# ANNEX A

# AUTHORITY 19

D96

UNITED
NATIONS

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

Case No.: IT-95-14/1-T

Date: 25 June 1999

Original: French

THE TRIAL CHAMBER

**Before:** **Judge Almiro Simões Rodrigues, Presiding**
**Judge Lal Chand Vohrah**
**Judge Rafael Nieto-Navia**

**Registrar:** **Mr. Jean-Jacques Heintz, Deputy Registrar**

**Decision of:** **25 June 1999**

THE PROSECUTOR

**v.**

ZLATKO ALEKSOVSKI

# JUDGEMENT

**The Office of the Prosecutor:**

**Mr. Grant Niemann**
**Mr. Anura Meddegoda**

**Counsel for the Accused:**

**Mr. Srdan Joka**

Trial Chamber will therefore limits its analysis to those circumstances under which an individual may incur responsibility within the meaning of Article 7(1) of the Statute for having contributed to the perpetration of the crime without, however, having himself committed the unlawful act.

60. This question was already the subject of in-depth debate in several cases heard before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda *inter alia* in the *Tadi}*[82], *^elebi}i*[83], *Furund`ija*[84] and *Akayesu*[85] cases. On the basis of the analysis of post-Second World War trials and international instruments, these cases have already made it possible to set out the rules of existing customary international law on the subject. The Trial Chamber therefore sees no point in making the same analysis and will rely on the two essential elements which entail responsibility within the meaning of Article 7(1) as unanimously established in all the other cases.

61. The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that lend encouragement or support"[86] constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had an "substantial effect"[87] on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate".[88] If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.

62. The forms of participation recognised as sufficient in customary international law are not limited to physical assistance provided while the unlawful act is being committed. The Trial Chamber seized of the *Tadi}* case noted that "the fact that participation in the commission of the crime does not require an actual physical presence or physical assistance

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[82] *The Prosecutor v. Du{ko Tadi}*, IT-94-1-T (hereinafter *Tadi}*), Judgement of Trial Chamber II, 7 May 1999, paras. 670-692, pp. 261-273.
[83] *The Prosecutor v. @ejnil Delali}, Zdravko Muci} alias "Pavo", Hasim Deli} and Esad Land`o alias "Zenga"*, IT-96-21-T (hereinafter *^elebi}i*), Judgement of Trial Chamber II, 16 November 1998.
[84] *The Prosecutor v. Anto Furund`ija*, IT-95-17/1-T (hereinafter *Furund`ija*), Judgement of Trial Chamber II, 10 December 1998.
[85] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (hereinafter *Akayesu*), 2 September 1998.
[86] *Tadi}*, para. 689, p. 269.
[87] *Tadi}*, para. 689, p. 269.
[88] *Tadi}*, para. 674, p. 261.

appears to have been well accepted at the Nürnberg war crimes trial".[89] Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime. For that reason, as stated by the Trial Chamber seized of the *Tadi}* case, "the act contributing to the commission and the act of commission itself can be geographically and temporally distanced".[90]

63. Such participation need not be manifested through physical assistance. Moral support or encouragement expressed in words or even by the mere presence at the site of the crime have at times been considered sufficient to conclude that the accused participated.[91]

64. Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*. The Prosecutor refers to the classical example of the accomplice keeping watch while his associates commit a crime.[92] Trial Chamber considered, in the *Tadi}* case, that the presence of the accused when crimes were committed by a group was sufficient to entail his responsibility if he had previously played an active role in similar acts committed by the same group and had not expressly spoken out against the conduct of the group.[93] In the *Akayesu* case, the Trial Chamber of the International Criminal Tribunal for Rwanda held that the accused had abetted acts of sexual violence merely by his having been present near the premises where the crime occurred. The Trial Chamber based its conclusions on the fact that the accused had previously provided verbal encouragement for the commission of similar acts and that his position as mayor conferred on him such authority that his silence in the face of crimes being committed nearby could be interpreted by the perpetrators of the rapes only as a signal of official tolerance for sexual violence.[94] In the *Furund`ija* case, the accused was convicted of rape because he continued his interrogation while the person being interrogated was subjected to sexual

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[89] *Tadi}*, para. 679, p.264.
[90] *Tadi}*, para. 687, p. 268.
[91] For a detailed analysis of the case-law, see *inter alia*, *Furund`ija*, paras. 200-215, pp. 77-82.
[92] Prosecutor's Closing Brief, para. 68, p. 29.
[93] *Tadi}*, para. 690, p. 269.
[94] *Akayesu*, para. 693, p. 277.

