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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-04-82-A

Date: 19 May 2010

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Judgement of: **19 May 2010**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Paul Rogers
Mr. François Boudreault
Ms. Nadia Shihata
Ms. Elena Martin Salgado
Ms. Laurel Baig

Counsel for Ljube Boškoski:

Ms. Edina Rešidović
Mr. Guénaël Mettraux

Counsel for Johan Tarčulovski:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

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I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals against the judgement rendered by Trial Chamber II ("Trial Chamber") on 10 July 2008 in the case of *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T ("Trial Judgement").

A. Background

2. The events giving rise to this appeal took place between 12 and 15 August 2001 in the village of Ljuboten in the northern part of the Former Yugoslav Republic of Macedonia ("FYROM").[1] On 12 August 2001, Ljuboten village was the subject of an attack during a police operation supported by the FYROM army. Six male ethnic Albanian Ljuboten residents were shot dead in the course of that operation. One other ethnic Albanian resident died the following day as a result of severe mistreatment. Subsequently a large number of ethnic Albanian men from the village were transferred to police stations not far from Ljuboten, where they were mistreated by police and others. In the course of the attack, houses in Ljuboten were set on fire by the police using gasoline or other incendiary materials.[2]

3. Johan Tarčulovski was at the relevant time a police officer acting as an Escort Inspector in the President's Security Unit in the Ministry of Interior of the FYROM.[3] At trial he was convicted under Article 7(1) of the Statute of the Tribunal ("Statute") for ordering, planning and instigating violations of the laws or customs of war referred to in Article 3 of the Statute.[4] He was convicted on three counts, namely: murder, wanton destruction and cruel treatment.[5] The Trial Chamber sentenced him to twelve years' imprisonment.[6] Tarčulovski was also charged with committing these crimes by participation in a joint criminal enterprise. These allegations were, however, dismissed.[7]

[1] The Chamber recognizes that by resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State provisionally referred to for all purposes within the United Nations as "The former Yugoslav Republic of Macedonia", pending settlement of the difference that had arisen over its name.
[2] Trial Judgement, para. 8.
[3] Trial Judgement, para. 4.
[4] Trial Judgement, para. 577.
[5] Trial Judgement, para. 607.
[6] Trial Judgement, para. 608.
[7] Trial Judgement, para. 585.

4. Ljube Boškoski was Minister of the Ministry of Interior ("MoI") of the FYROM from May 2001 until November 2002.[8] At trial he was charged with individual criminal responsibility pursuant to Article 7(3) of the Statute in respect of violations of the laws or customs of war referred to in Article 3 of the Statute - namely murder, wanton destruction and cruel treatment.[9] The Trial Chamber held that the Prosecution had not shown that Boškoski failed to take the necessary and reasonable measures required by Article 7(3) of the Statute with respect to punishing his subordinates. His obligation under Article 7(3) of the Statute was satisfied by reports made by police of the MoI to the appropriate authorities. The Trial Chamber found that those reports were likely to trigger an investigation into the alleged criminal conduct.[10] Accordingly, the Trial Chamber found Boškoski not guilty on all counts.[11]

B. The Appeals

1. Tarčulovski's Appeal

5. In the Tarčulovski Appeal Brief, Tarčulovski sets forth seven grounds of appeal and seeks an acquittal on all counts.[12] First, Tarčulovski submits that the Trial Chamber's exercise of jurisdiction over this matter is improper since the Trial Chamber did not make a threshold determination as to whether the government of the FYROM lawfully ordered the operation to root out terrorists from amongst the villagers of Ljuboten.[13] Furthermore, Tarčulovski argues that the exercise of jurisdiction by the Tribunal is improper because it is contrary to the determinations and actions of the United Nations ("UN") Security Council.[14]

6. Under his second ground of appeal, Tarčulovski submits that the events in Ljuboten on 12 August 2001 did not violate previously established "laws or customs of war".[15] There are two sub-grounds of appeal. The first concerns the application of the laws or customs of war in determining the propriety of a sovereign State's response to an internal terrorist attack,[16] whilst the second relates to the laws or customs of war in determining individual criminal responsibility for a person assigned to carry out a plan designed by a sovereign State.[17]

[8] Trial Judgement, para. 3.
[9] Trial Judgement, paras 2-3.
[10] Trial Judgement, para. 536.
[11] Trial Judgement, para. 606.
[12] Tarčulovski Appeal Brief, para. 232.
[13] Tarčulovski Appeal Brief, paras 39-53.
[14] Tarčulovski Appeal Brief, paras 54-58.
[15] Tarčulovski Appeal Brief, paras 59-65.
[16] Tarčulovski Appeal Brief, paras 66-88.
[17] Tarčulovski Appeal Brief, paras 89-92.

7. Third, Tarčulovski submits that the Trial Chamber erred in its application of Article 7(1) of the Statute with respect to planning, instigating or ordering.[18] Fourth, he alleges that the evidence was insufficient to find murder, wanton destruction or cruel treatment beyond a reasonable doubt.[19] Fifth, Tarčulovski submits that the burden of proof was improperly shifted to the defence and that the Trial Chamber misapplied the principle of *in dubio pro reo*. He argues that the Trial Chamber applied the wrong standards in evaluating the evidence and improperly rejected the testimony of entire categories of witnesses, later selectively using the rejected testimony.[20] Sixth, Tarčulovski argues that his statements to the commission that was established by the MoI to investigate what had occurred in Ljuboten were improperly admitted[21] or, alternatively, improperly used.[22] Finally, he requests that the Appeals Chamber reduce his sentence as the Trial Chamber erred in the exercise of its sentencing discretion.[23]

2. Prosecution's Appeal

8. The Prosecution sets forth one ground of appeal. It argues that the Trial Chamber erred in law in finding that Boškoski had taken the necessary and reasonable measures to punish under Article 7(3) of the Statute as the Trial Chamber applied the wrong legal standard.[24] In the alternative, the Prosecution argues that the Trial Chamber erred in fact since Boškoski failed to take certain measures that were necessary and reasonable to punish his offending subordinates.[25] The Prosecution argues that it was possible, necessary and reasonable for Boškoski to (a) inquire into the facts of the crimes;[26] (b) report the alleged criminal conduct of his subordinates to the competent authorities;[27] and (c) initiate disciplinary proceedings against his subordinates.[28] The Prosecution requests that the Appeals Chamber reverse Boškoski's acquittal for murder, wanton destruction and cruel treatment, apply the correct legal standard to the evidence or correct the erroneous factual findings and convict him pursuant to Article 7(3) of the Statute of the crimes under all counts detailed above.[29]

[18] Tarčulovski Appeal Brief, paras 93-136.
[19] Tarčulovski Appeal Brief, paras 137-179.
[20] Tarčulovski Appeal Brief, paras 187-198.
[21] Tarčulovski Appeal Brief, paras 199-215.
[22] Tarčulovski Appeal Brief, paras 216-224.
[23] Tarčulovski Appeal Brief, paras 225-229. Whenever appropriate, Tarčulovski's arguments made under a specific ground of appeal are discussed in a section concerning another ground of appeal.
[24] Prosecution Appeal Brief, para. 15.
[25] Prosecution Appeal Brief, para. 30.
[26] Prosecution Appeal Brief, paras 32-51.
[27] Prosecution Appeal Brief, paras 52-86.
[28] Prosecution Appeal Brief, paras 87-98.
[29] Prosecution Appeal Brief, paras 103-104.

II. APPELLATE REVIEW

9. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice.[30] These criteria are set forth in Article 25 of the Statute and are well-established in the jurisprudence of the *ad hoc* Tribunals.[31] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[32]

10. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision.[33] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[34] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[35] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments that an appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[36]

11. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[37] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the incorrect legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[38] In so doing, the Appeals Chamber not only corrects the legal error, but when necessary, applies the correct legal standard to the evidence contained in the trial record

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[30] *Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8.
[31] *Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8.
[32] *Milošević* Appeal Judgement, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8. The Appeals Chamber notes that the "general significance" exception was further qualified in the *Akayesu* case where the ICTR Appeals Chamber stated that "the Appeals Chamber will not consider all issues of general significance[;] [i]ndeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand" (*Akayesu* Appeal Judgement, para. 24).
[33] *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.
[34] *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.
[35] *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.
[36] *Milošević* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 7.
[37] *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.
[38] *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appealing party before that finding is confirmed on appeal.[39]

12. The Appeals Chamber reiterates that it does not review the entire trial record *de novo*; in principle, it takes into account only evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[40]

13. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[41] The Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[42] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[43] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but only one that has caused a miscarriage of justice.[44]

14. In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber.[45] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić et al.*, wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[46]

[39] *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.
[40] *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 13.
[41] *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11. *See* also *Milošević* Appeal Judgement, para. 15.
[42] *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[43] *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[44] *Milošević* Appeal Judgement, para. 15; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Simić* Appeal Judgement, para. 10.
[45] *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Simić* Appeal Judgement, para. 11; *Krnojelac* Appeal Judgement, para. 11.
[46] *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Kupreškić et al.* Appeal Judgement, para. 30; see also *Martić* Appeal Judgement, para. 11.

15. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal.[47] Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[48] Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal from a defence appeal against conviction.[49] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt.[50] The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[51]

16. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[52] Arguments which do not have the potential to cause the impugned decision to be reversed or revised need not be considered on the merits and may be immediately dismissed by the Appeals Chamber.[53]

17. The Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[54] In a primarily adversarial system, like that of the Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties.[55] It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner.[56] In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the

[47] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[48] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[49] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[50] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[51] *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Martić* Appeal Judgement, para. 12; *Strugar* Appeal Judgement, para. 14.
[52] *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[53] *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[54] *Milošević* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 13.
[55] *Simić* Appeal Judgement, para. 13.
[56] *Milošević* Appeal Judgement, para. 16; *Simić* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 43 (fns ommitted).

decision or judgement to which the challenges are being made.[57] Further, the Appeals Chamber will not consider a party's submissions when they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[58] Finally, the Appeals Chamber exercises its inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[59]

18. When applying these principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which are bound to be summarily dismissed.[60] In particular, the Appeals Chamber will dismiss without detailed analysis (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeal Chamber; (viii) allegations based on material not on record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error; and (x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[61]

[57] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002, paras 1(c)(iii), 1(c)(iv), and 4(b)(ii). *See* also *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; *Simić* Appeal Judgement, para. 13; *Gacumbitsi* Appeal Judgement, para. 10.
[58] *Milošević* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 16; *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Karera* Appeal Judgement, para. 12.
[59] *Milošević* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, para. 16.
[60] *Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 17; *Martić* Appeal Judgement, para. 15.
[61] *Milošević* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, paras 17-27; *Martić* Appeal Judgement, paras 14-21.

III. ALLEGED ERROR CONCERNING JURISDICTION (TARČULOVSKI'S FIRST GROUND OF APPEAL)

A. Existence of an internal armed conflict

19. The Appeals Chamber notes that at the briefing stage, Tarčulovski did not appeal the Trial Chamber's jurisdictional finding that at the times material to the Indictment, there was a state of internal armed conflict in the FYROM involving FYROM security forces, both army and police, and the National Liberation Army ("NLA").[62] However, after having heard Tarčulovski's submissions in the appeal hearing,[63] the Appeals Chamber considered it to be in the interests of justice to address this issue *proprio motu*[64] and invited both parties to make submissions on it during the appeal hearing.[65]

20. Tarčulovski submits that the conflict in the FYROM during the relevant period did not reach the level of an armed conflict as it did not meet the threshold requirement of intensity.[66] The Prosecution responds that the Trial Chamber's conclusions in this regard were correct in law and based on a careful assessment of the trial record, and that Tarčulovski has not shown that those conclusions were unreasonable.[67]

21. The Appeals Chamber first recalls that the Trial Chamber correctly set out the legal test for the existence of an armed conflict, stating that "[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and

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[62] Trial Judgement, para. 292. In his notice of appeal, Tarčulovski indicated that he would challenge the Trial Chamber's finding on the existence of an internal armed conflict (Tarčulovski Notice of Appeal, paras 31-43). However, in the Tarčulovski Appeal Brief, he did not repeat this challenge, and instead presented new arguments challenging the Tribunal's jurisdiction under grounds of appeal 1 and 2. The Appeals Chamber considered these as new grounds of appeal, and allowed Tarčulovski to file an amended notice of appeal reflecting this variation (Decision of 26 March 2009, paras 22-23 and 25). Neither the Tarčulovski Amended Notice of Appeal nor the Tarčulovski Reply Brief contains any explicit appeal against the Trial Chamber's finding on the existence of an internal armed conflict. *See* also Prosecution Response Brief, para. 13, where the Prosecution points out that Tarčulovski does not challenge this finding.
[63] AT. 38-40.
[64] *See Jokić* Judgement on Sentencing Appeal, para. 26; *Kordić and Čerkez* Appeal Judgement, para. 1031 (with further reference); *Ndindabahizi* Appeal Judgement, para. 13; AT. 40 and 53-55.
[65] AT. 40, 53-55 and 66.
[66] AT. 40, 63-64 and 94. In this regard, Tarčulovski also submits that an expert witness of the Prosecution even conceded that the situation in Northern Ireland was not recognised as an armed conflict (AT. 63-64, referring to the testimony of Henry Bolton, T. 1654-1655). However, the Appeals Chamber observes that Tarčulovski misrepresents the evidence in two aspects: (i) Henry Bolton, an OSCE representative, testified as a fact witness, not an expert witness; and (ii) he testified that it was correct that the British government had never regarded the situation in Northern Ireland as an armed conflict, whereas his own view on this point was left un-explored (T. 1654-1655). With respect to the situation in Northern Ireland, *see* also Trial Judgement, para. 179 and fn. 740.
[67] AT. 67-69.

organised armed groups or between such groups within a State".[68] The Trial Chamber further analysed the jurisprudence of the Tribunal as follows:

> [T]he Trial Chamber in *Tadić* interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the conflict and (ii) the organisation of the parties to the conflict, as a way to distinguish an armed conflict "from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law". This approach has been followed in subsequent judgements, although care is needed not to lose sight of the requirement for protracted armed violence in the case of in internal armed conflict, when assessing the intensity of the conflict. The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.[69]

The Appeals Chamber observes that having carefully and meticulously analysed the evidence in its entirety, the Trial Chamber concluded that (i) the conflict in the FYROM at the relevant times reached the required level of intensity,[70] and (ii) the NLA possessed sufficient characteristics of an organised armed group.[71]

22. With regard to the intensity of the conflict, the Trial Chamber took into account, *inter alia*, the evidence showing: frequent armed clashes and incidents of violence during the relevant period;[72] a geographical expansion of areas of fighting;[73] the use of heavy weaponry by the FYROM forces;[74] the variety of weapons used by the NLA;[75] the mobilization of the army and police units, including reservists, to combat readiness;[76] the number of orders for the FYROM forces to "destroy terrorists";[77] the besieging of towns;[78] the use of ceasefires;[79] the appeals by both sides to - and intervention of - international actors to help resolve the crisis;[80] the institution of a peace agreement to end hostilities;[81] the large number of persons displaced and refugees created by

[68] Trial Judgement, para. 175 (citing *Tadić* Jurisdiction Decision, para. 70). *See* also *Kordić and Čerkez* Appeal Judgement, para. 336; *Kunarac et al.* Appeal Judgement, para. 56.
[69] Trial Judgement, para. 175 (fns omitted) (citing, *inter alia*, *Tadić* Trial Judgement, para 562; *Kordić and Čerkez* Appeal Judgement, para. 341).
[70] Trial Judgement, para. 249; *see* also *ibid.*, paras 208-248.
[71] Trial Judgement, para. 291; *see* also *ibid.*, paras 250-290. While Tarčulovski's briefs do not contain any explicit challenge to the Trial Chamber's finding on the existence of an internal armed conflict, he argues, in the Tarčulovski Amended Notice of Appeal, that the Trial Chamber erred in relying on the evidence of certain witnesses when determining that the NLA was an organised armed group for the purposes of examining the existence of an armed conflict (Tarčulovski Amended Notice of Appeal, para. 19 (citing Trial Judgement, paras 250-291, in particular, 225-257 and 259-265)). He merely disputes the Trial Chamber's reliance on this evidence without further substantiation, and does not show that the Trial Chamber's careful analysis of this evidence was unreasonable. Hence, his submission is dismissed.
[72] Trial Judgement, para. 243 (referring to *ibid.*, paras 216-234).
[73] Trial Judgement, para. 243 (referring to *ibid.*, paras 216-234).
[74] Trial Judgement, para. 243 (referring to *ibid.*, paras 214, 216, 219-220, 222 and 232).
[75] Trial Judgement, paras 213, 216-217, 227, 236, 243 and 281.
[76] Trial Judgement, paras 243 and 245-246.
[77] Trial Judgement, paras 243 (referring to Ex. 1D79, Ex. P475, Ex. 1D80, Ex. 1D50, Ex. 1D58 and Ex. 1D81) and 246.
[78] Trial Judgement, paras, 218, 227-228 and 243.
[79] Trial Judgement, para. 243 (referring to *ibid.*, paras 213, 216, 219-220, 222 and 232).
[80] Trial Judgement, paras 220, 222, 224, 232, 233-234 and 243.
[81] Trial Judgement, para. 243 (referring to *ibid.*, paras 233-234).

the conflict;[82] a presidential statement and resolutions of the UN Security Council condemning the "terrorist activities", describing the situation as "a threat to the stability and security" of the FYROM and the wider region, and welcoming the signing of the peace agreement;[83] facilitation by the International Committee of the Red Cross ("ICRC") of the release of detainees on both sides;[84] the prosecution by FYROM authorities of persons for assisting an enemy army and other offences only applicable during armed conflict;[85] and the granting of a broad amnesty to all those who participated in the conflict, with the explicit exception of those accused of war crimes within the jurisdiction of the Tribunal.[86]

23. With respect to the issue of whether the NLA possessed the necessary characteristics of an organised armed group, the Trial Chamber found that: in June 2001, the NLA had approximately 2,000 to 2,500 fighters, and in August 2001 four functioning, though not fully manned, Brigades;[87] Ali Ahmeti was the leader of the NLA[88] and there was a functioning chain of command;[89] there was a basic system of discipline within the NLA that allowed it to function with some effectiveness;[90] the NLA operated in an organised and coordinated fashion;[91] NLA recruits underwent short military training;[92] the supply and distribution of weapons and armament became progressively more planned and coordinated and the quantity and variety of weaponry more extensive;[93] and the NLA was sufficiently organised to enter into ceasefire agreements using international bodies as intermediaries and to enter into and abide by an agreement with NATO to gradually disarm and disband.[94]

24. All these factors led the Trial Chamber to conclude that, despite the relatively limited numbers of causalities[95] and damaged houses,[96] the intensity of the conflict in the FYROM at the times material to the Indictment and the NLA's characteristics of an organised armed group were such that an internal armed conflict existed in the FYROM in August 2001 involving FYROM security forces and the NLA.[97] The Appeals Chamber does not see any error in this finding.

[82] Trial Judgement, paras 240, 243 and 248.
[83] Trial Judgement, para. 243 (referring to *ibid.*, paras 213-214 and 237 (*see* also Ex. 1D343, Ex. 1D230 and Ex. 1D346 cited therein)).
[84] Trial Judgement, para. 243 (referring to Ex. P607).
[85] Trial Judgement, para. 243 (referring to *ibid.*, paras 217, 225 and 234) and 247.
[86] Trial Judgement, para. 243 (referring to *ibid.*, para. 238) and 247.
[87] Trial Judgement, para. 267
[88] Trial Judgement, para. 268.
[89] Trial Judgement, para. 271.
[90] Trial Judgement, paras 274-275.
[91] Trial Judgement, para. 279.
[92] Trial Judgement, para. 284.
[93] Trial Judgement, para. 286.
[94] Trial Judgement, para. 289.
[95] Trial Judgement, paras 239 and 244.
[96] Trial Judgement, paras 241 and 244.
[97] Trial Judgement, para. 292.

Accordingly, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that there was an internal armed conflict in the FYROM during the relevant period.

B. Alleged lawfulness of the operation in self-defence and actions of the UN Security Council

1. Submissions of the Parties

(a) Tarčulovski

25. Tarčulovski submits that the Trial Chamber's finding that the jurisdiction of the Tribunal was established[98] was erroneous as it was based only on a factual determination on the existence of an armed conflict.[99] He argues that the Tribunal's jurisdiction should have been determined in light of: (i) the provisions of the UN Charter; (ii) the objective and purposes of the Statute; and (iii) the "express actions" of the UN Security Council prior to the events at issue.[100]

26. Tarčulovski contends that purely domestic acts carried out by a sovereign State in self-defence are outside the jurisdiction of the Tribunal.[101] He bases this argument in particular on (i) the principle of the sovereign equality of all UN Members, which include the FYROM;[102] and (ii) the right of a sovereign UN Member to self-defence.[103] He also asserts that violations of a lawful order issued by the State conducting a lawful domestic operation should be the responsibility of that State as they neither amount to "serious" violations of international law under Article 1 of the Statute, nor implicate the international concerns outlined in the Appeals Chamber's decision in *Tadić*.[104]

27. Tarčulovski further contends that the Trial Chamber's factual findings[105] leave no doubt that the FYROM was acting within its sovereign right to self-defence when it ordered the operation in

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[98] Prior to the commencement of the trial, the Appeals Chamber rendered a decision concerning Tarčulovski's challenges to the jurisdiction of the Tribunal, affirming the Trial Chamber's finding that the Tribunal has geographical and temporal jurisdiction over the present case, while leaving to the trial proceedings the question whether there was an armed conflict in the FYROM in August 2001 (Decision on Interlocutory Appeal on Jurisdiction, 22 July 2005). Subsequently, the Trial Chamber found that there was an internal armed conflict in the relevant area and during the relevant time, which was sufficiently linked with the acts alleged in the Indictment (Trial Judgement, paras 292 and 294).

[99] Tarčulovski Appeal Brief, para. 29; Tarčulovski Amended Notice of Appeal, paras 7-11, 13 and 15-16 (citing Trial Judgement, paras 173-207).

[100] Tarčulovski Appeal Brief, paras 29-33.

[101] Tarčulovski Appeal Brief, paras 39-40 and 44; AT. 24 and 36.

[102] Tarčulovski Appeal Brief, paras 30, 34 and 39 (citing Article 2 of the UN Charter).

[103] Tarčulovski Appeal Brief, paras 33, 44 and 52 (citing Article 51 of the UN Charter). Tarčulovski also argues that since Article 51 authorises self-defence even in actions across borders, "*a fortiori*", a UN Member State may act in self-defence within its own territory (*ibid.*, para. 52). *See* also AT. 26.

[104] Tarčulovski Appeal Brief, paras 39-40 (referring to *Tadić* Jurisdiction Decision, paras 55 and 57); Tarčulovski Reply Brief, paras 11-14 and 16; AT. 24 and 40-41.

[105] Such facts include: Ljuboten was of strategic importance to the NLA; the NLA engaged in terrorist activities or launching attacks against the FYROM forces around the relevant period, including the land mine attack on 10 August 2001 in the vicinity of Ljuboten; the FYROM Government reasonably believed that some of the terrorists were living in Ljuboten and were being sheltered by its residents; there were legitimate reasons for the FYROM police to enter Ljuboten on 12 August 2001 because of a suspected terrorist or NLA presence; and there may have been outgoing fire

Ljuboten on 12 August 2001.[106] He claims that the Trial Chamber erroneously held that the Tribunal has jurisdiction in the present case without even addressing this issue, thereby violating the principle of *in dubio pro reo*.[107]

28. Furthermore, Tarčulovski submits that the Trial Chamber erroneously failed to consider that the UN Security Council excluded the present conflict from the Tribunal's jurisdiction when it deemed the NLA to be "armed ethnic Albanian extremists" and called upon the FYROM Government to "isolate the forces behind all the violent incidents," thereby confirming that the dispute was domestic and had to be resolved by the FYROM Government.[108]

(b) Prosecution

29. The Prosecution responds that irrespective of whether the operation in Ljuboten was in self-defence against "terrorists", the FYROM forces were not entitled to violate international humanitarian law and the Tribunal was not deprived of its jurisdiction to prosecute FYROM officials for serious violations of international humanitarian law.[109] The Prosecution submits that Article 1 of the Statute does not make an exception for acts in self-defence against "terrorists", nor did the UN Security Council intend such an exception in establishing the Tribunal.[110] The Prosecution contends that regardless of whether Article 51 of the UN Charter applies to internal

directed at the FYROM army or police from the properties of Albanian villagers (Tarčulovski Appeal Brief, paras 43 (citing Trial Judgement, paras 30-31, 103, 133, 138-139, 229 and 232; Ex. 1D249), 46 (citing Trial Judgement paras 138, 140, 153-154, 161 and 163) and 49 (citing Trial Judgement, paras 139-140)).

[106] Tarčulovski Appeal Brief, para. 42. Tarčulovski also contests the Trial Chamber's conclusion that except for the events in the area of the Jashari family's houses, there is no evidence that the actions of the police relating to the charges were in self-defence or in the course of action against armed opponents (Tarčulovski Appeal Brief, paras 47-48 (citing Trial Judgement, para. 172)). *See* also Tarčulovski Amended Notice of Appeal, para. 12 (citing Trial Judgement, paras 178-206).

[107] Tarčulovski Appeal Brief, paras 37-38, 41, 49 and 53; Tarčulovski Amended Notice of Appeal, paras 13 (citing Trial Judgement, paras 177-206) and 18 (citing Trial Judgement, paras 208-249). *See* also Tarčulovski Amended Notice of Appeal, para. 21 (citing Trial Judgement, paras 292-295), arguing that the Trial Chamber failed to address whether Tarčulovski's acts were part of such a legitimate operation. *See* also Tarčulovski Reply Brief, para. 15.

[108] Tarčulovski Appeal Brief, paras 31-32, 36-39, 44 and 54-58, citing Ex. 1D230 (UN Security Council Press Release, SC/7026, and the UN Security Council Resolution 1345, 21 March 2001, S/RES/1345(2001)); Ex. 1D343 (Statement by the President of the UN Security Council, 12 March 2001, S/PRST/2001/7); Ex. 1D346 (UN Security Council Resolution 1371, 26 September 2001, S/RES/1371(2001), and whereby Tarčulovski argues that Articles 24 and 39 of the UN Charter grant the UN Security Council power to determine the existence of any threat to the peace; Tarčulovski Reply Brief, paras 17-18 (citing Trial Judgement, para. 192). *See* also Tarčulovski Amended Notice of Appeal, para. 14 (citing Trial Judgement, paras 191-192). Tarčulovski also asserts that the UN Security Council distinguished the conflict in the FYROM from ongoing conflicts in other regions which stemmed from the break-up of the Socialist Federal Republic of Yugoslavia (Tarčulovski Appeal Brief, paras 34 and 58).

[109] Prosecution Response Brief, paras 14-15 and 17 (citing Trial Judgement, para. 140 and referring to *Martić* Appeal Judgement, para. 268). The Prosecution also submits that the Appeals Chamber has already ruled that the Tribunal has geographical and temporal jurisdiction over the present case, and that the only jurisdictional question left open by the Appeals Chamber was whether there was an armed conflict in FYROM in August 2001, to which the Trial Chamber answered in the positive after a careful assessment of the law and the evidence presented (Prosecution Response Brief, para. 13).

[110] Prosecution Response Brief, para. 16, also arguing that the Security Council rather emphasised that all parties to the conflicts in the former Yugoslavia were obliged to comply with international humanitarian law, irrespective of the

armed conflicts, a State's use of force against armed groups operating on its territory must be done with full respect to applicable international law.[111] The Prosecution also contends that the Tribunal was established by the Security Council pursuant to Chapter VII of the UN Charter, which supersedes any claim of State sovereignty.[112]

30. The Prosecution further responds that the presidential statements and resolutions of the UN Security Council cited by Tarčulovski do not show an intent to remove the situation of the FYROM from the Tribunal's jurisdiction.[113] In addition, the Prosecution recalls that the Security Council stated that all parties to the conflict in the FYROM had to respect international humanitarian law.[114]

2. Discussion

31. At the outset, the Appeals Chamber recalls that Article 1 of the Statute authorises the Tribunal "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." The fact that a State resorted to force in self-defence in an internal armed conflict against an armed group does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of international humanitarian law.[115] As the Appeals Chamber has stated, "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out [during an armed conflict] was criminal or not."[116]

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precise reasons for their resort to force. *See* also *ibid.*, para. 17, arguing that nothing in Article 39 of the UN Charter supports Tarčulovski's assertions.

[111] Prosecution Response Brief, para. 18.

[112] Prosecution Response Brief, para. 19 (referring to Article 2(7) of the UN Charter).

[113] Prosecution Response Brief, paras 14 and 20; AT. 69-70. The Prosecution also argues that the UN Security Council did not make a binding declaration as to whether the jurisdictional requirements under Article 1 of the Statute had been met, which is an assessment to be made by the Tribunal's Judges (Prosecution Response Brief, paras 20-22). The Prosecution further submits that the fact that the Security Council did not intervene after the indictment of Boškoski and Tarčulovski confirms that the Security Council never intended to deprive the Tribunal of jurisdiction to try persons charged with serious violations of international humanitarian law in the FYROM in August 2001 (*ibid.*, para. 23).

