ANNEX A

AUTHORITY 23

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-A
		Date:	29 July 2004
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[76]

2. Aiding and Abetting

43. The Appellant submits that liability for aiding and abetting requires, at a minimum, actual knowledge.[77] He submits that not only must the aider and abettor know that his acts provide support to another person's offence, but he must also know the specifics of that offence. Recklessness or negligence on his part is not sufficient, he asserts, contrary to the Trial Chamber's alleged finding on that point.[78] Furthermore, the Appellant submits that the *actus reus* of aiding and abetting includes a causation requirement which the Trial Chamber failed to acknowledge and to apply.[79] In other words, the contribution must "have a direct and important impact on the commission of the crime."[80] Instead, the Appellant maintains, the Trial Chamber erroneously applied a strict liability standard to find the Appellant guilty as an aider and abettor and reiterates that the Trial Chamber's conclusion that "he could be found guilty if he accepted the possibility that some unspecified crime was a 'possible or foreseeable consequence' of military action effectively eliminates the 'actual knowledge' *mens rea* of aiding and abetting, and is thus erroneous as a matter

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[76] The French translation of this legal standard reads as follows:
> Quiconque ordonne un acte ou une omission en ayant conscience de la réelle probabilité qu'un crime soit commis au cours de l'exécution de cet ordre possède la *mens rea* requise pour établir la responsabilité aux termes de l'article 7 alinéa 1 pour avoir ordonné. Le fait d'ordonner avec une telle conscience doit être considéré comme l'acceptation dudit crime.

[77] Appellant's Brief, p. 131.
[78] Appellant's Brief, pp. 131-133.
[79] Appellant's Brief, pp. 133-135.
[80] Appellant's Brief, p. 134.

of law."[81] He states that this standard was set out at the beginning of the Trial Judgement and pervades the entire analysis that followed.[82]

44. The Prosecution submits that the Appellant's claim that the *mens rea* adopted by the Trial Chamber in relation to aiding and abetting — "possible and foreseeable consequence of the conduct" — was too low is unsupported by any "standard" or authority. Nor did the Appellant, according to the Prosecution, indicate any instance where the application of such a standard would have impacted upon his conviction thereby possibly enabling him to claim prejudice.[83] The Prosecution further submits that the Trial Chamber did not apply a negligence standard in the instant case but that, if it had, it would have been completely appropriate to do so.[84] Finally, the Prosecution rejects the Appellant's unsupported assertion that aiding and abetting liability requires an element of causation between the act of the accused and the act of the principal.[85]

45. In *Vasiljević*, the Appeals Chamber set out the *actus reus* and *mens rea* of aiding and abetting. It stated:

> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. [...]
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [...][86]

The Appeals Chamber considers that there are no reasons to depart from this definition.

46. In this case, the Trial Chamber, following the standard set out in *Furundžija*, held that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[87] It further stated that the *mens rea* required is "the knowledge that these acts assist the commission of the offense."[88] The Appeals Chamber considers that the Trial Chamber was correct in so holding.

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[81] Brief in Reply, para. 115.
[82] Brief in Reply, para. 116.
[83] Respondent's Brief, para. 5.67.
[84] Respondent's Brief, paras. 5.68-5.69.
[85] Respondent's Brief, paras. 5.71-5.75.
[86] *Vasiljević* Appeal Judgement, para. 102.
[87] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).
[88] Trial Judgement, para. 283 (quoting *Furundžija* Trial Judgement, para. 249).

47. The Trial Chamber further stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*."[89] It considered:

> In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.[90]

The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting.

48. The Trial Chamber in this case went on to state:

> Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required. Furthermore, participation may occur before, during or after the act is committed and be geographically separated therefrom.[91]

The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime.

49. In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."[92] However, as previously stated in the *Vasiljević* Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation.[93] In this respect, the Trial Chamber erred.

50. The Trial Chamber agreed with the statement in the *Furundžija* Trial Judgement that "it is not necessary that the aider and abettor…know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed,

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[89] Trial Judgement, para. 284 (footnote omitted).
[90] Trial Judgement, para. 284 (footnote omitted).
[91] Trial Judgement, para. 285 (citing *Furundžija* Trial Judgement, para. 233; *Aleksovski* Trial Judgement, para. 61).
[92] Trial Judgement, para. 286.
[93] *Vasiljević* Appeal Judgement, para. 102.

and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[94] The Appeals Chamber concurs with this conclusion.

51. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber was correct in part and erred in part in setting out the legal requirements of aiding and abetting.

52. The Appeals Chamber notes that in this case, the Trial Chamber did not hold the Appellant responsible for aiding and abetting the crimes at issue. In addition, the Appeals Chamber considers that this form of participation was insufficiently litigated on appeal.[95] Furthermore, the Appeals Chamber does not consider that this form of participation was fairly encompassed by the Indictment.[96] In these circumstances, the Appeals Chamber declines to consider this form of participation any further.