violence. The Trial Chamber found that "the presence of the accused and the continued interrogation aided and abetted the crimes committed by the Accused B".[95]

65. As these cases show, an individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. It must be noted in fact that the aforementioned cases did not establish an individual's responsibility on this basis alone. Admittedly, the presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some circumstances, be interpreted as approval of that conduct. The aforementioned cases moreover took into account the accused's prior or concomitant behaviour or statements in order to interpret his presence as an act of abetting. Moreover, it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or even decisive effect on promoting its commission. The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement. An individual's authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1) of the Statute. Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances. The Trial Chamber will thus assess the impact of the accused's alleged presence at the place where the crimes were committed when it discusses the legal characterisation of the facts.

### 2. Article 7(3)

66. In addition to individual criminal responsibility based on the accused's direct participation in the three crimes alleged, the Prosecutor considers that the accused incurs responsibility, cumulatively or alternatively, for not having prevented or punished the crimes committed by his subordinates.[96]

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[95] *Furund`ija*, para. 274, p. 103.
[96] Indictment, para. 37.

78. This approach is appealing but raises the question of the nature of the powers in fact and in law which an accused's functions confer on him. Hierarchical power constitutes the very foundation of responsibility under the terms of Article 7(3) of the Statute. In order to entail his responsibility under Article 7(3), whatever his status, the accused must first have superior authority. In this respect, the International Law Commission's conclusion that civilian authorities are superiors if they exercise a degree of control with respect to their subordinates similar to that of a military person in an analogous command position[128] is a particularly relevant analytical aid. In the opinion of the Trial Chamber, a civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof. A civilian's sanctioning power must however be interpreted broadly. It should be stated that the doctrine of superior responsibility was originally intended only for the military authorities. Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities. The Trial Chamber therefore considers that the superior's ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

(b) The superior knew or had reason to know that a crime was about to be committed or had been committed

79. The Prosecutor takes the view that "a commander's knowledge that a violation of international humanitarian law had been committed or was going to be committed may be actual or imputed".[129] A superior could thus not claim that he did not know a crime was about to be committed or had been committed if he deliberately remained ignorant about a

[128] ILC draft articles, p. 37.
[129] Prosecutor Closing Brief, para. 124, p. 45.

matter. He would likewise be presumed to have had knowledge of offences whenever they are "widespread, notorious and occur over a long period".[130]

80. Conversely, the Trial Chamber in the *^elebi}i* case held that it was not possible to conclude that this presumption was an established principle of customary law at the relevant time. For that reason, "in the absence of direct evidence of the superior's knowledge of the offences committed by subordinates, such knowledge cannot be presumed".[131] Admittedly, as regards "indirect" responsibility, the Trial Chamber is reluctant to consider that a "presumption" of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed.

(c) Necessary and reasonable measures

81. The Commentary on Additional Protocol I[132] and the International Law Commission's Draft Articles[133] limit the notion of "necessary and reasonable measures" to the measures which the superior can actually take. This was the position taken in the *^elebi}i* case: "[...] a superior should be held responsible for failing to take such measures that are within his material possibility".[134] Such a material possibility must not be considered abstractly but must be evaluated on a case by case basis depending on the circumstances.

[130] Prosecutor's Closing Brief, para. 124, p. 46.
[131] *^elebi}i*, para. 386. p. 143.
[132] Commentary of Additional Protocol I, para. 3548, p. 1039.
[133] ILC Draft Articles, p. 56 (French).
[134] ^elebi}i, para. 395, p. 147.

# III. LEGAL EVALUATION OF THE FACTS

82. Before establishing the facts alleged, it is important to assess whether they can be ascribed to the accused for reason of his position or behaviour. Accordingly, the Trial Chamber will first examine whether and to what extent the accused can be held responsible for the charges against him. The Trial Chamber will then consider the evidence tendered in support of the acts alleged to have been committed by the accused.

## A. The accused's responsibility

83. As noted above, the Prosecutor considers that the accused must be held responsible for the acts committed, not only within, but also outside, Kaonik prison. The Trial Chamber deems it necessary to distinguish both situations and will therefore successively examine the responsibility of the accused, on the basis of Articles 7 (1) and 7 (3) of the Statute, for the acts committed within the prison, and for the acts committed outside the prison.