[114] Prosecution Response Brief, para. 23.

[115] Tarčulovski's argument that the crimes committed in the present case do not implicate the "international concerns" as outlined in *Tadić* is not supported by the *Tadić* Jurisdiction Decision. In this decision, the Appeals Chamber found in relation to *inter alia* crimes allegedly committed in an internal armed conflict, that "the offences alleged against [Tadić] do not affect the interests of one State alone but shock the conscience of mankind" (*Tadić* Jurisdiction Decision, para. 57).

[116] *Martić* Appeal Judgement, para. 268. *See* also *Kordić and Čerkez* Appeal Judgement, para. 812; *Kordić and Čerkez* Trial Judgement, para. 452. *See* also international instruments affirming the applicability of international humanitarian law regardless of the legality of the use of force concerned: Geneva Conventions, Common Article 1; Additional Protocol I, Preamble, para. 5 and Article 1; ICRC Commentary on Additional Protocols, paras 48 and 1927; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 42. The Appeals Chamber notes that Article 51 of the UN Charter concerns an inherent right of self-defence in the case of armed attack by one State against another State (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 139). Since it is not alleged in the present case that the concerned operation was against an action by another State, this provision is not relevant to this case.

32. The Appeals Chamber also recalls that for a violation of international humanitarian law to be "serious" for the purposes of the Statute, it is required that the violation constitute a breach of a rule protecting important values, and that the breach involve grave consequences for the victim.[117] In the present case, having been satisfied that there had been an armed conflict in the FYROM at the times relevant to the Indictment and that the alleged crimes had been sufficiently linked with the armed conflict, the Trial Chamber correctly concluded that all the charged crimes (murder, wanton destruction and cruel treatment) constitute serious violations of international humanitarian law,[118] irrespective of the question whether the FYROM was conducting a lawful operation in self-defence against "terrorists" on its territory.[119]

33. Furthermore, the Appeals Chamber recalls that while the UN shall not "intervene in matters which are essentially within the domestic jurisdiction of any State [,] this principle shall not prejudice the application of enforcement measures under Chapter VII [of the UN Charter]".[120] This Tribunal was established by the UN Security Council acting under Chapter VII for the purpose of prosecuting serious violations of international humanitarian law.[121] Thus, even if the FYROM conducted an "anti-terrorist" operation in Ljuboten on its own territory, it cannot, based on its sovereignty, claim that the Tribunal does not have jurisdiction over any serious violations of international humanitarian law committed during this operation, provided it was in the context of an armed conflict. Consequently, the Trial Chamber's findings on NLA activities[122] did not affect the Trial Chamber's determination on its jurisdiction over the present case.

34. The Appeals Chamber further notes that the presidential statements and resolutions of the UN Security Council cited by Tarčulovski called for international involvement, stating that violence by Albanian extremists was affecting the peace and stability in the entire region.[123] For instance, the statement by the President of the Security Council of 12 March 2001 read:

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[117] *Tadić* Jurisdiction Decision, paras 90-94; *Kunarac et al.* Appeal Judgement, para. 66.
[118] Trial Judgement, paras 297-300.
[119] The Appeals Chamber further recalls that, provided that the alleged crimes are sufficiently linked with an armed conflict, the application of Article 3 of the Statute only depends on the four *Tadić* conditions. Thus, it is irrelevant if such violations have been committed in the context of a State's operation in self-defence against an armed group operating in its territory (*cf. Tadić* Jurisdiction Decision, para. 94). In light of this finding, the Appeals Chamber dismisses Tarčulovski's arguments that the Trial Chamber erred in law and fact "in determining that certain protocols that apply to the destruction of civilian property necessarily apply to situations where domestic terrorists are hiding among the civilian population, and in failing to consider whether the Government of Macedonia was justified in acting in self-defense in engaging in firings that had the effect of destroying houses" (Tarčulovski Amended Notice of Appeal, para. 86 (citing Trial Judgement, paras 352-358 and 380)). *See* also Tarčulovski Reply Brief, para. 42.
[120] Article 2(7) of the UN Charter. *See* also *Tadić* Jurisdiction Decision, para. 56.
[121] UN Security Council Resolution 827, 25 May 1993 (S/RES/827 (1993)).
[122] *E.g.*, Trial Judgement, paras 30-31, 103, 133, 138-140, 153-154, 161, 163, 229, 232 and 279.
[123] Ex. 1D230 (UN Security Council Press Release, SC/7026, and UN Security Council Resolution 1345, 21 March 2001, S/RES/1345(2001)); Ex. 1D343 (Statement by the President of the UN Security Council, 12 March 2001, S/PRST/2001/7) and Ex. 1D346 (UN Security Council Resolution 1371, 26 September 2001, S/RES/1371(2001)).

> The Security Council expresses its deep concern at those events, which constitute *a threat to the stability and security not only of the former Yugoslav Republic of Macedonia but also of the entire region*. It calls on *all political leaders in the former Yugoslav Republic of Macedonia and Kosovo, Federal Republic of Yugoslavia*, who are in a position to do so to isolate the forces behind the violent incidents and to shoulder their responsibility for peace and stability in the region.[124]

The Security Council did not state that the situation in the FYROM was a purely domestic matter or distinguishable from other conflicts in the region. Nor did it state that it was outside the Tribunal's jurisdiction.

35. Furthermore, while the Security Council mentioned the need to respect the sovereignty and territorial integrity of the FYROM and underlined the responsibility of its Government for the rule of law in its territory,[125] this does not show that the Security Council excluded the Tribunal's jurisdiction for any serious violations of international humanitarian law committed during the internal armed conflict on the territory of the FYROM.

36. Accordingly, the Appeals Chamber cannot discern any error in the Trial Chamber's finding that the jurisdiction of the Tribunal over the present case was established.

C. Conclusion

37. For the above reasons, the Appeals Chamber dismisses Tarčulovski's first ground of appeal in its entirety.

[124] Ex. 1D343, Statement by the President of the UN Security Council, 12 March 2001, S/PRST/2001/7 (emphasis added). *See* also Ex. 1D230, UN Security Council Press Release, SC/7026, pp. 9-10.

[125] Ex. 1D230 (UN Security Council Press Release, SC/7026, and UN Security Council Resolution 1345, 21 March 2001, S/RES/1345(2001)); Ex. 1D343 (Statement by the President of the UN Security Council, 12 March 2001, S/PRST/2001/7) and Ex. 1D346 (UN Security Council Resolution 1371, 26 September 2001, S/RES/1371(2001)). In this context, the Appeals Chamber recalls that the Security Council required "all parties [to the conflict in the FYROM] to act with restraint and full respect for international humanitarian law and human rights" (Ex. 1D230 (pp. 11-12), UN Security Council Resolution 1345, 21 March 2001, S/RES/1345 (2001)).

IV. ALLEGED ERROR IN FINDING THAT THE EVENTS IN LJUBOTEN ON 12 AUGUST 2001 VIOLATED ESTABLISHED "LAWS OR CUSTOMS OF WAR" (TARČULOVSKI'S SECOND GROUND OF APPEAL)

38. Under his second ground of appeal, Tarčulovski submits that the Trial Chamber erred in law and fact when it held that the events in Ljuboten on 12 August 2001 violated previously established laws or customs or war.[126]

A. The application of the laws or customs of war in determining the propriety of a sovereign State's response to an internal terrorist attack

1. Submissions of the parties

39. Under his first sub-ground, Tarčulovski submits that the Trial Chamber erroneously found that Common Article 3 of the Geneva Conventions ("Common Article 3"), as incorporated into Article 3 of the Statute, applies in the case of a sovereign State acting in self-defence against terrorists who live or hide amongst the civilian population.[127] Specifically, Tarčulovski asserts that Article 3 of the Statute does not apply in the present case because the operation in Ljuboten on 12 August 2001 had the "legitimate goal[s]" of countering internal terrorist activity and of not harming civilians.[128] Tarčulovski asserts that the Trial Chamber failed to focus on this objective of the operation and erroneously held that because a civilian was shot, the attack *must* have targeted civilians.[129] He submits that the Trial Chamber failed to consider what would constitute proportionate behaviour in an armed conflict when a sovereign State responds to a domestic terrorist attack in which terrorists hide among civilians.[130]

40. Tarčulovski further argues that Article 3 of the Statute does not explicitly prohibit the death or mistreatment of civilians[131] and that the Trial Chamber's improper reading of Article 3 of the Statute "is inconsistent with the cornerstone principle of respect for the sovereignty of nations",[132]

[126] Tarčulovski Amended Notice of Appeal, para. 26; Tarčulovski Appeal Brief, para. 64.
[127] Tarčulovski Amended Notice of Appeal, paras 26-31 (referring to Trial Judgement, paras 132-140 and 172-303); Tarčulovski Appeal Brief, paras 60, 64, 66, 70, 76, 78 and 82-84; Tarčulovski Reply Brief, paras 19, 22 and 26; AT. 24-25, 27, 34, 58, 92-95 and 97-99.
[128] Tarčulovski Appeal Brief, paras 76 (citing Ex. P302, p. 28; Trial Judgement, paras 109 and 113; T. 8554), 77 (citing T. 8554) and 80; AT. 24-25, 34-36, 40 and 58.
[129] Tarčulovski Amended Notice of Appeal, paras 29 and 33; Tarčulovski Appeal Brief, para. 73; AT. 28, 38 and 51.
[130] Tarčulovski Appeal Brief, paras 85-86; AT. 27-28, 32 and 34.
[131] Tarčulovski Appeal Brief, para. 62.
[132] Tarčulovski Appeal Brief, paras 74-75 (citing *Vasiljević* Trial Judgement, paras 193, 198) and 92; Tarčulovski Reply Brief, para. 26.

thus violating the principle of *nullum crimen sine lege*.[133] He also alleges that the Prosecution improperly relied on Article 50 of Additional Protocol I – which is only applicable in international armed conflicts – to establish that in case of doubt a person is assumed to have civilian status.[134]

41. The Prosecution responds that Common Article 3 is applicable and binds all parties in non-international armed conflicts, regardless of whether a State's resort to force is legal.[135] The Prosecution claims that the Trial Chamber correctly applied established case-law to find that violations of Common Article 3 fall within the scope of Article 3 of the Statute.[136]

42. The Prosecution asserts that the issue of self-defence is misplaced because it blurs the fundamental distinction between *jus in bello* (the rules governing the conduct of hostilities) and *jus ad bellum* (the rules governing the right to resort to armed force).[137] Furthermore, the Prosecution submits that the Tribunal is not mandated to consider whether States have the right to resort to force and have acted lawfully in self-defence, but to determine whether an individual's conduct is carried out in violation of applicable international humanitarian law.[138] According to the Prosecution, while the civilian deaths or injuries are lawful under international humanitarian law as long as they are collateral and proportionate damage to an otherwise lawful attack, the civilian casualties in the present case were not simply collateral and proportional damage but were the object of an unlawful attack.[139]

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[133] Tarčulovski Reply Brief, para. 28 (referring to *Stakić* Appeal Judgement, para. 313). Tarčulovski's submission that the Trial Chamber failed to consider whether the civilians in Ljuboten voluntarily assumed the role of human shields will be analysed under the fourth ground of appeal.

[134] Tarčulovski Appeal Brief, paras 71 (citing T. 10993-10994) and 72 (referring to Articles 51(5)(b) and 57 of Additional Protocol I); Tarčulovski Reply Brief, para. 25.

[135] Prosecution Response Brief, paras 27 and 31 (referring, *inter alia*, to Article 1 of the Geneva Conventions; Preamble and Article 1 of Additional Protocol I; ICRC Commentary, paras 48 and 1927; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, paras 41-42; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, paras 132-138; *Tablada* Case, Inter-American Comission on Human Rights, OAS, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, 30 October 1997, paras 173-174; *The United States v. Wilhelm List et al.*, "*Hostages* Case", Judgement of 19 February 1948, Military Tribunal V, Law Reports of the Trials of War Criminals, vol. VIII , pp. 59-60); AT. 70-72.

[136] Prosecution Response Brief, paras 27-28 (citing Trial Judgement, paras 175, 249, 291-292 and 299 and referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment of 27 June 1986, ICJ Reports 1986, para. 218; *Tadić* Jurisdiction Decision, paras 70, 102, 129 and 134; *Čelebići* Appeal Judgement, paras 125, 143 and 174; *Kunarac et al.* Appeal Judgement, para. 68).

[137] Prosecution Response Brief, paras 29 and 34; AT. 70-71, stating that "[t]here are no uncertainties as to the jus in bello; as soon as there's armed conflict, all parties are bound by applicable humanitarian law". *See* also Tarčulovski Reply Brief, para. 20.

[138] Prosecution Response Brief, paras 29-31 (referring to *Martić* Appeal Judgement, para. 268; *Kordić and Čerkez* Appeal Judgement, para. 812; ICRC Commentary, para. 1927).

[139] AT. 73 and 75, also stating that the notion of proportionality in this context means the ratio between the military advantage gained and the casualty to the civilian population, which is different from the notion of proportionality applicable in *jus ad bellum* in relation to right to self-defence.

43. The Prosecution further responds that the Appeals Chamber should summarily dismiss Tarčulovski's arguments that the Trial Chamber convicted him of murder simply because civilians died in an anti-terrorist operation.[140]

2. Discussion

(a) The Trial Chamber's alleged error in applying Common Article 3 in the case of a sovereign State acting in self-defence against terrorists

44. At the outset, the Appeals Chamber recalls the fundamental distinction in international law between the rules governing a State's right to resort to armed force (*jus ad bellum*) and the rules applicable in armed conflict (*jus in bello*). The Appeals Chamber has previously held that the application of the latter rules is not affected by the legitimacy of the use of force by a party to the armed conflict.[141]

45. The Trial Chamber found that the predominant objective of the operation in Ljuboten on 12 August 2001 was to indiscriminately attack ethnic Albanians and their property in retaliation for the actions of the NLA.[142] The Appeals Chamber further notes that an operation whose objective was a legitimate and defensive action against "terrorists" would not render Common Article 3 inapplicable. The issue is whether the conduct of the individual was in violation of international humanitarian law. Accordingly, the Trial Chamber did not err in applying Common Article 3 in the present case.

46. With respect to Tarčulovski's submissions on the allegedly proportionate use of force during the operation, the Appeals Chamber recalls that the targeting of civilians is absolutely prohibited in customary international law, and that civilian casualties are only legitimate if their deaths are *incidental* to the conduct of military operations.[143] The Trial Chamber's finding that the predominant objective of the operation was to indiscriminately attack ethnic Albanians establishes that the Trial Chamber was satisfied that the casualties were not incidental to the conduct of the operation in Ljuboten. Tarčulovski's submissions are therefore rejected.

[140] Prosecution Response Brief, para. 33 (referring to Trial Judgement, para. 302).
[141] *Kordić and Čerkez* Appeal Judgement, para. 812; *Martić* Appeal Judgement, para. 268. *Kordić and Čerkez* Trial Judgement, para. 452: "The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law." ICRC Commentary on Additional Protocols, para. 1927: "[T]he right to self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council."
[142] Trial Judgement, paras 571-573.
[143] *Galić* Appeal Judgement, para. 190.

(b) The alleged impreciseness of Article 3 of the Statute and the alleged violation of the principle of *nullum crimen sine lege*

47. The Appeals Chamber recalls that it is well-established that Article 3 of the Statute is a "residual clause" covering *inter alia* violations of Common Article 3.[144] The Appeals Chamber further recalls that the charges of murder and cruel treatment are brought under Common Article 3(1)(a)[145] and that they satisfy the four *Tadić* conditions.[146] Hence, the Trial Chamber correctly applied Common Article 3 and found that murder and cruel treatment are prohibited by Article 3 of the Statute. Consequently, the Trial Chamber did not violate the *nullum crimen sine lege* principle. Tarčulovski's submissions in this respect are dismissed.

B. The application of the laws or customs of war in determining individual criminal responsibility for a person assigned to carry out a plan designed by a sovereign State

1. Submissions of the parties

48. Under his second sub-ground, Tarčulovski submits that the Trial Chamber erred in finding that the Tribunal has jurisdiction over "an individual policeman" who was properly carrying out a lawful self-defence operation ordered by his sovereign State.[147] According to Tarčulovski, by failing to determine the legal nature of such an order and whether the operation in Ljuboten on 12 August 2001 was "proper", the Trial Chamber erroneously concluded that the Tribunal had jurisdiction over him and that he individually violated the laws or customs of war.[148]

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[144] *See* Trial Judgement, para. 298; *Tadić* Jurisdiction Decision, paras 89, 91 and 128; *Čelebići* Appeal Judgement, paras 125, 131-133, 136 and 169; *Strugar* Trial Judgement, para. 219.

[145] Common Article 3(1)(a) of the Geneva Conventions provides:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...]"

[146] *Tadić* Jurisdiction Decision, para. 134; *Čelebići* Appeal Judgement, para. 125; *Kunarac et al.* Appeal Judgement, para. 68. For the *Tadić* conditions *see Tadić* Jurisdiction Decision, para. 94: Firstly, the violation must constitute an infringement of a rule of international humanitarian law. Secondly, the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met. Thirdly, the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Finally, the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

[147] Tarčulovski Amended Notice of Appeal, paras 32-35; Tarčulovski Appeal Brief, paras 65 and 89-92.

[148] Tarčulovski Amended Notice of Appeal, para. 33; Tarčulovski Appeal Brief, para. 91.

49. Tarčulovski argues that the Trial Chamber failed to make a positive finding that the President of the FYROM ordered the operation, thus violating the principle of *in dubio pro reo*.[149] In addition, Tarčulovski argues that the Trial Chamber violated the principle of *nullum crimen sine lege* as Article 3 of the Statute does not say that a "relatively junior person" commits a war crime if civilian casualties result from his compliance with an order to conduct an operation against domestic terrorists hiding among civilians.[150]

50. The Prosecution responds that pursuant to Article 7(4) of the Statute,[151] Tarčulovski's arguments that the Tribunal could not hold him individually criminally responsible for crimes while operating under orders should be rejected.[152] The Prosecution further submits that Tarčulovski was not a "low-level soldier"; he was in charge and directed all stages of the operation in Ljuboten.[153]

2. Discussion

(a) The Trial Chamber's alleged error in failing to consider that Tarčulovski acted pursuant to a lawful order by a sovereign State to carry out a self-defence operation against domestic "terrorists"

51. The Appeals Chamber finds that even if a lawful governmental order had existed to conduct the operation in Ljuboten, Tarčulovski would still incur criminal responsibility for statutory crimes committed in the course of this operation.[154] The fact that a State is acting in lawful self-defence (*jus ad bellum*) is irrelevant for a determination as to whether a representative of this State has committed a serious violation of international humanitarian law during the exercise of the State's right to self-defence which constituted part of an armed conflict (*jus in bello*). Consequently, the Trial Chamber did not err in attributing criminal liability to Tarčulovski without making a finding on whether an order was lawfully given by the President of the FYROM to carry out a self-defence operation against domestic "terrorists".[155] Tarčulovski's submissions in this respect are rejected.

[149] Tarčulovski Amended Notice of Appeal, paras 34-35 (referring to Trial Judgement, paras 114 and 594); Tarčulovski Appeal Brief, paras 77 and 90-91 (citing Trial Judgement, paras 585 and 594); Tarčulovski Reply Brief, para. 28 (citing Trial Judgement, para. 594).
[150] Tarčulovski Amended Notice of Appeal, para. 35; Tarčulovski Appeal Brief, paras 90-91; Tarčulovski Reply Brief, para. 28; AT. 33, 35 and 40.
[151] Article 7(4) of the Statute provides: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."
[152] Prosecution Response Brief, para. 35; AT. 74.
[153] Prosecution Response Brief, para. 35.
[154] *Cf.* Article 7(4) of the Statute.
[155] *Cf.* Trial Judgement, paras 541 and 594.

(b) The Trial Chamber's alleged error in not considering Tarčulovski's low-level role in determining his individual criminal responsibility

52. The Appeals Chamber recalls that pursuant to Article 1 of the Statute, the Tribunal is not limited in its jurisdiction to prosecute persons of a specific level of authority.[156] Indeed, a number of accused who had low-ranking positions in the military or the police or did not have any official position at all have been prosecuted and convicted by the Tribunal.[157] Hence, the subordinate role of an accused is legally irrelevant in determining his individual criminal responsibility. Tarčulovski's arguments in this respect are dismissed.

C. Conclusion

53. In light of the above, the Appeals Chamber dismisses Tarčulovski's second ground of appeal in its entirety.

[156] Article 1 of the Statute provides: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

[157] *Cf. Erdemović* Sentencing Judgement, paras 92-95; *Tadić* Sentencing Judgement, para. 60; *Banović* Sentencing Judgement, paras 45 and 91; *Češić* Sentencing Judgement, para. 37; *Mrđa* Sentencing Judgement, para. 53. *See* also Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, para. 54: "*all persons* who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible" (emphasis added).

V. ALLEGED ERRORS CONCERNING THE EVALUATION OF EVIDENCE (TARČULOVSKI'S FIFTH GROUND OF APPEAL)

A. The Trial Chamber's allegedly selective use of supposedly rejected testimony

1. Rejection of the testimony of entire categories of witnesses

54. Tarčulovski submits that the Trial Chamber erred in law in sweepingly dismissing entire categories of witnesses as unreliable without evaluating the credibility of individual witnesses.[158] He refers in particular to the Trial Chamber's reservations on the credibility of the witnesses who were residents of Ljuboten, on the ground that they had a tendency "to speak as if with one voice".[159] Tarčulovski also notes that the Trial Chamber found particularly troubling their testimony on topics such as the presence of NLA members in the village, the circumstances in which certain deaths occurred, and the identity of the FYROM forces which entered the village on 12 August 2001.[160] Tarčulovski also submits that the Trial Chamber dismissed as unreliable virtually all of the testimony of members of the FYROM police and army and former or current employees of the MoI, on the ground that they were apparently seeking to distance themselves from any wrongdoing by FYROM forces or to exculpate the conduct of the police or army.[161]

55. The Prosecution responds that the Trial Chamber did not dismiss entire categories of witnesses as biased and unreliable, but rather explained why it treated *certain parts* of their evidence with particular caution.[162]

56. The Appeals Chamber is not satisfied that Tarčulovski has demonstrated that the Trial Chamber erroneously dismissed entire categories of witnesses. Rather, when the Trial Chamber observed close similarities in the evidence of witnesses who were then residents of Ljuboten, such that they appeared to speak as one, it was not able to accept this evidence "as fully convincing *in some respect*".[163] In matters where there was much divergence in the testimonies of witnesses, founded in differences of recollection or observation, the Trial Chamber held that it would treat the evidence "with reservation".[164] Similarly, when the Trial Chamber had the impression that members of the FYROM police and army sought to exculpate police or army conduct, it found that it could

[158] Tarčulovski Appeal Brief, paras 20, 187 and 189-190; Tarčulovski Amended Notice of Appeal, para. 96 (citing Trial Judgement, paras 9-19).
[159] Tarčulovski Appeal Brief, para. 188 (citing Trial Judgement, para. 11).
[160] Tarčulovski Appeal Brief, para. 188 (citing Trial Judgement, para. 11).
[161] Tarčulovski Appeal Brief, paras 20 and 189 (citing Trial Judgement, paras 12-13); AT. 48.
[162] Prosecution Response Brief, para. 153 (citing Trial Judgement, paras 11-17).
[163] Trial Judgement, para. 11 (emphasis added).
[164] Trial Judgement, para. 11.

not accept "some of this evidence" as reliable or truthful.[165] The Appeals Chamber can see no error in the Trial Chamber's careful approach to the evaluation of the evidence of these categories of witnesses. This part of Tarčulovski's fifth ground of appeal is therefore dismissed.

2. Selective reliance on supposedly rejected testimony

57. Tarčulovski further argues that the Trial Chamber selectively relied upon parts of supposedly rejected testimony.[166] As regards the witnesses who were residents of Ljuboten, he submits that the Trial Chamber relied "almost exclusively" on their testimony in order to find him guilty.[167] As for the military or police witnesses, Tarčulovski submits that although the Trial Chamber's categorical rejection of their credibility was based on their tendency to distance themselves from any potential liability "by pointing an accusatory finger at Tarčulovski", their exculpatory evidence was discredited, whereas their inculpatory testimony was credited.[168]

58. The Prosecution responds that a Trial Chamber is entitled to accept only parts of a witness's testimony,[169] and that in the present case the Trial Chamber reasonably credited only parts of the testimonies of witnesses.[170]

59. The Appeals Chamber has repeatedly held that a Trial Chamber can reasonably accept certain parts of a witness's testimony and reject others.[171] The Appeals Chamber is satisfied that Tarčulovski's assertion that the Trial Chamber relied on only parts of the evidence that incriminated him is a misinterpretation of the Trial Chamber's findings. As already noted, the Trial Chamber evaluated the evidence of Ljuboten residents with particular caution[172] and, contrary to Tarčulovski's assertions, it rejected some of it which was favourable to the Prosecution case.[173]

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[165] Trial Judgement, para. 12. *See* also *ibid.*, paras 13-17.
[166] Tarčulovski Appeal Brief, paras 20 and 191-192; Tarčulovski Amended Notice of Appeal, paras 47 (citing Trial Judgement, paras 36-47, 49-51, 55, 57 and 59-60) and 97.
[167] Tarčulovski Appeal Brief, para. 191.
[168] Tarčulovski Appeal Brief, para. 192. As examples, Tarčulovski refers to the testimonies of Witnesses M037 and M052, *see* Tarčulovski Appeal Brief, paras 192-193. Although Tarčulovski does not provide any references to particular page numbers of their testimonies or relevant paragraphs of the Trial Judgement, it appears that he refers to his complaints about the Trial Chamber's reliance and rejection of Witness M052's evidence in the third ground of appeal (*infra* para. 151), and that of Witness M037's evidence in the third and fourth grounds of appeal (*infra* paras 114 and 126-127). The parties' specific arguments regarding the evaluation of the evidence of Witnesses M037 and M052 will be addressed in the discussion of the third and fourth grounds of appeal.
[169] Prosecution Response Brief, para. 155 (referring to *Karera* Appeal Judgement, para. 88, *Blagojević and Jokić* Appeal Judgement, para. 82; *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248; *Ntakirutimana* Appeal Judgement, para. 215; *Kupreškić et al.* Appeal Judgement, para. 333).
[170] Prosecution Response Brief, para. 155 (citing Trial Judgement, paras 12-17, 30, 35-37, 41 (fn. 108), 42 (fn. 117), 56, 59 (fn. 200), 61, 69-71, 73, 75, 82, 116-118, 121-122, 136, 138, 147, 153-155, 162, 212, 419, 422-428, 438-439, 462, 474, 481-485, 488, 539, 543-545, 548, 551 and 553-554).
[171] *Krajišnik* Appeal Judgement, para. 354; *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333. *See* also *Seromba* Appeal Judgement, para. 110; *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.
[172] *See supra* para. 56.
[173] *E.g.*, Trial Judgement, paras 46, 134 and 140.

Similarly, contrary to Tarčulovski's claim, the Trial Chamber did not only accept the evidence of the military and police witnesses that indicated Tarčulovski's guilt.[174] Rather, the Trial Chamber also accepted some of their evidence favourable to Tarčulovski.[175] Tarčulovski's arguments are therefore dismissed.

B. Trial Chamber's alleged violations of the principle of *in dubio pro reo* where there was conflicting evidence or where the evidence was limited

60. Tarčulovski's submission that the Trial Chamber repeatedly violated the *in dubio pro reo* principle[176] will be analysed in the discussion of the third and fourth grounds of appeal.

[174] The Appeals Chamber also notes that the Trial Chamber did not state that military or police witnesses attempted to exonerate themselves by incriminating Tarčulovski, although it did state that they appeared to be seeking to exculpate themselves by taking distance from any wrongdoing of the Macedonian forces (*see* in particular, Trial Judgement, paras 12-17). Tarčulovski's argument in this regard amounts to a misrepresentation of the Trial Chamber's finding and is therefore dismissed.

[175] *E.g.*, Trial Judgement, paras 136-140 and 377 (referring back to *ibid.*, para. 155). *See* also *ibid.*, paras 155-161 and 344-345, holding that it must be left open that there may have been ongoing fire from one or more of the houses of the Jashari family, and finding that there is a reasonable doubt whether Xhelal Bajrami, Kadri Jashari and Bajram Jashari were taking an active part in the hostilities at the time they were shot.

[176] Tarčulovski Appeal Brief, paras 17-18, 183-186 and 195-197. Prosecution Response Brief, paras 149-152 and 157-159.

