the guilty accused. This factor is relevant and important where the guilty accused is regarded as dangerous to society.

(c) Rehabilitation

1233. The factor of rehabilitation considers the circumstances of reintegrating the guilty accused into society. This is usually the case when younger, or less-educated, members of society are found guilty of offences. It therefore becomes necessary to reintegrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard.

(d) Deterrence

1234. Deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law. Apart from the fact that the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes. Deterrence of high level officials, both military and civilian, in the context of the former Yugoslavia, by appropriate sentences of imprisonment, is a useful measure to return the area to peace. Although long prison sentences are not the ideal, there may be situations which will necessitate sentencing an accused to long terms of imprisonment to ensure continued stability in the area. Punishment of high-ranking political officials and military officers will demonstrate that such officers cannot flout the designs and injunctions of the international community with impunity.

[1091] See Erdemović Sentencing Judgement, 5 March 1998, RP D497-D498.

(e) Motives for the Commission of Offences

1235. Generally, motive is not an essential ingredient of liability for the commission of an offence. It is to some extent a necessary factor in the determination of sentence after guilt has been established. The offences charged are violations of international humanitarian law. It is, therefore, essential to consider the motives of the accused. The motive for committing an act which results in the offence charged may constitute aggravation or mitigation of the appropriate sentence. For instance, where the accused is found to have committed the offence charged with cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs, such circumstances necessitate the imposition of aggravated punishment. On the other hand, if the accused is found to have committed the offence charged reluctantly and under the influence of group pressure and, in addition, demonstrated compassion towards the victim or the group to which the victim belongs, these are certainly mitigating factors which the Trial Chamber will take into consideration in the determination of the appropriate sentence.

B. Factors Relevant to Sentencing in Respect of Each Accused

1236. This part of the Judgement is concerned with the imposition of the appropriate penalties on each of the accused persons found guilty and in respect of the counts of the Indictment of which they have been found guilty. For this purpose the Trial Chamber, considers, generally, the provisions of Article 24(2) of the Statute and sub-Rule 101(B) of the Rules, as well as the sentencing practice of the courts of the former Yugoslavia, following the provisions of the SFRY Penal Code. The Trial Chamber has discussed the law and practice in some detail above. In considering the appropriate sentence, the Trial Chamber briefly discusses, where relevant, the circumstances of the offence, the role played by the accused, factors in aggravation or mitigation of the offence and any other relevant factors. The three accused persons involved in this exercise are Zdravko Mucić, Hazim Delić and Esad Landžo. The appropriate sentences imposed upon them on conviction in respect of the various counts in the Indictment will be considered *seriatim*, beginning with Zdravko Mucić. Zejnil Delalić, having been acquitted on all counts charged in the Indictment, is not a subject of sentencing.

1. Zdravko Mucić

1237. The Trial Chamber has found Zdravko Mucić guilty, pursuant to Article 7(3) of the Statute, for: the wilful killing and murder of Zeljko Ćećez, Petko Gligorević, Gojko Miljanić, Miroslav Vujičić and Pero Mrkajić, Sćepo Gotovac, Zeljko Milošević, Simo Jovanović and Boško Samouković, and for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Slavko Šušic (counts 13 and 14); the torture of Milovan Kuljanin, Momir Kuljanin, Grozdana Ćećez, Milojka Antić, Spasoje Miljević and Mirko Đorđić (counts 33 and 34); the wilful causing of great suffering or serious injury to body or health to, and cruel treatment of, Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić, and the inhuman and cruel treatment of Mirko Kuljanin (counts 38 and 39); and for the inhuman and cruel treatment of Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin, Miso Kuljanin, Milenko Kuljanin and Novica Đorđić (counts 44 and 45). The Trial Chamber has further found that Zdravko Mucić, by his participation in the maintenance of inhumane conditions in the Čelebići prison-camp, as well as by his failure to prevent or punish the violent acts of his subordinates by which the detainees in the Čelebići prison-camp were subjected to an atmosphere of terror, is guilty of wilfully causing great suffering or serious injury to body or health, and cruel treatment (counts 46 and 47). Mr. Mucić has also been found guilty pursuant to Article 7(1) of the Statute of unlawful confinement of civilians (count 48).

1238. In the determination of the appropriate sentence to impose in respect of a finding of guilt it is important, in addition to the general factors, to consider the personal factors such as the age of the accused and his antecedents, including time spent in detention before and during trial. The general reputation of the accused is also a factor to be taken into account. These factors may operate either in aggravation or in mitigation, depending upon the matter in consideration.

1239. The Defence for Zdravko Mucić has given evidence of the good character of the accused. Many witnesses, including the daughter of the accused, gave oral testimony before the Trial Chamber. The Defence has pointed out, and it is not denied by the Prosecution, that there is no credible evidence of active, direct participation, in person, in respect of any act of violence or inhuman treatment, by the accused. On the other hand, there is evidence, even on the part of the Prosecution, that the accused, by his words or actions, and indeed by his actual presence in the Čelebići prison-camp, prevented the commission of acts of violence.

1240. Zdravko Mucić was at all material times the commander of the Čelebići prison-camp and responsible for conditions in the prison-camp. He was the direct superior of Hazim Delić. It is significant to observe that Mr. Mucić, with the exception of counts 46 and 47 (inhumane conditions) and count 48 (unlawful confinement of civilians), has not been found guilty of actively participating in any of the offences charged in the Indictment. All the convictions are in respect of offences for which he was culpable and liable because of the criminal acts of his subordinates.

1241. As discussed above in Section III, the Čelebići prison-camp was established to detain those Bosnian Serbs in the Konjic municipality whose loyalty to the State of Bosnia and Herzegovina was in doubt. The solution to the perceived threat from those arrested during military operations by the Bosnian government forces at, *inter alia*, Bradina and Donje Selo, was to keep them detained in the Čelebići prison-camp under the watchful eyes of Bosnian guards who would ensure that they would no longer constitute security risks or any danger to the State. The Trial Chamber has found that the facilities improvised in the Čelebići prison-camp were not satisfactory, being far from adequate for the number of detainees. Those who were responsible for the detention of the prisoners clearly did not consider the question of suitability of the facility, which was not used as a prison in times of peace. Moreover, the detainees were Bosnian Serbs and those identified as being in opposition to the survival of the independent Bosnian State. Those superintending the prison-camp were soldiers of this nascent State, some of whom were zealous for its survival and positively resentful and revengeful for the real or imagined activities of their opponents.

1242. The Trial Chamber has found that conditions of detention in the Čelebići prison-camp were harsh and, indeed, inhuman. The feeding conditions were at starvation level, medical health and sanitary conditions were inadequate and indeed deplorable. The guards were hostile, and severe beatings, torture and humiliation of detainees were the norm. Some guards experimented punishment methods on detainees, and the death of detainees was a common occurence and not a surprise. No one appeared to care whether the detainees survived. These were the conditions perpetrated by Zdravko Mucić, who was the commander of the Čelebići prison-camp after its creation. There is evidence that Mr. Mucić selected the guards. He also chose his deputy, Hazim Delić in apparent demonstration of the type of discipline he expected in the prison-camp. In addition, the prison-camp was set within the Čelebići barracks, where soldiers of the Bosnian army had free access.

1243. The uncontradicted evidence before the Trial Chamber is that Mr. Mucić was the commander of the prison-camp, with overall authority over the officers, guards and detainees, and the person to

whom the officers and guards were subordinate. Mr. Mucić was responsible for conditions in the prison-camp and for the unlawful confinement of the civilians there detained. He made no effort to prevent or punish those who mistreated the prisoners, or even to investigate specific incidents of mistreatment including the death of detainees. Instead, there is evidence that he was never in the prison-camp at night, when mistreatment was most likely to occur. He was regularly away to visit his family, and remained absent for days in obvious neglect of his duty as commander and the fate of the vulnerable detainees. According to the evidence before the Trial Chamber, he was aware that detainees were being mistreated or even killed. In apparent encouragement, he tolerated these conditions over the entire period he was commander of the prison-camp.

1244. The conduct of Mr. Mucić before the Trial Chamber during the course of the trial raises separately the issue of aggravation. The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucić throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. The Presiding Judge has, on occasions, had to issue stern warnings reminding him that he was standing trial for grave offences. The Prosecution has also presented evidence of an exchange of notes between Zejnil Delalić and Zdravko Mucić conspiring about the fabrication of evidence to be given at the trial. There have also been allegations that Mr. Mucić participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct, which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence.

1245. In addition to the number of aggravating factors, there are some mitigating instances. There was, in the Konjic municipality, a strong anti-Serb feeling at the time relevant to the Indictment. It was in the midst of this anti-Serb hostility that Mr. Mucić became the commander of a detention facility for Serbs suspected of anti-Bosnian activities. Zdravko Mucić was a Bosnian Croat among Bosnian Muslims. He could not ordinarily be seen to be favouring the Bosnian Serbs, who were perceived by many as the enemies of the Bosnian State. These considerations, probably in self-preservation, prevented him from taking stronger measures to contain the obvious mistreatment of detainees.