### 1. The accused's responsibility for acts committed in the prison

#### (a) The accused's responsibility pursuant to Article 7(1)

##### (i) The submissions of the parties

84. The Prosecution attributes responsibility to the accused under Article 7(1) on account of the bad conditions of detention (lack of medical care, hygiene and food) and of his involvement in the mistreatment and the cruel and abusive interrogations some detainees were subjected to.

85. The Defence contends that the Prosecutor has failed to submit evidence establishing the accused's responsibility.

##### (ii) The Trial Chamber's findings

86. The Trial Chamber considers it established beyond reasonable doubt that the accused was responsible for the detention conditions. The evidence at trial clearly demonstrated that it was his duty, as prison warden, to see to the conditions as regards hygiene[135] and the health and welfare of detainees.[136]

87. Several witnesses testified about the insults, threats, thefts and assaults[137] detainees suffered in the presence of the accused during body searches on 15 and 16 April 1993.[138] The Trial Chamber does not consider it proved that the accused ordered the crimes to be committed; it is however convinced that he aided and abetted in the commission of these acts. In his capacity as prison warden he was clearly in charge of organising the body-searches of detainees and of supervising them. By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting under Article 7(1) in the physical and mental abuse which detainees were subjected to during the body searches on 15 and 16 April 1993.

88. Several witnesses[139] spoke of the accused's participation in the physical violence they suffered during their detention.[140] The testimony of Witnesses L is consistent with that of Witness M. According to them, the abuse they received during their detention was initiated by the accused who led the guards to their cell to beat them.[141] Some of the accused's comments repeated at trial by the victims went to show that the accused intended to mistreat these detainees and that he had given the guards orders to that effect on several occasions. The accused had even been present on occasion and ordered the guards to go on beating them when they stopped.[142] The Trial Chamber is satisfied beyond reasonable doubt that the accused ordered or instigated and abetted the mistreatment of these witnesses. It is also similarly satisfied that the recurring brutality the two detainees were subsequently subjected to in the absence of the accused was aided and abetted by him. Abuse of this kind was frequent

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[135] Witness Percinli}, FPT p. 2047.
[136] Witness Osmancevi}, FPT p. 457; Witness Bili}; Witness Ivancevi}. Cf. *infra* para. 101.
[137] See in particular the statements by Witnesses E (FPT p. 578) and Osmancevi} (FPT p. 445) relating that a detainee was hit during the search.
[138] For more details about these crimes, see the draft about the conditions of detention.
[139] Witnesses Dautovi}, T, L, M, E.
[140] For the reasons set out above, the testimony of witnesses T and Dautovi} will only be given an indicative value.
[141] Witness M, FPT p. 1248.

and was committed day and night near the accused's office so that the accused could hardly not have not been aware of it. Yet he did not oppose or repress it, as his position required. On the contrary, his silence could only be taken as a sign of his approval, given that he participated actively in the initial abuse of these two detainees; the accused could hardly have been unaware that his silence would amount to encouragement to the perpetrators. This silence evinces a culpable intent of aiding and abetting such acts as contemplated in Article 7(1).

89. Finally, the Trial Chamber notes that the only interrogations carried out by the accused were the ones that took place after a detainee had escaped.[143] They were ordered by the accused. The mistreatments which occurred during them, if proved, may incur the accused's responsibility pursuant to Article 7(1).

(b) The accused's responsibility pursuant to Article 7(3)

(i) The accused's status as superior in the prison

a. The submissions of the parties

90. The Prosecution considers it proved beyond any reasonable doubt that the accused was the superior within the confines of the Kaonik facilities, as it believes the trial established very clearly that the accused was the warden of Kaonik prison. The Prosecutor acknowledges that the issue of the military or civilian status of the accused was not elucidated during the trial, and gives two reasons therefor. The Prosecution indicated first that it was very difficult to ascertain the formal status of the authorities exercising power in the former Yugoslavia at the time of the alleged crimes on account of the collapse of the earlier control and command system.[144] But the Prosecution argues in particular that there is no need to ascertain it to prove the accused's superior authority in the prison. In its view, the evidence went to show that the accused clearly "operated within a structure of command and discipline, and he was clearly part of the HVO structure",[145] which sufficed to establish his standing as a superior, since the trial had proved that he exercised his function as warden of Kaonik prison

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[142] Witness L, FPT p. 1211.
[143] Witnesses E and H.
[144] Closing arguments, FPT p. 3117.
[145] Closing brief, para. 88, p. 34.