VI. ALLEGED ERRORS CONCERNING THE *MENS REA* OF COMMON ARTICLE 3 CRIMES (PART OF TARČULOVSKI'S THIRD, FOURTH AND FIFTH GROUNDS OF APPEAL)

A. Submissions of the parties

61. Tarčulovski submits that the Trial Chamber erred in law and fact when it held that to incur criminal liability for acts prohibited under Common Article 3, it must merely be established that the victims of the alleged violation were not taking an active part in the hostilities when the crime was committed.[177] Tarčulovski argues the Prosecution must also show "that the perpetrator 'was aware or should have been aware of this status of the victim.'"[178] He further submits that when in doubt, the Prosecution must show that a reasonable person could not have believed that the individual he or she attacked was a combatant.[179]

62. Tarčulovski asserts that the Trial Chamber erroneously failed to make specific findings on who killed Rami Jusufi, Sulejman Bajrami and Muharem Ramadani, and that it is therefore unknown whether or not the unidentified perpetrators believed them to be NLA terrorists or posing a threat.[180] Tarčulovski argues that such findings were crucial as the Trial Chamber found that NLA members did not always distinguish themselves from civilians.[181] Tarčulovski further submits that "by extension", the Trial Chamber had to make a finding whether he himself could not have believed that the victims were NLA members.[182]

63. In response, the Prosecution asserts that the Appeal Chamber's jurisprudence does not explicitly mention the victim's status as an element of the *mens rea* to be established for Common Article 3 offences. However, to the extent that the principle of individual guilt requires that fundamental characteristics of a war crime be mirrored in the perpetrator's mind, the *mens rea* for murder under Common Article 3 must include that the victim was taking no active part in the

[177] Tarčulovski Appeal Brief, para. 181 (citing Trial Judgement, para. 301). The Appeals Chamber notes that while this argument is made under Tarčulovski's fifth ground of appeal, it also refers to his fourth ground of appeal.
[178] Tarčulovski Appeal Brief, paras 139 and 181 (both referring to *Halilović* Trial Judgement, para. 36). *See* also Tarčulovski Appeal Brief, para. 140 (referring to *Strugar* Appeal Judgement, para. 178).
[179] Tarčulovski Appeal Brief, para. 141 (referring to *Halilović* Trial Judgement para. 36 and *Blaškić* Appeal Judgement, para. 111).
[180] Tarčulovski Appeal Brief, para. 138; Tarčulovski Reply Brief, para. 53. Tarčulovski appears to argue that the same must have been proven for the crime of cruel treatment (Tarčulovski Appeal Brief, paras 181-182).
[181] Tarčulovski Appeal Brief, paras 142 (citing Trial Judgement, para. 285) and 182.
[182] Tarčulovski Appeal Brief, para. 142; Tarčulovski Reply Brief, para. 58.

hostilities at the time of the offence.[183] According to the Prosecution, this element of *mens rea* is "the awareness of (or reckless indifference as to) the factual circumstances establishing that the victim was taking no active part in the hostilities at the time of the crime; it is not necessary to prove knowledge of this legal status."[184]

64. The Prosecution submits further that it "does not appear" to be necessary to establish the *mens rea* of a physical perpetrator of a crime in order to convict an accused for ordering, instigating and planning this crime.[185] It claims that the only *mens rea* needed to be proven was Tarčulovski's *mens rea* for planning, instigating or ordering the war crimes of murder, wanton destruction and cruel treatment. In other words, only his own direct intent or his awareness of the substantial likelihood that these crimes would be committed in the execution of the operation had to be established. The Prosecution claims that the Trial Chamber properly found that Tarčulovski had the requisite *mens rea*.[186] Furthermore, the Prosecution argues for liability to be established for the Common Article 3 crimes of murder and cruel treatment, it is unnecessary to establish that Tarčulovski himself was aware of the factual circumstances that the victims were taking no active part in the hostilities.[187]

65. In his reply, Tarčulovski contends that such an argument amounts to taking Tarčulovski's *mens rea* required for planning, instigating and ordering, and an unknown perpetrator's *actus reus*, and erroneously combining them to satisfy the requisite elements of "a single crime of murder".[188]

B. Discussion

66. The Appeals Chamber recalls its holding that:

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[183] Prosecution Response Brief, paras 114-115 (fns omitted).

[184] Prosecution Response Brief, para. 116 (fns omitted). The Prosecution appears to argue that the same is applicable *mutatis mutandis* to other crimes under Common Article 3, including cruel treatment (Prosecution Response Brief, fn. 363, referring to the *mens rea* for the crime of attacks against civilians identified in *Galić* Trial Judgement, para. 55, and the *mens rea* for the crimes of murder and cruel treatment in internal armed conflicts under Article 8(2)(c)(i) of the International Criminal Court ("ICC") Statute (Elements of Crimes, Article 8(2)(c)(i)-1 and 8(2)(c)(i)-3)).

[185] Prosecution Response Brief, para. 103 and fn. 339 (referring to *Blaškić* Trial Judgement, para. 282). The Prosecution argues that "[t]o hold otherwise could allow persons ordering, planning or instigating criminal conduct to escape liability when the physical perpetrator carried out the *actus reus* of the crime but did not have the required *mens rea*, for instance because he lacked information, was an innocent agent or was otherwise used to commit a crime" (Prosecution Response Brief, fn. 339, referring to *Brdanin* Appeal Judgement, paras 362, 410-413 and 430; *Martić* Appeal Judgement, paras 168-172; *Gacumbitsi* Appeal Judgement, paras 59-61; *Ndindabahizi* Appeal Judgement, para. 123; *Seromba* Appeal Judgement, paras 161 and 171-182; *Milutinović et al.* Trial Judgement Vol.1, paras 138, 156-160, 162(e), 167, 181 and 206). The Prosecution also asserts that in any case, the evidence clearly establishes that the physical perpetrators had the required *mens rea* (Prosecution Response Brief, para. 103, concerning the crime of murder). *See* also *infra* paras 85, 94, 101 and 118 on the Prosecution's arguments on the *mens rea* of physical perpetrators on the status of victims.

[186] Prosecution Response Brief, fn. 339 (citing Trial Judgement, para. 576), para. 124 (citing Trial Judgement, para. 576).

[187] Prosecution Response Brief, paras 117 and 124 (citing Trial Judgement, para. 576).

[188] Tarčulovski Reply Brief, paras 54 and 58. With respect to wanton destruction and cruel treatment, *see ibid.*, paras 75 and 78.

> The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[189]

It is well-established in the Tribunal's jurisprudence that the elements of a Common Article 3 crime encompass the requirement that the victim did not take an active part in the hostilities at the time when the crime was committed.[190] Therefore, the Appeals Chamber is satisfied that the principle of individual guilt requires that the perpetrator of a Common Article 3 crime knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.[191]

67. In the present case, the Trial Chamber did not make explicit findings on the *mens rea* of the direct perpetrators in relation to the status of the victims of the Common Article 3 crimes of murder and cruel treatment.[192] However, when read as a whole,[193] the Trial Judgement shows that the Trial Chamber examined whether the direct perpetrators knew or should have been aware of the status of the victims in relation to each crime, as demonstrated by its findings on the factual circumstances in which the crimes were committed.[194] In these circumstances, where the direct perpetrators' knowledge of the status of the victims was part of the Trial Chamber's factual findings, the Appeals Chamber need not consider whether such findings are necessary for a conviction for planning, instigating and ordering. Tarčulovski's argument in this regard is dismissed. Under the third and

[189] *Naletilić and Martinović* Appeal Judgement, para. 114; *see* also *ibid.*, para. 118.
[190] *Strugar* Appeal Judgement, para. 172; *Čelebići* Appeal Judgement, paras 420 and 423-424.
[191] *See Naletilić and Martinović* Appeal Judgement, paras 118-121, analysing, in light of the principle of individual guilt, the *mens rea* requirement in relation to the international or internal nature of an armed conflict and arriving at the same conclusion. Concerning the *mens rea* of the crime of attacks against civilians, the Appeals Chamber held that it must be proven that the perpetrator *was aware or should have been aware of* the civilian status of the persons attacked (*Strugar* Appeal Judgement, para. 271, citing *Galić* Trial Judgement, para. 55). *See Haradinaj et al.* Trial Judgement, para. 62; *Milutinović et al.* Trial Judgement, para. 134; *Delić* Trial Judgement, para. 44; *Martić* Trial Judgement, para. 47; *Krajišnik* Trial Judgement, para. 847; *Halilović* Trial Judgement, para. 36. *Cf.* Elements of Crimes, Article 8(2)(c)(i)-1 and 8(2)(c)(i)-3 of the ICC Statute.
[192] Trial Judgement, paras 301-303. The Appeals Chamber notes that the Trial Chamber made explicit findings on all the other aspects of the *mens rea* of the direct perpetrators in relation to crimes of murder, wanton destruction and cruel treatment (Trial Judgement, paras 312, 320, 328, 330-332, 380, 385 and 387-388). In the Tarčulovski Reply Brief, Tarčulovski appears to contest these findings, in particular due to the lack of specific identification of the direct perpetrators (Tarčulovski Reply Brief, paras 53 (murder), 75 (wanton destruction) and 78 (cruel treatment); *see* also Tarčulovski Appeal Brief, para. 166). The Appeals Chamber finds that the Trial Chamber reasonably made these findings in light of the evidence taken as a whole. As regards the identification of the direct perpetrators, *see infra* paras 73-75 and 89.
[193] *See Orić* Appeal Judgement, para. 38; *Naletilić and Martinović* Appeal Judgement, para. 435; *Stakić* Appeal Judgement, para. 344.
[194] *See, e.g.*, Trial Judgement, paras 303, 310-312, 314-320, 323-328, 344-345, 383, 385 and 387-388.

fourth grounds of appeal, the Appeals Chamber will consider further whether the totality of the Trial Chamber's factual findings in relation to the status of the victims are reasonable.[195]

68. With respect to Tarčulovski's *mens rea*, the Appeals Chamber recalls that he was convicted of planning, instigating and ordering crimes including those under Common Article 3. Hence, Tarčulovski was required to have the direct intent or the awareness of the substantial likelihood that the crimes would be committed in the execution of his plan, instigation and order.[196] Indeed the Trial Chamber found that Tarčulovski was responsible for planning, instigating and ordering the "deliberate but indiscriminate attack against the residents of Ljuboten of Albanian ethnicity".[197] Given the indiscriminate nature of the attack, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that Tarčulovski possessed the requisite *mens rea* for these modes of liability.[198] His argument in this regard is dismissed.

[195] *See infra* paras 86, 95, 102 and 119.
[196] *See Kordić and Čerkez* Appeal Judgement, paras 29-32, and *infra* paras 132 and 174.
[197] Trial Judgement, para. 573. *See* also *ibid.*, para. 574; *infra* paras 135, 153-154, 157 and 161.
[198] Trial Judgement, para. 576. *See* also the Appeals Chamber's findings relevant to this matter in *infra* paras 132, 135, 150 and 174. *Cf. Milošević* Appeal Judgement, para. 273.

VII. ALLEGED ERROR IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT TARČULOVSKI (TARČULOVSKI'S FOURTH GROUND OF APPEAL)

A. Murder

69. Tarčulovski submits that the Trial Chamber erred in law and fact in finding beyond reasonable doubt that he was criminally responsible for the murders of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani.[199]

1. Rami Jusufi

70. The Trial Chamber found that on the morning of 12 August 2001 in Ljuboten, Rami Jusufi was shot at the entrance of his father, Elmaz Jusufi's, house at close range from outside; that those who entered the yard and shot at the house at that time were members of the police; and that Rami Jusufi died as a consequence of a gunshot wound.[200] The Trial Chamber also found that he was an unarmed civilian who was not taking an active part in hostilities at the time he was shot.[201] In addition, the Trial Chamber found that the members of the police who fired at the house did so with the intention to kill Rami Jusufi, or alternatively, with the knowledge that his death would be a probable consequence of their actions.[202]

(a) Identity of direct perpetrators

71. Tarčulovski contends that while the Trial Chamber made findings which would lead to the conclusion that there were four to six groups of armed police in Ljuboten on the morning of 12 August 2001, it erroneously failed to find which of them attacked the house of Elmaz Jusufi and fired shots at Rami Jusufi.[203] Tarčulovski also submits that the Trial Chamber erroneously concluded that the police were moving as one group through the village committing crimes, basing this conclusion on the testimony of Ljuboten residents who it initially discredited and despite its

[199] Tarčulovski Appeal Brief, para. 137.
[200] Trial Judgement, paras 43-44, 46-47, 306-309 and 312.
[201] Trial Judgement, paras 310-311.
[202] Trial Judgement, para. 312.
[203] Tarčulovski Appeal Brief, paras 143-147 (citing Trial Judgement paras 36, 42-44, 52, 56, 58 and 312); Tarčulovski Amended Notice of Appeal, para. 69 (citing Trial Judgement, paras 36-44, 306-312 and 553) and 73 (citing Trial Judgement, paras 43-44, 306-312 and 553); Tarčulovski Reply Brief, para. 57; AT. 48-49.

recognition that the evidence on the record was not specific in this regard.[204] Furthermore, he claims that the Trial Chamber failed to apply the principle of *in dubio pro reo* when it noted the insufficiency of evidence as to who shot Rami Jusufi.[205] Regarding the identities of the police members who entered Ljuboten on the morning of 12 August 2001, Tarčulovski also submits that the Trial Chamber erroneously drew inferences against him based on insufficient evidence.[206]

72. The Prosecution responds that the Trial Chamber did not have to make findings as to the precise identity of the police officers who committed the three murders, and that it properly found that there was only one group of police in Ljuboten and that it was led by Tarčulovski throughout the operation.[207] In addition, the Prosecution submits that the fact that the Trial Chamber noted that the evidence on the identity of those who entered Ljuboten on 12 August 2001 was sparse does not mean that the evidence was insufficient to find Tarčulovski guilty beyond reasonable doubt.[208]

73. With respect to the number of police groups in Ljuboten on 12 August 2001, the Appeals Chamber recalls that the Trial Chamber identified those who attacked Elmaz Jusufi's house and shot Rami Jusufi as the men belonging to the police unit which had entered Ljuboten at about 8.00 a.m. on 12 August 2001, and which moved through the village "as one group" led by Tarčulovski.[209] The Trial Chamber based this conclusion *inter alia* on evidence which Tarčulovski interpreted as suggesting the existence of several police groups in the village. However, minor discrepancies in the description of perpetrators did not prevent the Trial Chamber from reasonably concluding that the evidence in its entirety established that one police group led by Tarčulovski moved through the village that day.[210] Tarčulovski's argument that the Trial Chamber failed to find which police group attacked Elmaz Jusufi's house is based on his assumption that the facts as established by the Trial Chamber suggest that there were several separate groups of police in Ljuboten. This is a misinterpretation of the Trial Chamber's findings and an assertion that the Trial Chamber should have interpreted evidence in a different way without identifying why the Trial Chamber's conclusion was erroneous. Tarčulovski does not demonstrate why no reasonable trier of fact could have reached this conclusion. His argument in this regard is therefore dismissed.

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[204] Tarčulovski Amended Notice of Appeal, paras 48 (citing Trial Judgement, para. 552) and 102 (citing Trial Judgement, paras 11 and 552); AT. 51. *See* also Tarčulovski Appeal Brief, paras 20, 188 (citing Trial Judgement, para. 11) and 191.

[205] Tarčulovski Amended Notice of Appeal, para. 76 (citing Trial Judgement, paras 307-312). *See* also Tarčulovski Appeal Brief, para. 148.

[206] Tarčulovski Amended Notice of Appeal, para. 44 (citing Trial Judgement, paras 546-547); Tarčulovski Reply Brief, para. 53 (citing Trial Judgement, para. 546).

[207] Prosecution Response Brief, paras 46-62 (Section V.A.3.) and 103-111, also stating that the four to six "groups" identified in the Tarčulovski Appeal Brief "are in fact one and the same".

[208] Prosecution Response Brief, para. 152.

[209] Trial Judgement, paras 42, 60-61, 312, 552, 555, 560 and 564.

[210] *See* Trial Judgement, paras 36, 38, 41-74, 312, 546-547 and 552-560, and evidence cited in footnotes to those paragraphs.

74. The conclusion of the Trial Chamber regarding the identity of the police group was based not only on the evidence of Ljuboten residents.[211] The Trial Chamber also considered the testimony of military and police personnel, Tarčulovski's statements to a Commission for Inquiry as well as other documentary evidence.[212] Furthermore, although the Trial Chamber noted that "[t]he evidence is not specific as to the movements of the police through Ljuboten on 12 August",[213] Tarčulovski does not show that there was any basis for the Trial Chamber to have a reasonable doubt as to the number of the police groups. Hence, based on the totality of the evidence, the Trial Chamber reasonably reached its conclusion on this issue. Tarčulovski fails to show any error on the part of the Trial Chamber in this regard.

75. The Appeals Chamber notes that the Trial Chamber was unable to identify the direct perpetrators of the alleged murders or other crimes by name, but with respect to the crimes for which Tarčulovski was convicted the Trial Chamber did find that the direct perpetrators were members of the police who entered Ljuboten on the morning of 12 August 2001[214] and that Tarčulovski directed the actions of the police in the village that day.[215] These findings were sufficiently specific to identify the direct perpetrators as persons being directed by Tarčulovski for the purposes of establishing his criminal liability.[216] Tarčulovski's arguments in this respect are rejected.

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[211] *See* also *supra* paras 56 and 59.

[212] *See* Trial Judgement, paras 36, 38, 41-74, 312, 546-547 and 552-560, and evidence cited in footnotes to those paragraphs. The Trial Chamber's cautious approach can be also seen when the Trial Chamber rejected part of Ljuboten residents' incriminating evidence when it found it unreliable (*e.g.*, Trial Judgement, para. 46).

[213] Trial Judgement, para. 552.

[214] Trial Judgement, paras 42, 58, 60-61, 66, 312-313, 316, 319, 325, 328, 380, 383, 385, 552, 555, 560 and 564.

[215] Trial Judgement, paras 555, 560, 564 and 574.

[216] *See* also for: Planning: *Kordić and Čerkez* Appeal Judgement, paras 26, 29 and 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Kordić and Čerkez* Appeal Judgement, paras 27, 29 and 32; *Karera* Appeal Judgement, paras 317-318; *Nahimana et al.* Appeal Judgement, para. 480. *See* also, *e.g.*, *Gacumbitsi* Appeal Judgement, 99 and 105-108, affirming the Trial Chamber's finding that Gacumbitsi is responsible for instigating, referring to, in particular, Trial Judgement, paras 213, 215 and 328, where physical perpetrators are described as a "group of attackers on which the *bourgmestre* had influence", and "young men who, being in the neighbourhood, heard the *bourgmestre*'s instigation". Ordering: *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, paras 28-30; *Karera* Appeal Judgement, para. 211; *Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182; *Semanza* Appeal Judgement, para. 361. *See* also, *e.g.*, *Blaškić* Appeal Judgement, paras 588 (fn. 1195) and 597, finding Blaškić responsible for ordering, and confirming the Trial Chamber's findings, in particular paras 688, 693, 699 and 735, in which physical perpetrators are referred to as the "HVO" or "HVO soldiers" and the "Military Police"; *Gacumbitsi* Appeal Judgement, paras 184-187, finding Gacumbitsi responsible for ordering, and referring to, in particular, Trial Judgement, paras 98, 152, 154, 163, 168 and 171-173, where physical perpetrators are referred to as "*conseillers*", the "communal police", "gendarmes", and the "*Interahamwe*"; *Semanza* Appeal Judgement, para. 363, finding Semanza responsible for ordering, and confirming the Trial Chamber's findings, in particular in paras 178 and 196, where physical perpetrators are described as "soldiers", "gendarmes", and the "*Interahamwe*". *Cf.* for superior responsibility: *Orić* Appeal Judgement, para. 35; *Blagojević and Jokić* Appeal Judgement, para. 287; *Blaškić* Appeal Judgement, para. 216, with reference to *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras 38 and 40. As regards joint criminal enterprise: *Krajišnik* Appeal Judgement, paras 156-157.

(b) The shooting of Rami Jusufi

76. Tarčulovski submits that the Trial Chamber erred in law and fact in concluding that Rami Jusufi was shot at close range. He claims that there is no evidence to support any finding relating to the position of the perpetrator.[217] Tarčulovski further submits that the Trial Chamber erroneously relied on the testimony of close relatives of Rami Jusufi to find the circumstances of his death and other events at or near Elmaz Jusufi's house, notwithstanding its negative view of their credibility.[218]

77. The Prosecution submits that this argument should be summarily dismissed, as it ignores the evidence discussed by the Trial Chamber.[219]

78. The Appeals Chamber observes that in finding that Rami Jusufi was shot at close range,[220] the Trial Chamber considered an eyewitness account that the shots came "from a distance of about 10 or 15 metres from the door", which Rami Jusufi was trying to close,[221] an autopsy report and testimony of medical specialists,[222] as well as testimony of a member of the FYROM Army and another Ljuboten villager and photos depicting spent casings.[223] The Appeals Chamber is satisfied that this evidence was sufficient for the Trial Chamber to conclude that Rami Jusufi was shot at close range.[224] The fact that the evidence was insufficient to establish the precise position of the shooter is immaterial to that finding.[225] Accordingly, Tarčulovski's submission is dismissed.

(c) Status of Rami Jusufi

79. Tarčulovski argues that the Trial Chamber erred in law and fact in finding that Rami Jusufi was neither a member of the NLA nor took an active part in the hostilities. Tarčulovski submits that the Trial Chamber erroneously relied on testimony, which it had previously declared untrustworthy and erred in rejecting conflicting evidence of military and police personnel.[226] Tarčulovski claims

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[217] Tarčulovski Appeal Brief, paras 153-154 (citing Trial Judgement, paras 306 and 308; M171, T. 3436; Ex. D78); Tarčulovski Amended Notice of Appeal, para. 73 (citing Trial Judgement, paras 43-44, 306-312 and 553); Tarčulovski Reply Brief, para. 60; AT. 103-104. *See* also Tarčulovski Amended Notice of Appeal, para. 75 (citing Trial Judgement, paras 306-309); Tarčulovski Appeal Brief, para. 148 (citing Trial Judgement, paras 307 and 309).

[218] Tarčulovski Amended Notice of Appeal, para. 71 (citing Trial Judgement, paras 43 and 306-311). *See* also Tarčulovski Appeal Brief, paras 20, 188 (citing Trial Judgement, para. 11) and 191.

[219] Prosecution Response Brief, fn. 373 (citing Trial Judgement, paras 43 (in particular, fn. 120) and 307-308).

[220] Trial Judgement, para. 312.

[221] Trial Judgement, para. 43 (citing in-court testimony and written statements of Elmaz Jusufi, Zenep Jusufi and Muzafer Jusufi).

[222] Trial Judgement, paras 306-307.

[223] Trial Judgement, para. 308 (citing testimony of Marijo Jurišić and Fatmir Kamberi; Ex. 1D101; Ex. P429). The Trial Chamber had rejected suggestions put forward by the Defence as unpersuasive (Trial Judgement, paras 307-308).

[224] *See* also *supra* paras 56 and 59.

[225] Trial Judgement, para. 308.

[226] Tarčulovski Appeal Brief, paras 148-150 (citing Trial Judgement paras 285, 307 and 309-310; Witness M037, T. 781); Tarčulovski Amended Notice of Appeal, paras 54 (citing Trial Judgement, para. 567), 71 (citing Trial Judgement,

that this resulted in a violation of the principle of *in dubio pro reo* and a shifting of the burden of proof as to the status of Rami Jusufi.[227] Tarčulovski further argues that the Trial Judgement assumes that Rami Jusufi was unarmed[228] and that his father's statement that Rami Jusufi deliberately changed from pyjamas into his black t-shirt before going to the door demonstrates that the black t-shirt served as a uniform of the NLA.[229] Tarčulovski also contends that it is wrong to conclude that anyone not conspicuously displaying a weapon is "taking no active part in the hostilities", particularly where "terrorists deliberately conceal themselves" and intermingle with the civilian population.[230]

80. The Prosecution responds that the issue to be decided by the Trial Chamber was not whether Rami Jusufi was a member of the NLA, but whether he was taking an active part in the hostilities at the time he was shot. The Prosecution argues that the Trial Chamber reasonably found that this was not the case.[231] The Prosecution also asserts that the Trial Chamber was entitled to accept part of the testimony of Ljuboten residents and reject part of the testimony of witnesses who were military and police personnel.[232]

81. The Appeals Chamber considers that the Trial Chamber's conclusion that Rami Jusufi had been an "unarmed civilian" not taking part in the hostilities at the time of his death[233] was based on its careful evaluation and analysis of the evidence. The Trial Chamber explained in detail its reasons for its reliance on certain pieces of evidence[234] and its rejection of other evidence,[235] finding

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paras 43 and 306-311), 73 (citing Trial Judgement, paras 43-44, 306-312 and 553) and 74 (citing Trial Judgement, paras 304-312). Tarčulovski refers to the evidence of Fatmir Kamberi, a resident of Ljuboten (Ex. P426), as the evidence on which the Trial Chamber erroneously relied, and the evidence of Captain Grozdanovski, M2D-008 and M-037 as the conflicting evidence (Tarčulovski Appeal Brief, paras 149-150).

[227] Tarčulovski Amended Notice of Appeal, para. 74 (citing Trial Judgement, paras 304-312); Tarčulovski Reply Brief, para. 64, stating that demanding that Tarčulovski present sufficient evidence that Jusufi was an NLA member improperly shifts burden of proof from the Prosecution to Tarčulovski. *See* also Tarčulovski Appeal Brief, paras 20 and 188-191 (citing Trial Judgement, paras 11-13).

[228] Tarčulovski Reply Brief, para. 59.

[229] Tarčulovski Reply Brief, para. 62 (without any specific page reference to Rami Jusufi's farther's statement).

[230] Tarčulovski Reply Brief, para. 61. *See* also Tarčulovski Appeal Brief, para. 79 (referring to *Strugar* Appeal Judgement, paras 177-179); Tarčulovski Amended Notice of Appeal, para. 31 (citing Trial Judgement, paras 301-302); Tarčulovski Reply Brief, para 27.

[231] Prosecution Response Brief, paras 113 and 125-128 (citing Trial Judgement, paras 41-42 and 310-311); AT. 81-83 (referring to *Strugar* Appeal Judgement, para. 177), also arguing that a person does not lose his protected status under Common Article 3 when he merely supports an armed group.

[232] Prosecution Response Brief, paras 126 (concerning the evidence of Fatmir Kamberi, and citing Trial Judgement, para. 310), 127 (concerning the evidence of Captain Grozdanovski and M2D-008, and citing Trial Judgement, paras 145-146) and 128 (concerning the evidence of Witness M037, and citing Witness M037, T. 780-781).

[233] Trial Judgement, para. 311.

[234] In particular, *see* Trial Judgement, para. 310, regarding the evidence of Fatmir Kamberi.

[235] In particular, *see* Trial Judgement, paras 145-146, regarding the evidence of Captain Grozdanovski and M2D-008, and para. 153, regarding the evidence of Witness M037.

inter alia that Rami Jusufi was in civilian clothes at the time of his death; that he was not an NLA member; and that Elmaz Jusufi's house was not used as an NLA check-point.[236]

82. Furthermore, Tarčulovski misrepresents Elmaz Jusufi's evidence. This evidence did not show that his son, Rami Jusufi, changed from pyjamas to a *black* t-shirt. Rather, as the Trial Chamber found, the evidence of Elmaz Jusufi, an autopsy report of 2002 and several photographs taken on 13 August 2001 show that he wore a *white* shirt at the time of his death.[237] In addition, no evidence indicated that Rami Jusufi was armed.[238] Hence, Tarčulovski's arguments are dismissed.

83. As regards Tarčulovski's argument that it is wrong to conclude that anyone not conspicuously displaying a weapon is "taking no active part in the hostilities", the Appeals Chamber recalls that the Trial Chamber's finding was based on the evidence before it as discussed above.[239] As Tarčulovski has not shown that this finding is unreasonable, his submissions as to the status of Rami Jusufi are rejected.