1246. The Prosecution would seem to agree with this view but counters immediately with the submission that it is not an excuse for the failure of Mr. Mucić to take appropriate action and to do everything within his authority to prevent mistreatment of detainees.

1247. In its submission, the Defence for Mr. Mucić refers to the evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of Mr. Mucić towards the detainees. Reference was made to the oral testimony of Miro Golubović, Nedeljko Draganić, Grozdana Ćećez, Witness P and Witness T, all of whom were Prosecution witnesses. The testimony of Miro Golubović was that, in his opinion, there would have been no war in Bosnia and Herzegovina if only 20 per cent of the people were like Mr. Mucić. Indeed, the witness stated that he owed his life, and his ability to testify, to Mr. Mucić.[1092] Grozdana Ćećez spoke of how Mr. Mucić prevented the rape of a 13 year old girl in the prison-camp by taking her back to her parents.[1093] Mrs. Ćećez also testifed that he paid 300 German Marks to enable her to escape and that he may have assisted in saving others.[1094] The apparent concern of Mr. Mucić for the detainees was also evinced in the oral testimony of Witness P, who overheard a telephone conversation in which Mr. Mucić made an urgent and frantic request for food for the detainees.[1095]

1248. The Trial Chamber has made very sober reflection on the submissions of the parties. There is a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances discussed above. It is relevant, and crucial, to take into account the circumstances in which the events occurred as well as the social pressures and hostile environment within which the accused was operating. On the whole, the Trial Chamber has taken into consideration the conduct of the accused within the situation when he was in possession of considerable authority and was exercising the power of life and death over the detainees in the prison-camp. The Trial Chamber has taken into account the fact that the accused has not been named by any of the witnesses as an active participant in any of the murders or tortures for which he was charged with responsibility as a superior. The Trial Chamber has not placed any reliance on Esad Landžo's testimony that Mr. Mucić ordered the killing of Šćepo Gotovac. The scenario thus described would suggest the recognition of individual failing as an aspect of human frailty, rather than one of individual malice. The criminal liability of Mr. Mucić has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Čelebići prison-camp.

1249. The Defence for Mr. Mucić has urged the Trial Chamber to compare his case with that of Field Marshal von Leeb during the Second World War.[1096] The Field Marshal was convicted for

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[1092] *See* T. 2187.
[1093] *See* T. 541-T. 542.
[1094] *See* T. 604.
[1095] *See* T. 4574-T. 4575.
[1096] See United States v. Wilhelm von Leeb et al., Vol. XI TWC 462, 553-565.

the execution of an order by his subordinates, known as "The Barbarossa Jurisdiction Order". This order imposed upon junior officers the authority to shoot individuals on suspicion of certain acts. There was evidence that von Leeb had implemented the order by passing it through the chain of command. The United States Military Tribunal found that the order had been criminally applied by the units and held that, having set it in motion, von Leeb must bear the responsibility for its illegal enforcement. The only parallel with the instant case is that both Field Marshal von Leeb and Mr. Mucić exercised and enjoyed command authority and superior responsibility over subordinates in respect of whose wrongful acts they were and are criminally responsible.

1250. In the instant case, Mr. Mucić, by means of deliberate neglect of his duty to supervise his subordinates, thereby enabling them to mistreat the detainees in the Čelebići prison-camp, has been imputed with knowledge of their crimes. Mr. Mucić was consciously creating alibis for possible criminal acts of subordinates. It would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in mitigation of criminal responsibility. In this particular case, the reason for staying away from the prison-camp at nights without making provision for discipline during these periods, which was to save himself from the excesses of the guards and soldiers, is rather an aggravating factor. The sentence of three years imprisonment imposed in the case of Field Marshal von Leeb would not constitute an appropriate precedent on the facts of this case.

1251. The general attitude of Mr. Mucić during the trial proceedings in and outside the courtroom would seem to be a repetition of his casual and perfunctory attitude to his duties in the Čelebići prison-camp. He made concerted and sustained efforts where he could to intimidate witnesses and to suborn favourable evidence from them. His demeanour throughout the proceedings suggests that he appears to have regarded this trial as a farce and an expensive joke. Zdravko Mucić has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.

1252. In imposing sentence, the Trial Chamber has also considered the gravity of the offences for which the accused has been convicted. We do not consider retribution *simpliciter* as a desirable basis for sentencing in offences of the nature with which the Trial Chamber here is confronted. The Trial Chamber bears in mind, in the conviction of persons exercising superior authority, that the subordinate official, in respect of whose criminal acts the superior is held liable, is often also charged and convicted of the same offence.

2. Hazim Delić

1253. The Trial Chamber has found Hazim Delić guilty of committing a series of violent crimes upon detainees who were at his mercy in the Čelebići prison-camp. He has been adjudged as guilty for: the wilful killing and murder of two detainees, Šćepo Gotovac and Željko Milošević (counts 1 to 4); the severe beating of Slavko Šušić which constitutes cruel treatment and wilfully causing great suffering or serious injury to body or health (counts 11 and 12); the rapes of two female detainees, Grozdana Ćećez and Milojka Antić, which constitutes torture (counts 18, 19, 21 and 22); inhuman acts involving the use of an electrical shock device on detainees, which constitutes inhuman and cruel treatment (counts 42 and 43); and, because each of the aforementioned crimes contributed to an atmosphere of terror and thus to the creation and maintenance of inhuman conditions in the Čelebići prison-camp, wilfully causing great suffering or serious injury and cruel treatment (counts 46 and 47).

1254. The Prosecution contends, *inter alia*, that Hazim Delić personally participated in monstrous crimes. He murdered a number of detainees, he brutally raped a number of the women in the prison-camp and then boasted about it, and he frequently beat detainees, often using a baseball bat, causing his victims to suffer broken ribs. The Prosecution submits that he took a sadistic pleasure in the infliction of pain, for example, when he used an electrical device to shock detainees, he would laugh in response to pleas for mercy from the victims.

1255. According to the Prosecution, when Mr. Delić was not physically mistreating detainees, he would often gratuitously take action to make them suffer in other ways, which included making some of them run around and pretend to be automobiles. It contends that Mr. Delić's own violent behaviour towards the prisoners and his callous disregard for their well-being, could only have encouraged the brutality of others and ensured the existence of a culture of impunity in the Čelebići prison-camp.

1256. The Prosecution indicates that Mr. Delić has a prior conviction for murder in Bosnia and Herzegovina for which he served approximately two to two and half years. The Prosecution also presented victim statements in which the victims described the impact of the crimes committed upon them. In addition, the Prosecution submits that the Trial Chamber is able to consider the suffering of the victims in the context of the conditions of imprisonment as an aggravating factor.

1257. The Defence contends that the personal circumstances of Hazim Delić are relevant in the determination of his sentence. It describes a man who was born and lived most of his life in the Konjic municipality. He graduated from secondary school in 1980 and served as a JNA infantryman from January 1982 until February 1983. He was permitted to leave the army 55 days early because of good behaviour. Shortly after his release from the JNA, he commenced employment as a locksmith repairing machinery in a wood working plant. Mr. Delić was married on 31 January 1984 and has two young children. He was mobilised early in the armed conflict in Bosnia and Herzegovina and prior to that time had not had trouble with the law, nor had he been charged with any criminal offences. He had received no training prior to his assignment to the Čelebići prison-camp. His Defence tendered a number of statements including one from his father and one from his wife. These support the Defence description of the background of Mr. Delić and attest to his good character.[1097]

1258. Further, the Defence submits that, on the basis of an expert medical opinion, Hazim Delić suffers from post traumatic stress syndrome based on his experiences during the war. Apparently, over the past year he has become better adjusted and is increasingly able to control his temper and, due to the end of his solitary confinement, is less depressed. In addition, the Defence states that Mr. Delić has had no problems with authority in the Detention Unit or with his fellow detainees, regardless of their background. Finally, the Defence seeks to rely on a declaration by one of its investigators who interviewed a number of people in the Konjic municipality and reported, *inter alia*, that Hazim Delić had arranged for the release of prisoners, intervened to stop the beatings of prisoners by guards, sought medical treatment for a number of detainees and, on one occasion, sought to arrange for the provision of soap to the detainees in order to make conditions more hygienic and lessen the chances of disease.

1259. During sentencing proceedings Hazim Delić made a brief statement in mitigation of his sentence. He stated that he had said "everything he could to the Prosecution", but that after hearing the testimony of Esad Landžo, he could not sleep at night.[1098] He denied giving any orders to kill detainees, to set them on fire or to force them to perform fellatio upon each other.[1099]

1260. The touchstone of sentencing is the gravity of the offence for which an accused has been found guilty, which includes considering the impact of the crime upon the victim. Accordingly, the

[1097] Exhibits D109/3 and D112/3a.
[1098] T. 16052-T. 16053.
[1099] T. 16052-T. 16053 and T. 16056-T. 16057.

Trial Chamber shall now turn to a consideration of the circumstances of each crime for which Mr. Delić stands convicted.