B. Command Responsibilty under Article 7(3) of the Statute

53. In this section,[97] the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered.

1. Actual knowledge of a superior

54. The Appellant claims that the *mens rea* under Article 7(3) of the Statute is actual knowledge or "information which, if at hand, would oblige the commander to conduct further inquiry."[98] Regarding actual knowledge, the Appellant submits that it requires more than proof of a person's rank as a military commander, and that the Trial Chamber failed to look beyond the Appellant's status to establish his knowledge, thus relying "almost exclusively" on the Appellant's rank and status. This, the Appellant contends, is an unacceptable form of strict liability which in effect shifts the burden of proof.[99]

55. The Prosecution responds that the Appellant has failed to make a single reference to any paragraph of the Trial Judgement that would lend credence to this allegation. On the contrary, it

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[94] Trial Judgement, para. 287 (quoting *Furundžija* Trial Judgement, para. 246). *See,* for example, in German law, "Risikoerhöhungstheorie" ("theory of added peril"), BGH St. 42, 135-139.
[95] It was discussed primarily as an error of law in the parties' briefs, and there was no discussion concerning aiding and abetting during the appeal hearing. Compare *Krstić* Appeal Judgement, p. 47, n. 228; *Vasiljević* Appeal Judgement, para. 133.
[96] *See* below Chapter VI (A); compare *Krstić* Appeal Judgement, para. 137.
[97] In this Judgement, the expressions "command responsibility" and "superior responsibility" are synonymous.
[98] Appellant's Brief, p. 136.

submits, this argument has been contradicted by the findings of the Trial Chamber in relation to the events in Ahmići, the offence of trench-digging, and the maltreatment of detainees.[100]

56. The Appeals Chamber notes that the Appellant has not taken issue with the requirements set out by the Trial Chamber with regard to the circumstantial evidence to be used in support of the finding of a superior's actual knowledge. Rather, he challenges the statement of the Trial Chamber in paragraph 308 of the Trial Judgement that:

> [t]hese indicia must be considered in light of the accused's position of command, if established. Indeed, as was held by the *Aleksovski* Trial Chamber, an individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates.

The Appellant contends that this statement applies the standard of strict liability by founding his actual knowledge on the basis of his position of command.

57. The Appeals Chamber disagrees with this interpretation of the Trial Judgement. The Trial Chamber referred to the Appellant's position of command in addition to the indicia it set out in paragraph 307 of the Trial Judgement,[101] and regarded the position of command not as the criterion for, but as indicia of the accused's knowledge. Given that paragraph 308 appears in the section of the Trial Judgement discussing Article 7(3) of the Statute, and given the fact that the Trial Chamber recognised, at the beginning of its discussion of Article 7(3), that to establish responsibility under that article, proof was required of, among other things, the accused's knowledge,[102] there is no merit in the Appellant's allegation of the application of strict liability by the Trial Chamber to his case. This aspect of the appeal is dismissed.

2. The standard of "had reason to know"

58. The Appellant next submits that the "had reason to know" standard is not a mere negligence standard and does not imply a general duty to know on the part of the commander.[103] He argues that the Trial Chamber's view that the Appellant's negligence in informing himself may serve as a basis for establishing his liability under Article 7(3) of the Statute is contrary to the role, function, and interpretation of that provision and creates in effect a form of strict liability which infringes upon the presumption of innocence of the Appellant by focusing exclusively on his position.[104] He

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[99] Appellant's Brief, p. 136.
[100] Respondent's Brief, paras. 5.78-5.79.
[101] These indicia are: "the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time." Trial Judgement, para. 307 (footnote omitted).
[102] Trial Judgement, para. 307.
[103] Appellant's Brief, pp. 136-139.
[104] Appellant's Brief, p. 139.

submits that even if it were admitted that command responsibility is a form of liability based on negligence, all of the underlying offences with which the Appellant was charged require more than negligence as the *mens rea*, and that offences such as "negligent murder" or "negligent persecutions" simply do not exist under international law.[105] He concludes that what the Trial Judgement does by allegedly lowering the *mens rea* standard of command responsibility is to create new criminal offences such as "negligent murder," thereby violating the principle of *nullum crimen sine lege*.[106]

59. The Prosecution concedes that, to the extent that the Trial Chamber stated that the "had reason to know" standard encompassed a "should have known" standard, the Trial Chamber was in error.[107] However, the Prosecution adds that such a theoretical allowance would not enable the conclusion that such an error would invalidate the Trial Judgement.[108] No showing to that effect has been made by the Appellant, and none could be made since, according to the Prosecution, none of the Trial Chamber's findings rests solely on the Appellant's alleged breach of his duty to know.[109]

60. In reply, the Appellant contends that the Prosecution's concession that the Trial Chamber committed an error in relation to the required *mens rea* should "for this reason alone" lead to a reversal of his conviction.[110] It is not sufficient for the Prosecution to say that in any case the point was rendered harmless because of the Trial Chamber's finding of "actual" or "constructive" knowledge. Further, the Appellant contends that the imputation of knowledge to him by the Trial Chamber was based solely on his position.[111]

61. The Appeals Chamber notes that the Trial Chamber concluded that:

> ...if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.[112]

At another place in the Trial Judgement, the Trial Chamber "holds, again in the words of the Commentary, that '[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this

[105] Appellant's Brief, p. 139.
[106] Appellant's Brief, p. 139.
[107] Respondent's Brief, para. 5.80.
[108] AT 694 (16 Dec. 2003).
[109] Respondent's Brief, paras. 5.82-5.83. *See also* AT 694 (16 Dec. 2003).
[110] Brief in Reply, para. 117.
[111] Brief in Reply, para. 122.

purpose.'"[113] One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

62. The Appeals Chamber considers that the *Čelebići* Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[114] Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[115] There is no reason for the Appeals Chamber to depart from that position.[116] The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.

63. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law."[117] It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...."[118] The Appeals Chamber expressly endorses this view.

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[112] Trial Judgement, para. 332.
[113] Trial Judgement, para. 329 (quoting the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz et al. (eds.), ICRC, 1986), para. 3545).
[114] *Čelebići* Appeal Judgement, para. 241 (emphasis added) (footnote omitted). The standard as interpreted in the *Čelebići* Appeal Judgement has been applied in the *Bagilishema* Appeal Judgement, para. 42, and in the *Krnojelac* Appeal Judgement, para. 151.
[115] *Čelebići* Appeal Judgement, para. 226.
[116] *Aleksovski* Appeal Judgement, para. 107. The Appeals Chamber has previously stated in the *Aleksovski* Appeal Judgement that "a previous decision of the Chamber should be followed unless there are cogent reasons in the interests of justice for departing from it." *Aleksovski* Appeal Judgement, para. 128. Elaborating on this principle, the Appeals Chamber stated that: "[i]nstances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law." *Aleksovski* Appeal Judgement, para. 108.
[117] *Bagilishema* Appeal Judgement, para. 34.
[118] *Bagilishema* Appeal Judgement, para. 35.

64. The appeal in this respect is allowed, and the authoritative interpretation of the standard of "had reason to know" shall remain the one given in the *Čelebići* Appeal Judgement, as referred to above.

3. When does effective control exist and in what form?

65. The Appellant submits that it was not established that he had effective control over the perpetrators at the time of the commission of their acts.[119] He insists that this control must be established at the time of the incidents charged in the Indictment.[120] He also argues that he would only have had effective control over the special purpose units at the time of the incidents charged in the Indictment, if at that time "he not only had been able to give orders to these units but if, in addition, those orders had actually been followed."[121] He contends that the submission of reports on atrocities does not in itself enable the conclusion that effective control existed, as the commander does not have the authority to confront the situation himself but must await the steps taken by competent authorities.[122] He adds that the vagueness of the Trial Judgement on that point requires a reversal of the conviction.[123]

66. The Prosecution responds that the Appellant's argument that the Trial Chamber erred insofar as it concluded that "effective control" could be established on the basis of evidence that a person had the material ability to submit reports about atrocities to higher authorities should be rejected.[124] The Prosecution considers that the Appellant appears to suggest that his effective control over special units could only have been established if his orders had been shown to have been followed by them, but that he has failed to identify the Trial Chamber's findings to which this aspect of his ground of appeal relates and has failed to establish that the Trial Chamber's finding that his orders were indeed followed by such units was unreasonable.[125] The Prosecution further rejects the Appellant's limited interpretation of what may constitute "effective control" and submits that, on the basis of the evidence, the Trial Chamber could reasonably conclude that he was in control of certain units which did not form parts of the regular HVO troops.[126] In its view, where subordinates are under more than one superior, every such superior may be held responsible for the crimes committed by the subordinates.[127]

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[119] Appellant's Brief, pp. 140-142.
[120] Appellant's Brief, p. 141.
[121] Appellant's Brief, p. 141.
[122] Appellant's Brief, p. 142.
[123] Appellant's Brief, p.142.
[124] AT 696-697 (16 Dec. 2003).
[125] Respondent's Brief, paras. 5.86-5.88.
[126] Respondent's Brief, paras. 5.88-5.99.
[127] AT 695-696 (16 Dec. 2003).

67. The Appeals Chamber takes note that the Trial Chamber concurred with the *Čelebići* Trial Judgement, which endorsed the view that a superior must have effective control over "the persons *committing* the underlying violations of international humanitarian law."[128] The Trial Chamber also stated that "a commander may incur criminal responsibility for crimes *committed* by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them."[129] Both conclusions of the Trial Chamber fall within the terms of Article 7(3) of the Statute, and both are not challenged by the Appellant.

68. With regard to the position of the Trial Chamber that superior responsibility "may entail" the submission of reports to the competent authorities,[130] the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.

69. The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I.[131] The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law,[132] and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[133] The appeal in this regard is therefore rejected.

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[128] Trial Judgement, paras. 300-301 (emphasis added) (quoting *Čelebići* Trial Judgement, para. 378).
[129] Trial Judgement, para. 301 (emphasis added) (footnote omitted).
[130] Trial Judgement, para. 302.
[131] Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his 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 at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
[132] *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.
[133] *Aleksovski* Appeal Judgement, para. 76.