(d) *Mens rea* concerning the status of Rami Jusufi

84. Tarčulovski submits that the Trial Chamber erred in law and fact when it failed to address his *mens rea* or that of the perpetrator as to Rami Jusufi's status, "that is, whether he knew that Jusufi was a civilian or could not have reasonably believed otherwise."[240] Tarčulovski also argues that it was impossible to prove what was in the mind of an unknown perpetrator who killed Jusufi.[241] Furthermore, Tarčulovski submits that the Trial Chamber's findings on Jusufi's appearance and the circumstances in which he was shot are "legally insufficient" to prove the shooter's awareness of these facts, since no one outside of the house testified to the shooter's location.[242] Tarčulovski also argues that the Trial Chamber failed to apply the principle of *in dubio pro reo* and shifted the burden of proof when it found insufficient evidence to establish with certainty who shot Rami Jusufi and the location of the shooter.[243]

85. The Prosecution responds that the Trial Chamber found *inter alia* that Rami Jusufi was unarmed, in civilian clothes and shot at close range, there was no resistance, and that the

[236] Trial Judgement, paras 309-311. *See supra* paras 56 and 59.
[237] Trial Judgement, para. 309 (citing Ex. 1D77 and Ex. 1D78).
[238] Trial Judgement, paras 43 and 309-311.
[239] Trial Judgement, para. 311. This finding is consistent with the notion of active participation in the hostilities, as clarified in *Strugar* Appeal Judgement, para. 178.
[240] Tarčulovski Appeal Brief, paras 151-152 (citing Trial Judgement, para. 312); Tarčulovski Amended Notice of Appeal, paras 69 (citing Trial Judgement, paras 36-44, 306-312 and 553) and 71(citing Trial Judgement, para. 312). *See* also *supra* para. 62.
[241] Tačulovski Appeal Brief, para. 138; Tarčulovski Reply Brief, para. 53.
[242] Tarčulovski Reply Brief, para. 59. *See* also Tarčulovski Appeal Brief, para.153.
[243] Tarčulovski Amended Notice of Appeal, para. 76 (citing Trial Judgement, paras 307-312). *See* also Tarčulovski Appeal Brief, paras 148 and 153.

perpetrators who killed Jusufi were aware of the facts establishing that he was taking no active part in the hostilities at the time.[244] Alternatively, the Prosecution submits that the only reasonable conclusion on the evidence is that the perpetrators were aware of the factual circumstances establishing Jusufi's status.[245]

86. The Appeals Chamber notes that the Trial Chamber did not make an explicit finding that the murderer(s) of Rami Jusufi were aware or should have been aware that he was taking no active part in the hostilities. However, the Trial Chamber considered

> the fact that evidence discloses there was no resistance, the fact that Rami Jusufi was shot at close range from outside the house as he was at the open door, that he was unarmed at the time, in civilian clothes, and the number of bullets fired from the front yard and patio area at the house in the vicinity of the doorway in which Rami Jusufi was standing[.][246]

These findings show that the Trial Chamber was satisfied beyond reasonable doubt that the physical perpetrators were aware or should have been aware that Rami Jusufi was taking no active part in the hostilities. The lack of evidence concerning the specific identification of the direct perpetrators[247] and their exact positions,[248] is immaterial to these findings. Further, the insufficiency of evidence establishing the identity of the actual perpetrator did not leave the Trial Chamber in any doubt that the perpetrator should have been aware that the victim was taking no active part in the hostilities. Thus, the principle of *in dubio pro reo* was not applicable. Finally, there is no basis for Tarčulovski's assertion that the Trial Chamber, in failing to identify the exact perpetrator, shifted the burden of proof to him to establish that the perpetrator could not have known that the victim was not taking an active part in the hostilities. There was ample evidence for the Trial Chamber to establish that the status of the victim should have been known by the perpetrator as already discussed. His submissions in this respect are rejected.

2. Sulejman Bajrami

87. The Trial Chamber found that Sulejman Bajrami was detained and mistreated by a group of armed police in front of Adem Ametovski's house, deliberately shot at very close range and killed nearby this house.[249] The Trial Chamber held that he was shot with the intention that his death should show other villagers "who had the ultimate power".[250] It also found that his movement did

[244] Prosecution Response Brief, paras 118, 119 (citing Trial Judgement, paras 43, 310, 312 and 567) and 120 (citing Trial Judgement, paras 43, 152-154 and 307-308).
[245] Prosecution Response Brief, para. 118.
[246] Trial Judgement, para. 312.
[247] *See supra* para. 75.
[248] *See supra* para. 78.
[249] Trial Judgement, paras 50-55, 313 and 316-319.
[250] Trial Judgement, paras 319-320.

not present a real threat of escape, and that he was an unarmed civilian taking no active part in the hostilities.[251]

(a) Identity of direct perpetrators

88. Tarčulovski avers that the Trial Chamber erred in law and fact in failing to make a finding as to who shot Sulejman Bajrami and in concluding that Tarčulovski was present with the armed police responsible for his death.[252] Tarčulovski claims that the Trial Chamber's findings indicate that there were several other armed police units present that did not match the description of Tarčulovski and his men as wearing camouflage uniforms without any insignia on them.[253] In relation to the identities of the police who entered Ljuboten on the morning of 12 August 2001, Tarčulovski submits that the Trial Chamber erroneously drew inferences against Tarčulovski based on insufficient evidence.[254]

89. The Appeals Chamber recalls that the Trial Chamber identified those who entered Adem Ametovski's compound and shot Sulejman Bajrami as members of the police unit which had entered Ljuboten at about 8.00 a.m. on 12 August 2001, attacked Elmaz Jusufi's house and moved through the village "as one group" led by Tarčulovski.[255] Despite the varying accounts as to whether camouflage uniforms worn by these police members bore insignia,[256] the Trial Chamber reasonably reached this conclusion based on its assessment of the totality of the evidence.[257] Tarčulovski misinterprets the Trial Chamber's findings on the police group in Ljuboten and merely asserts that the Trial Chamber should have interpreted evidence differently without establishing that its finding was erroneous.[258] His arguments are thus dismissed.[259]

[251] Trial Judgement, paras 314-320.
[252] Tarčulovski Appeal Brief, paras 155-156 (citing Trial Judgement, paras 55, 59, 313 and 320).
[253] Tarčulovski Appeal Brief, para. 156 (citing Trial Judgement, paras 41 and 58-59); Tarčulovski Reply Brief, para. 57; AT. 51.
[254] Tarčulovski Amended Notice of Appeal, para. 44 (citing Trial Judgement, paras 546-547); Tarčulovski Reply Brief, para. 53 (citing Trial Judgement, para. 546); AT. 48. *See* also Tarčulovski Appeal Brief, para. 22 (citing Trial Judgement, para. 547, whereby the Trial Chamber states that in the context of the police's deliberate attempts to avoid identification of those who entered Ljuboten on 12 August 2001, the Trial Chamber must view "the limited evidence" concerning Tarčulovski on that day). *See* also Prosecution Response Brief, paras 46-62 (Section V.A.3.), 103-111 (with further references to relevant parts of Trial Judgements and evidence) and 152.
[255] Trial Judgement, paras 42, 58, 60-61, 313, 316, 552, 555, 560 and 564.
[256] Trial Judgement, paras 41 and 58.
[257] *See*, in particular, Trial Judgement, para. 60. *See* also *supra* paras 73-75.
[258] With respect to Tarčulovski's argument regarding the insufficient evidence on the specific identities of the police members, *see supra* para. 75.
[259] *See* also *infra* para. 130.

(b) Status of Sulejman Bajrami

90. Tarčulovski argues that the Trial Chamber erred in law and fact in rejecting his claim that Sulejman Bajrami was a member of the NLA and was shot while seeking to escape, as well as in finding that Bajrami was not taking an active part in the hostilities solely on the basis of villagers' testimony, which had been deemed unreliable by the Trial Chamber.[260] In particular, Tarčulovski argues that Bajrami's black t-shirt could have indicated "NLA involvement".[261]

91. The Prosecution responds that the Trial Chamber reasonably concluded that Sulejman Bajrami was an unarmed civilian taking no active part in hostilities at the time he was killed.[262]

92. The Appeals Chamber finds that Tarčulovski does not show that the Trial Chamber unreasonably rejected his arguments on Sulejman Bajrami's possible membership of the NLA and his attempt to escape.[263] Furthermore, Tarčulovski does not show an error in the Trial Chamber's reliance on the evidence of Ljuboten residents. The Trial Chamber noted that the residents who were present when he was shot were in the custody of the police, lying face down, with their eyes and head covered with their t-shirts, and that for the most part they could not see what happened.[264] The Trial Chamber considered that this caused discrepancies in their testimonies.[265] It assessed these discrepancies in light of other evidence[266] and could reach the finding that while escape may have been on Bajrami's mind, this was "manifestly hopeless."[267] Considering that Bajrami had been mistreated right before he was killed, as well as the circumstances in which he was shot, the Trial Chamber did not err in failing to find that his black t-shirt would have given rise to any reasonable doubt that Bajrami's conduct *at the time of his death* was connected to the activities of the NLA.[268] Consequently, Tarčulovski's arguments on this point are rejected.

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[260] Tarčulovski Appeal Brief, paras 158-159 (citing Trial Judgement, paras 314-316 and 320) and 191; Tarčulovski Amended Notice of Appeal, para. 82 (citing, Trial Judgement, paras 43-44, 313-320 and 553).
[261] Tarčulovski Reply Brief, para. 68. *See* also Tarčulovski Appeal Brief, para. 79 (referring to *Strugar* Appeals Judgement, paras 177-179); Tarčulovski Amended Notice of Appeal, para. 31(citing Trial Judgement, paras 301-302); Tarčulovski Reply Brief, para. 27.
[262] Prosecution Response Brief, paras 130-131 (citing Trial Judgement, paras 315-320, referring to villagers' evidence – Osman Ramadani, Ex. P197; Ismail Ramadani, Ex. P188; Vehbi Bajrami, Ex. P247.1–, as well as OSCE related evidence – Ex. 1D24; Henry Bolton, T. 1808-1809; Ex. P238; Ex. P239; Ex. P240; Ex. P241; Ex. P185; Ex. P19–). *See* also Prosecution Response Brief, para. 113; AT. 81.
[263] Trial Judgement, para. 314 (analysis on Bajrami's possible membership of the NLA), paras 315-320 (analysis on Bajrami's attempt to escape).
[264] Trial Judgement, paras 54-55 and 315.
[265] *See supra* paras 56 and 59. *See e.g.*, Testimony of Ismail Ramadani, Osman Ramadani, Vehbi Bajrami, cited in Trial Judgement, paras 315-318.
[266] *See e.g.*, Testimony of Henry Bolton; Ex. P19; Ex.P185; Ex. P239; Ex. P240; Ex. P241; Ex. P449; Ex. P450; Ex. 1D222 and Ex. 1D24, cited in Trial Judgement, paras 313 and 315-317.
[267] Trial Judgement, para. 318.
[268] *See Strugar* Appeal Judgement, para. 178.

(c) *Mens rea* concerning the status of Sulejman Bajrami

93. Tarčulovski submits that the Trial Chamber erred in law and fact in failing to make a finding on the *mens rea* of the – unknown[269] – murderer(s) of Sulejman Bajrami, who was "a potentially dangerous NLA terrorist" trying to escape.[270]

94. The Prosecution responds that in light of the Trial Chamber's findings, the police members who killed Sulejman Bajrami were undoubtedly aware of the facts establishing that he was not taking an active part in the hostilities at the time he was killed.[271] Alternatively, the Prosecution submits that the only reasonable conclusion on the facts established in this case is that the perpetrator(s) were aware of the factual circumstances establishing Bajrami's status.[272]

95. The Appeals Chamber recalls that elsewhere in this Judgement, it has clarified that the *mens rea* of perpetrators regarding the status of victims needs to be proven in order to establish crimes under Common Article 3.[273] The Appeals Chamber further recalls the Trial Chamber's findings that Sulejman Bajrami was detained and severely mistreated before he was shot dead and that he was unarmed and among a very large group of well-armed police.[274] Also, contrary to Tarčulovski's assertion, the Trial Chamber did not make a finding that the perpetrators did not believe that Bajrami was trying to escape. Rather, taking into account the manner in which he was shot, the Trial Chamber found that even though they may have thought that he was attempting to escape, "the hopelessness of his position was obvious", and that "[h]is conduct did not present a real threat of escape."[275] The Appeals Chamber considers that these findings indicate that the Trial Chamber was satisfied beyond reasonable doubt that the perpetrators were aware or should have been aware that Bajrami was taking no active part in the hostilities.[276] Thus, Tarčulovski's arguments are rejected.

[269] Tarčulovski Appeal Brief, para. 138; Tarčulovski Reply Brief, para. 53.
[270] Tarčulovski Appeal Brief, para. 159 (citing Trial Judgement, paras 315-316 and 319); Tarčulovski Amended Notice of Appeal, paras 79 (citing Trial Judgement, paras 54-58 and 313-320) and 83 (citing Trial Judgement, paras 313-320). *See* also *supra* para. 62. Tarčulovski further argues that the Trial Chamber violated the *in dubio pro reo* principle by concluding that those who shot Bajrami did not believe that he was trying to escape (Tarčulovski Amended Notice of Appeal, para. 83 (citing Trial Judgement, paras 313-320)). *See* also Tarčulovski Appeal Brief, para. 196 (citing Trial Judgement, para. 9).
[271] The Trial Chamber found that Bajrami was unarmed, detained and severely beaten by members of armed police led by Tarčulovski, and thereafter shot several times at very close range. It further found that his conduct did not present a real threat of escape (Prosecution Response Brief, para. 121 (citing Trial Judgement, paras 55 and 317-320)). *See* also AT. 81.
[272] Prosecution Response Brief, para. 118.
[273] *See supra* para. 66.
[274] Trial Judgement, para. 318.
[275] Trial Judgement, para. 319.
[276] This is so despite the lack of evidence concerning the specific identification of the direct perpetrators, *see supra* paras 75 and 89.

3. Muharem Ramadani

96. The Trial Chamber found that Muharem Ramadani died from gunshot wounds on 12 August 2001 in front of Adem Ametovski's house, the fatal shots being fired by one or more members of the police who had him in their custody at the house.[277] The Trial Chamber also found that Ramadani was an unarmed civilian who was not taking an active part in hostilities at the time he was killed, and that the one or more police members who shot him acted with the intent to kill or in the knowledge that his death was a probable consequence of this shooting.[278]

(a) The Trial Chamber's reliance on circumstantial evidence

97. Tarčulovski submits that the Trial Chamber erred in law and fact in relying entirely on circumstantial evidence to incriminate him in the death of Muharem Ramadani instead of drawing other reasonable inferences that were permissible from the evidence.[279]

98. The Prosecution contends that the Trial Chamber reasonably concluded that Muharem Ramadani was killed by the police unit led by Tarčulovski on 12 August 2001.[280]

99. The Trial Chamber found that there was no direct evidence of the circumstances in which Muharem Ramadani was killed.[281] Its conviction was based on circumstantial evidence. In light of the circumstances established on the evidence, the Trial Chamber found that the *only* reasonable conclusion was that the police, directed by Tarčulovski, killed Muharem Ramadani.[282] The circumstantial evidence relied upon by the Trial Chamber in reaching this conclusion was: an autopsy report describing firearm injuries on him in the area of the neck and in the area of the ribcage of such a nature as to have caused his death;[283] an OSCE member's observations of Ramadani's body and its surroundings on 14 August 2001, which led the Trial Chamber to conclude that Ramadani had been shot several times at close range;[284] and testimony that he "was in the custody of armed police in front of Adem Ametovski's house when last seen" and that "his body

[277] Trial Judgement, paras 57 and 321-325.
[278] Trial Judgement, paras 326-328.
[279] Tarčulovski Appeal Brief, paras 161-163 (citing Trial Judgement, paras 324-325); Tarčulovski Amended Notice of Appeal, para. 85 (citing Trial Judgement, paras 57 and 321-328). In this context, Tarčulovski challenges the Trial Chamber's reliance on an autopsy report (Ex. P451), over an OSCE report (Ex. 1D24), Tarčulovski Appeal Brief, para. 163 (citing Trial Judgement, paras 322 and 324); Tarčulovski Reply Brief, para. 70.
[280] Prosecution Response Brief, paras 132-133 (citing Trial Judgement, paras 57, 321-328 and 553; Ismail Ramadani, Ex. P188; Osman Ramadani, Ex. P197; Witness M012, T. 894-895, 974), also stating that the Trial Chamber "correctly rejected the suggestion in an OSCE report (Ex. 1D24) that the deaths of Muharem Ramadani and Sulejman Bajrami might have occurred during an anti-terrorist operation. *See* also Prosecution Response Brief, 46-62 (Section V.A.3.).
[281] Trial Judgement, para. 324.
[282] *See Hadžihasanović and Kubura* Appeal Judgement, para. 286; *Galić* Appeal Judgement, para. 218; *Stakić* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 303; *Čelebići* Appeal Judgement, para. 458.
[283] Trial Judgement, para. 322.
[284] Trial Judgement, paras 323 and 325.

was found on the road at the entrance to the house".[285] The Trial Chamber also explained why it rejected the suggestion made in an OSCE report that the death of Ramadani could have occurred during the operation by the FYROM forces to clear the area of hostile forces.[286] Tarčulovski fails to demonstrate any error in the findings of the Trial Chamber.[287] Tarčulovski's submissions in this respect are thus rejected.

(b) *Mens rea* concerning the status of Muharem Ramadani

100. Tarčulovski argues that the Trial Chamber failed to make a finding concerning the *mens rea* of the unidentified murderers of Muharem Ramadani with regard to his status.[288]

101. The Prosecution responds that even assuming *arguendo* that Muharem Ramadani had been a NLA member, no reasonable trier of fact could have concluded otherwise than that he was *hors de combat* at the time he was killed, given that he was unarmed and in the custody of the armed police.[289]

102. The Trial Chamber identified those who killed Muharem Ramadani as one or more members of the police group who entered Adem Ametovski's compound on 12 August 2001 and took Ramadani and others into custody.[290] The Trial Chamber reasonably found that even if Ramadani had been a NLA member, he was not taking an active part in the hostilities at the time he was killed.[291] It based its finding on the fact that Ramadani was in the custody of the police members[292] and on evidence indicating that he wore civilian clothes[293] and that the only weapon found in Ametovski's house was a light shotgun for hunting birds, which had not been used or moved.[294] The Appeals Chamber finds that on the basis of the evidence, the Trial Chamber was satisfied beyond reasonable doubt that the perpetrators were aware or should have been aware that Ramadani was taking no active part in the hostilities. Tarčulovski's arguments are thus rejected.

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[285] Trial Judgement, paras 57, 321, 323-325.
[286] Trial Judgement, para. 324.
[287] Trial Judgement, para. 325.
[288] Tarčulovski Appeal Brief, para. 138; Tarčulovski Reply Brief, para. 53. *See* also *supra* para. 62. In this context, Tarčulovski appears to assert that there is no evidence as to who killed Ramadani or why he was killed (Tarčulovski Appeal Brief, para.163). *See* also Tarčulovski Appeal Brief, para. 79 (referring to *Strugar* Appeals Judgement, paras 177-179); Tarčulovski Amended Notice of Appeal, para. 31(citing Trial Judgement, paras 301-302); Tarčulovski Reply Brief, para. 27.
[289] Prosecution Response Brief, para. 122 (citing Trial Judgement, paras 57 and 321-328); AT. 81.
[290] Trial Judgement, paras 57-61, 325 and 328. *See* also the Appeals Chamber's affirmation of the Trial Chamber's findings on this police group at Adem Ametovski's house (*supra* paras 73-75). *See* also *supra* para. 66.
[291] Trial Judgement, paras 326 and 328.
[292] Trial Judgement, paras 51-57, 321 and 325.
[293] Trial Judgement, para. 326.
[294] Trial Judgement, para. 327.

B. Wanton Destruction

103. Tarčulovski submits that the Trial Chamber erred in law and in fact, when it found that the elements of wanton destruction were established beyond reasonable doubt.[295]

1. Existence of military necessity / military objects

104. Tarčulovski submits that the Trial Chamber erred in law and fact when it found that twelve houses in Ljuboten had been intentionally destroyed on 12 August 2001 without military necessity.[296] In particular, Tarčulovski contends that the Trial Chamber erred in disregarding the statements of military and police members that they were specifically targeting houses harbouring "NLA terrorists".[297] Tarčulovski avers that evaluating a military/police operation while disregarding all testimony from military and police witnesses placed an impossible burden on him, and he could not possibly defend himself.[298]

105. Tarčulovski also contends that the Trial Chamber erred in law and fact in failing to consider the evidence that "NLA terrorists" were improperly using civilian property to hide themselves from the military and the police; that there was outgoing fire from such civilian houses; and whether the FYROM forces were justified in firing at certain houses under these circumstances.[299] Tarčulovski avers that the Trial Chamber's failure to consider these reasonable inferences amounts to a violation of his right to be presumed innocent, the principle of *in dubio pro reo*, and its own standard of evaluation of evidence.[300]

106. The Prosecution responds that Tarčulovski's submissions should be summarily dismissed, as he repeats submissions made at trial without specifying any error in the Trial Judgement, misrepresents the Trial Chamber's findings, or simply asserts his own interpretation of the evidence without explaining why no reasonable trier of fact could have reached the same conclusion.[301]

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[295] Tarčulovski Appeal Brief, para. 164 (citing Trial Judgement, paras 349-380 and 577).
[296] Tarčulovski Appeal Brief, para. 164 (citing Trial Judgement, paras 349-380).
[297] Tarčulovski Appeal Brief, para. 165; Tarčulovski Amended Notice of Appeal, para. 87 (citing Trial Judgement, paras 141-157 and 359-379). *See* also *ibid.*, para. 86.
[298] Tarčulovski Appeal Brief, paras 21, 165 and 190; Tarčulovski Amended Notice of Appeal, paras 87 (citing Trial Judgement, paras 141-157 and 359-379) and 95.
[299] Tarčulovski Appeal Brief, para. 172; Tarčulovski Amended Notice of Appeal, paras 54-57 (citing Trial Judgement, paras 145-146 (fns 594, 598-599) and 567-569) and 87 (citing Trial Judgement, paras 141-157 and 359-379); AT. 29. In this context, Tarčulovski in particular criticises the Trial Chamber's rejection of the evidence given by Captain Grozdanovski, Tarčulovski Appeal Brief, paras 172-173 (citing Trial Judgement, paras 145-146).
[300] Tarčulovski Appeal Brief, paras 175 (citing Trial Judgement, para. 9) and 195-196 (citing Trial Judgement, paras 154, 161, 166, 169 and 171); Tarčulovski Amended Notice of Appeal, paras 103-104 (citing Trial Judgement, paras 154, 161, 166 and 171).
[301] Prosecution Response Brief, paras 135-136 (citing Trial Judgement, paras 145-146 regarding the evidence of Captain Grozdanovski, 364, 369, 375 and 378-380) and 154 (citing Trial Judgement, paras 132-172).

107. The Appeals Chamber finds that Tarčulovski in part repeats his arguments at trial[302] without demonstrating that the Trial Chamber's rejection of them was erroneous. The Trial Chamber examined in great detail the evidence on the alleged usage of civilian houses by the NLA and outgoing fire from those houses, and reasonably accepted and rejected part of this evidence.[303] The Trial Chamber found that some of the twelve houses which had been damaged as a result of fire started by the police advancing through Ljuboten may have been used to fire at the FYROM forces; that even if that was the case, none of these houses were used for military purposes *at the time when* they were set on fire; and that the damage to the twelve houses was not justified by military necessity "except possibly for some firearm damage to the houses of the Jashari family".[304] It also found:

> Apart from the events in the area of the Jashari family houses, there is no evidence that the actions of the police relating to the charges were in self defence or in the course of action against armed opponents *nor is there a foundation for a reasonable doubt* that this may have been the case.[305]

In light of these findings, the Appeals Chamber is satisfied that the Trial Chamber reasonably found that the setting fire to the relevant houses was not justified by military necessity, and that there was no violation of the principle of *in dubio pro reo*. Tarčulovski asserts that the Trial Chamber failed to rely on the evidence of certain witnesses but does not explain why the findings should not stand on the basis of the remaining evidence. He merely requests to substitute his own evaluation of the evidence for that of the Trial Chamber. Tarčulovski's arguments are therefore dismissed.

2. Evaluation of evidence provided by Ljuboten residents

108. Tarčulovski argues that almost none of the witnesses who were residents of Ljuboten and on whose statements the Trial Chamber principally relied, personally saw how the houses were destroyed.[306]

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[302] Trial Judgement, para. 132.

[303] Trial Judgement, paras 136-140 and 145-170. The Appeals Chamber also notes that the Trial Chamber neither disregarded nor rejected all of the evidence coming from military and police witnesses (*see, e.g.*, Trial Judgement, paras 136-140, 145-147, 150-151, 153-155, 161 and 171). *See* also *supra* paras 56 and 59.

[304] Trial Judgement, paras 171 and 359-380.

[305] Trial Judgement, para. 172 (emphasis added).

[306] Tarčulovski Appeal Brief, para. 168 (citing Trial Judgement, paras 45-49 and 363-368; Ex. P426; Ex. P219.1; Ex. P372), also arguing that although Ex. P372 shows that "men in camouflage uniforms" setting fire to hay were eye-witnessed, this does not prove which of the police units perpetrated the destruction of the relevant houses; Tarčulovski Reply Brief, paras 73 (citing Trial Judgement fn. 131 discussing Fatmir Kamberi's evidence – Ex. P426; Ex. P427; Fatmir Kamberi, T. 4555-4556 – as well as some other pieces of evidence concerning the burning down of Alim Duraki's house) and 74 (challenging the credibility of the witness who provided a statement in Ex. P432). *See* also Tarčulovski Appeal Brief, para. 191; Tarčulovski Amended Notice of Appeal, para. 87 (citing Trial Judgement, paras 141-157 and 359-379).

109. The Prosecution responds that Tarčulovski's submissions should be summarily dismissed,[307] since he ignores other evidence relied upon by the Trial Chamber including eyewitness accounts[308] and misrepresents the contents and significance of the three exhibits he mentions.[309]

110. The Appeals Chamber recalls that the Trial Chamber based its findings regarding the destruction of some of the houses on the accounts of witnesses who personally saw perpetrators setting them on fire.[310] The findings on the destruction of other houses were based on circumstantial evidence, including the accounts of witnesses who saw the houses burning or smoke coming out of them, the positions of the houses, and the presence of police members in the proximity thereof.[311] The Appeals Chamber is not satisfied that Tarčulovski shows that the Trial Chamber's findings were unreasonable.[312] His arguments are therefore rejected.

3. Cause of the destruction

111. Tarčulovski also submits that the Trial Chamber erred in law and fact by failing to point to any evidence that established beyond reasonable doubt that the houses were set on fire by the police, and that it was unclear from the evidence how, why and when the houses were damaged.[313]

(a) Inflammatory materials stored in the relevant houses

112. Tarčulovski avers that the Trial Chamber erred in law and fact when it disregarded the possibility that some of the houses may have been used on 12 August 2001 by three to five persons to fire upon the army, meaning that potentially incendiary weapons were used from within these

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[307] Prosecution Response Brief, para 135.

[308] Prosecution Response Brief, fn. 447 (citing Trial Judgement, fns 130-131; Ex. P8.1; Ex. P200.1; Ex. P200.2; Witness M092, T. 1299; Ex. P266; Ex. P432; Witness M088, T.1191-1193; Ex. P208; Ex. P210; Nikolče Grozdanovski, T. 10420, 10494; Ex. 2D88.)

[309] Prosecution Response Brief, para. 138 (citing Ex. P372; Ex. P426; Ex. P219.1, and also referring to Ćemuran Redžepi, T.3525-3527, 3555; Fatmir Kamberi, T.4555-4556; Ex. P427; Mamut Ismaili, T.1344-1345; Ex. P222).

[310] *See, e.g.,* Trial Judgement, paras 45 (regarding the houses of Qenan Jusufi, Sabit Jusufi, Agim Jusufi), 49 (regarding the houses of Harun Redžepi and Ismet Rexhepi), 68 (regarding the house of Qani Jashari and two other Jashari's houses) and evidence cited in footnotes thereto. As regards the identity of perpetrators described as "men in camouflage uniforms" in Ex. P372, para. 8 cited in para. 49 of the Trial Judgement, the Appeals Chamber notes that the Trial Chamber made a finding, based on the totality of the evidence, that they were members of the police group who entered Ljuboten at about 8.00 a.m. on 12 August 2001 and attacked Elmaz Jusufi's house and subsequently Adem Ametovski's compound, Trial Judgement, para. 60. Further identification would not have been necessary to establish elements of the crime of destruction and Tarčulovski's individual criminal responsibility, *see* the discussion on the identity of perpetrators, *supra* para. 75. In relation to the credibility of Aziz Redžepi's statement in Ex. 432, Tarčulovski does not provide any reference to support its assertion that "the Prosecution conceded that he would lie to help". Thus, this argument does not warrant further discussion.

[311] *See, e.g.,* Trial Judgement, paras 45 (fns 130-131) (regarding the houses of Xhevxhet Jusufovski and Alim Duraki), 49 (fn. 156) (regarding the houses of Nazim Murtezani), 372 (regarding the house of Abdullah Lutfiu – *see* also para. 49) and evidence cited in footnotes thereto.

[312] As for a conviction based on circumstantial evidence, *see supra* para. 99. *See* also *supra* paras 56 and 59.

[313] Tarčulovski Appeal Brief, para. 166; Tarčulovski Amended Notice of Appeal, para. 89 (citing Trial Judgement, paras 359-379). *See* also Prosecution Response Brief, para. 137 (citing Trial Judgement, para. 361).

houses. He also argues that fire could easily spread to and burn a house due to barns and stalls connected to it, which contained highly combustible materials.[314]

113. The Appeals Chamber recalls that the Trial Chamber duly took into account the evidence that some houses in Ljuboten contained inflammable agricultural materials in their storage.[315] However, in light of the totality of the evidence, including of police members setting fire to houses,[316] the possible use of the houses to fire at the FYROM forces,[317] and the shelling by the FYROM army,[318] the Trial Chamber reasonably found that none of the relevant houses caught fire accidentally.[319] Tarčulovski's arguments misrepresent or ignore relevant factual findings of the Trial Judgement and are thus dismissed.