1261. Hazim Delić has criminally caused the death of two detainees in the Čelebići prison-camp. He was a party to the brutal and merciless beatings of Šćepo Gotovac. He beat this elderly man to death on the basis of an accusation that he had been responsible for the deaths of Muslims in the Second World War. The cruel premeditation of Hazim Delić is underlined by the fact that he warned his victim before beating him, that he should not hope to remain alive. Željko Milošević also died at the hands of Hazim Delić because Mr. Delić believed he was a Serb sniper. The victim was subjected to a beating by Mr. Delić with a piece of electrical cable, prior to the beating which lead to his death. After the victim refused to make "confessions" to journalists visiting the prison-camp, he encountered the wrath of Mr. Delić, who forewarned him of what was to come and told him to be ready to be beaten at an appointed hour. Thereafter, this detainee was taken out and beaten to death by Hazim Delić, thereby indicating the cold premeditation behind his acts. Mr. Delić has also been found to have inflicted a series of vicious beatings on Slavko Šušić, one of which included the use of a heavy implement.

1262. Hazim Delić is guilty of torture by way of the deplorable rapes of two women detainees in the Čelebići prison-camp. He subjected Grozdana Ćećez not only to the inherent suffering involved in rape, but exacerbated her humiliation and degradation by raping her in the presence of his colleagues. The effects of this crime are readily apparent from the testimony of the victim when she said "…he trampled on my pride and I will never be able to be the woman that I was."[1100]

1263. Before the first rape of Milojka Antić, Hazim Delić threatened her and told her that, if she did not do whatever he asked, she would be sent to another prison-camp or shot. He then forced her to take her clothes off at gunpoint, ignored her pleas for mercy and cursed and threatened her while raping her. The following day he compounded her fear and suffering by stating "…[w]hy are you crying? This will not be your last time".[1101] This rape was followed by two others, one of which involved painful and physically damaging anal penetration. These were committed by Hazim Delić when he was armed, in total disregard of his victim's pleas for mercy. Ms. Antić testified as to the effect these crimes had on her, including feelings of misery, constant crying and the feeling that she had gone crazy. In a victim impact statement submitted by the Prosecution for the purposes of

[1100] T. 494.
[1101] T. 1780.

sentencing, she stated, "[t]he wounds that I carry from the rapes in Čelebići will never go away".[1102]

1264. Hazim Delić is also guilty of inhuman and cruel treatment through his use of an electrical shock device on detainees. The shocks emitted by this device caused pain, burns, convulsions and scaring and frightened the victims and other prisoners. The most disturbing, serious and thus, an aggravating aspect of these acts, is that Mr. Delić apparently enjoyed using this device upon his helpless victims. He treated the device like a toy. He found its use funny and laughed when his victims begged him to stop. There is little this Trial Chamber can add by way of comment to this attitude, as its depravity speaks for itself.

1265. In addition to the offences where Hazim Delić has been found guilty, the Trial Chamber has made a number of factual findings regarding his behaviour in the prison camp. For example, Mr. Delić was instrumental in locking Milovan Kuljanin in a small, dark manhole, with another detainee, for at least a day and a night without any food or water. The purpose of this act was to intimidate the victim prior to his interrogation, during which Mr. Delić entered the room and struck Milovan Kuljanin with a wooden object. He was also present during the collective beating of detainees. Further, he consistently singled out one of the detainees, Vukašin Mrkajić for abuse, and would hit him almost every time he came to Hangar 6, for no apparent reason.

1266. Hazim Delić is guilty of contributing to the atmosphere of terror that prevailed in the prison-camp as a result of the foregoing acts. He deliberately contributed to conditions where detainees were compelled to live with the ever present fear of being killed or subjected to physical abuse. Further, Hazim Delić contributed to this atmosphere by threatening the detainees. For example, Witness R stated that, when Mr. Delić was confronted by a request for medical care by a detainee he responded with the statement "sit down, you have to die anyway, whether you are given medical assistance or not".[1103] This same witness testified that this was a favourite phrase that Mr. Delić used with detainees. This is supported by the testimony of Nedeljko Draganić who stated that, when he asked to go to the infirmary in order to have his wound cleaned, Mr. Delić would tell him not to go adding "[y]ou don't need that, you won't last very long".[1104] In addition, Witness R testified that while in Hangar 6, Mr. Delić would come in and say to the detainees "'sit down

[1102] Sentencing Submission of the Prosecution, RP D9754.
[1103] T. 7774.
[1104] T. 1631.

basluci', the word meaning Muslim tombstones, wishing to imply that we would stay there forever".[1105]

1267. In addition, Hazim Delić acted in a manner that demeaned the detainees. For example, there is evidence that he only allowed the detainees in Hangar 6 to leave the Hangar twice a day in order to urinate in groups of 30-40 people. Mr. Delić would order them out, in response to which they would have to run out of the Hangar to a ditch and attempt to urinate. A few moments later they were ordered to stop and return to the Hangar. This is contrasted with the fact that, at least initially, these detainees were allowed unrestricted toilet access to a ditch and septic tank behind the Hangar.

1268. An examination of the foregoing crimes and their underlying motivations, where relevant, demonstrates that they cannot be characterised as anything other than some of the most serious offences that a perpetrator can commit during wartime. The manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity. This is only amplified by the fact that Hazim Delić was the deputy commander of the prison-camp. His victims were captive and at his mercy, he abused his position of power and trust, causing at least two men to die and consigning numerous others to the suffering reserved for survivors of torture and other grave mistreatment. Thus, these circumstances are considered significant aggravating factors in the sentencing of Hazim Delić.

1269. The motive for the commission of these breaches of humanitarian law is also a relevant aggravating factor to be taken into account in the sentencing of Hazim Delić. The evidence indicates that, as well has having a general sadistic motivation, Hazim Delić was driven by feelings of revenge against people of Serb ethnicity. Before raping Ms. Antić, he stated that "the Chetniks were guilty for every thing that was going on. He [Delić] started to curse my Chetnik mother".[1106] Nedeljko Draganić, stated that Mr. Delić "walked into the [sic] Hanger Number 6 on one occasion and he told us that we are all detained because we were Serbs".[1107] Mirko Đorđić testified that, on one occasion, Mr. Delić took detainees outside into the sunshine. The guards switched on spiritual Muslim songs while the detainees had to shout certain slogans in response to Mr. Delić's, and others, prompting, such as "Hazim is the greatest" or "Sieg Heil".[1108] Risto Vukalo stated that

[1105] T. 7704.
[1106] T. 1777.
[1107] T. 1617.
[1108] T. 4800.

Mr. Delić took the detainees out in front of Hanger 6, and ordered them to say slogans of a religious nature which were distasteful to them.[1109]

1270. The mitigating factors operating in favour of Hazim Delić are the fact that the evidence discloses that on one occasion he distributed blankets to detainees.[1110] In addition, he occasionally arranged medicine and medical care for some detainees.[1111] Further, the Trial Chamber considers that the evidence submitted by the Defence on the personal background, character and health of Hazim Delić are relevant factors in sentencing and have treated them as such.

1271. Contrary to the contention of the Defence, Hazim Delić did not surrender himself to the International Tribunal, but was detained on 2 May 1996 in Bosnia and Herzegovina by the Bosnian authorities and transferred to the Tribunal on 13 June 1996. Accordingly, this contention is incorrect and cannot be used in mitigation of his sentence.

3. Esad Landžo

1272. The charges that stand established against Esad Landžo are clearly of the most serious nature, being, the wilful killing and murder of Šćepo Gotovac, Simo Jovanović and Boško Samouković, the torture of Momir Kuljanin, Spasoje Miljević and Mirko Đorđić, and wilful causing of great suffering or serious injury to and cruel treatment of Slavko Šušić and Nedeljko Draganić. In addition to the specific acts in the Indictment which Mr. Landžo has been found to have committed, the Trial Chamber also notes that he contributed substantially towards the atmosphere of terror prevailing in the Čelebići prison-camp through his brutal treatment of the detainees. The beatings and other forms of mistreatment which Mr. Landžo meted out to the prisoners detained in Hangar 6 and elsewhere in the prison-camp were inflicted randomly and without any apparent provocation, in a manner exhibiting some imaginative cruelty as well as substantial ferocity.