4. "Reasonable and necessary measures" and the nexus between the failure of a superior to act and subordinates' crimes

(a) Reasonable and necessary measures

70. The Appellant contends that the Trial Chamber did not set any standards for determining the "reasonable and necessary measures" required of the commander, and that the example of submitting reports by the commander is insufficient to define the measures.[134]

71. The Prosecution responds that the Appellant has failed to establish that the Trial Chamber erred in its reasoning as to what constituted "reasonable and necessary measures" in the present instance.[135]

72. The Appeals Chamber notes that the Trial Chamber held that:

> ...it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator...this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.[136]

It appears from this statement that necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates. The measure of submitting reports is again an example, applicable "under some circumstances." The Appeals Chamber considers that it was open to the Trial Chamber not to list measures that might vary from case to case,[137] since it had made it clear that such measures should be necessary and reasonable to prevent subordinates' crimes or punish subordinates who had committed crimes. What constitutes such measures is not a matter of substantive law but of evidence, whereas the effect of such measures can be defined by law,[138] as has been so defined by the Trial Chamber in this case. The appeal in this regard is rejected.

(b) The nexus between the failure of a superior to act and subordinates' crimes

73. The Appellant argues that an element of causation is required to establish a commander's responsibility under Article 7(3) of the Statute,[139] and that the Trial Chamber failed to establish the required causal nexus between the Appellant's failure to act and the commission of crimes on his

[134] Appellant's Brief, pp. 144-145.
[135] Respondent's Brief, paras. 5.105-5.107.
[136] Trial Judgement, para. 335.
[137] *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.
[138] *Čelebići* Appeal Judgement, para. 198.
[139] Appellant's Brief, pp. 143-144.

101. In relation to the widespread or systematic nature of the attack, the Appeals Chamber recalls the jurisprudence of the International Tribunal according to which the phrase "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.[198] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.[199] Only the attack, not the individual acts of the accused, must be widespread or systematic.[200] The Appeals Chamber underscores that the acts of the accused need only be a part of this attack, and all other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.[201]

102. In sum, the Appeals Chamber concludes that the Trial Chamber was correct in stating that acts constituting crimes against humanity must be part of a widespread or systematic attack against civilians.

2. Requirement that the attack be directed against a civilian population

103. The Appellant further submits that the Prosecution must establish that there was an attack directed against a civilian population of which the acts of the accused formed a part.[202] He asserts that this requirement hinges on the intent of the attack rather than on its physical result,[203] and that the expression "directed against" requires that the civilian population be the primary object of the attack.[204] At a minimum, the Appellant alleges, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian, and that he could not reasonably have believed that the victim was a member of the armed forces or other legitimate combatant.[205] The Appellant further submits that he never ordered attacks directed against a civilian population, and reiterates that civilian casualties were the unfortunate consequence of an otherwise legitimate and proportionate military operation, not an attack targeting a civilian population.[206]

104. The Prosecution suggests that the Appellant defines the phrase "civilian population" too restrictively in light of the settled law of the International Tribunal and that he confuses the issue of whether there was a widespread or systematic attack on the one hand, with which particular

[198] *Kunarac* Appeal Judgement, para. 94.
[199] *Kunarac* Appeal Judgement, para. 94.
[200] *Kunarac* Appeal Judgement, para. 96.
[201] *Kunarac* Appeal Judgement, para. 96.
[202] Appellant's Brief, p. 151.
[203] Appellant's Brief, p. 151.
[204] Appellant's Brief, p. 151.
[205] Appellant's Brief, p. 152.
[206] Brief in Reply, paras. 124-128.

individuals can be considered to be among the victims of this attack, on the other.[207] In particular, the Prosecution submits that the Trial Chamber was correct in concluding that the presence of resistance fighters and those placed *hors de combat* does not alter the civilian character of a population.[208] The Prosecution further submits that reference in paragraph 435 of the *Kunarac* Trial Judgement to the perpetrator's knowledge of the victim's status relates more to the issue of which individuals may be said to be the victims of crimes against humanity. The reference should be understood as "guidance to the trier of fact in the sense that an accused's knowledge cannot be assessed *in abstracto* but must be evaluated in relation to the particular crime against humanity the perpetrator is accused of."[209] The Prosecution also insists that in situations of uncertainty as to an individual's status, he or she must be presumed to be a civilian.[210] As the Appellant has not even attempted to demonstrate that the conclusions reached by the Trial Chamber on the composition of the victim group in this case were so unreasonable that no reasonable trier of fact could have reached similar conclusions, the Prosecution says, the findings of the Trial Chamber should be left undisturbed.[211]

105. The Appeals Chamber considers that the Appellant seems to be alleging an error of law in the Trial Judgement in relation to this issue, as well as an error of fact. Only the alleged legal error will be addressed here. The legal requirement under Article 5 of the Statute that the attack in question be directed against a civilian population was elaborated upon in the *Kunarac* Appeal Judgement, wherein the Appeals Chamber stated that:

> ... the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[212]

106. The Appeals Chamber in *Kunarac* further stated:

> ... the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course

[207] Respondent's Brief, paras. 6.9-6.12.
[208] Respondent's Brief, para. 6.14.
[209] Respondent's Brief, paras. 6.16-6.17.
[210] Respondent's Brief, para. 6.18.
[211] Respondent's Brief, para. 6.19.
[212] *Kunarac* Appeal Judgement, para. 90 (footnotes omitted).

> of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.[213]

107. In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that "the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed."[214] The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.