(b) Possibility of shelling by actors other than the police

114. Tarčulovski further submits that the Trial Chamber erred in law and fact by overlooking the "strong possibility" that damage to this densely inhabited part of Ljuboten came from earlier, concurrent or later shelling by the army or even by NLA members themselves.[320] In particular, Tarčulovski asserts that the Trial Chamber failed to credit Witness M037's evidence that he never saw any security members carrying gasoline or starting fires, although it relied upon Witness M037's evidence in another aspect.[321]

115. The Prosecution responds that Tarčulovski ignores the Trial Chamber's consideration of evidence regarding army fire on 10 and 12 August 2001.[322] With regard to the possibility that the damage was inflicted by NLA members, the Prosecution submits that the Trial Chamber in fact

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[314] Tarčulovski Appeal Brief, paras 169-170 (citing Trial Judgement, paras 361 and 377-379; Ex. P411); Tarčulovski Amended Notice of Appeal, para. 88 (citing Trial Judgement, para. 361). Tarčulovski further asserts that this amounts to a violation of the *in dubio pro reo* principle (Tarčulovski Amended Notice of Appeal, para. 88 (citing Trial Judgement, para. 361)). *See* also Tarčulovski Appeal Brief, para. 196. *See* also Prosecution Response Brief, paras 135 and 137 (citing Trial Judgement, paras 31, 33-36, 38-39, 41-42, 45, 48-49, 60, 68, 361-362, 552 and 571).
[315] Trial Judgement, para. 361; *see also* fn. 236.
[316] *See, e.g.*, Trial Judgements, paras 45, 49, 60, 66 and 68.
[317] *See, e.g.*, Trial Judgement, paras 136-140, 145-171 and 359-380.
[318] *See, e.g.*, Trial Judgement, paras 42, 145-151, 154-156, 158, 163, 169-171, 369, 371, 375, 377 and 379.
[319] Trial Judgement, para. 361.
[320] Tarčulovski Appeal Brief, paras 166-167 (citing Trial Judgement, paras 103 and 362), 171 and 173-175 (citing Trial Judgement, paras 146 and 148-149); Tarčulovski Amended Notice of Appeal, para. 91 (citing Trial Judgement, paras 141-157 and 359-379). In particular, Tarčulovski alleges that the Trial Chamber erred in law and fact in relying on the testimony of Peter Bouckaert, only partially accepting the evidence of Nikolče Grozdanovski and rejecting the evidence given by and Henry Bolton (Tarčulovski Appeal Brief, paras 173-174 (citing Trial Judgement, paras 146 and 148-149); Tarčulovski Amended Notice of Appeal, para. 90 (citing Trial Judgement, paras 146-148)).
[321] Tarčulovski Appeal Brief, paras 166 (citing Witness M037, T. 868) and 192-193. In Tarčulovski's view, this amounts to a violation of the *in dubio pro reo* principle (Tarčulovski Amended Notice of Appeal, paras 91 (citing Trial Judgement, paras 141-157 and 359-379) and 103-104 (citing Trial Judgement, paras 154, 161, 166 and 171); Tarčulovski Appeal Brief, paras 195-196 (citing Trial Judgement, paras 154, 161, 166, 169 and 171)).
[322] Prosecution Response Brief, paras 137 (citing Trial Judgement, paras 371, 375, 377 and 379, as examples) and 158 (citing Trial Judgement paras 154, 161, 166, 169 and 171).

considered the relevant evidence which Tarčulovski alleges it improperly disregarded.[323] The Prosecution further submits that Witness M037's evidence is contradicted by the statements of other witnesses, as well as circumstantial evidence.[324] As for the timing of the shelling, the Prosecution asserts that Tarčulovski misrepresents the significance of the Trial Chamber's finding that some houses in Ljuboten sustained damage on 16 or 17 August 2001.[325]

116. The Appeals Chamber recalls that after having examined the evidence on the shelling by the FYROM army[326] and possible shelling by the NLA,[327] the Trial Chamber rejected the suggestion that the NLA shelled the village of Ljuboten.[328] It found, however, that there was shelling by the army in certain areas in the village,[329] although it did not cause the destruction at issue.[330] The Trial Chamber also considered evidence suggesting the possibility that the houses were destroyed prior or subsequent to 12 August 2001,[331] and where there was no evidence indicating that the date of the alleged destruction was 12 August 2001, the Trial Chamber did not enter a conviction in relation to that particular destruction.[332] With respect to the evidence of Witness M037, the Appeals Chamber recalls that the Trial Chamber reasonably relied on only part of this evidence.[333] Tarčulovski's arguments are therefore dismissed.

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[323] Prosecution Response Brief, para. 136 (citing Trial Judgement, paras 145-146 and 149 regarding the evidence of Henry Bolton).
[324] Prosecution Response Brief, para. 139 (referring to *Karera* Appeal Judgement, para. 88, *Blagojević and Jokić* Appeal Judgement, para. 82; *Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248; *Ntakirutimana* Appeal Judgement, para. 215; *Kupreškić et al.* Appeal Judgement, para. 333).
[325] Prosecution Response Brief, para. 137 (citing Trial Judgement, para. 370).
[326] *See, e.g.,* Trial Judgement, paras 42, 145-151, 154-156, 158, 163, 169-171, 369, 371, 375, 377 and 379.
[327] *See, e.g.,* Trial Judgement, paras 148-151 and 163.
[328] *See, e.g.,* Trial Judgement, paras 149 and 151. The Appeals Chamber also observes that the Trial Chamber duly evaluated the evidence of Peter Bouckaert, Nikolče Grozdanovski and Henry Bolton in the light of other evidence, and provided detailed explanations as to why it accepted the evidence of Peter Bouckaert, partially rejected the evidence of Nikolče Grozdanovski and rejected the evidence of Henry Bolton, Trial Judgement, paras 145-146 and 148-151. The Appeals Chamber also notes that the Trial Chamber's analysis of the evidence and conclusion on the Macedonian army's possession of 120 millimetre mortars can be found in Trial Judgement, paras 143-144, even though, as Tarčulovski alleges (Tarčulovski Appeal Brief, para. 174), the Trial Chamber did not make a cross-reference and cited only Nikolče Grozdanovski's evidence on this point in Trial Judgement, para. 149.
[329] *See, e.g.,* Trial Judgement, paras 147, 149, 151, 163, 170-171, 369 and 377 (referring to para. 155), *see* also paras 154 and 379.
[330] *See, e.g.,* Trial Judgement, paras 146, 154, 170-171, 369, 375 and 377-380.
[331] *See, e.g.*, Trial Judgement, paras 103-104, 147 (fns 604-605), 154, 371 (regarding shelling by the Macedonian army on 10 August 2001) and 362 (regarding the possible burning of some houses on 16-17 August 2001).
[332] Trial Judgement, para. 370.
[333] *See supra* paras 56 and 59. In particular, the Trial Chamber was reasonable in not relying on Witness M037's testimony that he did not see any members of security forces setting houses on fire in Ljuboten on 12 August 2001 (Witness M037, T. 868), considering that there was a substantial amount of evidence to the contrary (*see, e.g.*, Trial Judgement, paras 45, 49, 60, 66 and 68) and that Witness M037 was one of the police or military witnesses who were found to have had a tendency to seek to exculpate their own behaviour or the conduct of the police force on that day (Trial Judgement, para. 12).

C. Cruel Treatment

117. Tarčulovski argues that the Trial Chamber erred in law and fact in failing to consider whether the victims of cruel treatment were actively engaged in the hostilities because they were voluntarily shielding NLA terrorists.[334] He further argues that the Trial Chamber failed to make any finding on the *mens rea* of the perpetrators concerning the status of these victims.[335]

118. The Prosecution responds that the Trial Chamber's findings on the unarmed victims' clothing and on the way they were captured and beaten show that there can be no doubt that the physical perpetrators of the cruel treatment were aware of the facts establishing that their victims were taking no active part in the hostilities at the time they were beaten.[336]

119. The Appeals Chamber recalls that the Trial Chamber found that the unarmed victims were seriously and repeatedly beaten by the armed police who kept them in custody,[337] and that the victims who had been in the basement of Adem Ametovski's house had placed themselves in the custody of the police by waving a white cloth.[338] Therefore, any alleged shielding of NLA "terrorists" would be irrelevant for a determination as to whether the victims were taking an active part in the hostilities *at the time* they were mistreated.[339] Consequently, Tarčulovski does not show that the Trial Chamber unreasonably concluded that the victims were not taking an active part in the hostilities at the relevant time. Furthermore, the findings[340] show that the Trial Chamber was satisfied that the perpetrators were aware or should have been aware that the victims were taking no active part in the hostilities when they were mistreated. Tarčulovski's arguments are thus dismissed.

D. Conclusion

120. For the above reasons, Tarčulovski's fourth ground of appeal is dismissed in its entirety.

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[334] Tarčulovski Amended Notice of Appeal, para. 92 (citing Trial Judgement, paras 382). The Appeals Chamber notes that in the Tarčulovski Appeal Brief, Tarčulovski does not clearly challenge the Trial Chamber's finding concerning the status of the victims of the cruel treatment. However, the Appeals Chamber addresses this issue, since it is related to the question on the perpetrators' *mens rea* on the status of the victims, which is raised in the Tarčulovski Appeal Brief. *See* also Tarčulovski Appeal Brief, para. 79 (referring to *Strugar* Appeal Judgement, paras 177-179); Tarčulovski Amended Notice of Appeal, para. 31; Tarčulovski Reply Brief, para. 27.
[335] Tarčulovski Appeal Brief, paras 181-182.
[336] Prosecution Response Brief, para. 148 (citing Trial Judgement, paras 51-52, 70, 72, 74, 303 and 383-391); AT. 81.
[337] Trial Judgement, paras 51-56, 70-74, 383 and 385.
[338] Trial Judgement, para. 51.
[339] *See Strugar* Appeal Judgement, para. 178.
[340] Trial Judgement, paras 383 and 385.

VIII. ALLEGED ERROR IN APPLYING ARTICLE 7(1) OF THE STATUTE WITH RESPECT TO PLANNING, INSTIGATING OR ORDERING (TARČULOVSKI'S THIRD GROUND OF APPEAL)

121. Tarčulovski submits that the Trial Chamber erred in law and fact in its application of the modes of liability of planning, instigating and ordering under Article 7(1) of the Statute.[341]

122. As a preliminary point, Tarčulovski asserts that the Trial Chamber erred in law and fact in addressing the distinct concepts of planning, instigating and ordering as one concept in the section on "Responsibility of Johan Tarčulovski".[342] He does not show, however, that this alleged error could have an impact on the conviction or sentence. Thus, his assertion is summarily dismissed.

A. Tarčulovski's presence at the crime scenes

1. Whether presence at the crime scenes is a legal element of planning, instigating and ordering

123. Tarčulovski submits that the Trial Chamber acknowledged that for him to be criminally responsible for cruel treatment, the Prosecution had to prove beyond a reasonable doubt that he was present when the mistreatment occurred.[343] He further submits that the Trial Chamber erred in law and fact in concluding that he led the police operation in Ljuboten on 12 August 2001, and that he was with the group of police that moved through the village of Ljuboten from the house of Rami Jusufi's parents to Adem Ametovski's house committing killings, beatings and setting houses on fire.[344]

124. The Prosecution responds that while the modes of criminal liability of planning, instigating or ordering did not require Tarčulovski's presence when the mistreatment or the destruction of the

[341] Tarčulovski Appeal Brief, para. 93; Tarčulovski Amended Notice of Appeal, paras 36-37 (citing Trial Judgement, paras 577 and 594).
[342] Tarčulovski Appeal Brief, para. 94 (citing Trial Judgement, paras 561-579); Tarčulovski Amended Notice of Appeal, para. 38 (citing Trial Judgement, paras 562-579); AT. 42. The Prosecution does not specifically respond to this argument.
[343] Tarčulovski Appeal Brief, para. 177 (citing Trial Judgement, para. 575); Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391). Tarčulovski also appears to make this argument in relation to murder and wanton destruction. *See* also Tarčulovski Reply Brief, para. 53.
[344] Tarčulovski Appeal Brief, paras 96 and 109-111 (citing Trial Judgement, paras 547, 564, 567, 568-570 and 594); Tarčulovski Amended Notice of Appeal, paras 50-52 (citing Trial Judgement, paras 555, 558, 560 and 564-565), 61 (citing Trial Judgement, para. 574) and 64 (citing Trial Judgement, para. 558 and fn. 2045); AT. 52 and 59. Tarčulovski interprets that, here, the Trial Chamber concluded that Tarčulovski was with the police reserve volunteers throughout the operation based on use of the term "we" in Ex. P379.01.); Tarčulovski Reply Brief, paras 33-34.

houses occurred,[345] the Trial Chamber reasonably held that Tarčulovski was present when the crimes were committed by the police.[346]

125. The Appeals Chamber finds that it is not required to prove Tarčulovski's presence at the crime scenes to hold him criminally responsible, provided the Trial Chamber was satisfied that the crimes were committed by police acting under Tarčulovski's direction or according to his plan.[347] As he has not established that this finding was erroneous, Tarčulovski's submissions in this regard are dismissed. The Appeals Chamber will now turn to his challenges to the Trial Chamber's factual findings on his presence at the crime sites.

2. Factual findings on Tarčulovski's presence at the crime sites

126. With respect to the killing of Rami Jusufi at Elmaz Jusufi's house, Tarčulovski asserts that the Trial Chamber erred in law and fact when it inferred that he was present at the time of Rami Jusufi's death. Tarčulovski argues that the evidence allowed for the reasonable inference that the operation began while he was outside the village, that other police units entered at or before 8.00 a.m. and that Tarčulovski entered the village between 10.00 and 11.00 a.m. after Rami Jusufi had been killed.[348] Tarčulovski asserts that the only evidence upon which the Trial Chamber relied concerning his whereabouts on 12 August 2001 derives from Witness M037 who falls into the category of witnesses whose credibility the Trial Chamber doubted,[349] and whose evidence shows that Tarčulovski entered the village at approximately 11.00 am.[350] Furthermore, Tarčulovski submits that the Trial Chamber erred in fact in finding that he radioed the Stranište checkpoint at

[345] Prosecution Response Brief, paras 140 (citing Trial Judgement, paras 398-400) and 142-143.
[346] Prosecution Response Brief, paras 46-62 (Section V.A.3.), 82-84, 129 (citing Trial Judgement, paras 552, 555, 560, 564-565), 132 (citing Trial Judgement, paras 325, 553) and 143 (citing Trial Judgement, paras 553 (fn. 200), 555-557 and 564-565; Witness M037, T. 875; Ex. P379.01; Ex. P379.02). The Prosecution submits that Tarčulovski's arguments contesting this holding should be summarily dismissed, since it misrepresents or ignores the Trial Chamber's findings, or merely substitutes his evaluation of evidence for that of the Trial Chamber (Prosecution Response Brief, para. 82).
[347] The Trial Chamber found that Tarčulovski was not criminally responsible for the murder of Atulla Quaili because the perpetrators of the murder were not acting under his authority or direction, and not because he was away from the site where Atulla Quaili was killed (Trial Judgement, para. 575). Furthermore, the presence of an instigator, orderer or planner at the crime scene is not required for the proof of planning, instigating or ordering criminal conduct (*Milošević* Appeal Judgement, para. 290, regarding ordering. *Cf. Aleksovski* Trial Judgement, para. 62; *Tadić* Trial Judgement, paras 679 and 687). The Appeals Chamber also recalls that in the jurisprudence of the Tribunal and the ICTR, the accused's presence was never mentioned as an element of planning, instigating and ordering (*e.g.*, Planning: *Kordić and Čerkez* Appeal Judgement, paras 26, 29 and 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Kordić and Čerkez* Appeal Judgement, paras 27, 29 and 32. Ordering: *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, paras 28-30; *Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182; *Semanza* Appeal Judgement, para. 361).
[348] Tarčulovski Amended Notice of Appeal, para. 72. *See* also Tarčulovski Appeal Brief, paras 113-114, 150 and 157; AT. 60.
[349] Tarčulovski Appeal Brief, paras 113 and 157.
[350] Tarčulovski Appeal Brief, para. 114 (citing Witness M037, T. 766-770, 774, 776; Ex. P36; Trial Judgement, paras 43 and 44 (fn. 108)), 150 and 157 (citing Trial Judgement, para. 59, fn. 200 which refers to Witness M037, T. 782-784, 786; Ex. P38; Ex. P39); Tarčulovski Reply Brief, para. 63; AT. 59 and 101. Tarčulovski further submits that the Trial Chamber violated the principle of *in dubio pro reo* when it failed to make this inference in his favour (Tarčulovski Appeal Brief, para. 197(e)).

8.00 a.m. with information that the police were about to enter the village of Ljuboten, which allegedly contradicts Witness M037's testimony.[351]

127. Tarčulovski further submits that the Trial Chamber erred in fact in finding that he was with the group of police at Adem Ametovski's house when the police shot and killed Sulejman Bajrami and Muharem Ramadani and mistreated individuals who had been in the house cellar.[352] Tarčulovski argues that the Trial Chamber erroneously found that "the police unit including Johan Tarčulovski arrived at the house of Ametovski following the Hermelin APC",[353] relying on Witness M037's testimony in this regard and rejecting other exculpatory aspects of his testimony.[354] Tarčulovski claims that Witness M037's testimony indicates that he was present outside Ametovski's house when the men were taken out of the basement, and that he had already departed in the direction of Qani Jashari's house when Bajrami was killed and the mistreatment was committed.[355] Tarčulovski also asserts that his statement does not contain any admission of his presence.[356]

128. Tarčulovski further claims that the Trial Chamber erred in law and fact in failing to point to any evidence showing that he was present when houses were set on fire.[357]

129. With respect to the time when Tarčulovski entered Ljuboten, and his presence at Elmaz Jusufi's house, the Prosecution responds that the Trial Chamber did not only rely on Witness M037's evidence, and reasonably interpreted his evidence.[358] The Prosecution further argues that the Trial Chamber reasonably concluded that Tarčulovski was with the police when they committed the crimes at Adem Ametovski's house.[359] In particular, the Prosecution argues that Witness

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[351] Tarčulovski Appeal Brief, para. 113 (citing Trial Judgement para. 36; Witness M037, T. 779, 781-783); Tarčulovski Amended Notice of Appeal, para. 46 (citing Trial Judgement, para. 36).

[352] Tarčulovski Amended Notice of Appeal, paras 49 (citing Trial Judgement, paras 553-554) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Appeal Brief, paras 115-116, 155-156 (citing Trial Judgement, paras 51, 54, 55, 313 and 320), 161-163 (citing Trial Judgement, paras 322 and 324-325) and 178; Tarčulovski Reply Brief, paras 34 and 66.

[353] Trial Judgement, para. 59, fn. 200.

[354] Tarčulovski Appeal Brief, paras 115, 157 (citing Trial Judgement, para. 59, fn. 200) and 192-193; Tarčulovski Amended Notice of Appeal, para. 81 (citing Trial Judgement, paras 553-555); AT. 59 and 101.

[355] Tarčulovski Appeal Brief, paras 115 and 178; Tarčulovski Amended Notice of Appeal, para. 81 (citing Trial Judgement, paras 553-555); Tarčulovski Reply Brief, paras 34 (citing Witness M037, T. 787, 792) and 66-67. Tarčulovski also submits that failing to make this inference in his favour, the Trial Chamber violated the principle of *in dubio pro reo* (Tarčulovski Appeal Brief, para. 197(b)).

[356] Tarčulovski Reply Brief, fn. 57 (referring to Ex. P379).

[357] Tarčulovski Appeal Brief, paras 116 and 176; Tarčulovski Amended Notice of Appeal, para. 89 (citing Trial Judgement, paras 359-379). *See* also Prosecution Response Brief, para. 140 (citing Trial Judgement, paras 555 and 564-565).

[358] Prosecution Response Brief, para. 83 (citing Trial Judgement, paras 41, 42, 44, 47 (referring to Elmaz Jusufi's testimony), 131 (referring to Ex. P302; Ex. P303; Ex. P304) and 556-560 (referring to Ex. P379.01; Ex. P379.02), fns 108 and 117); AT. 77.

[359] Prosecution Response Brief, paras 46-62 (Section V.A.3.), 84 (citing Trial Judgement, para. 553 and fn. 200), 129 (citing Trial Judgement, paras 552, 555, 560 and 564-565), 132 (citing Trial Judgement, paras 325 and 553), 143 (citing Trial Judgement, paras 553, fn. 200, 555-557 and 564-565; Witness M037, T. 875; Ex. P379.01; Ex. P379.02) and 159.

M037's evidence placed Tarčulovski at the crime scene and that it did not contradict other parts of his testimony that Tarčulovski was subsequently present at the house of Qani Jashari.[360] The Prosecution avers that Witness M037's evidence was corroborated by Tarčulovski's own statement.[361]

130. The Appeals Chamber recalls that with respect to Tarčulovski's whereabouts on 12 August 2001, the Trial Chamber found that he personally led the police as they moved through Ljuboten on that day.[362] The Trial Chamber also found that the police led by Tarčulovski entered Ljuboten at about 8.00 a.m. and that the Hermelin APC followed soon after that.[363] These findings were not only based on Witness M037's testimony but also on accounts of Ljuboten residents and army members observing the police and the Hermelin APC in the village,[364] and Tarčulovski's statements to the Commission for Inquiry.[365] In light of this evidence, the Appeals Chamber is satisfied that Tarčulovski has not shown that the Trial Chamber unreasonably relied on parts of Witness M037's evidence while discrediting other parts.[366] Instead, he seeks to substitute his evaluation of Witness M037's testimony for that of the Trial Chamber without establishing any error on the part of the Trial Chamber. Tarčulovski's arguments are thus dismissed.

3. Whether Tarčulovski's presence is a requirement to establish his *mens rea*

131. Tarčulovski asserts that the Trial Chamber erred in law and fact when it concluded that he intended that crimes be committed, although his presence at the crime sites was not proven.[367]

132. The Appeals Chamber recalls that the accused's presence at the crime scene is not a requisite element of planning, instigating and ordering,[368] although it can be one of the factors to be

[360] Prosecution Response Brief, para. 84 (citing Trial Judgement, paras 69 and 554; Witness M037, T. 786, 792) and 159 (citing Trial Judgement, para. 553; Witness M037, T. 786).
[361] Prosecution Response Brief, paras 84 (citing Trial Judgement, para. 557; Ex. P379.02) and 129 (citing Trial Judgement, paras 50-61, 553, 557 (referring to Ex. P379.02) and fn. 200)); T. 77.
[362] Trial Judgement, paras 552, 555, 560 and 564-565.
[363] Trial Judgement, para, 42.
[364] *See, e.g.*, Trial Judgement, paras 36, 41-42 (describing the evidence on Tarčulovski's conduct at Stranište checkpoint immediately before entering Ljuboten), 43-68 (describing the evidence on the police group and the Hermelin APC seen near Elmaz Jusufi's house, near Redžepi family's houses, at Adem Ametovski's compound, and at Jashari family's houses), 59 (fn. 200), 553 (describing the evidence locating Tarčulovski at Adem Ametovski's house), 69 and 554 (describing the evidence locating Tarčulovski near Jashari family's houses).
[365] Trial Judgement, paras 556-558. The Appeals Chamber notes that Tarčulovski's argument is correct to the extent that Tarčulovski does not explicitly admit in his statements that he was at Adem Ametovski's house. However, his reference to himself and members of his police group entering two or three houses and taking ten to fifteen people into custody is supportive of the Trial Chamber's conclusion (Ex. P379.01; Ex. P370.02).
[366] Trial Judgement, fns 108, 117, 200. The Appeals Chamber also notes that the Trial Chamber explicitly provided the reason why it did not rely on a few other witnesses' testimony suggesting that the Hermelin APC patrol entered the village after 11.00 a.m., Trial Judgement, fn. 108. *See* also *supra* paras 56 and 59.
[367] Tarčulovski Amended Notice of Appeal, para. 62 (citing Trial Judgement, para. 576). With respect to the killing of Sulejman Bajrami, *see* Tarčulovski Appeal Brief, para. 159. With respect to the burning of Albanian houses, *see* Tarčulovski Appeal Brief, paras 164, (citing Trial Judgement, paras 349-380 and 577) and 176. *See* also Prosecution

considered in determining the *mens rea* of the planner, instigator or orderer. The Appeals Chamber further recalls its finding that the Trial Chamber reasonably concluded that Tarčulovski personally led the police in Ljuboten on 12 August 2001 that were engaged in the shooting at Elmaz Jusufi's house, the setting fire to the houses of the Jusufi, Redžepi and Lutfiu families, the mistreatment and killings of detainees at Adem Ametovski's house, the setting of fire to the houses of the Jashari family and the mistreatment at Andreja Braca's house.[369] Based on these findings concerning his presence, Tarčulovski's arguments are therefore dismissed.

B. Planning

1. The objective of the operation on 12 August 2001

(a) Trial Chamber allegedly engaged in "circular reasoning"

133. Tarčulovski submits that the Trial Chamber erroneously applied "circular reasoning" when it concluded that what occurred in Ljuboten on 12 August 2001 shows what was planned or intended.[370]

134. The Prosecution responds that Tarčulovski's argument should be summarily dismissed as it misrepresents the Trial Chamber's findings[371] and ignores "a long list of indicia" established by the evidence and relied upon by the Trial Chamber to reach its conclusion.[372]

Response Brief, para. 124 (citing Trial Judgement, para. 576) (with respect to the killing of Suljeman Bajrami) and 140 (citing Trial Judgement, paras 398-400) (with respect to the burning of Albanian houses).

[368] *See supra* para. 125. *See* also for the *mens rea* of planning: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, paras 29 and 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, paras 29 and 32; *Nahimana et al.* Appeal Judgement, para. 480. Ordering: *Martić* Appeal Judgement, paras 221-222; *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, paras 29-30; *Nahimana et al.* Appeal Judgement, para. 481.

[369] *See supra* para. 130 and the evidence referred to therein. *See* also, *e.g.*, Trial Judgement, paras 552, 555, 558, 560 and 564-565. *See* also Trial Judgement, paras 36, 41-42 (describing the evidence on Tarčulovski's conduct at Stranište checkpoint immediately before entering Ljuboten), 43-68 (describing the evidence on the police group and the Hermelin APC seen near Elmaz Jusufi's house, near Redžepi family's houses, at Adem Ametovski's compound, and at Jashari family's houses), 59 (fn. 200), 553 (describing the evidence locating Tarčulovski at Adem Ametovski's house), 69 and 554 (describing the evidence locating Tarčulovski near Jashari family's houses).

[370] Tarčulovski Appeal Brief, paras 96-98 and 109-110 (citing Trial Judgement, paras 564, 565 (holding that "what was done by the group of police in the village, in the presence of the leader of the group, Johan Tarčulovski, [...] provides a significant and reliable guide to what was intended as the object of the operation, by Johan Tarčulovski,"), 567-570, 576 and 594); Tarčulovski Amended Notice of Appeal, paras 41 (citing Trial Judgement, paras 555 and 571-572), 59 (citing Trial Judgement, para. 572), 60 (citing Trial Judgement, para. 573) and 63 (citing Trial Judgement, para. 565); Tarčulovski Reply Brief, paras 6, 32 and 37-38 (citing *Sandstrom v. Montana*, 442 U.S. 513 (1979)); AT. 28, 38, 46-48 and 51. Tarčulovski further argues that this "circular reasoning" violated the principle of *in dubio pro reo* (Tarčulovski Appeal Brief, para. 197(a); Tarčulovski Reply Brief, para. 84).

[371] Prosecution Response Brief, paras 72 (citing Trial Judgement, paras 563-573), 82 and 85 (citing Trial Judgement, para. 576).

[372] Prosecution Response Brief, paras 86 (citing Trial Judgement, paras 537-575), 141 and 159 (citing Trial Judgement, paras 571-573); AT. 84-85. *See* also Prosecution Response Brief, Section V.

135. The Appeals Chamber recalls that in concluding that (i) the predominant object of the police operation in Ljuboten on 12 August 2001 was "to indiscriminately attack ethnic Albanians and the property of ethnic Albanians" and (ii) this was also Tarčulovski's intention, the Trial Chamber took into consideration *inter alia* the following factors:

> [The police unit which conducted the operation] was not composed of regular police experienced in criminal or terrorist investigation, but reservists from a security agency and apparently other volunteers; the operation was led by Johan Tarčulovski, who had no experience in criminal or terrorist investigation and whose normal position and duties would not rank him as a leader of such a group; the acts of shooting men who did not pose a significant threat to the police; the deliberate setting fire to houses and property with no apparent need or justification; the deliberate firing of rifles at houses; the very considerable and repeated violence to persons detained; the taking of valuables from detained men, and also from women in respect of whom no other action was taken; the fact that the police did not proceed along all roads in the village and enter and search all houses, or all houses occupied by ethnic Albanians. Instead the operation was essentially confined to houses which could be readily reached from the main road.[373]

With respect to Tarčulovski's intent, in addition to the factors above, the Trial Chamber considered the evidence establishing that he was in charge of the operation and responsible for its preparation, that he personally led the police as they moved through Ljuboten and was present when the police engaged in the criminal conduct, and that "[t]he actions of the police in the village were at his direction."[374] Tarčulovski fails to show that the Trial Chamber could not reasonably infer from this evidence that he had the necessary intent.[375] His arguments are therefore dismissed.