1273. The Trial Chamber thus notes the aggravating factors which are relevant in relation to Mr. Landžo's conduct in the Čelebići prison-camp. In particular, and as emphasised above, reference should be made to the substantial pain, suffering and injury which Mr. Landžo inflicted

[1109] T. 6280.
[1110] T. 2409 and T. 1268.
[1111] T. 4721-T. 4722 and T. 2000.

upon each of his victims and those who were detained in the prison-camp and were witness to his cruelty. Many of these victims and witnesses bear the permanent physical and psychological scars of Mr. Landžo's cruelty and their experiences within the prison-camp. For example, Novica Đorđić, stated that:

> if I had another 70 lives, regular human lives, I don't think that I would be able to forget this, not all of it. I'm forgetting details, but the essence of everything that I went through, that I experienced, is there to stay. It may just be pushed back into the subconscious. It may not show up in regular life but the essence is essence. I was humiliated there in every respect, as a human being, as a person and physically and health wise, and I can't forget that.[1112]

In particular, there can be no doubt as to the savagery with which Mr. Landžo beat to death Šćepo Gotovac, an elderly and defenceless man, and his potential for cruelty, exhibited by the pinning of a metal badge to Mr. Gotovac's head in addition to his beating. The Trial Chamber has also heard testimony that Mr. Landžo continued in his beating of Mr. Gotovac, impervious to the pleas for mercy of the victim.[1113] This is also the case with the killing of Simo Jovanović, who was heard to cry "Please don't do it brothers" while being beaten to death outside Hangar 6,[1114] a murder for which Mr. Landžo has been found to be responsible. Similarly, his sudden attack on Boško Somouković was sustained and ferocious, admittedly motivated by vengeful desires and serious enough to result in death shortly thereafter. The Trial Chamber has also heard evidence that Mr. Landžo threatened the detainees with violence should any of them attempt to come to the assistance of those who he singled out for particular mistreatment.[1115]

1274. Furthermore, many witnesses testified before the Trial Chamber about Mr. Landžo's apparent preference for inflicting serious burns upon detainees in the prison-camp. It is the view of this Trial Chamber that such a method of mistreatment exhibits particularly sadistic tendencies and clearly requires premeditation. Mr. Landžo has, indeed, been found guilty of torture for such burning incidents, particularly in relation to Momir Kuljanin, Spasoje Miljević, Mirko Đorđić, as well as of wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Nedeljko Draganić.

[1112] T. 4286.
[1113] *See* T. 5766-T. 5767, Branko Sudar.
[1114] *See* T. 1638, Nedeljko Draganić.
[1115] *See e.g.*, T. 7798, Witness R.

1275. The Trial Chamber has further made factual findings that Esad Landžo tied a burning fuse-cord around Vukašin Mrkajić, forced two brothers to commit fellatio with each other and ordered a father and son to beat one another. While Mr. Landžo was not charged directly with these offences and thus is not sentenced in relation to them, the Trial Chamber again notes the heinous nature of the acts involved and the depravity of mind necessary to conceive of and inflict such forms of suffering.

1276. Mr. Landžo has also been found guilty of directly contributing to the atmosphere of terror which existed in the Čelebići prison-camp throughout the period relevant to the Indictment, by his constant kicking, beating and mistreatment of the detainees. That Mr. Landžo deliberately sought to instil such terror and apprehension in the detainees is evident from his threatening words and behaviour towards them. For example, Witness N testified during the trial that he was once taken out of Hangar 6 by Mr. Landžo and made to kneel down while Mr. Landžo pressed a gun against his neck in mock execution.[1116] It has been made abundantly clear from such testimony that all of the detainees regarded Mr. Landžo with great fear and trepidation that he would turn his attention on them, with horrific consequences.[1117]

1277. The Defence for Mr. Landžo, in its submissions on sentencing, makes reference to certain mitigating circumstances which it believes to be pertinent. These include, the extreme youth of Mr. Landžo at the time relevant to the Indictment, his family background, his character, his admissions of guilt and feelings of remorse, his attempt to co-operate with the Prosecution and his voluntary surrender to the authorities of Bosnia and Herzegovina.[1118] The Defence further suggests that no sentence should be imposed for any of the counts of which Mr. Landžo might be found guilty, that would exceed five years and that all such sentences should be set to run concurrently. The Defence argues that Mr. Landžo would thus be enabled to remould his future in accordance with his newly reformed and responsible personality.

1278. The Prosecution concedes that the youth and mental state of Mr. Landžo at the time of commission of the offences should be taken into account in deciding upon his appropriate sentence.[1119] However, it further argues that his personality problems are such that he represents a

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[1116] *See* T. 1914.
[1117] *See, e.g.*, T. 1378, Witness F.
[1118] *See* Esad Landžo's Submissions on Proposed Sentencing, 5 Oct. 1998, (RP D9827-D9887) (hereafter "Landžo Sentencing Brief").
[1119] Sentencing Submission of the Prosecution, 1 Oct. 1998 (RP D9660-D9787), RP D9763.

continuing danger to society. The Prosecution also disputes the claim that Mr. Landžo had offered to co-operate with it and contends that the Defence for Mr. Landžo approached it, in September 1997, with the proposal that he would plead guilty in the event that it would agree to a maximum sentence of five years imprisonment. It further states that, in view of the severity of the crimes committed by Mr. Landžo, the Prosecution did not accept this proposal.[1120]

1279. The Trial Chamber does not consider Mr. Landžo's belated partial admissions of guilt, or any expressions of remorse, to significantly mitigate, in the circumstances, the crimes committed by him. Prior to his appearance before the Trial Chamber as his own witness, Mr. Landžo did not, in any of his interviews or written statements, admit his guilt. This remained the case despite the fact that Mr. Landžo watched and listened to many victims of his mistreatment as they testified in the courtroom and were subjected to gruelling cross-examination on his behalf. Mr. Landžo did address a written statement to the Trial Chamber after the end of his trial, stating that he was sorry for his conduct in the Čelebići prison-camp and that he wished to express his regrets to his victims and their families.[1121] Such expression of remorse would have been more appropriately made in open court, with these victims and witnesses present, and thus this ostensible, belated contrition seems to merely have been an attempt to seek concession in the matter of sentence. In addition, the Trial Chamber does not consider any attempt at plea bargaining to be a mitigating factor in the matter of sentencing.

1280. The Defence for Mr. Landžo also raises once again the argument that he was merely an ordinary soldier and, as such, should not be subject to the jurisdiction of the International Tribunal, which is limited to persons in positions of superior authority. This argument has been considered and dismissed above and the Trial Chamber finds no reason to revisit it in detail. It does, however, note that the statement issued in May of this year (1998) by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence,[1122] indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landžo would appear to fall within this exception.

[1120] *Ibid*., RP D9762.
[1121] Exhibit D93/4.
[1122] Statement by the Prosecutor following the Withdrawal of the Charges Against 14 Accused, 8 May 1998 (CC/PIU/314-E).

1281. The Defence further contends that Mr. Landžo committed the offences established against him under the orders of his superiors. This assertion has been considered and rejected in the examination of the evidence under each of the counts of the Indictment relating to him. Even were it to be accepted that Mr. Landžo was, on occasion, ordered to kill or mistreat prisoners within the prison-camp, the evidence does not indicate that he performed these tasks with reluctance. To the contrary and as discussed above, the nature of his acts strongly indicates that he took some perverse pleasure in the infliction of great pain and humiliation.

1282. It is, moreover, incorrect to say that Mr. Landžo voluntarily surrendered to the International Tribunal. According to his own statement, he was first called to Sarajevo by the Bosnian authorities and he was detained there pending his transfer to The Hague. Upon completion of the relevant procedure by the Supreme Court of Bosnia and Herzegovina, Mr. Landžo was transferred to the Tribunal on 13 June 1996.

1283. Nonetheless, there are certain features of Mr. Landžo's case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him. First, there is his relative youth – he was only nineteen years of age at the time of commission of the offences – and his poor family background. Related to these considerations is his immature and fragile personality at that time, which is undisputed between the parties and has been testified to by several expert witnesses. While the special defence of diminished responsibility, raised by the Defence, has been rejected by the Trial Chamber above, the Trial Chamber may nonetheless take note of the evidence presented by the numerous mental health experts, which collectively reveals a picture of Mr. Landžo's personality traits that contributes to our consideration of appropriate sentence. Secondly, he had no proper military training or instruction in how to comport himself in relation to detainees such as those in the Čelebići prison-camp. Thirdly, the harsh environment of the armed conflict as a whole, and the events in the Konjic municipality in particular, must also be considered.

1284. This armed conflict created an environment clearly not of Mr. Landžo's own choosing. His home town of Konjic was shelled over a continued period of time in 1992, resulting in an atmosphere of constant fear of injury or death for himself and his family, and it was also under a blockade such that living conditions became very difficult. Many displaced persons were arriving in the town, having been expelled from their own homes in other parts of Bosnia and Herzegovina, and the stories of their mistreatment, and that of the Bosnian Muslim population in general, at the hands of the Bosnian Serbs and Croats, were undoubtedly circulating. Additionally, among the casualties of the conflict were persons close to Mr. Landžo. Given that the detainees in the Čelebići

prison-camp were Bosnian Serbs who had been arrested upon the execution of military operations by Bosnian government forces to break up pockets of resistance against the lawful authorities in the municipality, along with Mr. Landžo's immature and impressionable state of mind, it is not surprising that he might identify these detainees with the enemy that had inflicted this suffering and hardship upon himself, his family and his fellow members of the population of Bosnia and Herzegovina.

VI. JUDGEMENT

1285. FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the TRIAL CHAMBER finds, and imposes sentences, as follows:

With respect to the first accused, **ZEJNIL DELALIĆ**:

Counts 13 and 14: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killings) and a Violation of the Laws or Customs of War (murders).