108. The Trial Chamber concluded:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear (*sic*) uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.[215]

109. Before determining the scope of the term "civilian population," the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "[t]argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.

110. In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed.[216] In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts."[217] Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.

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[213] *Kunarac* Appeal Judgement, para. 91 (footnote omitted).
[214] Trial Judgement, para. 208.
[215] Trial Judgement, para. 214 (footnote omitted).
[216] *Hadžihasanović* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* 16 July 2003 Decision"), para. 44. *See also* on a more general note, Report of the Secretary General, (S/25704, 3 May 1993), paras. 29, 34.
[217] Report of the Secretary General, (S/25704, 3 May 1993), para. 37.

111. Article 50, paragraph 1, of Additional Protocol I states that a civilian is "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.

112. As the ICRC Commentary to the Additional Protocol explains, the following categories of persons, derived from Article 4A of the Third Geneva Convention, are excluded from civilian status:

> (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 recognizable 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.
>
> (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.[218]

In addition, Article 43 of Additional Protocol I sets out a new definition of armed forces "covering the different categories of the above-mentioned Article 4 of the Third Convention."[219]

113. Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups,

[218] ICRC Commentary, p. 611, para. 1915.
[219] ICRC Commentary, p. 611, para. 1916.

or former combatants, who have laid down their arms, does not alter its civilian characteristic.[220] The Trial Chamber was correct in this regard.

114. However, the Trial Chamber's view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states:

> All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).[221]

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

115. The Trial Chamber also stated that the "presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population." The ICRC Commentary on this point states:

> ...in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.[222]

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.

116. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 of the Statute.

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[220] Common Article 3 of the Geneva Conventions provides that "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." That these persons are protected in armed conflicts reflects a principle of customary international law.

[221] ICRC Commentary, p. 515, para. 1676.

[222] ICRC Commentary, p. 612, para. 1922.

to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard. Furthermore, the Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused.

127. The Appeals Chamber further observes that the Trial Chamber's list of four points which may serve as proof of the *mens rea* suffers from a number of defects. The first point, that the accused "willingly agreed to carry out the functions he was performing," is vague and does not necessarily relate to the *mens rea* applicable to crimes against humanity. The second[255] and third[256] points, as well as the first part of the fourth point,[257] may be misleading because they could be interpreted as suggesting that an ideology, policy, or plan is required. Further, they too do not relate with sufficient precision to the requirement that the accused must know that his acts form part of the criminal attack. Finally, the second part of the fourth point[258] seems to relate to command responsibility under Article 7(3), rather than Article 7(1) responsibility for crimes against humanity.

128. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity.

B. Elements of Persecutions as a Crime against Humanity

129. The Appellant argues that the Trial Chamber erred in defining the *actus reus* and *mens rea* of persecutions as a crime against humanity, and that he is innocent of all charges of persecutions. The Appellant submits that three basic requirements for persecutions are generally recognized: (i) the occurrence of a persecutory act or omission; (ii) a discriminatory basis for that act or omission on one of the enumerated grounds, namely, race, religion, or politics; and (iii) the specific intent to cause an infringement of an individual's enjoyment of a basic or fundamental right.[259] The Appellant claims, furthermore, that an act of persecution must constitute a gross or blatant denial on discriminatory grounds of a fundamental right, laid down in international customary or treaty law,

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[255] Namely, "that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes." Trial Judgement, para. 257.
[256] Namely, "that he received orders relating to the ideology, policy or plan..." Trial Judgement, para. 257.
[257] The first part of the fourth point is: "that he contributed to its commission through intentional acts[.]" Trial Judgement, para. 257.
[258] The second part of the fourth point is that he contributed to its commission "by simply refusing of his own accord to take the measures necessary to prevent their perpetration." Trial Judgement, para. 257.
[259] Appellant's Brief, pp. 157-158.

reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.[260]

130. The Prosecution submits that the elements of persecutions may be summarised as follows: (i) the accused committed conduct against a victim or victim population violating a basic or fundamental human right; (ii) the accused intended to commit the violation; (iii) the accused's conduct was committed on political, racial or religious grounds; and (iv) the accused's conduct was committed with discriminatory or persecutory intent.[261]

131. The Appeals Chamber considers that persecutions as a crime against humanity is defined as:

> (...) an act or omission which:
>
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
>
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[262]

These two elements of the crime will be considered separately.

1. *Actus reus* of persecutions

132. The Appellant submits that the Trial Chamber erred in that it adopted an expansive definition of the *actus reus* of persecutions, and impermissibly included acts such as the destruction of private dwellings and businesses.[263] He further submits that the Trial Chamber improperly defined the *actus reus* of persecutions solely in terms of the perpetrator's state of mind, without regard to the gravity or criminality of the underlying act.[264] He claims that both the persecutory policy and the acts of the accused must have "as their aim the removal from society of the targeted population or, in the case of property crimes, the aim to deprive the targeted population of its livelihood."[265] He maintains that the Trial Chamber does not specify the circumstances justifying the elevation of acts causing physical and mental injury to the international crime of persecutions.[266]

133. The Prosecution points out that persecutions may encompass acts which are listed in the Statute, as well as acts which are not. It accepts that all persecutory acts must reach the same level