(b) The shooting in Ljuboten was allegedly not an indiscriminate or random attack

136. Tarčulovski argues that some of the Trial Chamber's findings show that the shootings in Ljuboten were neither an "indiscriminate" attack on civilians nor a "random assault" against ethnic Albanians: (i) three of seven individuals killed that day were fleeing and may have been taking an active part in armed hostilities, and (ii) the killing of Sulejman Bajrami was a deliberate shooting of a civilian among a large group of people and his movement may have been interpreted by the shooters as an attempt to escape.[376]

137. The Prosecution responds that the Trial Chamber's conclusion regarding the predominant object of the operation does not contradict its other factual findings. The Prosecution submits that even if the three men were shot while actively taking part in the hostilities, this would not undermine the finding that the predominant objective of the operation was to indiscriminately

[373] Trial Judgement, para. 571. *See* also *ibid.*, paras 41-43, 565-570.
[374] Trial Judgement, paras 537-560, 564-565, 574 and 576. *See* the evidence mentioned in *supra* para. 130; *infra* paras 153-154, 157, 161 and 164.
[375] *See supra* para. 99.
[376] Tarčulovski Appeal Brief, para. 98 (citing Trial Judgement, para. 320); AT. 29. *See* also Tarčulovski Reply Brief, para. 41. *See* also AT. 52-53.

retaliate against persons of Albanian ethnicity for the NLA's actions.[377] The Prosecution further contends that Tarčulovski's argument concerning the Trial Chamber's findings on the killing of Sulejman Bajrami must be summarily dismissed as it misrepresents the findings.[378]

138. The Appeals Chamber recalls that the Trial Chamber found that an indiscriminate attack on Albanian villagers and property was not the only objective of the operation; but that it was the *predominant* objective. The Trial Chamber also observed that this operation was a means to retaliate against the NLA's mine attack on 10 August 2001 and to warn persons of Albanian ethnicity of the consequences of support for the NLA.[379] The killings by the police of Xhelal Bajrami, Kadri Jashari and Bajram Jashari, who may have been taking an active part in the hostilities,[380] did not cast any reasonable doubt as to the predominant objective of the operation, considering the totality of the evidence pointing to the randomness and indiscriminate nature of the attack. Such evidence includes the manner in which the police moved throughout the village, committed the other killings and beatings, and burned houses.[381] Tarčulovski's arguments in relation to the killing of Sulejman Bajrami are rejected for the reasons set out above.[382] Thus, Tarčulovski fails to show any error in the Trial Chamber's finding on the indiscriminate nature of the operation.

(c) "Terrorists" were allegedly hiding in the houses of Adem Ametovski and the Jusufi family

139. Tarčulovski contends that the Trial Chamber improperly discredited the existence of extensive testimony that "terrorists" were living or hiding in the houses of Adem Ametovski and the Jusufi family on the ground that it came from military or police personnel.[383]

140. The Prosecution responds that the Trial Chamber properly assessed the evidence in its totality and concluded that there was no outgoing fire from the house of the Jusufi family, and that in Adem Ametovski's house, there were neither weapons nor any men who were armed or wore NLA uniforms.[384]

[377] Prosecution Response Brief, para. 73 (citing Trial Judgement, paras 345 and 571-572).
[378] Prosecution Response Brief, para. 74 (citing Trial Judgement, para. 320). In particular, the Prosecution points to the Trial Chamber's finding that even if Bajrami's action may have been seen as an attempt to escape, the attempt was not regarded by the police as posing any real risk.
[379] Trial Judgement, para. 572.
[380] Trial Judgement, paras 155-161, 344-345 and 348.
[381] *See supra* para. 135.
[382] *See supra* paras 92 and 95.
[383] Tarčulovski Appeal Brief, para. 99 (citing Trial Judgement, paras 145-146 and fns 594, 598-599); Tarčulovski Amended Notice of Appeal, paras 54-57 (citing Trial Judgement, paras 145-146, 567-569 and fns 594, 598-599). *See* also AT. 52-53 and 96.
[384] Prosecution Response Brief, para. 75 (citing Trial Judgement, paras 51 and 146).

141. The Appeals Chamber has already found that the Trial Chamber's findings on the possible outgoing fire from relevant houses in Ljuboten and the possible usage of the houses by the NLA, including the houses of the Jusufi family and Adem Ametovski,[385] were reasonable.[386] The Appeals Chamber has also found that the Trial Chamber reasonably considered the evidence provided by military and police personnel in this regard.[387] Thus, Tarčulovski's arguments are dismissed.

(d) The object of the operation was allegedly not to commit crimes, but to eradicate "terrorists"

142. Tarčulovski asserts that the Trial Chamber erred in law and fact in assuming that there was a plan to engage in criminal activity, since there is neither evidence nor any finding that any crimes were discussed or planned at the meeting on 10 August 2001.[388] Tarčulovski underlines Witness M052's testimony that in the meeting there was no discussion on the killing of civilians or setting houses on fire.[389] Tarčulovski submits that the evidence suggests that the objective of the operation was to eradicate NLA members who were described as "the terrorists" from Ljuboten, and that the operation was a legitimate act of "law enforcement" to locate and arrest them.[390] He also refers to evidence of a series of clashes between the NLA and the FYROM military from which the Trial Chamber concluded that such clashes rose to the level of an "armed conflict".[391] He also argues that

[385] Trial Judgement, paras 145-146, 162 (referring to the evidence cited in paras 51 and 327) and 369.
[386] *See supra* para. 107.
[387] *Ibid.*
[388] Tarčulovski Appeal Brief, paras 96, 103 and 176; Tarčulovski Amended Notice of Appeal, paras 53 and 65; AT. 37 and 44. *See* also Tarčulovski Reply Brief, para. 36, arguing that the *actus reus* of planning requires "that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated", referring to *Nahimana et al.* Appeal Judgement, para. 479.
[389] Tarčulovski Appeal Brief, paras 103, 107 (citing Witness M052, T. 8535-8536, 8553-8554) and 108; Tarčulovski Amended Notice of Appeal, para. 53; Tarčulovski Reply Brief, para. 39.
[390] Tarčulovski Appeal Brief, para. 103 (citing Ex. P302; Witness M052, T. 8554), 108 and 183 (citing Trial Judgement, para. 571); Tarčulovski Amended Notice of Appeal, paras 53, 59 and 98 (citing Trial Judgement, para. 571); Tarčulovski Reply Brief, paras 31 (citing Trial Judgement, paras 140, 294 and 572 in which, according to Tarčulovski, the Trial Chamber "necessarily recognized" that there were "NLA terrorists" in the village and that there was reason to launch a police operation against them), 32, 39 and 42 (citing Trial Judgement, para. 572); AT. 29-30, 32, 37 (arguing that the reconnaissance was conducted before the operation to find out which people were terrorists and where the terrorists were hiding), 43-44 and 99. *See* also Tarčulovski Appeal Brief, para. 101 (citing Trial Judgement, paras 139 and 292), arguing the Trial Chamber failed to make "the appropriate affirmative finding that *when* the operation was planned, its *goal* was the indiscriminately attack on civilians (emphasis in original)", since "Macedonia responded to the NLA actions," such as its land mine killing. *See* also AT. 30, 35 and 44-46, arguing that there is no evidence indicating that at the preparatory stage, the objective of the operation was the indiscriminately attack on ethnic Albanians.
[391] Tarčulovski Appeal Brief, para. 194 (citing Trial Judgement, paras 208-292); Tarčulovski Amended Notice of Appeal, paras 17 and 99 (citing Trial Judgement, paras 208-292). Tarčulovski further argues that, by ignoring the existence of the legitimate objective of the operation, the Trial Chamber violated the principle of *in dubio pro reo* and the Trial Chamber's own standard of evidentiary review (Tarčulovski Appeal Brief, paras 183 (citing Trial Judgement, paras 571-572), 186 (citing Trial Judgement, para. 9), 194 (citing Trial Judgement, paras 208-292) and 197(d); Tarčulovski Amended Notice of Appeal, para. 98 (citing Trial Judgement, para. 571) and 99 (citing Trial Judgement, paras 208-292); Tarčulovski Reply Brief, para. 84. *See* also Tarčulovski Reply Brief, para. 31 (citing Trial Judgement, paras 140, 294 and 572). In the same paragraph of the Tarčulovski Reply Brief, Tarčulovski quotes the Trial Chamber's finding that "an object, apparently the predominant object, was to indiscriminately attack ethnic Albanians...", and states that "apparently" is not proof beyond reasonable doubt. *See* also AT. 28-30.

the Trial Chamber erroneously assumed that the direct perpetrators were acting pursuant to a plan to commit crimes.[392]

143. Tarčulovski further submits that the Trial Chamber drew "an impermissible negative inference" from his silence by holding that

> in some cases Johan Tarčulovski may have been told of some possible NLA affiliation of a member of a household, which encouraged actions against the person or the home of that person or of his family. *But this is not able to be demonstrated from the evidence as Johan Tarčulovski has not disclosed what he may have been told or by whom.*[393]

144. The Prosecution responds that on the basis of Witness M052's testimony and other evidence, the Trial Chamber reasonably concluded that the predominant purpose of the operation planned in the meeting on 10 August 2001 was to commit crimes in direct response to the land mine incident of the same day.[394] The Prosecution also contends that the fact that there was an armed conflict between the NLA and FYROM forces does not necessarily mean that the Ljuboten operation was substantially directed against the NLA.[395] The Prosecution further argues that the operation had none of the features of "an anti-terrorist action", as Tarčulovski and other participants in the operation had no experience in criminal or terrorist investigation; some participants had been convicted of criminal offences; and houses and people were searched in only one compound (Ametovski) without conducting any systematic search in Ljuboten to detect terrorists and their infrastructure.[396]

145. The Prosecution further submits that the Trial Chamber did not draw an impermissible negative inference against Tarčulovski based on his failure to testify or present evidence.[397]

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[392] Tarčulovski Appeal Brief, para. 109; Tarčulovski Amended Notice of Appeal, paras 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328).

[393] Tarčulovski Appeal Brief, paras 23 (citing Trial Judgement, para. 572) and 184-185 (citing Trial Judgement, para. 572, emphasis added by Tarčulovski); Tarčulovski Amended Notice of Appeal, para. 100 (citing Trial Judgement, para. 572). *See* also Tarčulovski Appeal Brief, para. 99; Tarčulovski Amended Notice of Appeal, para. 57.

[394] Prosecution Response Brief, paras 72 (citing Trial Judgement, paras 563-573), 80 (citing Trial Judgement, paras 108-113), 141 and 159 (citing Trial Judgement, paras 571-573); AT. 83-84. *See also* Prosecution Response Brief, Section V (in particular, paras 39-42 and 63-65).

[395] Prosecution Response Brief, para. 156 (citing Trial Judgement, para. 572).

[396] Prosecution Response Brief, paras 63-65 (citing Trial Judgement, paras 4, 30, 43-57, 69, 107, 117-118, 171-172, 302-303, 497, 542, 537, 541, 563, 567-573 and 591); AT. 84. *See* also Tarčulovski Reply Brief, para. 40 (citing Trial Judgement, para. 594) stating that Tarčulovski's inexperience in the field of criminal or terrorist investigation and that of the other participants in the operation does not negate the proposition that the objective of the operation was to eradicate "the terrorists", since he did not appoint himself, nor was there any evidence showing that he had access to more qualified personnel or that he knew any participants' criminal records, and para. 41 stating the operation was "a targeted operation" with "a focused search" in one compound (Ametovski's), rather than random or indiscriminate retaliation. *See* also AT. 52-53.

[397] Prosecution Response Brief, para. 151 (citing Trial Judgement, para. 572). The Prosecution further responds that "the principle of *in dubio pro reo* only applies where more than one inference is *reasonably* open on the facts," and that the fact that the Trial Chamber noted some evidence to suggest that the object of the operation was law enforcement does not mean that the Trial Chamber was required to credit this evidence above all other evidence (Prosecution

146. The Appeals Chamber notes that the Trial Chamber considered evidence suggesting that the aim of "law enforcement" against NLA members believed to have been "terrorists" may have been in the minds of Tarčulovski and other participants in the operation.[398] However, the Appeals Chamber recalls its finding that Tarčulovski does not show that the Trial Chamber unreasonably found on the basis of the totality of the evidence[399] that the predominant objective of the operation in Ljuboten on 12 August 2001 was to indiscriminately attack Albanian villagers and their property.[400] In particular, he fails to show that it was unreasonable for the Trial Chamber to place limited weight on the fact that the commission of crimes was not explicitly discussed in the meeting on 10 August 2001 as suggested by Witness M052.[401] Tarčulovski's arguments in this respect therefore fail.

147. The Appeals Chamber further observes that contrary to Tarčulovski's submission, the Trial Chamber did not draw a negative inference from his silence. The Trial Chamber merely stated that it could not determine whether Tarčulovski may have been told of some possible affiliation of Ljuboten residents with the NLA, since he did not give evidence in this regard.[402] Furthermore, the Trial Chamber found that even if Tarčulovski had been told about possible NLA affiliations of household members – an inference in his favour – this would not have justified the commission of crimes in the village.[403] Tarčulovski's argument is a misinterpretation of the Trial Chamber's finding. His submission in this respect is accordingly dismissed.

(e) The crimes were committed because Tarčulovski was an allegedly inappropriate person to carry out the operation

148. Tarčulovski submits that the Trial Chamber erred in law and fact in failing to draw a reasonable alternative inference that "what occurred was not planned, but resulted because

Response Brief, paras 149 (citing Trial Judgement, paras 571-573) and 150 (citing Trial Judgement, para. 9)). *See* also Prosecution Response Brief, Section V.

[398] Trial Judgement, paras 571-572. The Trial Chamber's findings further indicate that (i) a number of NLA members were present in Ljuboten during the events between 10 and 12 August 2001 (Trial Judgement, para. 140); (ii) there were legitimate reasons for the police to enter in Ljuboten on 12 August 2001 because of "suspected terrorist or NLA presence" (*ibid.*); (iii) intense armed clashes between FYROM security forces and the NLA had reached the level of internal armed conflict and were linked with the Ljuboten operation on 12 August 2001 (Trial Judgement, paras 249, 292 and 294); (iv) among senior police officers the purpose of the operation was described as being "to clean up the village of Ljuboten from terrorists" (Trial Judgement, paras 109, 111 and 113).

[399] *See supra* paras 135, 138 and 141.

[400] *Ibid.*

[401] Trial Judgement, paras 109, 111, 113 and 571. *See* Witness M052, T. 8553-8554.

[402] Trial Judgement, para. 572.

[403] Trial Judgement, para. 572.

Tarčulovski, who was ordered to carry out an operation *planned by others*, was an inappropriate person [...] to carry out the operation."[404]

149. The Prosecution responds that the Trial Chamber considered the alternative inference that what occurred was not planned, finding that the pattern of conduct in Ljuboten on 12 August 2001 displaced the possibility that the crimes occurred by mistake, confusion or accident.[405]

150. The Appeals Chamber recalls that the Trial Chamber reasonably concluded based on the totality of the evidence that "the repetition of each of the offences of murder, cruel treatment and wanton destruction *displaces* [...] *all possibility* that the conduct constituting these offences occurred by mistake or confusion or accidentally."[406] The inexperience of Tarčulovski and other participants in the operation and the fact that he was not a self-appointed leader of the operation did not give rise to any reasonable doubt regarding the deliberate and wilful nature of the crimes committed during the operation. Tarčulovski fails to show that no reasonable trier of fact could have reached this conclusion. His argument is therefore dismissed.

2. Tarčulovski's involvement in planning the operation

151. Tarčulovski challenges the Trial Chamber's "exclusive" reliance on Witness M052's testimony in concluding that "*it was said*" that he planned the operation, despite its reservation about the value of evidence from military witnesses.[407] Tarčulovski also submits that Witness M052's testimony does not support the Trial Chamber's conclusion, since he stated in cross-examination that it was his assumption as opposed to his personal knowledge that Tarčulovski had planned the operation, and that Tarčulovski could have been a messenger from the President.[408] Tarčulovski asserts that in failing to draw the alternative reasonable inference that it was the

[404] Tarčulovski Appeal Brief, para. 100 (emphasis added; citing Trial Judgement, paras 571 and 594) and 108; Tarčulovski Amended Notice of Appeal, para. 58 (citing Trial Judgement, para. 571) and 65 (citing Trial Judgement, para. 541); Tarčulovsk Reply Brief, paras 35 and 40 (citing Trial Judgement, para. 594). He points out that the Trial Chamber found that Tarčulovski lacked experience, as did the others who took part in the operation, and that he was not self-appointed to carry out this operation. *See* also AT. 51 and 103.

[405] Prosecution Response Brief, para. 76 (citing Trial Judgement, para. 573); AT. 87.

[406] Trial Judgement, para. 573 (emphasis added). *See* also *supra* para. 135.

[407] Tarčulovski Appeal Brief, para. 102 (emphasis in original; citing Trial Judgement para. 543, referring to Witness M052, T. 8270) and 104-105 (citing Trial Judgement, paras 15-19; Witness M052, T. 8239-8242). Tarčulovski does not substantiate his assertion that the Trial Chamber erred in law in relying upon a hearsay statement provided by Miodrag Stojanovski to a commission of equiry (Tarčulovski Amended Notice of Appeal, para. 42). His argument is thus summarily dismissed.

[408] Tarčulovski Appeal Brief, paras 104-106 (citing Witness M052, T. 8263-8266, 8269-8270, 8555-8556), 108 and 192; Tarčulovski Amended Notice of Appeal, para. 53 (citing Trial Judgement, para. 543).

President of the FYROM or higher officials of the MoI who planned the operation, the Trial Chamber violated the principle of *in dubio pro reo*.[409]

152. The Prosecution responds that Witness M052's testimony was only one of the various pieces of evidence on which the Trial Chamber based its conclusion that Tarčulovski personally planned the operation,[410] and that Tarčulovski's submissions should be summarily dismissed as he merely substitutes his own evaluation of Witness M052's evidence for that of the Trial Chamber.[411]

153. The Appeals Chamber notes that the Trial Chamber based its conclusion that Tarčulovski planned the 12 August 2001 operation in Ljuboten on *inter alia* the following evidence: he was ordered to lead an operation in Ljuboten;[412] his participation in the meeting on 10 August 2001 in which police and military representatives discussed the operation;[413] a report and notes recording this meeting referring to the operation as his action or being led by him;[414] Witness M052's evidence in relation to information that the operation was planned by Tarčulovski;[415] and Tarčulovski's involvement in the preparation of the operation.[416] Therefore, Tarčulovski's assertion that the Trial Chamber exclusively relied upon Witness M052's evidence is a misrepresentation of its finding.

154. In light of the above evidence, Tarčulovski has not shown that the Trial Chamber erred in failing to find that the President of the FYROM or a higher official at the MoI planned the operation.[417] However, more than one person can be criminally responsible for planning a statutory

[409] Tarčulovski Appeal Brief, para. 197(c); Tarčulovski Amended Notice of Appeal, para. 101. *See* also AT. 33, 35 and 49-51. *See* also Tarčulovski Amended Notice of Appeal, paras 50 (citing Trial Judgement, para. 555) and 52 (citing Trial Judgement, para. 560), arguing that the Trial Chamber erred in law and fact in concluding that Tarčulovski was in charge of the police operation to enter the village of Ljuboten and that he was responsible for the preparations for the operation in that capacity. Tarčulovski also argues that having found that the police unit which conducted the operation in Ljuboten was composed of reservists and that the Minister of Interior was to call up police reservists for duty following an order of the President, the Trial Chamber could not have reached the conclusion that Tarčulovski was involved in the preparatory stage of the operation (AT. 49-50 (referring to Trial Judgement, paras 492-497, 571) and 56-57). *See* also AT. 43, 46-47 and 102.

[410] Prosecution Response Brief, paras 78 (citing Trial Judgement, paras 41, 107, 111-113, 124-125, 541-545, 548-551 and 560), 79 and 159 (citing Trial Judgement, paras 540-550). The Prosecution also submits that the facts of this case show that Tarčulovski was responsible for the preparations for the attack on Ljuboten (AT. 85-88). *See also* Prosecution Response Brief, Section V.

[411] Prosecution Response Brief, para. 81.

[412] Trial Judgement, paras 539-541.

[413] Trial Judgement, paras 108-113 and 543.

[414] Trial Judgement, paras 109 and 543.

[415] Trial Judgement, para. 543 (citing Witness M052, T. 8270).

[416] Trial Judgement, paras 106-107, 109, 538, 542 and 545. This involvement comprised, *inter alia*, a reconnaissance of Ljuboten led by him on 11 August 2001 (Trial Judgement, paras 124 and 544); his initiative in establishing coordination with the army with a view to carrying out the operation (*ibid.*, paras 124-130 and 544); his further communication with army personnel (*ibid.*, paras 41 and 548-550); and his request to the Head of OVR Čair for the Hermelin APC which was used in the operation (*ibid.*, paras 36, 41 and 551).

[417] *See* also Trial Judgement, paras 114, 126-130 and 540-541, where the Trial Chamber refrained from making a positive finding that the President ordered the operation.

crime.[418] Hence, even if these individuals had been involved in the planning, this would not render unreasonable the Trial Chamber's finding that Tarčulovski was criminally responsible for planning. Consequently, the Trial Chamber did not violate the principle of *in dubio pro reo*. Tarčulovski's arguments are therefore dismissed.

C. Instigating

155. Tarčulovski asserts that the Trial Chamber erred in law and fact in concluding that he instigated crimes without finding that he prompted any person to commit an offence.[419] Tarčulovski also submits that there was no evidence to make such a finding, since none of his words or actions could be considered encouragement to commit crimes, nor is there sufficient evidence to confirm his presence at any of the crime sites.[420]

156. The Prosecution responds that the Trial Chamber properly concluded that Tarčulovski's actions in the preparation and execution of the operation substantially contributed to the commission of the crimes, and that he had the necessary *mens rea*.[421]

157. The Appeals Chamber notes that no evidence suggested that Tarčulovski explicitly prompted police members to commit the crimes charged. However, the Trial Chamber found that Tarčulovski was responsible for instigation on the basis of the totality of the evidence, including the evidence suggesting (i) that he was responsible for the preparation of the operation with the predominant objective to indiscriminately attack Albanian villagers and their property;[422] (ii) that he personally led this operation;[423] (iii) that he was present in Ljuboten while the crimes were committed;[424] and (iv) that he authorised the police members not to conduct an inspection in respect of the deaths of three men.[425] The Appeals Chamber is satisfied that on the basis of this evidence, the Trial Chamber reasonably concluded that Tarčulovski prompted police members to commit the crimes at issue, although it did not articulate this finding in the Trial Judgement. The Trial Chamber

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[418] *Kordić and Čerkez* Appeal Judgement, paras 26, 29 and 31. The Appeals Chamber further notes that the legal elements of planning did not require Tarčulovski to be the originator of the plan.
[419] Tarčulovski Appeal Brief, paras 117-118 (citing Trial Judgement, para. 399); Tarčulovski Amended Notice of Appeal, para. 66.
[420] Tarčulovski Appeal Brief, paras 118-120 and 176; Tarčulovski Amended Notice of Appeal, paras 66, 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Reply Brief, para. 43.
[421] Prosecution Response Brief, paras 87-88 (citing Trial Judgement, paras 399, 537-577 (fn. 2052) and 594) and 141. *See* also Prosecution Response Brief, Section V. The Prosecution also requests summarily dismissal stating that Tarčulovski's arguments either misrepresent the factual findings of the Trial Chamber or amount to mere undeveloped assertions (Prosecution Response Brief, para. 88).
[422] *See supra* paras 135, 138, 141, 146-147, 150 and 153-154.
[423] *See supra* para. 130.
[424] *Ibid.*
[425] Trial Judgement, para. 554.

was indeed satisfied that the elements of instigation, including this *actus reus* element,[426] were established.[427] Tarčulovski's arguments in this respect are therefore dismissed.

D. Ordering

1. *Actus reus* of ordering – proof of an order and a causal link

158. Tarčulovski avers that the Trial Chamber erred in law and fact in concluding that he ordered any crime, since there was no evidence or finding in the Trial Judgement that he ordered or instructed any other person to commit a crime, nor was a link established between an act of ordering and the physical perpetration of a crime.[428] Tarčulovski claims that the Trial Chamber merely found that he personally led a police operation in Ljuboten on 12 August 2001, which is insufficient to incur criminal responsibility.[429]

159. The Prosecution responds that the Trial Chamber need not identify "positive evidence of a specific order to a specific perpetrator" to convict Tarčulovski.[430] The Prosecution argues that an order need not be explicit and that its existence may be proven through circumstantial evidence.[431] The Prosecution submits that the circumstances surrounding the operation and the crimes, and Tarčulovski's role as the person in charge lead to the only reasonable conclusion that he ordered the crimes committed.[432] Furthermore, the Prosecution contends that it is unnecessary to prove that the crimes would not have been perpetrated without his involvement, and that the Trial Chamber reasonably found that his acts substantially contributed to the commission of the crimes.[433]

160. The Appeals Chamber recalls that the *actus reus* of ordering requires that a person in a position of authority instruct another person to commit an offence.[434] There is no requirement that the order be given in any particular form, and the existence of the order may be proven through

[426] Trial Judgement, para. 399.
[427] Trial Judgement, para. 577.
[428] Tarčulovski Appeal Brief, paras 122-126 (citing Trial Judgement, paras 541 and 564; Witness M037; T. 868) and 176; Tarčulovski Amended Notice of Appeal, paras 40, 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Reply Brief, paras 45, 53 and 55; AT. 36 and 59-61.
[429] Tarčulovski Appeal Brief, paras 123 and 125-126 (citing Trial Judgement, paras 541 and 564); Tarčulovski Amended Notice of Appeal, para. 40; AT. 60-61.
[430] Prosecution Response Brief, para. 90.
[431] Prosecution Response Brief, paras 90-91 (citing Trial Judgement, para. 400).
[432] Prosecution Response Brief, paras 89, 92 (citing Trial Judgement, paras 537-560 and 574) and 141. *See* also Prosecution Response Brief, Section V.
[433] Prosecution Response Brief, para. 93 (citing Trial Judgement, para. 577 and fn. 2052).
[434] *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Nahimana et al.* Appeal Judgement, para. 481; *Semanza* Appeal Judgement, para. 361. *See* also Trial Judgement, para. 400.

circumstantial evidence.[435] Furthermore, it is sufficient to demonstrate that the order substantially contributed to the physical perpetrator's criminal conduct.[436]

161. The Trial Chamber found that Tarčulovski "led and directed the operation at all stages on 10, 11 and 12 August," and that "[t]he actions of the police in the village [of Ljuboten] were at his direction."[437] These actions included the murders of Rami Jusufi, Sulejman Bajrami, Muharem Ramadani, wanton destruction of a number of houses owned by Albanian villagers and cruel treatment of thirteen individuals.[438] The Trial Chamber also concluded that the predominant objective of the operation was to indiscriminately attack Albanian villagers and their property.[439] The Appeals Chamber is satisfied that these findings on Tarčulovski's directions are a sufficient basis for the Trial Chamber's conclusion that he instructed and ordered the members of his police group to commit the crimes at issue.[440] Tarčulovski's arguments are therefore dismissed.