Counts 33 and 34: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 35: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 38 and 39: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 44 and 45: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 46 and 47: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Count 48: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (unlawful confinement of civilians).

With respect to the second accused, **ZDRAVKO MUCIĆ**:

Counts 13 and 14: GUILTY of a Grave Breach of Geneva Convention IV (wilful killings) and a Violation of the Laws or Customs of War (murders) in respect of Željko Ćećez, Petko Gligorević, Gojko Miljanić, Miroslav Vujičić, Pero Mrkajić, Šćepo Gotovac, Željko Milošević, Simo Jovanović and Boško Samouković.

NOT GUILTY in respect of Milorad Kuljanin, Slobodan Babić and Željko Klimenta.

NOT GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder) in respect of Slavko Šušić.

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Slavko Šušić.

For wilful killings, and wilfully causing great suffering or serious injury to body or health, as Grave Breaches of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.
For murders and cruel treatment as Violations of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Counts 33 and 34: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture) in respect of Milovan Kuljanin, Momir Kuljanin, Grozdana Ćećez, Milojka Antić, Spasoje Miljević and Mirko Đorđić.

NOT GUILTY in respect of Mirko Babić.

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Count 35: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 38 and 39: GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić.

NOT GUILTY in respect of Duško Benđo.

NOT GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) in respect of Mirko Kuljanin.

GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Mirko Kuljanin.

For wilfully causing great suffering or serious injury to body or health, and inhuman treatment, as Grave Breaches of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Counts 44 and 45: GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Milenko Kuljanin, Novica Đorđić, Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin and Miso Kuljanin.

For inhuman treatment as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Counts 46 and 47: GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Count 48: GUILTY of a Grave Breach of Geneva Convention IV (unlawful confinement of civilians).

For unlawful confinement of civilians as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucić to seven (7) years' imprisonment.

Count 49: A Violation of the Laws or Customs of War (plunder), is DISMISSED.

With respect to the third accused, **HAZIM DELIĆ**:

Counts 1 and 2: GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to twenty (20) years' imprisonment.
For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to twenty (20) years' imprisonment.

Counts 3 and 4: GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).
For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to twenty (20) years' imprisonment.
For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to twenty (20) years' imprisonment.

Counts 5 and 6: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

Counts 11 and 12: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to seven (7) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to seven (7) years' imprisonment.

Counts 13 and 14: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killings) and a Violation of the Laws or Customs of War (murders).

Counts 15 and 16: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 18 and 19: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to fifteen (15) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to fifteen (15) years' imprisonment.

Count 20: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 21 and 22: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to fifteen (15) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to fifteen (15) years' imprisonment.

Count 23: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 24 and 25: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 26: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 27 and 28: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 29: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 33 and 34: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 35: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 38 and 39: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 42 and 43: GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

For inhuman treatment as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to ten (10) years' imprisonment.
For cruel treatment as a Violation of the Laws or customs of War, the Trial Chamber sentences Hazim Delić to ten (10) years' imprisonment.

Counts 44 and 45: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 46 and 47: GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delić to seven (7) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delić to seven (7) years' imprisonment.

Count 48: NOT GUILTY of a Grave Breach of Geneva Convention IV (unlawful confinement of civilians).

Count 49: A Violation of the Laws or Customs of War (plunder), is DISMISSED.

With respect to the fourth accused, **ESAD LANDŽO**:

Counts 1 and 2: GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.
For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.

Counts 5 and 6: GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.
For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.

Counts 7 and 8: GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.
For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to fifteen (15) years' imprisonment.

Counts 11 and 12: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to five (5) years imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to five (5) years' imprisonment.

Counts 15 and 16: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.

Count 17: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 24 and 25: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.

Count 26: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 27 and 28: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 29: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 30 and 31: GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.
For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to seven (7) years' imprisonment.

Count 32: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 36 and 37: GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to five (5) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to five (5) years' imprisonment.

Counts 46 and 47: GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landžo to five (5) years' imprisonment.
For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landžo to five (5) years' imprisonment.

1. Concurrence of Sentences

1286. During the pre-trial stage of these proceedings, the Trial Chamber issued a decision on the motion by the Defence for Zejnil Delalić challenging the form of the Indictment. This decision considered, *inter alia*, the issue of whether it is permitted to charge an accused under several legal qualifications for the same act, that is, the issue of whether cumulative charging is permitted. The Trial Chamber agreed with a previous decision issued in the case of the *Prosecutor v. Duško Tadić*, and thus declined to evaluate this argument on the basis that the matter is only relevant to penalty considerations if the accused is ultimately found guilty of the charges in question. Accordingly, this challenge to the Indictment was denied.[1123] It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.

2. Credit for Time Served

1287. By the provisions of sub-Rule 101(D) of the Rules of Procedure and Evidence a convicted person is entitled to credit "for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal". It will be observed that time spent in custody in respect of domestic prosecutions is not given credit for pursuant to this rule, until a formal request for deferral to the jurisdiction of the International Tribunal is made.[1124]

1288. Pursuant to a request from the Prosecutor under Rule 40 of the Rules,[1125] Zdravko Mucić was arrested by the national authorities in Austria on 18 March 1996. On 21 March 1996, following the confirmation of the Indictment against the four accused on that day, a Warrant of Arrest and Order for Surrender of Zdravko Mucić was issued by Judge Claude Jorda.[1126] Thereafter, on 9 April 1996 Zdravko Mucić was transferred to the United Nations Detention Centre in The Hague, where he has remained in detention throughout the trial. Notwithstanding that Zdravko Mucić's arrest thus preceded the confirmation of the Indictment and the issuance of an order for his surrender to the

[1123] Decision on motion by the accused Zejnil Delalić based on defects in the form of the Indictment, Case No. IT-96-21-T, 4 Oct. 1996 (RP D1576-D1590) para. 24.
[1124] *Tadic Sentencing Judgment*, RP D17972; *Erdemovic Sentencing Judgement*, 5 March 1998, RP D494.
[1125] This Rule provides: "In case of urgency, the Prosecutor may request any State: (i) to arrest a suspect provisionally; […] The State concerned shall comply forthwith, in accordance with Article 29 of the Statute."

International Tribunal, the Trial Chamber finds, for the purposes of sub-Rule 101(D), that Zdravko Mucić has been held in custody pending surrender to the International Tribunal since his detention by the Austrian authorities at the request of the Prosecutor of the International Tribunal on 18 March 1996. Accordingly, Zdravko Mucić is entitled to credit for two years, seven months and twenty-nine days in relation to the sentence imposed by the Trial Chamber as at the date of this Judgement, together with such additional time as he may serve pending the determination of any appeal.

1289. Hazim Delić and Esad Landžo were detained by the authorities in Bosnia and Herzegovina on 2 May 1996, pursuant to two Warrants of Arrest and Order for Surrender issued by Judge Claude Jorda on 21 March 1998.[1127] On 13 June 1996, they were transferred to the United Nations Detention Centre in The Hague, where they have remained in detention throughout the trial. Consequently, Hazim Delić and Esad Landžo are each entitled to credit for two years, six months and fourteen days in relation to the sentence imposed by the Trial Chamber, as at the date of this Judgement, together with such additional time as they may serve pending the determination of any appeal.

3. Enforcement of Sentences

1290. Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Zdravko Mucić, Hazim Delić and Esad Landžo shall each serve their sentence in a State designated by the President of the International Tribunal from a list of States who have indicated to the Security Council their willingness to accept convicted persons. The transfer of Zdravko Mucić, Hazim Delić and Esad Landžo to the designated State or States shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the person or persons in respect of whom such notice has been given shall instead be effected as soon as possible after the Appeals Chamber has determined the appeal. Until that time, in accordance with the provisions of Rule 102, Zdravko Mucić, Hazim Delić and Esad Landžo, are to remain in the custody of the International Tribunal.

[1126] Warrant of Arrest, Order for Surrender, Case No. IT-96-21-I, 21 March 1996 (RP D293-D296).
[1127] Warrant of Arrest, Order for Surrender, Case No. IT-96-21-I, 21 March 1996 (RP D304-D307); Warrant of Arrest, Order for Surrender, Case No. IT-96-21-I, 21 March 1996 (RP D298-D301).

1291. Pursuant to Rule 99 of the Rules, the Trial Chamber orders that Zejnil Delalić be released immediately from the United Nations Detention Unit. This order is without prejudice to any such further order as may be made by the Trial Chamber pursuant to sub-Rule 99(B).

Done in English and French, the English text being authoritative.