Croatian soldiers on 19 June 1993, whereas the 16 May 1993 exchange seems to have involved solely civilians. As to HVO soldiers held pursuant to the order of the Travnik military tribunal or of HVO commanders, they could be released only pursuant to orders from these two authorities. The Trial Chamber therefore considers that the evidence merely established that the accused had at most an executing role in this regard.

ii. The accused's authority over the prison guards

103. The Trial Chamber rejects the Defence argument that the guards, as members of the military police, answered for their acts solely to the commander of the military police. Even if the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police, it cannot be deduced therefrom that he had no authority over the guards. For the reasons set forth above[191], The Trial Chamber considers that anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations.

104. The Trial Chamber finds first of all that the accused had the power to give the guards orders. The testimony of the secretary Bla`enka Vujica, in particular, clearly demonstrated that the guards acted pursuant to the accused's orders. This witness, who was called by the Defence, specified in particular that, "the shift commanders were not allowed to make instructions of their own. They had to receive instructions from the warden".[192] The accused passed on his orders and instructions in particular through a bulletin board located in the hall at the entrance to the first warehouse.[193] Several witnesses of the second period said that the guards addressed the accused by calling him "commander"[194] or that the accused had introduced himself as such to the detainees.[195] Other witnesses heard the accused give the guards orders[196] or hand them papers in the hallway.[197] Two witnesses furthermore stated

[191] See *supra* II, B, 2.
[192] FPT p. 2357.
[193] Witness Jerkovi}, FPT p. 2132.
[194] Witnesses H; Garanovi}, FPT p. 811; Meho Sivro, p. 870.
[195] See Notes 150 and 151 above.
[196] Witness Hajdarevi}, FPT p. 327.
[197] Witness F, FPT p. 717.

they had been hit by guards at the accused's order.[198] Witness E in particular explained that the accused was present when the witness was hit, and that he indicated to the guards to go on or let off hitting "giving signs with his eyes and his head".[199]

105. The evidence moreover showed that the accused could initiate disciplinary or criminal proceedings against guards who committed abuses. This would take the form of the accused reporting to the military police commander and the president of the Travnik military tribunal, who were competent to take the necessary measures.[200] The secretary related on this score that the accused usually had daily contact with the military police commander[201] and the president of the Travnik military tribunal[202], and that it was normal procedure for the accused to report any crimes committed by the guards to the district military tribunal.[203]

106. The issue whether the guards came concurrently under another authority, such as the military police commander, in no way detracts from the fact that the accused was their superior within the confines of Kaonik prison, since it has been proved, as regards the activities within the prison, that the guards obeyed the accused's instructions and were answerable to him for their acts. Accordingly, the Trial Chamber considers that, on the basis of the evidence tendered at trial, it was established that the accused was the superior of prison guards within the meaning of Article 7(3) of the Statute for all matters relating to their duties in connection with the organisation and functioning of Kaonik prison.

### iii. The accused's authority over the HVO soldiers in the prison

107. In his capacity as prison warden, the accused had effective authority over the soldiers imprisoned in Kaonik prison for disciplinary punishment or on the orders of the Travnik military tribunal. The evidence tendered at trial did not establish clearly whether the HVO soldiers who committed crimes within Kaonik prison were soldiers imprisoned there, soldiers housed in the building located at the compound entrance, or soldiers entering the compound in violation of the rules.

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[198] Witness E, Witness H.
[199] FPT p. 595.
[200] Witness Vujica, FPT pp. 2334-2335 and 2363; Anto Jerkovi}, FPT p. 2135.
[201] Witness Vujica, FPT p. 2333.
[202] Witness Vujica, FPT p. 2333.
[203] Witness Vujica, FPT p. 2363.

him with a truncheon and that another guard punched him in front of the accused, who nodded to them as a sign to continue. He suffered a broken nose. According to the witness, the same treatment was meted out to the other detainees.[451] The four prisoners were left in the solitary confinement cells for a while. They were given something to eat and then transferred to another cell.

210. The only interrogations in which the accused was clearly implicated were those conducted after a detainee had escaped. However serious it may be, this incident must be seen as an isolated case which does not demonstrate a systematic resolve to mistreat the prisoners.

## IV. CONCLUSIONS ON THE LAW AND THE FACTS

211. After a careful consideration of the facts and the law, the Trial Chamber has reached the following conclusions.

212. As regards the detention, the day-to-day conditions within Kaonik prison were very poor and this fact has not been challenged by the Defence. That finding must however be assessed in the light of the circumstances prevailing at the time and the principles which should govern detention.