2. Tarčulovski's authority and control over physical perpetrators

162. Tarčulovski submits that there was no evidence showing that he had *de jure* or *de facto* authority to order killings, burnings or beatings or that any perpetrator believed that he had such authority.[441] In addition, he submits that there was no evidence showing that the persons committing the crimes were under his control.[442] In particular, concerning the cruel treatment at Braca's house, Tarčulovski contends that the Trial Chamber found that Ljube Boškoski was present

[435] Trial Judgement, para. 400 (citing, in particular, *Kamuhanda* Appeal Judgement, para. 76; *Galić* Appeal Judgement, paras 170-171; *Limaj et al.* Trial Judgement, para. 515; *Blaškić* Trial Judgement, para. 281).
[436] *Nahimana et al.* Appeal Judgement, para. 492; *Strugar* Trial Judgement, para. 332. *See* also *Aleksovski* Trial Judgement, para. 61; *Tadić* Trial Judgement, paras 673-674.
[437] Trial Judgement, para. 574.
[438] Trial Judgement, paras 312, 320, 325, 328, 346, 380, 383-387, 391 and 566-570.
[439] Trial Judgement, para. 572.
[440] *See supra* paras 130, 135, 138, 141, 146-147, 150 and 153-154. *See* Trial Judgement, paras 400 and 577.
[441] Tarčulovski Appeal Brief, para. 124 (citing Trial Judgement, para. 574); Tarčulovski Amended Notice of Appeal, paras 70 (citing Trial Judgement, paras 36-44, 306-312 and 553) (regarding his authority over perpetrators of the killing of Rami Jusufi), 77 (citing Trial Judgement, paras 306-312) and 85 (citing Trial Judgement, paras 57 and 321-328); Tarčulovski Reply Brief, paras 55 and 78.
[442] Tarčulovski Appeal Brief, para. 177 (citing Trial Judgement, para. 575) and 179; Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391); Tarčulovski Reply Brief, para. 78. Although the Tarčulovski Appeal Brief addresses this issue of "control" specifically in relation to cruel treatment, the Tarčulovski Amended Notice of Appeal, which was filed subsequently, indicates that Tarčulovski intends to make this assertion in relation to other crimes such as murder and wanton destruction (Tarčulovski Amended Notice of Appeal, para. 61 (citing Trial Judgement, para. 574)). Tarčulovski appears to be of the view that Tarčulovski's presence at the crime scenes needed to be proven in order for the Trial Chamber to conclude that he had control over the police who perpetrated the crimes (Tarčulovski Amended Notice of Appeal, paras 78 (citing Trial Judgement, paras 306-312), 80 (citing Trial Judgement, paras 36-44, 54-58, 313-320 and 553) and 84 (citing Trial Judgement, paras 306-312)). The Appeals Chamber recalls its finding that the accused's presence at crime scenes is not a requirement for establishing planning, instigating and ordering, *see supra* para. 125. It follows that the accused's presence at crime scenes is not necessary to prove the accused's control or authority over physical perpetrators, although it may be considered as a factor to support proof of such control or authority. Tarčulovski also appears to argue that specific identities of physical perpetrators needs to be proven in order for the Trial Chamber to find that he had control over them (Tarčulovski Reply Brief, para. 53). The Appeals Chamber recalls its consideration on physical perpetrators' identities, and finds that the Trial Chamber

at the house, and that there is no evidence that the men who were abusing the villagers there were under Tarčulovski's control.[443]

163. The Prosecution responds that the Trial Chamber properly found that Tarčulovski had *de facto* authority over the physical perpetrators and exercised effective leadership and control over the police in the village.[444]

164. The Appeals Chamber recalls that the *actus reus* of ordering requires no formal superior-subordinate relationship between the orderer and a physical perpetrator.[445] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[446] The Trial Chamber found that Tarčulovski was in charge of the operation in Ljuboten, which he led and directed from its preparatory phase until its execution.[447] In light of the totality of the evidence,[448] it was reasonable for the Trial Chamber to conclude that he was in a position of authority to compel the police members to commit a crime.[449] Furthermore, the presence of Ljube Boškoski at Andreja Braca's house does not in and of itself render the finding on Tarčulovski's authority unreasonable. Tarčulovski has failed to show why his authority and that of Boškoski, if any, could not coincide. Therefore, Tarčulovski's arguments are dismissed.

3. Superior order given to Tarčulovski

165. Finally, Tarčulovski argues that the Trial Chamber could neither determine who ordered the operation nor the substance of this order. Consequently, it erred in finding that it was Tarčulovski who had the *mens rea* to order that specific crimes be committed.[450] Tarčulovski also contends that although the Trial Chamber considered his claim that the operation was ordered by the President,

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sufficiently identified physical perpetrators for the purposes of proving Tarčulovski's authority over them (*see supra* para. 75).

[443] Tarčulovski Appeal Brief, para. 179 (citing Trial Judgement, para. 72); Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391). Tarčulovski also asserts that this constitutes a violation of his right to be presumed innocent (Tarčulovski Amended Notice of Appeal, para. 93 (citing Trial Judgement, paras 381-391)). *See* also Tarčulovski Appeal Brief, para. 196.

[444] Prosecution Response Brief, paras 94 (citing Trial Judgement, para. 574) and 144 (citing Trial Judgement, paras 73-74, 428, 558, 570 and 574). The Prosecution argues that "[p]olice superiors generally do not have legal authority to order their subordinates to commit crimes, but the point is that Tarčulovski in fact controlled all actions of the police during the operation." The Prosecution requests summary dismissal on the grounds that his argument is contrary to common sense and that Tarčulovski merely asserts that the Trial Chamber failed to interpret evidence in a particular manner (*ibid.*, para. 94). The Prosecution further asserts that Tarčulovski's allegation concerning the presence of Boškoski at Braca's house is irrelevant to establishing liability for planning, ordering and instigating (*ibid.*, para. 145).

[445] *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.

[446] *Semanza* Appeal Judgement, para. 361.

[447] Trial Judgement, paras 555, 560 and 574.

[448] *See supra* paras 130, 135 and 153-154.

[449] *See* Trial Judgement, para. 574.

[450] Tarčulovski Appeal Brief, paras 125 and 128 (both citing Trial Judgement, para. 541); Tarčulovski Amended Notice of Appeal, para. 43 (citing Trial Judgement, para. 541), also stating that the Trial Chamber found Tarčulovski

Boris Trajkovski, it failed to make a reasonable and favourable inference from this evidence, thereby violating the principle of *in dubio pro reo*.[451]

166. The Prosecution responds that the Trial Chamber's finding that Tarčulovski was in charge of the operation on the ground is consistent with the finding that he was not the person who initiated it.[452] The Prosecution further argues that the fact that an accused has acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility.[453]

167. The Appeals Chamber recalls that the Trial Chamber found that Tarčulovski had been ordered to lead the police in the operation in Ljuboten without making a positive finding as to who gave the order.[454] This is, however, irrelevant: the fact that Tarčulovski was ordered to lead the operation does not exonerate him from criminal responsibility if in the execution of the order he in turn instructed other persons to commit a crime.[455] Moreover, the fact that someone else ordered Tarčulovski to lead the operation does not mean that he did not order the operation to be carried out. Tarčulovski fails to show that the Trial Chamber's findings in this respect were unreasonable,[456] and that the *in dubio pro reo* principle was violated. His arguments in this regard are therefore dismissed.

E. Alleged improper expansion of *actus reus* and *mens rea* of planning, ordering and instigating

168. Tarčulovski contends that the Trial Chamber erred in finding that an accused is criminally responsible for planning, instigating or ordering an operation with a legitimate goal, if he did so with the awareness of the substantial likelihood that crimes would be committed in the execution of the operation.[457]

1. Alleged expansion of the *actus reus*

169. First, Tarčulovski argues that the Trial Chamber misapplied the Appeals Chamber's jurisprudence and erroneously expanded the *actus reus* of planning, instigating and ordering by

criminally liable although it could not even determine whether the President was directly involved (citing Trial Judgement, para. 563); AT. 35 and 51.

[451] Tarčulovski Appeal Brief, para. 197(f) (citing Trial Judgement, para. 114); Tarčulovski Amended Notice of Appeal, para. 104 (E) (citing Trial Judgement, para. 114).

[452] Prosecution Response Brief, paras 95 (citing Trial Judgement, paras 564, 574 and 594) and 159 (citing Trial Judgement, paras 113-114 and 594).

[453] Prosecution Response Brief, paras 95 and 159 (both referring to Article 7(4) of the Statute).

[454] Trial Judgement, paras 114 and 541.

[455] *Cf.* Article 7(4) of the Statute.

[456] Trial Judgement, paras 572, 574 and 577.

[457] Tarčulovski Appeal Brief, para. 127 (citing Trial Judgement, para. 576); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576); Tarčulovski Reply Brief, para. 32.

finding that it can encompass the planning, instigating or ordering of conduct that does not constitute a crime.[458]

170. The Prosecution responds that this argument ignores and misrepresents the Trial Chamber's findings that the predominant object of the operation was to commit the crimes and that "ordering, planning or instigating an operation primarily designed to commit crimes is the same as ordering planning or instigating the crimes themselves."[459] The Prosecution further contends that "the plan, instigation or order need not be explicitly to commit crimes" and that an accused can be held responsible when planning, instigating or ordering an act or omission with the awareness of the substantial likelihood that it will result in a crime.[460]

171. The Trial Chamber reasonably found that the predominant purpose of the operation in Ljuboten was to indiscriminately attack Albanian villagers and their property and that the evidence established that Tarčulovski planned, instigated and ordered this operation.[461] In other words, the Trial Chamber found that Tarčulovski planned, instigated and ordered conduct *which constituted crimes.*[462] In so doing, the Trial Chamber did not expand the *actus reus* of planning, instigating and ordering. Tarčulovski's arguments misinterpret the Trial Chamber's findings and are thus dismissed.[463]

172. Furthermore, the Appeals Chamber notes that the legitimate character of an operation does not exclude an accused's criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation. In other words, even if the goal of an operation is to root

[458] Tarčulovski Appeal Brief, paras 127 and 129 (citing Trial Judgement, para. 576); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576). *See* also Tarčulovski Reply Brief, paras 47-49. Tarčulovski further argues that requiring that an accused solely planned, instigated or ordered an act or omission, including a legitimate operation, with the awareness of the substantial likelihood that it will result in a crime, effectively turns into criminals "commanding officers of any country whose troops have gone to war, especially against terrorists who hide among civilians". According to Tarčulovski, "in wartime, there is a substantial likelihood – if not a near certainty – that some soldiers will behave improperly and engage in behaviour that IHL law proscribes" (Tarčulovski Reply Brief, para. 46). *See* also AT. 95-96.

[459] Prosecution Response Brief, paras 70 (citing Trial Judgement, paras 572-573) requesting summarily dismissal and 97 (citing Trial Judgement, paras 572-573). *See* also Prosecution Response Brief, Section V (in particular, paras 63-65).

[460] Prosecution Response Brief, paras 98-99 (referring to *Nahimana et al.* Appeal Judgement, paras 479-481; *Karera* Appeal Judgement, para. 211; *Blaškić* Appeal Judgement, paras 41-42 and 471; *Kordić and Čerkez* Appeal Judgement, paras 30-32; *Martić* Appeal Judgement para. 261, and citing Trial Judgement, para. 577 and fn. 2502).

[461] *See supra* paras 135, 153-154, 157 and 161.

[462] *See* Planning: *Kordić and Čerkez* Appeal Judgement, paras 26; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Kordić and Čerkez* Appeal Judgement, paras 27; *Nahimana et al.* Appeal Judgement, para. 480. Ordering: *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28; *Nahimana et al.* Appeal Judgement, para. 481; *Semanza* Appeal Judgement, para. 361. *See* also Trial Judgement, paras 398-400.

[463] Consequently, the Appeals Chamber dismisses Tarčulovski's arguments that even if the jurisprudence of the Appeals Chamber had expanded the *actus reus* of ordering, planning or instigating, their holdings must not be applied "retroactively" to the charged crimes in August 2001 (Tarčulovski Appeal Brief, paras 134-135; Prosecution Response Brief, paras 100-101).

out "terrorists", this must not be achieved by an act that constitutes a crime.[464] In addition, the Appeals Chamber recalls "that motive is generally not an element of criminal liability".[465]

2. Alleged expansion of the *mens rea*

173. Tarčulovski also submits that the Trial Chamber erroneously expanded the *mens rea* of planning, instigating and ordering when it held that an accused must only know of the *possibility* that a crime will be committed, although the correct standard is that an accused must be aware of a "substantial likelihood" that a crime will occur.[466] Tarčulovski further asserts that the Trial Chamber failed to address whether the risk of crimes being committed under the "perceived threat" by the NLA was unjustifiable or unreasonable.[467]

174. The Appeals Chamber recalls the Trial Chamber's finding that the crimes "were foreseen [...] to be a substantial likelihood of the execution of the operation."[468] This finding is consistent with the established *mens rea* standard of planning, instigating and ordering.[469] The jurisprudence does not require the risk of crimes to be committed to be "reasonable" or "justified"; therefore the Trial Chamber did not err when it did not address this issue.[470] Tarčulovski's arguments in this regard are therefore dismissed.

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[464] *Cf.* HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 854. (Supreme Court in Israel)

> "This is the destiny of a democracy - it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one arm tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."

[465] *Limaj et al.* Appeal Judgement, para. 109; *Jelisić* Appeal Judgement, para. 71; *Tadić* Appeal Judgement, para. 269. *See also Kvočka et al.* Appeal Judgement, para. 106; *Jelisić* Appeal Judgement, para. 49. As regards Tarčulovski's argument that too broad an interpretation of the legal requirements for planning, instigating and ordering would effectively turn into criminals commanding officers of any country whose troops have gone to war, the Appeals Chamber is not satisfied that he has shown that the Trial Chamber erred in the definition of these modes of liability.

[466] Tarčulovski Appeal Brief, paras 130-132 (referring to *Blaškić* Appeal Judgement, paras 32, 34-42; *Kordić and Čerkez* Appeal Judgement, paras 29-32); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576). It is not clear from Tarčulovski's submissions whether he considers this notion of *mens rea* different from, or akin to, "recklessness" in common law.

[467] Tarčulovski Appeal Brief, para. 133 (referring to *Blaškić* Appeal Judgement, para. 38); Tarčulovski Amended Notice of Appeal, para. 39 (citing Trial Judgement, para. 576); Tarčulovski Reply Brief, para. 50. The Prosecution responds that the Trial Chamber reasonably applied the Tribunal's jurisprudence that in order to hold a person criminally responsible for planning, instigating and ordering a crime, that person must have acted at least with the awareness of the substantial likelihood that the crime will occur (Prosecution Response Brief, paras 98-99 (citing Trial Judgement, para. 576)).

[468] Trial Judgement, para. 576.

[469] Planning: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, para. 31; *Nahimana et al.* Appeal Judgement, para. 479. Instigating: *Martić* Appeal Judgement, fn. 553; *Kordić and Čerkez* Appeal Judgement, para. 32; *Nahimana et al.* Appeal Judgement, para. 480. Ordering: *Martić* Appeal Judgement, paras 221-222; *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30; *Nahimana et al.* Appeal Judgement, para. 481.

[470] The Appeals Chamber notes that para. 38 of the *Blaškić* Appeal Judgement refers to the notion of "unjustifiable or unreasonable" only in the context of the *mens rea* of "recklessness" in common law jurisdictions.

F. Conclusion

175. For the foregoing reasons, Tarčulovski's third ground of appeal is dismissed in its entirety.

IX. ALLEGED ERRORS CONCERNING THE ADMISSION AND EVALUATION OF TARČULOVSKI'S STATEMENTS (TARČULOVSKI'S SIXTH GROUND OF APPEAL)

A. Introduction

176. Under his sixth ground of appeal, Tarčulovski claims that the Trial Chamber erred in law and in fact by admitting into evidence three statements ("Statements") made by Tarčulovski to the Commission for Inquiry[471] or, in the event the Statements were properly admitted, by rejecting these Statements as unreliable.[472]

177. The Statements include: an Official Note handwritten and signed by Tarčulovski referring to a meeting with the Commission for Inquiry that he attended on 5 May 2003 ("Official Note");[473] a document entitled "Minutes" summarising an interview with the Commission for Inquiry on 12 November 2003 ("Minutes");[474] and a document entitled "Information" of 25 November 2003 containing a complete reproduction of the Minutes ("Information").[475]

B. Submissions of the parties

178. Tarčulovski contends that the Trial Chamber wrongly applied Rule 89(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") in admitting the Statements. First, he argues that the Trial Chamber failed to make a "fair determination of the matter": since the Trial Chamber determined that the Statements constituted a reliable record of his understanding of the events and accepted them on that basis,[476] they should have been given credence[477] instead of which, they were virtually rejected.[478]

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[471] The Commission for Inquiry was established by the then Minister of FYROM, Mr Hari Kostov, on 7 March 2003 to conduct an inquiry into the events at Ljuboten on 12 August 2001 (*see* Decision of 10 December 2007, para. 2). *See* also Ex. P379, Decision on Establishment of a Commission, 7 March 2003, signed by the Minister of the Interior Hari Kostov.
[472] Tarčulovski Appeal Brief, paras 199 and 207-224; Tarčulovski Amended Notice of Appeal paras 105-106.
[473] The "Official Note" was erroneously dated 3 March 2003 (*see* Decision of 10 December 2007, para. 3 and fn. 13).
[474] The Minutes were prepared by witness Tatjana Groševa immediately after the Commission meeting in the presence of Tarčulovski and his attorney (Tatjana Groševa, T. 4725-4726). Tarčulovski was afforded the opportunity to review the Minutes which he then signed (Tatjana Groševa, T. 4729).
[475] All three documents were admitted into evidence by the Trial Chamber which deemed them to be reliable (*see* Decision of 10 December 2007, paras 41, 43 and 44).
[476] Tarčulovski Appeal Brief, para. 207.
[477] Tarčulovski Appeal Brief, para. 209. *See* also Tarčulovski Reply Brief, paras 91-92.
[478] Tarčulovski Appeal Brief, paras 207-209. *See* also Tarčulovski Amended Notice of Appeal, para. 107.

179. Second, Tarčulovski claims that the Trial Chamber did not act in accordance with "the spirit of the Statute" which was designed to facilitate the prosecution of those alleged to have committed serious violations of international humanitarian law. He argues that this process would be undermined by the admission and use of out of court statements such as these, rendering future internal investigations more difficult.[479]

180. Third, Tarčulovski argues that the admission of the Statements is not consistent with "general principles of law". He asserts that the evidentiary rules of most legal systems sometimes exclude relevant, reliable and probative evidence in order to further other important interests. He states that since the evidence adduced by the Commission for Inquiry could not be used in a criminal court in the FYROM, the Tribunal should "adopt a privilege excluding statements made during national investigations of suspected or possible war crimes [...] in order to encourage persons to cooperate with such investigations".[480]

181. Tarčulovski further claims that even if the Statements were admissible, the Trial Chamber improperly determined that his accounts were deficient and erred in drawing adverse inferences from his refusal to answer questions.[481] He avers that the Trial Chamber relied heavily on the Statements, which were exculpatory, to convict him.[482] He also finds significance in the fact that the Trial Chamber failed to explain its decision to reject the Statements earlier in the Trial Judgement, notably in the section discussing the rejection of other evidence.[483]

182. The Prosecution responds that Tarčulovski's arguments about the spirit of the Statute and general principles of law are raised for the first time on appeal and should be rejected on the basis of waiver.[484] The Prosecution further cites Rule 89(A) of the Rules which provides that the Tribunal is not bound by national rules of evidence. It argues that the mere fact that the Statements may have been inadmissible before FYROM courts is insufficient to constitute a general principle of law.[485]

183. The Prosecution also argues that Tarčulovski's challenges to the Trial Chamber's admission and assessment of the Statements should be dismissed. It claims that the Trial Chamber provided detailed reasons explaining its decision to admit the Statements and states that Tarčulovski fails to

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[479] Tarčulovski Appeal Brief, paras 210-213. *See* also Tarčulovski Reply Brief, paras 88-89; Tarčulovski Amended Notice of Appeal, para.105.
[480] Tarčulovski Appeal Brief, paras 210 and 214-215. *See* also Tarčulovski Reply Brief, para. 88; Tarčulovski Amended Notice of Appeal, para.105.
[481] Tarčulovski Appeal Brief, paras 217-222; Tarčulovski Amended Notice of Appeal, para. 45.
[482] Tarčulovski Appeal Brief, paras 217-224.
[483] Tarčulovski Appeal Brief, para. 224; Tarčulovski Reply Brief, para. 92.
[484] Prosecution Response Brief, para. 162; AT. 89. In reply, Tarčulovski states that he had relied on Rule 89 in his submissions to the Trial Chamber and that his arguments were sufficiently broad to cover his appellate claim (Tarčulovski Reply Brief, para. 88).
[485] Prosecution Response Brief, para. 166.

address this reasoning and show how the Trial Chamber abused its discretion.[486] The Prosecution further maintains there is no incongruity in the Trial Chamber's finding that the Statements were sufficiently reliable to be admitted and subsequently rejecting them for not accurately reflecting the events on 12 August 2001 in Ljuboten.[487]

184. Lastly, the Prosecution contends that the Trial Chamber accorded proper weight to the Statements and correctly identified their deficiencies. The Prosecution asserts that the Trial Chamber only relied on the Statements as corroborative evidence to the evidence which showed that Tarčulovski personally selected the police reserve volunteers and was with them in the village throughout the operation.[488]

C. Discussion

1. Waiver

185. The Appeals Chamber recalls that a party is required to raise formally any issue of contention before the Trial Chamber, either during trial or pre-trial.[489] Failure to do so may result in the complainant having waived his right to raise the issue on appeal.

186. The Appeals Chamber observes that Tarčulovski raised an objection to the admission of the Statements at trial under Rule 89 of the Rules[490] and that Rule 89 was the basis of the Trial Chamber's decision to admit the Statements.[491] Tarčulovski's submissions on appeal refer to the "subject matter"[492] of this ground of appeal, namely the alleged inadmissibility of the Statements at trial pursuant to Rule 89 of the Rules. All of his submissions effectively hinge on Rule 89 and, as such, the Appeals Chamber rejects the Prosecution's claim that Tarčulovski waived his right to raise a violation of Rule 89 of the Rules on appeal in relation to the Statements.

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[486] Prosecution Response Brief, paras 162-163; AT. 89.
[487] Prosecution Response Brief, para. 164; AT. 90.
[488] Prosecution Response Brief, para. 174 (citing Trial Judgement, paras 538 (fn. 2000) and 558). Tarčulovski replies that this contention is untenable or, if correct, is confirmation that the Trial Chamber interpreted exculpatory evidence improperly and prejudicially (Tarčulovski Reply Brief, para. 93).
[489] *Krajišnik* Appeal Judgement, para. 654; *Blaškić* Appeal Judgement, para. 222; *Čelebići* Appeal Judgement, para. 640; *Furundžija* Appeal Judgement, para. 174; *Tadić* Appeal Judgement, para. 55; *Akayesu* Appeal Judgement para. 361.
[490] Tarčulovski's Submissions of 3 October 2007, para. 3. The Appeals Chamber notes that the arguments now advanced by Tarčulovski under this rule were not fully pleaded in either Tarčulovski's written submissions or his oral arguments before the Trial Chamber (*see* Tarčulovski's Submissions of 3 October 2007 and T 5145-5146). The Appeals Chamber further considers that while Tarčulovski could have applied for certification to lodge an interlocutory appeal on this point, it is not compulsory for the Appellant to have followed this procedure. *See Nyiramasuhuko* Decision of 4 October 2004, para. 5: "It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence." (fn. omitted).
[491] *See* Decision of 10 December 2007, paras 9-11 and 15-16.
[492] *See Čelebići* Appeal Judgement, para. 640.

2. Admissibility

(a) Fair determination

187. The Appeals Chamber considers that there is no incongruity in the Trial Chamber admitting evidence deemed to be "an apparently reliable record of the Accused's understanding of these events"[493] and proceeding to "reject virtually all of what the statements said."[494] In admitting the Statements, the Trial Chamber merely concluded that they contained a reliable record of Tarčulovski's evidence before the Commission for Inquiry.[495] At the time of their admission, the Trial Chamber made no determination as to whether they accurately reflected the events in Ljuboten on 12 August 2001.[496]

188. Thus, the Trial Chamber was entitled to admit the Statements as accurately representing Tarčulovski's evidence before the Commission for Inquiry. This did not preclude the Trial Chamber from considering what weight to accord the Statements in the determination of Tarčulovski's criminal responsibility.[497]

189. In light of the foregoing, this sub-ground of appeal is dismissed.

(b) The spirit of the Statute

190. The proposition advanced by Tarčulovski, namely, that the Tribunal should create a privilege to exclude statements made during the course of a national investigation of suspected war crimes, would unduly compromise the Tribunal's discretion to admit evidence under Rule 89 of the Rules. Such an exemption could potentially preclude the Tribunal from considering vital pieces of evidence and consequently undermine the Tribunal's ability to fulfil its mandate to prosecute

[493] Decision of 10 December 2007, para. 41.
[494] Tarčulovski Appeal Brief, para. 208.
[495] Decision of 10 December 2007, paras 41-45. The Appeals Chamber further observes that the Trial Chamber was not satisfied with the reliability of the Report of 6 May 2003 and did not admit it on that basis (*see* Decision of 10 December 2007, para. 46).
[496] Decision of 10 December 2007, para. 8: "[T]he present issue is whether the documents described earlier should be admitted into evidence. This is not the stage of the trial at which the Chamber should seek to assess the weight that should ultimately be given to this evidence (if admitted). As will be discussed, a number of factors may need to be considered to determine admissibility. What is said in this regard is in no sense, however, an indication of the weight, if any, which the Chamber may ultimately attach to evidence it admits." *See* also Trial Judgement, para. 10: "The Trial Chamber would emphasise that the mere admission of evidence in the course of trial has no bearing on the weight which the Chamber subsequently attaches to it."
[497] *Čelebići* Decision of 4 March 1998, para. 20; *Rutaganda* Appeal Judgement, fn. 63; *Popović et al.* Decision of 30 January 2008, para. 22; *Blagojević and Jokić* Decision of 18 December 2003, para. 14; *Brđanin and Talić* Order of 15 February 2002, para. 18; *Muvunyi* Decision of 28 February 2006, para. 12; *Orić* Order of 21 October 2004, para. 10; *Simić et al.* Decision of 22 May 2002, para. 12.

persons accused of serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.[498]

191. The Appeals Chamber further considers that the creation of the aforementioned privilege could create an impromptu immunity, allowing those responsible for the commission of war crimes to comply with national investigations and thereafter rely on the exemption to exclude incriminatory evidence from subsequent criminal proceedings.

192. In light of the foregoing, this sub-ground of appeal is dismissed.

(c) General principles of law

193. The Appeals Chamber recalls that Rule 89(A) of the Rules specifically provides that the Tribunal is not bound by national rules of evidence.[499] Furthermore, the Tribunal's jurisprudence confirms that evidence inadmissible under domestic law is not necessarily inadmissible in proceedings before the Tribunal.[500]

194. Further, the Appeals Chamber notes that Tarčulovski has failed to identify a "general principle of law" to support his argument. The fact that the Statements were inadmissible before FYROM courts is insufficient to support the claim that such a general principle of law exists. In this context, the Appeals Chamber observes that out-of-court statements made by an accused are admissible in a number of common law[501] and civil law[502] jurisdictions.

195. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in its reliance on Rule 89 of the Rules as a basis for admitting the statements and accordingly dismisses this sub-ground of the appeal.

3. Evaluation

196. The Appeals Chamber recalls that the admission of a statement does not in itself mean that the evidence it contains will be accepted as accurate. A decision to admit a document has no

[498] Article 1 of the Statute.
[499] The Appeals Chamber notes with approval the Prosecution Response Brief, para. 166 (fn. 545).
[500] *See Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 19; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, paras 53-54; *Orić* Order of 21 October 2004, para. 8.
[501] Sections 81 and 82 of the Evidence Act of 1995 (Australia); Section 76 of the Police and Criminal Evidence Act of 1984, Sections 114 and 118 of the Criminal Justice Act 2003 (United Kingdom); *R. v. C. (B.)*, (1993) 62 O.A.C. 13, para. 12 (Canada); Section 3(1) of the Law of Evidence Amendment Act No. 45 of 1988 and Section 219A of the Criminal Procedure Act 51 of 1977 (South Africa).
[502] Article 427 of the *Code de procédure pénale* (France); Article 322 of Keiji sosho ho (Code of Criminal Procedure), (Japan).

bearing on the weight the Trial Chamber will ultimately accord it.[503] The weight accorded to evidence is determined at the close of the case having regard to the evidence as a whole.[504] In its assessment of the Statements, the Trial Chamber considered the discrepancies between Tarčulovski's accounts and had regard to the Statements in the context of the evidence disclosed at trial and found "significant differences" between that evidence and the Statements, and between the Statements themselves.[505]

197. In particular, the Trial Chamber noted that the Statements did not correspond with more credible evidence which showed "that the police in the village were more extensively armed than merely with Kalashnikovs and that a Hermelin APC supported them and carried incendiary materials used to set houses on fire."[506] The Trial Chamber also observed:

> The facts entirely contradict that what occurred was a spontaneous happening in which Johan Tarčulovski and more than 100 reserve police just came together, found arms, munitions, equipment, transport and accommodation, gathered intelligence through personal contacts, secured army and police co-operation and support and enjoyed such success that even the Minister came to see what was happening.[507]

198. The Appeals Chamber observes that the Statements were carefully considered in light of all the evidence before the Trial Chamber, including Defence-led evidence which contradicted the Statements.[508] The Appeals Chamber finds that the "significant" inconsistencies noted between Tarčulovski's accounts and the remainder of the evidence constitutes a reasonable basis for the Trial Chamber to reject substantial parts of the Statements as unreliable while relying on other parts.[509]

199. The Trial Judgement makes a number of references to the information omitted from Tarčulovski's accounts of the events on 12 August 2001 in Ljuboten, such as the extent to which

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[503] *See supra* paras 187-188; *Čelebići* Decision of 4 March 1998, para. 20; *Rutaganda* Appeal Judgement, fn. 63; *Nyiramasuhuko* Decision of 4 October 2004, para. 7; *Popović et al.* Decision 30 January 2008, para. 22; *Blagojević and Jokić* Decision of 18 December 2003, para. 14; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered During the Rejoinder Case, 23 October 2002, p. 2; *Brđanin and Talić* Order of 15 February 2002, para. 18.