Adolphus G. Karibi-Whyte
Presiding

Elizabeth Odio Benito

Saad Saood Jan

Dated this sixteenth day of November 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]

ANNEX A - Glossary of Terms

Additional Protocol I	Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Protocol I), of 8 June 1977.
Additional Protocol II	Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.
Akayesu Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998.
Bothe Commentary	Micheal Bothe, Karl Josef Partsch, Waldemar A. Solf- *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff: The Hague 1982).
Brownlie Principles	Brownlie - *Principles of Public International Law* (4th ed., 1990).
Building A	Small reception building at the entrance gate of the Čelebići prison-camp.
Building B	Large administration building in the Čelebići prison-camp.
Building 22	Small building opposite administration and reception buildings in the Čelebići prison-camp.
Commentary to the Additional Protocols	International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz *et al.* eds., 1987).
Commentary to Geneva Convention I	Jean Pictet (ed.) - Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1958) - 1994 reprint edition.
Commentary to Geneva Convention II	Jean Pictet (ed.) - Commentary: II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1958) - 1994 reprint edition.

Commentary to Geneva Convention III	Jean Pictet (ed.) - Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War (1958) - 1994 reprint edition.
Commentary to Geneva Convention IV or Commentary	Jean Pictet (ed.) - Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) - 1994 reprint edition.
Commission of Experts Report	Final Report of the United Nations Commission of Experts, S/1994/674.
CSCE	Conference on Security and Cooperation in Europe.
Declaration on Torture	Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 9 December 1975.
Defence	Defence for all four accused, unless otherwise indicated.
Delalić Closing Brief	The Final Written Submissions of Zejnil Delalić, Case No. IT-96-21-T, 28 August 1998 (RP D8366-D8717).
Delalić Pre-Trial Brief	Pre-Trial Brief of Zejnil Delalić, Case No. IT-96-21-PT, 3 March 1997 (RP D2939-D2944).
Delić Closing Brief	Defendant Hazim Delić's Final Written Submissions on the Issue of Guilt/Innocence, Case No. IT-96-21-T, 28 August 1998 (RP D8180-D8364).
Delić Pre-Trial Brief	Defendant Delić's Pre-Trial Memorandum, Case No. IT-96-21-PT, 21 Feb. 1997 (RP D2789-D2817).
Dissent	Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, Case No. IT-94-1-T, 7 May 1997 (RP D17363-D17381).
Erdemović Sentencing Judgement, 29 November 1996	Sentencing Judgement, Case No. IT-96-22-T, 29 November 1996 (RP D1/472bis-D58/472*bis*).
Erdemović Sentencing Judgement, 5 March 1998	Sentencing Judgement, Case No. IT-96-22-T*bis*, filed on 5 March 1998 (RP D481-D515).
European Convention	European Convention on Human Rights, signed in Rome on 4 November 1950 and entered into force on 3 September 1953.
European Court	European Court of Human Rights.

Fletcher	Fletcher - *Rethinking Criminal Law* (1978).
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro).
GAOR	United Nations Official Records of the General Assembly.
Gehring	Gehring, Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I, Vol. 90 Military Law Review (1980).
Geneva Convention I, or First Geneva Convention	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.
Geneva Convention II, or Second Geneva Convention	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949.
Geneva Convention III, or Third Geneva Convention	Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949.
Geneva Convention IV, or Fourth Geneva Convention	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
Hadžibegović Report	Expert Report of Professor Iljas Hadžibegović, admitted into evidence as Exhibit D135-1a/1.
Hague Convention IV	1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.
Hague Regulations	Regulations attached to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.
Hangar 6	Large metal hangar, approximately 30 metres long and 13 metres wide in the Čelebići prison-camp.
HDZ	Croatian Democratic Union.
High Command Case	*United States v. Wilhelm von Leeb et al.,* Vol. XI, Trials of War Criminals before the Nuernburg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950) 462.
Homicide Act	English Homicide Act 1957.
HOS	Croatian Defence Forces (Paramilitary Wing of the Croatian Party of rights).

Hostage Case	*United States v. Wilhelm List et al.,* Vol. XI, Trials of War Criminals before the Nuernburg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950) 1230.
HV	The Croatian Army.
HVO	Croatian Defence Council.
HZH-B	Croatian Community of Herceg-Bosna.
ICCPR	International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976.
ICJ	International Court of Justice.
ICRC	International Committee of the Red Cross.
ICTR	International Criminal Tribunal for Rwanda.
ILC	International Law Commission.
ILC Draft Code	Report of the International Law Commission on the work of its Draft Code of Crimes against the Peace and Security of Mankind, forty-eighth session, 6 May - 26 July 1996, General Assembly Official Records, fifty-first session, Supp. No. 10 U.N. Doc. A/51/10.
Inter-American Commission	Inter-American Commission on Human Rights.
Inter-American Convention	Inter-American Convention to Prevent and Punish Torture, adopted at the Third Plenary Session of the Organization of American States on 9 December 1985 and entered into force on 28 February 1987.
International Tribunal or Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
JNA	Yugoslav People's Army.
Landžo Closing Brief	Esad Landžo's Amended Final Submission and Motion for Acquittal, Case No. IT-96-21-T, 31 Aug. 1998 (RP D9022-D9204).
Landžo Pre-Trial Brief	Pre-Trial Brief of Esad Landžo and Response to Prosecutor's Pre-Trial Brief, Case No. IT-96-21-PT, 3 March 1997 (RP D2898-D2912).

Law Reports	Law Reports of Trials of War Criminals (London: Published for the United Nations War Crimes Commission by His Majesty's stationary office).
Medical Case	*United States v. Karl Brandt and others*, Vol. II, Trials of War Criminals before the Nürnburg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950) 186.
Meron	T. Meron - Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout, 92 American Journal of International Law 236 (1998).
Motion to Dismiss	Defendants' Motion for Judgment of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutors's Case, Case No. IT-96-21-T, 20 February 1998 (RP D5503-D5724).
Mucić Closing Brief	Defendant Zdravko Mucić's Final Submission, Case No. IT-96-21-T, 28 Aug. 1998 (RP D8093-D8178).
Mucić Pre-Trial Brief	Pre-Trial Brief of the Accused Zdravko Mucić, Case No. IT-96-21-PT, 3 March 1997 (RP D2914-D2922).
Munich Statements:	Zejnil Delalić pre-trial statements.
MUP	Ministry of the Interior in Konjic police forces.
Nationality and Internationality	B. Brown - Nationality and Internationality in International Humanitarian Law, 34 Stanford Journal of International Law 347 (1998).
Nicaragua Case	Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*) (Merits) 1986 I.C.J. Reports, 14.
Northern Ireland Case	*Case of Republic of Ireland v. United Kingdom*, 2 European Human Rights Reports 25, 1979-80.
Nowak Commentary	Nowak - UN Covenant on Civil and Political Rights, CCPR Commentary (1993).
Official Records	Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Swiss Federal Political Department: Bern 1978).
Oppenheim	Jennings and Watts (eds.) - *Oppenheim's International Law*, 9th edition, Volume I (London, 1992).

Prosecution	Office of the Prosecutor.
Prosecution Closing Brief	Closing Statement of the Prosecution, Case No. IT-96-21-T, 25 August 1998 (RP D7610-D8082).
Prosecution Response to the Motion to Dismiss	Prosecution's Response to Defendant's Motion for Judgement on Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, Case No. IT-96-21-T, 6 March 1998 (RP D5759-D5861).
Prosecution Response to the Pre-Trial Briefs of the Accused	Prosecutor's Response to the Pre-Trial Brief of the Accused, Case No. IT-96-21-T, 18 April 1997 (RP D3311-D3363).
Prosecution Pre-Trial Brief	The Prosecutor's Pre-Trial Brief, Case No. IT-96-21-PT, 24 February 1997 (RP D2823-D2850).
Reply on the Motion to Dismiss	Reply of Defendants Delalić, Delić and Landžo to Prosecution's Response to Defendants' Motion for Judgement of Acquittal, or in the alternative, Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, Case No. IT-96-21-T, 10 March 1998 (RP D5866-D5922).
Report of the Secretary General	Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704.
Report of the Special Rapporteur	Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986.
Rodley	Nigel S. Rodley - *The Treatment of Prisoners under International Law* (2nd Edition Clarendon Press, Oxford) forthcoming 1998.
Rome Statute of the International Criminal Court	Rome Statute, The International Criminal Court, 17 July 1998 A/CONF.183/9.
Rules	Rules of Procedure and Evidence of the International Tribunal.
SAO	Serbian autonomous region.
SDA	Muslim Party of Democratic Action.
SDS	Serbian Democratic Party.
SRBH	Serbian Republic of Bosnia and Herzegovina.
SFRY	The Socialist Federal Republic of Yugoslavia.

SRFY Penal Code	Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted by the SFRY Assembly at the session of the Federal Council held on September 28, 1976 (Unofficial translation on file with the Tribunal Library).
Statute	Statute of the International Tribunal.
T.	Transcript of trial proceedings in *Prosecutor v. Delalić et al*, Case No. IT-96-21-T. All transcript page numbers referred to in the course of the Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tadić Judgment	Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997 (RP D17338-D17687).
Tadić Jurisdiction Decision	Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, filed on 2 October 1995 (RP D6413-D6491).
Tadić Sentencing Judgment	Sentencing Judgment, Case No. IT-94-1-T, filed on 14 July 1997 (RP D17971-D18012).
TG 1	Tactical Group 1.
TO	Territorial Defence forces.
Tokyo Trial Official Transcript	The Complete Transcripts of the Proceedings in the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial (Garland Publishing: New York and London 1981).
Tokyo Tribunal	International Military Tribunal for the Far East.
Torture Convention	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987.
Tunnel 9	A tunnel extending approximately 30 metres on a downwards slope, with a width of 1.5 metres and a height of 2.5 metres in the Čelebići prison-camp.
TWC	Trials of War Criminals before the Nuernburg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950).
UNHCR	United Nations High Commissioner for Refugees.