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[260] Appellant's Brief, pp. 158-160.
[261] Respondent's Brief, para. 6.60.
[262] *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113.
[263] Appellant's Brief, p. 164 (citing Trial Judgement, paras. 227, 233).
[264] Appellant's Brief, p. 164 (citing Trial Judgement, para. 235)
[265] Appellant's Brief, p. 165. According to the Appellant, "[i]n further finding that the confiscation and destruction of private dwellings and businesses constitute persecution, however, the Trial Chamber expanded the definition of persecution to include acts rendered more serious by virtue of their discriminatory nature alone." Appellant's Brief, p. 164.

of gravity as acts enumerated in Article 5 of the Statute, and claims that the acts should not be considered in isolation, but in their context and with due consideration to their cumulative effect.[267]

134. The Prosecution claims that the Appellant's suggestion that the Trial Chamber impermissibly expanded the definition of persecutions (in particular, by including acts rendered sufficiently serious by virtue of their discriminatory nature only) is duly contradicted by the Trial Chamber's findings.[268] It adds that, concerning property crimes, detention crimes, and deportation, the Trial Chamber merely held that, all other conditions being met, they could amount to persecutions.[269] The Prosecution suggests that the Appellant conflates the *mens rea* and *actus reus* when claiming that the Trial Chamber improperly defined the *actus reus* of persecutions solely on the basis of his state of mind, and further points out that the gravity requirement relates to the latter, whereas the finding of the Trial Chamber at paragraph 235 of the Trial Judgement to which the Appellant referred is "principally a finding with regard to the *mens rea.*"[270]

135. The Appeals Chamber considers that "although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds."[271] Furthermore, the acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute.[272]

136. In this case, the Trial Chamber stated:

> There is no doubt that serious bodily and mental harm and infringements upon individual freedom may be characterized as persecution when, as will be indicated below, they target the members of a group because they belong to a specific community. The Trial Chamber considers that infringements of the elementary and inalienable rights of man, which are "the right to life, liberty and the security of person", the right not to be "held in slavery or servitude", the right not to "be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and the right not to be "subjected to arbitrary arrest, detention or exile" as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may constitute persecution when committed on discriminatory grounds.[273]

In this paragraph, the Trial Chamber set out parameters for acts that may constitute persecutions, including acts that cause "serious bodily and mental harm" and "infringements upon individual freedom" in circumstances where members of a particular group are targeted on discriminatory grounds. The Trial Chamber set forth a definition of persecutions that characterizes the *actus reus*

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[266] Appellant's Brief, p. 166.
[267] Respondent's Brief, para. 6.67.
[268] Respondent's Brief, paras. 6.77-6.78.
[269] Respondent's Brief, paras. 6.79-6.82.
[270] Respondent's Brief, paras. 6.83-6.86.
[271] *Vasiljević* Appeal Judgement, para. 113.
[272] *Krnojelac* Appeal Judgement, paras. 199, 221.

as encompassing infringements upon fundamental human rights. It also reviewed jurisprudence from Nuremberg, World War II trials, and of the International Tribunal, in determining whether the violations covered in the Indictment may constitute persecutions, and under what circumstances.[274] It then held that persecutions may take other forms than injury to the human person and referred to "those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind."[275]

137. In adopting a standard for acts which may constitute the crime of persecutions, the Trial Chamber then held that:

> the crime of "persecution" encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.[276]

The Trial Chamber further held, in a sub-section entitled "Discrimination":

> It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property. In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.[277]

138. The Appeals Chamber considers that the Trial Chamber failed to mention that acts of persecutions, considered separately or together, should reach the level of gravity of other crimes listed in Article 5 of the Statute. It appeared to consider, erroneously, that underlying acts are rendered sufficiently grave if they are committed with a discriminatory intent.

139. The Appeals Chamber notes that the Prosecution is required to charge particular acts as persecutions.[278] The Trial Chamber must then consider whether such acts, either individually or jointly, amount to persecutions. In this regard, it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law at the time the accused is alleged to have committed the offense. As stated above, these acts must constitute a denial of or infringement upon a fundamental right laid down in international customary law. It is not the case that any type of act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity.

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[273] Trial Judgement, para. 220.
[274] *See* Trial Judgement, paras. 220-234.
[275] Trial Judgement, para. 227.
[276] Trial Judgement, para. 233.
[277] Trial Judgement, para. 235.
[278] *See Kupreškić* Appeal Judgement, para. 98.