213. The circumstances were, first, the armed conflict between the Bosnian Croats and the Bosnian Muslims at that time, more specifically between the HVO and the BH army. The conflict occurred within a relatively small geographic area, known as Kaonik in the La{va Valley. The valley is relatively narrow. The European observer, Witness McLeod, noted that the front line was less than two kilometres from the prison[452] and that communications, in particular by road, were difficult, and at times even totally cut off. In those conditions both the water and food supply and the provision of medicines and treatment were difficult to organise, if indeed possible at all.

[451] Witness E., FPT p. 593.
[452] See also witness K, FPT p. 1186.

214. It is against that background that compliance, or non-compliance with principles which should govern detention must be assessed. It is important, in that connection, to verify whether the alleged poor standards there were the result of a deliberate intent, whether they were the product of intentional discrimination and whether they resulted from negligence or failure of the person in charge of the prison to act. The Trial Chamber would like to assert that the mere existence of a state of armed conflict would not be enough to obviate responsibility. Conversely, the mere finding of deplorable conditions would not be sufficient to lead to a finding of culpable intention.

215. In this case, the Trial Chamber notes that it has not been established from the statements of witnesses that there was an intention to discriminate. Although Witness McLeod noted that the detainees were treated differently depending on whether they were Croats or Muslims,[453] the discrimination does not, however, appear to have been systematic. Very few Croats were detained and several witnesses testified that they had been robbed of their personal property at the trenches which implies that they were not robbed at Kaonik prison itself. Admittedly, with a few rare exceptions,[454] Croatian detainees and Muslim detainees were separated although that was wholly understandable in view of the conflict. Moreover, the Croatian detainees were military personnel imprisoned for having committed ordinary criminal offences or breaches of military discipline, whereas the latter category consisted essentially of civilians.[455]

216. Furthermore, for the reasons set out above, the accused could not challenge the arrival *en masse* of hundreds of Muslim detainees. Even if he had disagreed with the imprisonment of these detainees, the only recourse available to the accused would have been to report the situation to the judicial authorities[456] or to resign. In either case, the situation would have remained unchanged or would have worsened for the detainees themselves, if only because of the loss of one of the rare persons, possibly even the only person, who had had professional detention experience before the conflict.

217. In any event, the submissions made during oral arguments show that not only did all the detainees receive the same food but also that the detainees and the guards received the

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[453] According to the witness, the Muslim detainees were held four to ten in a cell and did not have personal property whereas the Croats were only two to a cell and did have personal property, FPT p. 145.
[454] Witness Garanovi} explained that he shared his cell with two Croatian soldiers serving a disciplinary sentence, FPT pp. 812-813.
[455] The lawfulness or otherwise of their detention is a separate question.
[456] It should be noted that in this case these were military judicial authorities.

same food and rations. Admittedly, it would seem that the detainees had a limited time in which to eat, but that situation is not exceptional for collective meals.

218. It did not emerge in the proceedings that there was discrimination as regards the sanitary conditions and access to medical treatment. Neutral witnesses gave evidence that the detention areas were relatively satisfactory, and many former detainees stated that they had been able to see a physician during their detention, some not in the presence of a guard. Admittedly, there were instances when the physician recommended that a detainee be treated at home but the detainee was not released. For the reasons set out above, the Trial Chamber cannot find the accused culpable for that state of affairs.

219. Although the detention conditions were harsh because of inadequate space and heating, it must be noted that the accused seems to have taken all the steps available to him: distribution of blankets, occupation of the cells emptied of Croatian soldiers held there, and changing cells to improve conditions because of the state of health of some of the detainees. In that regard, it seems particularly clear that the accused did not *a priori* have the intent to cause harm. The overpopulation and the inadequate resources were the result of circumstances beyond his control: evidence given in the oral proceedings showed that, generally speaking, the detention conditions improved when the prison became less crowded.

220. Finally, an examination of the evidence relating to religious practice revealed no prohibition and no culpable restriction. Admittedly, there was no prayer area and it was difficult for those detainees wishing to wash before performing their rituals to do so. However, given the prevailing circumstances, the absence of any physical restriction and the benefit of services of a *hodja* (a Muslim cleric), deserve favourable mention.

221. In the final analysis, the Trial Chamber notes that the detention conditions at Kaonik prison were undoubtedly poor and clearly did not meet international human rights requirements. The Prosecution has not proved beyond a reasonable doubt that the accused did not take the measures incumbent upon and available to him, or, conversely, that he deliberately ordered or allowed these poor detention conditions to arise. The abuses of these human rights do not in the circumstances constitute a grave violation of international humanitarian law which the Tribunal was set up to safeguard.