UNPROFOR	United Nations Protection Force.
Vejzagić Report	Expert Report of Brigadier Mohammed Vejzagić, admitted into evidence as Exhibit D143-1a/1.
Venice Commission	European Commission for Democracy through Law.
VJ	Army of the Federal Republic of Yugoslavia.
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.

ANNEX B – The Indictment

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE PROSECUTOR
OF THE TRIBUNAL

CASE NO.: IT-96-21

AGAINST

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ, also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO, also known as "ZENGA"

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to his authority under Article 18 of the Statute of the Tribunal, charges:

ZEJNIL DELALIĆ, ZDRAVKO MUCIĆ, HAZIM DELIĆ and **ESAD LANDŽO** with GRAVE BREACHES OF THE GENEVA CONVENTIONS and VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR, as set forth below.

BACKGROUND

1. The Konjic municipality is located in central Bosnia and Herzegovina. In the 1991 census, the population of Konjic municipality, which includes Konjic town and surrounding villages including Čelebići, was approximately 45,000 persons, with the ethnic distribution being approximately 55% Muslim, 26% Croatian, and 15% Serbian. Konjic was of significance because it contained a large

factory for arms and ammunition, as well as several military facilities, and because it was a transportation link between Mostar and Sarajevo.

2. Beginning in the latter part of May 1992, forces consisting of Bosnian Muslims and Bosnian Croats attacked and took control of those villages containing predominantly Bosnian Serbs within and around the Konjic municipality. The attackers forcibly expelled Bosnian Serb residents from their homes, and held them at collection centres. Many of the women and children were confined in a local school or in other locations. Most of the men and some women were taken to a former JNA facility in Čelebići, hereafter referred to as the Čelebići camp. There, the detainees were killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment. The majority of detainees were confined at Čelebići from approximately May 1992 until approximately October of 1992, though some remained until December 1992. Detention facilities within the camp included a tunnel, a hangar, and an administration building. After their confinement in Čelebići, the majority of the detainees were moved to other detention camps, where they were imprisoned for periods of up to 28 months.

THE ACCUSED

3. **Zejnil DELALIĆ,** born 25 March 1948, co-ordinated activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from approximately April 1992 to at least September 1992 and was the Commander of the First Tactical Group of the Bosnian Muslim forces from approximately June 1992 to November 1992. His responsibilities included authority over the Čelebići camp and its personnel.

4. **Zdravko MUCIĆ, also known as "Pavo",** born 31 August 1955, was commander of Čelebići camp from approximately May 1992 to November 1992.

5. **Hazim DELIĆ,** born 13 May 1964, was deputy commander of Čelebići camp from approximately May 1992 to November 1992. After the departure of Zdravko MUCIĆ in approximately November 1992, **DELIĆ** became commander of Čelebići camp until it closed in approximately December 1992.

6. **Esad LANDŽO, also known as "Zenga",** born 7 March 1973, was a guard at Čelebići camp from approximately May 1992 to December 1992.

SUPERIOR AUTHORITY

7. The accused **Zejnil DELALIĆ, Zdravko MUCIĆ and Hazim DELIĆ** had responsibility for the operation of Čelebići camp and were in positions of superior authority to all camp guards and to those other persons who entered the camp and mistreated detainees. **Zejnil DELALIĆ, Zdravko MUCIĆ** and **Hazim DELIĆ** knew or had reason to know that their subordinates were mistreating detainees, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. By failing to take the actions required of a person in superior authority, **Zejnil DELALIĆ, Zdravko MUCIĆ** and **Hazim DELIĆ** are responsible for all the crimes set out in this indictment, pursuant to Article 7(3) of the Statute of the Tribunal.

8. **Hazim DELIĆ** is also or alternatively individually responsible for certain crimes set out in the indictment because of his direct participation in individual acts specifically identified below, pursuant to Article 7(1) of the Statute of the Tribunal.

GENERAL ALLEGATIONS

9. At all times relevant to this indictment, a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina, in the territory of the former Yugoslavia.

10. All acts or omissions herein set forth as grave breaches of the Geneva Conventions of 1949 (hereafter "grave breaches"), punishable under Article 2 of the Statute of the Tribunal occurred during that international armed conflict and partial occupation.

11. At all times relevant to this indictment, the accused were required to abide by the laws and customs governing the conduct of war, including Common Article 3 of the Geneva Conventions of 1949.

12. In each paragraph charging torture, the acts were committed by, or at the instigation of, or with the consent of, an official or person acting in an official capacity, and for one or more of the following purposes: to obtain information or a confession from the victim or a third person; to punish the victim for an act the victim or a third person committed or was suspected of having committed; to intimidate or coerce the victim or a third person; and/or for any reason based upon discrimination.

13. All of the victims referred to in the charges contained in this indictment were at all relevant times detainees in Čelebići camp and were persons protected by the Geneva Conventions of 1949.

14. All acts described in the paragraphs below occurred in the Čelebići camp in the Konjic municipality.

15. The allegations contained in paragraphs seven to fourteen are realleged and incorporated into each of the relevant charges set out below.

CHARGES

COUNTS 1 AND 2
Killing of Šćepo GOTOVAC

16. Sometime around the latter part of June 1992, **Hazim DELIĆ, Esad LANDŽO** and others selected Šćepo GOTOVAC, aged between 60 and 70 years. **Hazim DELIĆ, Esad LANDŽO** and others then beat Šćepo GOTOVAC for an extended period of time and nailed an SDA badge to his forehead. Šćepo GOTOVAC died soon after from the resulting injuries. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 1. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 2. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 3 AND 4

Killing of Željko MILOŠEVIĆ

17. Sometime around the middle of July 1992 and continuing for several days, Željko MILOŠEVIĆ was repeatedly and severely beaten by guards. Sometime around 20 July 1992, **Hazim DELIĆ** selected Željko MILOŠEVIĆ and brought him outside where **Hazim DELIĆ** and others severely beat him. By the next morning, Željko MILOŠEVIĆ had died from his injuries. By his acts and omissions, **Hazim DELIĆ** is responsible for:

Count 3. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 4. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 5 AND 6

Killing of Simo JOVANOVIĆ

18. Sometime in July 1992 in front of a detention facility, a group including **Hazim DELIĆ** and **Esad LANDŽO** over an extended period of time severely beat Simo JOVANOVIĆ. **Esad LANDŽO** and another guard then brought Simo JOVANOVIĆ back into the detention facility. He was denied medical treatment and died from his injuries almost immediately thereafter. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 5. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 6. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 7 AND 8

Killing of Boško SAMOUKOVIĆ

19. Sometime in July 1992, **Esad LANDŽO** beat a number of detainees from Bradina with a wooden plank. During the beatings, **Esad LANDŽO** repeatedly struck Boško SAMOUKOVIĆ, aged approximately 60 years. After Boško SAMOUKOVIĆ lost consciousness from the blows, he was taken out of the detention facility and he died soon after from his injuries. By his acts and omissions, **Esad LANDŽO** is responsible for:

Count 7. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 8. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 9 AND 10

Killing of person with surname MILJANIĆ

[Withdrawn 21 April 1997]

20. Sometime around the latter part of July 1992, **Esad LANDŽO** entered a detention facility and selected a detainee with the surname MILJANIĆ, aged between 60 and 70 years. **Esad LANDŽO** then used a baseball bat to beat the detainee to death. By his acts and omissions, **Esad LANDŽO** is responsible for:

Count 9. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 10. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 11 AND 12

Killing of Slavko ŠUŠIĆ

21. Sometime around the latter part of July, or in August 1992, a group including **Hazim DELIĆ** and **Esad LANDŽO** repeatedly selected Slavko ŠUŠIĆ for severe beatings. **Hazim DELIĆ**, **Esad LANDŽO** and others beat Slavko ŠUŠIĆ with objects, including a bat and a piece of cable. They also tortured him using objects including pliers, lit fuses, and nails. After being subjected to this treatment for several days, Slavko ŠUŠIĆ died from his injuries. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 11. A Grave Breach punishable under Article 2(a)(wilful killing) of the Statute of the Tribunal; and

Count 12. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murder) of the Geneva Conventions.