V. ALLEGED ERRORS OF LAW IN APPLICATION OF ARTICLE 2 OF THE STATUTE

A. Alleged error in finding that nationality alone does not determine "protected person" status for the purposes of Article 2

167. The Appellant submits that the Trial Chamber, by relying on the *Tadić* Appeal Judgement and finding that victims could be "protected" from persons of the same nationality, ignored the express language of that provision.[339] He argues that the very nature of Article 4 of Geneva Convention IV is premised upon the perpetrator and the victim having different nationalities.[340] Second, the Appellant submits that the Trial Chamber disregarded the express provisions of Article 4 of Geneva Convention IV and its Commentary, "which plainly provide that nationality constitutes the sole decisive factor in determining the status of protected persons."[341] The Appellant submits that the reliance on allegiance and ethnicity to prove differing nationalities between perpetrator and victim is unprecedented in pre-Tribunal law, and that this violated the principles of legality and specificity.[342] He argues that, because the Bosnian Muslims were held captive by the HVO, each possessing Bosnian nationality, they could not be deemed protected persons in terms of the Geneva Conventions.[343] Third, the Appellant submits that the Trial Chamber impermissibly collapsed the two distinct jurisdictional requirements of Article 2 of the Statute by "holding that an international armed conflict suffices to satisfy the protected persons requirement".[344] He contends that the fact "that a conflict may be internationalized by virtue of third-party foreign State intervention does not, without more, convert the supported entity into that third-party State."[345] Fourth, the Appellant submits that the Trial Chamber's use of an "allegiance test" gives rise to serious issues of unequal treatment between Bosnian Muslim victims and Bosnian Croat victims as the latter would not attract protected persons status absent a corresponding foreign State captor.[346]

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[339] Appellant's Brief, pp. 176-178. The Appellant also attempts to distinguish the *Tadić* Appeal Judgement on the grounds that that case concerned Bosnian Serbs who were trying to create a new State by seceding. Appellant's Brief, p. 177, n. 490. This ground of appeal was the Tenth Ground in the Appellant's Brief.
[340] Appellant's Brief, p. 177.
[341] Appellant's Brief, p. 177.
[342] Appellant's Brief, pp. 177-178.
[343] Appellant's Brief, pp. 176-177.
[344] Appellant's Brief, p. 178.
[345] Appellant's Brief, p. 178; *see also* Brief in Reply, para. 149 (restating "[t]hat a conflict may be international in character by virtue of third-party intervention, does not as a matter of law convert the supported entity into an Occupying Power for purposes of Article 4").
[346] Appellant's Brief, pp. 178-179.

2. The Appeals Chamber's findings

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

> [i]n the final analysis, the Trial Chamber is convinced that General Blaškić ordered the attacks that gave rise to these crimes. *In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them.*[779]

373. The Appeals Chamber notes that the Trial Chamber concluded that the HVO military structure operated under a unified command, order, and discipline, and that the Appellant maintained effective control over every HVO unit in Central Bosnia. It determined that the Appellant exercised authority over the special units, the Military Police, and conventional combatants involved in the attack in the Ahmići area at the time that the crimes were committed, based *inter alia* on the territorial nature of his authority.[780]

374. The Appeals Chamber has reversed the finding that the crimes in the Ahmići area were "ascribable" not only to the Military Police, but also to regular HVO troops, in particular the Viteška Brigade and the Domobrani.[781] The Appeals Chamber has also found that the trial record assessed together with the additional evidence admitted on appeal suggests that the crimes in the Ahmići area were perpetrated by the 4th MP Battalion and the Jokers.

375. It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct.[782] The Appeals Chamber will discuss whether the Appellant wielded effective control over the troops that perpetrated the crimes in the Ahmići area.

376. The Trial Chamber found that the Appellant had "command authority" over the 4th MP Battalion and the Jokers during the period in question.[783]

377. The evidence underlying this finding consists of the Appellant's acknowledgment that troops from the Military Police could be attached to him for *ad hoc* missions pursuant to specific

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[779] Trial Judgement, para. 495(emphasis added).
[780] Trial Judgement, paras. 453-466.
[781] Trial Judgement, para. 440.
[782] *Čelebići* Appeal Judgement, para. 256. *See* Chapter III (B) (3) in this Judgement.
[783] Trial Judgement, para. 465.

417. The Appeals Chamber considers that even though a determination of the necessary and reasonable measures that a commander is required to take in order to prevent or punish the commission of crimes, is dependent on the circumstances surrounding each particular situation, it generally concurs with the *Čelebići* Trial Chamber which held:

> [i]t 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.[829]

418. Evidence admitted on appeal supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmići be carried out, and that the investigation was taken over by the SIS Mostar. For instance, Exhibit 1 to the Second Rule 115 Motion (SIS report), states that the Appellant asked Slišković to carry out an investigation of the events which occurred in Ahmići so that he could send a report to Mostar. This document states that Slišković allegedly conducted the investigation inefficiently, and obstructed it.[830]

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[829] *Čelebići* Judgement, para. 395.

[830] Ex. 1 to the Second Rule 115 Motion. *See* the following parts:

> ...Tihomir BLAŠKIĆ told Ante SLIŠKOVIĆ, chief of the SIS for the Central Bosnia Military District, to carry out an investigation into the incident so that he could send a report to Mostar. SLIŠKOVIĆ however, allegedly obstructed the investigation, repeating the theory about the involvement of the Serbs, Muslims and the British "staging" the crime.
>
> After the Military Police unit had committed the crime in Ahmići, of which BLAŠKIĆ informed Darijo KORDIĆ by telephone, BLAŠKIĆ asked for a report into the incident, which was compiled and signed by Vlado ĆOSIĆ on behalf of Paško LJUBIČIĆ who was the commander of the Military Police. According to the information available, the report does not mention the crime, only the fighting.
>
> There is allegedly a report into the incident at Ahmići from Ivo LUČIĆ which was sent to the Assistant Minister for Security in BH, and an analytical report by the HIS. These reports are, apparently, incomplete and are only reconstructions of the incidents or summaries of more extensive reports, which should be in the SIS HZ HB/Croatian Community of Herceg-Bosna/archive. (p. 14)
>
> The Croatian political leadership had mainly accurate information at its disposal about the extent of the crime, its circumstances, victims, perpetrators, etc...
>
> ...On the other hand, based on the premise that the RH is in no way guilty for the war in BH that blame lies entirely with the Muslims and Serbs, and that the international community offered no support to RH, the SIS RH began an investigation into the crimes committed by Muslims and Serbs against Croats in BH. In order to corroborate these crimes, documentation from BH was delivered to the RH and people were prepared for possible testifying in trials in The Hague. Identification papers and other such items were procured for individuals who came to the RH (by *Lora,* the SIS in Split). However, it is obvious that the analysis for the crime in Ahmići was conducted in parallel and that the documents which are now stored in the offices of the SIS in Split were also transferred from BH to the RH.

664. The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.[1386]

665. For the use of detainees as human shields, the Appellant was indicted under Counts 19 (a grave breach as recognised by Article 2(b) of the Statute for inhuman treatment), and 20 (a violation of the laws or customs of war as recognised by Article 3 of the Statute and Article 3(1)(a) of the Geneva Conventions, for cruel treatment). Cruel treatment as a violation of the laws or customs of war has already been considered above to be an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. Inhuman treatment under Article 2 is distinct from "cruel treatment" under Article 3, and has been described as:

> (a) an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.
>
> (b) committed against a protected person.[1387]

666. In order to be responsible for the omission under Article 2, the Appellant must have been aware of the use of the detainees as human shields. The Trial Chamber concluded that the Appellant knew that the detainees were outside his headquarters, and were being used as human shields.[1388]

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against all acts of violence or threats thereof and against insults and public curiosity". As stated by the Nuremberg Tribunal, "international law imposes duties and liabilities upon individuals" (*Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 22, p. 65*), who therefore may be held personally responsible for failing to perform those duties (emphasis added). In the *Bagilishema* Trial Judgement, para. 29, n. 19, it was stated that: "An individual incurs criminal responsibility for an *omission* by failing to perform an act in violation of his or her duty to perform such an act." (Emphasis added.)

[1385] Indeed, while various provisions in the Geneva Conventions impose a positive duty to act, Article 86(1) of Additional Protocol I states the position most clearly: "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so." *See also, inter alia*: Article 16 of Geneva Convention I, the preparation of records of the wounded, sick or dead; Article 14(2) of Geneva Convention III, protection of prisoners of war against acts of violence or intimidation and against insults and public curiosity; Articles 55 and 56 of Geneva Convention IV, the duty of ensuring the food and medical supplies of the occupied population, and ensuring and maintaining the medical and hospital establishments and services, public health and hygiene in the occupied territory. *See also* the analysis of Additional Protocol I, Article 51, para. 7, above. The Appeals Chamber notes that while these obligations are technically incumbent on the States Party to the Conventions, they have resulted in the recognition of a general principle of criminal liability for omission (*see* Cassesse, A. International Criminal Law, p. 201).

[1386] A superior who perpetrates a crime by omission pursuant to Article 7(1) of the Statute will, at the same time, fail to prevent this crime. The Appeals Chamber has already considered that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute (*see supra*, Chapter III (C)). Thus, in such cases, Article 7(1) of the Statute will in general prevail over Article 7(3) of the Statute.

[1387] *Čelebići* Appeal Judgement, para. 426.

[1388] Trial Judgement, paras. 742-3.

orders issued by the Appellant into account, noting that the reasons adduced in D269 to justify the attack were "based on propaganda designed to incite racial hatred."[1637]

46. In my view, it was reasonable for the Trial Chamber to conclude, on the basis of the totality of the evidence on the trial record, that the Appellant ordered troops under his command to participate in the attack directed at the Muslim civilian population in Ahmići and the neighbouring villages on 16 April 1993. There is nothing in the additional evidence that demonstrates this conclusion to be unreasonable. I would therefore have affirmed his conviction for ordering the crimes that occurred during the attack on the Ahmići area on 16 April 1993.

E. Conclusion

47. The correct standard of review, even in cases involving additional evidence, is whether a reasonable tribunal of fact could have reached the Trial Chamber's factual conclusion. Applying this standard, and analysing the additional evidence together with the trial record, I conclude that it has not been shown that no reasonable tribunal of fact could have assessed the evidence as the Trial Chamber did.

48. Applying the standard of review well established by the jurisprudence of the International Tribunal, I would affirm the Trial Chamber's finding that the Appellant was guilty beyond a reasonable doubt of ordering the crimes committed in the Ahmići area on 16 April 1993 pursuant to Article 7(1) of the Statute.

49. For similar reasons, I would affirm other factual findings in the Trial Judgement.

50. As a consequence, I do not agree with the new sentence imposed by the Appeals Chamber.

Judge Weinberg de Roca

Done this 29th day of July 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[1637] Trial Judgement, para. 469.