222. The situation is different with regard to mistreatment meted out to detainees, be it physical or psychological violence.

223. Granted, no medical certificates were produced although the seriousness of the injuries suffered, as described by witnesses, meant that they could have been drawn up even several months after the events.[457] Precedents have however established that evidence of such violence suffered may be given by other means, and the Trial Chamber considers in this regard that the cumulative testimony was consistent enough and the number of witnesses sufficient, at least as far as the second period was concerned, to be satisfied beyond reasonable doubt that acts of violence were committed.

224. The evidence relating to screams played over the loud-speaker, the nature of the blows inflicted on some of the credible witnesses, the accused's presence when was violence done to detainees, and the state in which some of the detainees returned from digging trenches, goes to establish that the accused was perfectly aware of the traumas suffered by the detainees. The question however is whether these traumas were severe enough to constitute an offence within the meaning of the Statute.

225. The evidence given by witnesses at the hearing shows that the scale of the violence increased over time, and that its peak coincided with the time during the second period when the conflict between Muslims and Bosnian Croats was at its worst in the region. The intensity of the violence may be the result of its very nature or the fact that it kept recurring or both given the context in which it occurred.

226. The Trial Chamber notes that psychological violence included a direct threat (holders of military identity papers were threatened with death) or was repetitive (men entering cells at night, screams played over a loudspeaker). It is appropriate to add to this the uncertainty weighing on the minds of the detainees as to whether they would be dispatched to dig trenches, and, more generally as to whether they would be released.

227. The assessment of incidents of physical violence cannot be made without considering the context in which they occurred. In that connection, two conflicting points are at issue in the case in point, i.e. the precariousness of the detainees' situation and the existence of an armed conflict. The unquestionable consequence of the armed conflict for Kaonik prison was that, although it may not have led to uncertainty about the chain of command, it did at least

[457] This is particularly so for the case of post traumatic stress described by one of the witnesses, or for those who suffered fractures.

promote the coexistence of groups of men, soldiers and guards coming under different commands. The Trial Chamber notes in that regard that the Prosecution did not establish whether the accused was a civilian or a soldier. Conversely, the detainees were in a particularly precarious and weakened position, and the accused was well aware of this. In its written submissions, the Defence referred moreover to the case of persons of Japanese origin whom the United States Government decided to intern in camps during the Second World War. The argument regarding requests for compensation made by some of these former prisoners which are known to have proved, *inter alia*, the traumatic nature of such an experience. The Trial Chamber categorically rejects the idea that the existence of such situations justifies recourse to force as described by the former Kaonik prison detainees. Furthermore, the Trial Chamber considers that the commission of violent offences against vulnerable,[458] helpless persons or those placed in a situation of inferiority[459] constitutes an aggravating circumstance which, in this case, excludes the excuse which might derive from a situation of conflict which had itself led to unrest.

228. In sum, the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace. The Trial Chamber considers that the existence of an armed conflict does not render it tolerable and that it constitutes a grave violation of the principles of international humanitarian law arising from the Geneva Conventions. For the reasons set out above, the violence in question constitutes an outrage upon personal dignity and, in particular, degrading or humiliating treatment within the meaning of Common Article 3 of the Conventions and therefore constitutes a violation of the laws or customs of war within the meaning of Article 3 of the Statute for which the accused must be held responsible under Articles 7(1) and 7(3) of the Tribunal's Statute.

229. Likewise and as seen above, the use of detainees as human shields or trench-diggers constitutes an outrage upon personal dignity protected by Article 3 of the Statute for which the accused must be held guilty under Article 7(1), that is, for aiding and abetting.

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[458] On this point at least, national laws often have specific provisions, for example those relating to violence against a handicapped person.

[459] Same observation as above, with reference to laws prohibiting violence committed over persons in a situation of inferiority or by a person in a position of authority.

Done in French and English, the French version being authoritative.

Almiro Simões Rodrigues,

Presiding

Lal Chand Vohrah

Rafael Nieto-Navia

Dated this twenty-fifth day of June 1999

At The Hague

The Netherlands

**[Seal of the Tribunal]**

Judge Rodrigues, presiding, appends a dissenting Opinion on the application of Article 2 of the Statute to the facts of the case.

Judges Vohrah and Nieto-Navia append a joint Opinion on the same issue.