COUNTS 13 AND 14

Responsibility of Superiors for Murders

22. With respect to the murders committed in Čelebići camp, including: the murder in June 1992 of Milorad KULJANIN, who was shot by guards, one of whom said they wished a sacrifice for the Muslim festival of Bairaim; the murder of Željko ĆEĆEZ, who was beaten to death in June or July 1992; the murder of Slobodan BABIĆ, who was beaten to death in June 1992; the murder of Petko GLIGOREVIĆ, who was beaten to death in the latter part of May 1992; the murder of Gojko MILJANIĆ, who was beaten to death in the latter part of May 1992; the murder of Željko KLIMENTA, who was shot and killed during the latter part of July 1992; the murder of Miroslav VUJIČIĆ, who was shot on approximately 27 May 1992; the murder of PERO MRKAJIĆ, who was beaten to death in July 1992; and including all the murders described above in paragraphs sixteen to twenty-one, **Zejnil DELALIĆ**, **Zdravko MUCIĆ** and **Hazim DELIĆ** knew or had reason to know that their subordinates were about to commit those acts or had done so, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators. With respect to those counts above where **Hazim DELIĆ** is charged as a direct participant, he is also charged here as a superior. By their acts and omissions, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:

Count 13. A Grave Breach punishable under Article 2(a)(wilful killings) of the Statute of the Tribunal; and

Count 14. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(murders) of the Geneva Conventions.

COUNTS 15 TO 17

Torture of Momir KULJANIN

23. Sometime beginning around 25 May 1992 and continuing until the beginning of September 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others repeatedly and severely beat Momir KULJANIN. The beatings included being kicked to unconsciousness, having a cross burned on his hand, being hit with shovels, being suffocated, and having an unknown corrosive powder applied to his body. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 15. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 16. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 17. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 18 TO 20

Torture and Rape of Grozdana ĆEĆEZ

24. Sometime beginning around 27 May 1992 and continuing until the beginning of August 1992, **Hazim DELIĆ** and others subjected Grozdana ĆEĆEZ to repeated incidents of forcible sexual intercourse. On one occasion, she was raped in front of other persons, and on another occasion she was raped by three different persons in one night. By his acts and omissions, **Hazim DELIĆ** is

responsible for:

Count 18. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 19. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 20. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 21 TO 23

Torture and Rape of Witness A

25. Sometime beginning around 15 June 1992 and continuing until the beginning of August 1992, **Hazim DELIĆ** subjected a detainee, here identified as Witness A, to repeated incidents of forcible sexual intercourse, including both vaginal and anal intercourse. **Hazim DELIĆ** raped her during her first interrogation and during the next six weeks, she was raped every few days. By his acts and omissions, **Hazim DELIĆ** is responsible for:

Count 21. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 22. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 23. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 24 TO 26

Torture of Spasoje MILJEVIĆ

26. Sometime beginning around 15 June 1992 and continuing until August 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others mistreated Spasoje MILJEVIĆ on multiple occasions by placing a mask over his face so he could not breath, by placing a heated knife against parts of his body, by carving a Fleur de Lis on his palm, by forcing him to eat grass, and by severely beating him using fists, feet, a metal chain, and a wooden implement. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 24. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 25. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 26. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 27 TO 29

Torture of Mirko BABIĆ

27. Sometime around the middle of July 1992, **Hazim DELIĆ**, **Esad LANDŽO** and others mistreated Mirko BABIĆ on several occasions. On one occasion, **Hazim DELIĆ**, **Esad LANDŽO**, and others placed a mask over the head of Mirko BABIĆ and then beat him with blunt objects until he lost consciousness. On another occasion, **Esad LANDŽO** burned the leg of Mirko BABIĆ. By their acts and omissions, **Hazim DELIĆ** and **Esad LANDŽO** are responsible for:

Count 27. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 28. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 29. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 30 TO 32

Torture of Mirko ĐORĐIĆ

28. Sometime around the beginning of June 1992 and continuing to the end of August 1992, **Esad LANDŽO** subjected Mirko ĐORĐIĆ to numerous incidents of mistreatment, which included beating him with a baseball bat, forcing him to do push-ups while being beaten, and placing hot metal pincers on his tongue and in his ear. By his acts and omissions, **Esad LANDŽO** is responsible for:

Count 30. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 31. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 32. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 33 TO 35

Responsibility of Superiors for Acts of Torture

29. With respect to the acts of torture committed in Čelebići camp, including placing Milovan KULJANIN in a manhole for several days without food or water, and including those acts of torture described in paragraphs twenty-three to twenty-eight, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators. With respect to those counts above where **Hazim DELIĆ** is charged as a direct participant, he is also charged here as a superior. By their acts and omissions, Zejnil **DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:

Count 33. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 34. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 35. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 36 AND 37

Causing Great Suffering or Serious Injury to Nedeljko DRAGANIĆ

30. Sometime beginning around the end of June 1992 and continuing until August 1992, **Esad LANDŽO** and others repeatedly mistreated Nedeljko DRAGANIĆ by tying him to a roof beam and beating him, by striking him with a baseball bat, and by pouring gasoline on his trousers, setting them on fire and burning his legs. By his acts and omissions, **Esad LANDŽO** is responsible for:

Count 36. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering or serious injury) of the Statute of the Tribunal; and

Count 37. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 38 AND 39

Responsibility of Superiors for Causing Great Suffering or Serious Injury

31. With respect to the acts causing great suffering committed in Čelebići camp, including the severe beatings of Mirko KULJANIN and Dragan KULJANIN, the placing of a burning fuse cord around the genital areas of Vukašin MRKAJIĆ and Duško BENĐO, and including those acts causing great suffering or serious injury described above in paragraph thirty, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators. With respect to those counts above where **Hazim**

DELIĆ is charged as a direct participant, he is also charged here as a superior. By their acts and omissions, **Zdravko MUCIĆ** and **Hazim DELIĆ** are responsible for:

Count 38. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering or serious injury) of the Statute of the Tribunal; and

Count 39. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3((1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 40 AND 41
Causing Great Suffering or Serious Injury to Miroslav BOZIĆ
[Withdrawn 19 January 1998]

32. On approximately 1 December 1992, after having been accused earlier that day by **Hazim DELIĆ** of belonging to an enemy military unit, Miroslav BOZIĆ was selected and then severely beaten by a group of guards for approximately 30 minutes. **Hazim DELIĆ**, who was then Commander of Čelebići camp, observed the beating, and at one point after initially stating that Miroslav BOZIĆ could return to his cell, **Hazim DELIĆ** ordered him back against the wall, where the beating by the guards continued for another ten minutes. In addition to his responsibility as a direct participant in this incident, **Hazim DELIĆ** knew or had reason to know that persons in positions of subordinate authority to him were about to commit those acts, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. He is also charged as a superior. By his acts and omissions, **Hazim DELIĆ** is responsible for:

Count 40. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering or serious injury) of the Statute of the Tribunal; and

Count 41. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

COUNTS 42 AND 43

Inhumane Acts Involving the Use of Electrical Device

33. Sometime beginning around 30 May 1992 and continuing until the latter part of September 1992, **Hazim DELIĆ** used a device emitting electrical current to inflict pain on many detainees, including Milenko KULJANIN and Novica ĐORĐIĆ. By his acts and omissions, **Hazim DELIĆ** is responsible for:

Count 42. A Grave Breach punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and

Count 43. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 44 AND 45

Responsibility of Superiors for Inhumane Acts

34. With respect to the incidents of inhumane acts committed in Čelebići camp, including forcing persons to commit fellatio with each other, forcing a father and son to slap each other repeatedly, and including those acts described above in paragraph thirty-three, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators. With respect to those counts above where **Hazim DELIĆ** is charged as a direct participant, he is also charged here as a superior. By their acts and omissions, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:

Count 44. A Grave Breach punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and

Count 45. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 46 AND 47

Inhumane Conditions

35. Between May and October 1992, the detainees at Čelebići camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma. **Zdravko MUCIĆ**, **Hazim DELIĆ** and **Esad LANDŽO** directly participated in creating these conditions. **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the inhumane conditions, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, **Hazim DELIĆ**, and **Esad LANDŽO** are responsible for:

Count 46. A Grave Breach punishable under Article 2(c)(wilfully causing great suffering) of the Statute of the Tribunal; and

Count 47. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNT48

Unlawful Confinement of Civilians

36. Between May and October 1992, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** participated in the unlawful confinement of numerous civilians at Čelebići camp. **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had

been committed. By their acts and omissions, **Zejnil DELALIĆ**, **Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:

Count 48. A Grave Breach punishable under Article 2(g)(unlawful confinement of civilians) of the Statute of the Tribunal.

COUNT 49

Plunder of Private Property

37. Between May and September 1992, **Zdravko MUCIĆ** and **Hazim DELIĆ** participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp. **Zdravko MUCIĆ** and **Hazim DELIĆ** also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the plunder of private property, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, **Zdravko MUCIĆ**, and **Hazim DELIĆ** are responsible for:

Count 49. A Violation of the Laws or Customs of War punishable under Article 3(e)(plunder) of the Statute of the Tribunal.

Richard J Goldstone
Prosecutor

19 March 1996

ANNEX C – Map of the Bosnian Municipalities (Exhibit 44)

ANNEX D – Plan of the Čelebići Prison-Camp (Exhibit 1)

ANNEX E – Photographs