[504] *See Čelebići* Decision of 4 March 1998, para. 20; *Rutaganda* Appeal Judgement, fn. 63; *Nyiramasuhuko* Decision of 4 October 2004, para. 7; *Muvunyi* Decision of 28 February 2006, para. 12; *Orić* Order of 21 October 2004, para. 10; *Brđanin and Talić* Order of 15 February 2002, para. 13; *Simić et al.* Decision of 22 May 2002, para. 12.

[505] Trial Judgement, para. 558.

[506] Trial Judgement, para. 558.

[507] Trial Judgement, para. 559.

[508] The Trial Chamber noted that: "the Defence led evidence and submitted that the President was personally involved in supporting the operation" (Trial Judgement, para. 559).

[509] The Appeals Chamber notes that in the Tarčulovski Amended Notice of Appeal (para. 106), the Tarčulovski Appeal Brief (para. 221) and Tarčulovski Reply Brief (para. 92) he now refers to the Statements as "exculpatory" while, by contrast, in his written submissions regarding the admission into evidence of the exhibits marked for identification as P00379, P00435 and P00251 dated 3 October 2007 (para. 6) he describes the same Statements as "unreliable" and "wrong". As regards the evaluation of incriminating evidence originating from an accused, *see Martić* Appeal Judgement, paras 228-235.

the police reserve volunteers were armed[510] and, notably, "the fact that men were murdered and cruelly mistreated and that many houses were deliberately set on fire".[511] The Appeals Chamber considers that these omissions were observed in the context of compelling incriminatory evidence from other sources. Consequently, the Appeals Chamber finds that the Trial Chamber did not improperly rely on any perceived omissions in the Statements to convict Tarčulovski but was satisfied of his guilt based on the evidence as a whole.

200. Tarčulovski's complaint that the rejection of the Statements was improperly positioned in the Trial Judgement does not reveal any error on the part of the Trial Chamber and is thus dismissed. In light of the foregoing, this sub-ground of the appeal is dismissed.

D. Conclusion

201. For the foregoing reasons, Tarčulovski's sixth ground of appeal is dismissed in its entirety.

[510] Trial Judgement, paras 558-559.
[511] Trial Judgement, para. 558.

X. ALLEGED ERROR CONCERNING SENTENCING (TARČULOVSKI'S SEVENTH GROUND OF APPEAL)

202. The Trial Chamber found Tarčulovski guilty on three counts: murder, a violation of the laws or customs of war (Count 1); wanton destruction, a violation of the laws or customs of war (Count 2); and cruel treatment, a violation of the laws or customs of war (Count 3). The Trial Chamber imposed a sentence of twelve years' imprisonment.[512] Tarčulovski has appealed against the sentence.

A. Applicable law and standard of review

203. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, a Trial Chamber must take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[513]

204. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[514] Trial Chambers are vested with a broad discretion in determining an appropriate sentence.[515] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[516] It is for the party challenging the sentence to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[517]

205. To show that the Trial Chamber committed a discernible error in exercising its discretion, an appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was

[512] Trial Judgement, Chapter IX (Disposition).
[513] *Krajišnik* Appeal Judgement, para. 733; *Blagojević and Jokić* Appeal Judgement, para. 320; *Bralo* Judgement on Sentencing Appeal, para. 7. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any state on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[514] *Krajišnik* Appeal Judgement, para. 734; *Kupreškić et al.* Appeal Judgement, para. 408; *Galić* Appeal Judgement, para. 393.
[515] *Milošević* Appeal Judgement, para. 297; *Krajišnik* Appeal Judgement, para. 734; *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393.
[516] *Milošević* Appeal Judgement, para. 297; *Krajišnik* Appeal Judgement, para. 734; *Blagojević and Jokić* Appeal Judgement, para. 321; *Bralo* Judgement on Sentencing Appeal, para. 9.
[517] *Krajišnik* Appeal Judgement, para. 734; *Blagojević and Jokić* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 393.

so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[518]

B. Tarčulovski's appeal against sentence

206. Under his seventh ground of appeal, Tarčulovski argues that the Trial Chamber committed a discernible error in the exercise of its discretion in considering various factors in its determination of his sentence.[519] The Prosecution rejects all arguments in this regard.[520]

207. The Appeals Chamber identifies four main arguments in support of this ground of appeal: (1) the Trial Chamber incorrectly found that the minimum sentence that could be imposed was ten years' imprisonment, and it disregarded FYROM law that would have resulted in a lighter sentence;[521] (2) the Trial Chamber failed to consider the fact that Tarčulovski was carrying out orders of those senior to him in the MoI as a mitigating circumstance;[522] (3) the Trial Chamber failed to consider that the FYROM later granted amnesty to those involved in both sides of the conflict;[523] and (4) the Appeals Chamber ought to reduce Tarčulovski's sentence if it accepts even some of his arguments.[524]

C. Law on sentencing in the FYROM

1. Submissions of the parties

208. Tarčulovski argues that the Trial Chamber erroneously found that under FYROM law, the minimum sentence that could be imposed for the crimes for which he was convicted was a sentence of ten years' imprisonment.[525] He submits that the Trial Chamber overlooked Article 40 of the 1996 FYROM Criminal Code which permits more lenient sentences if mitigating circumstances were applicable.[526]

209. The Prosecution responds, *inter alia*, that the Trial Chamber committed no discernible error in its exercise of discretion regarding Tarčulovski's sentence[527] and that it correctly considered the

[518] *Krajišnik* Appeal Judgement, para. 735; *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 394.
[519] Tarčulovski Appeal Brief, paras 226-228.
[520] Prosecution Response Brief, paras 176-180.
[521] Prosecution Response Brief, para. 226.
[522] Prosecution Response Brief, para. 227.
[523] Prosecution Response Brief, para. 228.
[524] Prosecution Response Brief, para. 229.
[525] Tarčulovski Appeal Brief, para. 226.
[526] Tarčulovski Appeal Brief, para. 226. Tarčulovski further submits that Article 40 of the FYROM Criminal Code was contained in Ex. P81. *See* also AT. 62.
[527] Prosecution Response Brief, para. 176; AT. 91.

general practice of the FYROM courts in its determination of Tarčulovski's sentence.[528] The Prosecution asserts that the Trial Chamber did not make a determination of what his sentence would be under FYROM law; it merely noted that Article 404 of the 1996 FYROM Criminal Code indicated that violations of international law would warrant a minimum sentence of ten years' imprisonment.[529] The Prosecution also submits that the fact that the Trial Chamber did not expressly refer to Article 40 of the 1996 FYROM Criminal Code does not constitute an error.[530]

2. Discussion

210. In its determination of the appropriate sentence for Tarčulovski, the Trial Chamber considered the general practice regarding prison sentences in the courts of the FYROM.[531] The Trial Chamber also summarised the legal provisions that are relevant to sentencing in the FYROM, as well as any relevant definitions of offences included in the relevant laws.[532] The Trial Chamber noted that relevant factors in sentencing were set out in Articles 39(1) and 39(2) of the 1996 FYROM Criminal Code, which was in force at the time of the commission of the crimes alleged in the Indictment.[533] The Trial Chamber further noted that Article 404 of the 1996 FYROM Criminal Code, which codified laws related to violations of the rules of international law, prohibited "ordering or committing 'murder', 'inhumane acts' and 'inflicting grave suffering or injury to the body integrity or the health' and 'illegal and self-willed destruction or usurpation of a larger extent of properties which is not justified by the military needs'", prescribing a sentence of between ten years to life imprisonment.[534] The Trial Chamber also noted that Article 35(1) of the 1996 FYROM Criminal Code limited fixed-term imprisonment to a maximum of fifteen years, which was amended to allow for a sentence up to twenty years in 2004.[535] The Trial Chamber held that the maximum sentence that could be imposed by FYROM courts for "crimes committed in 2001 of the nature of those charged [...] in the Indictment"[536] was fifteen years to life imprisonment.[537]

211. The Appeals Chamber notes that the Trial Chamber made no explicit findings as to the minimum sentence required by the 1996 FYROM Criminal Code.[538] Rather, it merely referred to Article 404 of the 1996 FYROM Criminal Code which prescribes a sentence of at least ten years for

[528] Prosecution Response Brief, para. 178; AT. 92.
[529] Prosecution Response Brief, para. 179.
[530] Prosecution Response Brief, para. 179; AT. 92.
[531] Trial Judgement, paras 602-603.
[532] Trial Judgement, paras 602-603.
[533] Trial Judgement, para. 602.
[534] Trial Judgement, para. 603.
[535] Trial Judgement, para. 603.
[536] Trial Judgement, para. 603.
[537] Trial Judgement, para. 603. The Trial Chamber referred to the principle of *lex mitior* which is enshrined in Article 3(2) of the 1996 FYROM Criminal Code.
[538] Trial Judgement, para. 603.

violations of international law.[539] Thus, Tarčulovski's argument that the Trial Chamber erred in its determination that the minimum sentence prescribed by the laws of FYROM is ten years' imprisonment, misrepresents the Trial Chamber's findings and is accordingly dismissed.

212. With respect to Tarčulovski's argument that the Trial Chamber overlooked Article 40 of the 1996 FYROM Criminal Code which permits more lenient punishments in the presence of especially extenuating circumstances,[540] the Appeals Chamber notes that the Trial Chamber did not find that such circumstances existed.[541] Also, the Appeals Chamber recalls that the Trial Chamber was not bound by FYROM sentencing practices in general or Article 40 of the 1996 FYROM Criminal Code in particular.[542] Therefore, the Appeals Chamber finds that the Trial Chamber did not err in its consideration of the general sentencing practices in the courts of the FYROM.

3. Conclusion

213. For the foregoing reasons, this sub-ground of appeal is dismissed.

D. Alleged failure to consider mitigating circumstance

1. Submissions of the parties

214. Tarčulovski argues that he believed he was carrying out directives given by the Government of FYROM, and that the Trial Chamber erroneously failed to consider this as a mitigating circumstance in determining the appropriate sentence.[543]

215. The Prosecution responds that the Trial Chamber considered that Tarčulovski acted under the orders of those senior to him, noting that the Trial Chamber stated that he was not to be sentenced as the person who initiated the police operation in Ljuboten.[544] The Prosecution further submits that it is irrelevant that the Chamber considered this under the heading of "gravity of the offence" as opposed to "mitigating circumstances".[545]

2. Discussion

216. The Trial Chamber considered that while Tarčulovski was the leader of the police in Ljuboten on 12 August 2001 and of a police operation on that day, he was carrying out the orders of

[539] Trial Judgement, para. 603.
[540] Tarčulovski Appeal Brief, para. 226.
[541] *See* Trial Judgement, paras 599-601.
[542] *See Dragan Nikolić* Judgement on Sentencing Appeal, para. 84; *Tadić* Judgement on Sentencing Appeal, para. 21.
[543] Tarčulovski Appeal Brief, para. 227.
[544] Prosecution Response Brief, para. 177.
[545] Prosecution Response Brief, para. 177.

an unknown person or persons who were superior to him in the MoI, or indeed the President of the FYROM.[546] The Trial Chamber further determined that he was a relatively junior person in the MoI carrying out orders.[547] Accordingly, the Appeals Chamber finds that Tarčulovski has not established that the Trial Chamber failed to consider his junior role in determining an appropriate sentence. Furthermore, the Appeals Chamber finds that Tarčulovski has not shown that the consideration of this fact under the category of gravity of the offence as opposed to mitigating circumstances had an impact on the sentence. Thus, the Appeals Chamber finds that Tarčulovski has not demonstrated a discernible error in the reasoning of the Trial Chamber.

3. Conclusion

217. For the foregoing reasons, the Appeals Chamber dismisses this sub-ground of appeal.

E. Alleged failure to consider amnesty

1. Submissions of the parties

218. Tarčulovski further submits that the Trial Chamber failed to consider that the FYROM granted amnesty to persons involved in the FYROM-NLA conflict, and that basic principles of fairness mandate that he should not be prosecuted as a scapegoat.[548]

219. The Prosecution responds that although the FYROM granted amnesty to others responsible for crimes committed in the FYROM during this conflict, this neither diminishes Tarčulovski's criminal responsibility nor does it constitute a personal mitigating circumstance.[549] Furthermore, the Prosecution notes that the Trial Chamber was under no obligation to consider the FYROM's grant of amnesty to persons on both sides of the FYROM-NLA conflict under the Statute and the Rules.[550]

2. Discussion

220. The Appeals Chamber finds the fact that the FYROM granted amnesty to others involved in the FYROM-NLA conflict to be irrelevant in the present case, as the Tribunal is not bound by any act of the FYROM granting amnesty to those involved in the FYROM-NLA conflict under Article

[546] Trial Judgement, para. 594.
[547] Trial Judgement, para. 594.
[548] Tarčulovski Appeal Brief, para. 228; Tarčulovski Reply Brief, para. 97; AT. 62-63.
[549] Prosecution Response Brief, para. 180; AT. 91, also stating that the relevant amnesty law excludes those who committed criminal acts under the jurisdiction of the Tribunal.
[550] Prosecution Response Brief, para. 180.

24 of the Statute or Rule 101 of the Rules.[551] The Appeals Chamber also notes that the relevant legislature of the FYROM contains a provision that those who committed criminal acts falling within the jurisdiction of the Tribunal are excluded from the grant of amnesty.[552] Hence, Tarčulovski does not show any alleged error of the Trial Chamber in failing to consider whether such amnesty could have had an impact on his sentence.

221. Hence, the Trial Chamber committed no discernible error when it did not consider in sentencing that the FYROM had granted amnesty to others involved in the FYROM-NLA conflict.

3. Conclusion

222. For the foregoing reasons, the Appeals Chamber dismisses this sub-ground of appeal.

F. Reduction of the sentence

223. In the alternative, Tarčulovski requests the Appeals Chamber to reduce the length of his sentence, even if it finds no discernible error in the Trial Chamber's exercise of sentencing discretion.[553] He submits that if the Appeals Chamber accepts all or some of his legal arguments under his other grounds of appeal, the Appeals Chamber must reduce his sentence, to reflect a modified conviction.[554] As the Appeals Chamber has not granted any other part of Tarčulovski's appeal, his alternative request is dismissed.

[551] The Appeals Chamber notes that while the Trial Chamber must consider the sentencing practices in the former Yugoslavia, it is not bound to strict adherence to these practices, which only provide guidance. *See Krajišnik* Appeal Judgement, para. 749; *Hadžihasanović and Kubura* Appeal Judgement, para. 335; *Galić* Appeal Judgement, paras 400-405. *See* also Prosecution Response Brief, para. 180.
[552] *See* Ex. P83, Law on Amnesty, Article 1. *See* also Trial Judgement, paras 238, 243 and 247.
[553] Tarčulovski Appeal Brief, para. 229. *See* also Prosecution Response Brief, para. 181.
[554] Tarčulovski Appeal Brief, para. 229.

XI. ALLEGED ERRORS CONCERNING FAILURE TO PUNISH RESPONSIBILITY (PROSECUTION'S GROUND OF APPEAL)

A. Alleged Error of Law

1. Submissions of the parties

224. Under its first sub-ground of appeal, the Prosecution submits that the Trial Chamber committed an error of law when it interpreted the requirement under Article 7(3) of the Statute that a superior "take the necessary and reasonable measures" to punish his offending subordinates, as meaning that a superior need only provide a "report to the competent authorities" that was "likely to trigger an investigation into the alleged criminal conduct".[555] The Prosecution argues that necessary and reasonable measures are those that lie within the competence of a superior as evidenced by his degree of effective control over his subordinates: the measure of submitting reports is merely an example that may be sufficient under Article 7(3) of the Statute "under some circumstances".[556] Thus, according to the Prosecution, the Trial Chamber erroneously assumed that if a report likely to trigger an investigation was made to the competent authorities, no further consideration of the measures within Boškoski's material ability was warranted. Consequently, the Trial Chamber allegedly erred in failing to look at the totality of measures within his material ability to determine which were necessary and reasonable for him to take.[557]

225. The Prosecution further submits that the Appeals Chamber should review the relevant factual findings of the Trial Chamber in accordance with the correct legal standard and convict Boškoski for crimes committed by his subordinates.[558]

226. Boškoski responds that the Prosecution conceded in the Prosecution Notice of Appeal that the Trial Chamber *in fact* applied the correct legal standard - "necessary and reasonable measures" – and that it ought to be precluded from arguing to the contrary.[559] As to the merits of the Prosecution's submission, Boškoski argues that the Trial Chamber correctly articulated and applied the legal standard with respect to the "necessary and reasonable measures" pursuant to Article 7(3) of the Statute.[560] He posits that under customary international law, a superior may satisfy the duty to punish by reporting the issue to the competent authorities, and that the *actual*

[555] Prosecution Appeal Brief, paras 5-6 (citing Trial Judgement, paras 519, 529 and 536), 15 (citing Trial Judgement, para. 536) and 17.
[556] Prosecution Appeal Brief, para. 18 (citing *Blaškić* Appeal Judgement, para. 72).
[557] Prosecution Appeal Brief, paras 20-26 (citing Trial Judgement, paras 519, 521-522, 529 and 535-536).
[558] Prosecution Appeal Brief, para. 8.
[559] Boškoski Response Brief, paras 24-25 (citing Prosecution Notice of Appeal, para. 7).
[560] Boškoski Response Brief, paras 4-15 (citing Trial Judgement, paras 406, 415, 417 and 536).

triggering of an investigation is not required of a superior who fulfils such duty unless he knows the investigation to be a sham.[561] Therefore, according to Boškoski, a superior's duty to punish is displaced once the matter is referred to the competent authorities whose responsibility it is to further investigate/prosecute the matter.[562] He also refers to the Trial Chamber's finding that Boškoski had received no information that would suggest that the investigation he knew had been triggered was being interfered with.[563]

227. Boškoski further responds that even if the Trial Chamber adopted an incorrect legal standard, the Prosecution still fails to meet the required standard on appeal as this error of law would not invalidate the Trial Judgement: according to Boškoski, the Prosecution has failed to show that the Trial Chamber could not reasonably have come to the same conclusion if it had applied the "reasonable and necessary measures" standard which the Prosecution claims it failed to apply.[564]

2. Discussion

228. In the Prosecution Notice of Appeal, the Prosecution argues that the Trial Chamber erroneously "conclude[d] that Ljube Boškoski had taken the necessary and reasonable measures to punish his subordinates".[565] The Appeals Chamber is not satisfied, however, that this statement amounts to a concession by the Prosecution that the Trial Chamber indeed applied the standard of necessary and reasonable measures. Elsewhere in the Prosecution Notice of Appeal, the Prosecution explicitly argues that the Trial Chamber failed to apply the legal standard "that a superior is required to take the necessary and reasonable measures to punish his subordinates who have perpetrated crimes."[566] Thus, the Appeals Chamber is satisfied that this issue effectively turns on semantics as opposed to substance, and that the Prosecution is not precluded from arguing that the Trial Chamber misapplied the legal standard for failure to punish liability.

(a) Whether the Trial Chamber articulated the correct legal standard of failure to punish liability

229. The Prosecution alleges that the Trial Chamber erred in law in interpreting the standard of "necessary and reasonable measures" under Article 7(3) of the Statute as meaning that a superior need only provide a report to the competent authorities that was likely to trigger an investigation into the alleged criminal conduct.[567]

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[561] Boškoski Response Brief, paras 16-23.
[562] Boškoski Response Brief, paras 27-35.
[563] Boškoski Response Brief, paras 36-42 (citing Trial Judgement, paras 534 and 536).
[564] Boškoski Response Brief, paras 43-46 (citing Trial Judgement, para. 417).
[565] Prosecution Notice of Appeal, para. 7.
[566] Prosecution Notice of Appeal, para. 4.
[567] Prosecution Appeal Brief, para. 15 (citing Trial Judgement, para. 536).

230. The Appeals Chamber notes that when setting out the applicable law for failure to punish responsibility pursuant to Article 7(3) of the Statute, the Trial Chamber held *inter alia* that the jurisprudence of the Tribunal requires that:

> 3. the superior failed to take the *necessary and reasonable measures* to prevent the criminal act or punish the perpetrator thereof.[568]

Similarly, in a sub-section entitled "(c) Necessary and reasonable measures", the Trial Chamber held that:

> A superior's duty to take the *necessary and reasonable measures* to prevent the commission of a crime or punish the perpetrators thereof relates directly to his possession of effective control [...].[569]
>
> What is relevant is whether the superior took measures to punish which were "necessary and reasonable" in the circumstances, and not whether those measures were of a disciplinary or criminal nature.[570] A superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities.[571]

The Appeals Chamber is satisfied that the above findings correctly articulate the legal standard for failure to punish responsibility under Article 7(3) of the Statute. The Trial Chamber correctly held that the relevant question for liability for failure to punish is whether the superior took the necessary and reasonable measures to punish under the circumstances and that the duty to punish may be discharged, under some circumstances, by filing a report to the competent authorities.

231. With respect to these legal findings, the Prosecution submits that the Trial Chamber erred in relying on the *Aleksovski* and *Brđanin* Trial Judgements in finding that:

> civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings.[572]

The Prosecution argues that in this passage the Trial Chamber erroneously overlooked that the relevant findings in the *Aleksovski* and *Brđanin* Trial Judgements were made in the context of determining the requirement of effective control, and not in relation to the element of necessary and reasonable measures. The Appeals Chamber recalls, however, that these two elements are interrelated, as the degree of effective control over subordinates can be evidence for the necessary and reasonable measures within the competence of a superior.[573] Consequently, the Trial Chamber

[568] Trial Judgement, para. 406 (emphasis added; citing *inter alia Čelebići* Trial Judgement, para. 346; *Blaškić* Appeal Judgement, para. 484).
[569] Trial Judgement, para. 415 (emphasis added).
[570] Trial Judgement, para. 417 (citing *Hadžihasanović and Kubura* Appeal Judgement, para. 142).
[571] Trial Judgement, para. 417 (citing *Hadžihasanović and Kubura* Appeal Judgement, para. 154).
[572] Trial Judgement, para. 418 (citing *Aleksovski* Trial Judgement, para. 78; *Brđanin* Trial Judgement, para. 281).
[573] *Blaškić* Appeal Judgement, para. 72.

was correct in finding that a civilian superior may, under some circumstances, discharge his obligation to punish an offending subordinate by reporting to the competent authorities when a crime has been committed, provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.[574]

(b) Whether the Trial Chamber applied the correct legal standard to its factual findings

232. After having articulated the correct legal standard for responsibility for failure to punish under Article 7(3) of the Statute, the Trial Chamber found that Boškoski did not incur criminal liability for the crimes that occurred.[575] The Appeals Chamber is satisfied that the relevant findings show that the Trial Chamber applied the correct legal standard in this respect. In particular, the Trial Chamber did not, as alleged by the Prosecution, interpret the requirement of necessary and reasonable measures to punish the criminal acts of subordinates, as meaning that the superior need only provide a report to the competent authorities that is likely to trigger an investigation into the alleged criminal conduct.[576] Instead, the Trial Chamber held that the reports by the MoI to the competent authorities constituted a *type of measure* that satisfied the legal standard which was correctly identified as the "necessary and reasonable measures".

233. In the view of the Prosecution, the Tribunal's case-law only recognizes that such reports *may* suffice, requiring the superior to look at the totality of measures within his material ability to determine which were necessary and reasonable for him to take.[577] However, the Appeals Chamber is not satisfied by the Prosecution's submission that the Trial Chamber erred in law in finding that Boškoski's obligation to punish his offending subordinates *would* be satisfied if the reports to the appropriate authorities were likely to trigger an investigation into the alleged criminal conduct.[578]

234. The Appeals Chamber recalls that under the correct legal standard, a report to the appropriate authorities *may* be sufficient to discharge the obligation to punish offending subordinates: whether it is indeed sufficient depends on the circumstances of each case.[579] If, for instance, the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was sham, such a report would not be sufficient to fulfil the obligation to punish offending subordinates.

[574] *See* also *Blaškić* Appeal Judgement, para. 72.
[575] Trial Judgement, para. 536.
[576] Prosecution Appeal Brief, para. 15.
[577] Prosecution Reply Brief, para. 20 (citing *Hadžihasanovic and Kubura* Appeal Judgement, para. 154). *See* also Prosecution Appeal Brief, paras 20-26.
[578] Prosecution Reply Brief, para. 20 (referring to Boškoski Response Brief, para. 17). *See* also Prosecution Appeal Brief, paras 20-21.
[579] *Cf. Blaškić* Appeal Judgement, para. 72.

235. In the present case, however, the Trial Chamber was satisfied that the circumstances were such that Boškoski fulfilled his obligation to punish offending subordinates. The Trial Chamber held, *inter alia*, that the reports by the MoI, in the ordinary course, would have led an investigative judge and the public prosecutor to properly investigate the alleged police criminal conduct in Ljuboten.[580] The Trial Chamber further held that while Boškoski was informed about the notification by the MoI to the judicial authorities,[581] there was no evidence indicating that he was aware of the serious failure of these authorities to adequately investigate the events.[582] Furthermore, the Trial Chamber found that Boškoski did not have the personal power to punish subordinates,[583] and it found that disciplinary measures within the MoI would have been "an entirely inadequate measure for the punishment of any police."[584] It is in the context of these factual findings that the Trial Chamber found that a superior would have satisfied his obligation to punish offending subordinates by filing a report to the appropriate authorities.[585] In so doing, the Trial Chamber did not apply the wrong legal standard for failure to punish liability.[586] Instead, the Trial Chamber accepted the reports as evidence that, in the circumstances of the case, Boškoski had fulfilled his obligation to punish offending subordinates.[587] Indeed, the Trial Chamber concluded in finding that "[i]t is not shown that [Boškoski] failed to take the necessary and reasonable measures",[588] a finding that correctly reflects the legal standard for failure to punish responsibility under Article 7(3) of the Statute. Whether this finding was reasonable will be discussed under the Prosecution's second sub-ground of appeal.

236. For the foregoing reasons, the Prosecution's submission that the Trial Chamber erred in law in applying the wrong legal standard of failure to punish liability pursuant to Article 7(3) of the Statute is dismissed.

B. Alleged error of fact

1. Preliminary remarks in relation to Boškoski's acquittal

237. The Trial Chamber acquitted Boškoski of command responsibility for the counts charged against him, finding that it was not shown that he failed to take the necessary and reasonable

[580] Trial Judgement, para. 529.
[581] Trial Judgement, para. 536.
[582] Trial Judgement, paras 533-534.
[583] Trial Judgement, para. 519.
[584] Trial Judgement, para. 521.
[585] Trial Judgement, para. 536.
[586] Consequently, the Appeals Chamber is not satisfied that other findings by the Trial Chamber as referred to by the Prosecution show that the Trial Chamber misapplied the correct legal standard of failure to punish liability (Prosecution Appeal Brief, paras 21-26 (referring to Trial Judgement, paras 519, 521-522, 529 and 535-536)).
[587] *Cf.* Trial Judgement, para. 415
[588] Trial Judgement, para. 536.

measures to punish his subordinates for crimes committed in Ljuboten on 12 August 2001.[589] The Trial Chamber relied in particular on the submission of two reports made in relation to the events in Ljuboten on that day ("Reports").[590]

238. Each of the two Reports consists of one exhibit. The first, Exhibit 1D6, is an "Official Note" signed by investigative judge Ognen Stavrev on 15 August 2001. It records two pieces of information the investigative judge received from the MoI: at 5.30 p.m. on 12 August 2001,[591] the MoI informed the on-duty investigative judge that there were "several killed members of the paramilitary of the Albanian terrorists" in Ljuboten, which could not be reached because of ongoing "combat activities."[592] In addition, at 1.30 p.m. on 14 August 2001, the MoI again informed the investigative judge of "several corpses" in Ljuboten which "probably concern[ed] killed members of the terrorist organization" the NLA or KLA who "perished in combat activities" with security forces of the FYROM on 12 August 2001.[593]

239. The second report, Exhibit P261, represents "Official Note 537" submitted by Blagoja Toskovski of the MoI (OVR Čair) to the public prosecutor on 14 August 2001. It is a "Report on a deceased person" identified as Atulla Qaili[594] against whom a criminal report had been filed for the crime of terrorism. The note states that on 12 August 2001, Qaili was interviewed and an official note was taken while he "was able to communicate."[595] It further states that on the following day, FYROM security forces brought Qaili to the Mirkovci Police Station where his health continued to deteriorate and that he was then taken to Skopje City Hospital where he died on the same day.[596]

240. With respect to the Reports, the Trial Chamber found that Boškoski was informed that the judicial authorities had been notified and that an investigation into the events in Ljuboten on that

[589] Trial Judgement, paras 536 and 606.
[590] *See* Trial Judgement, para. 529. The Reports consist of Ex. 1D6 (Official Note from the investigative department of the Skopje Basic Court 2, signed by investigative judge Ognen Stavrev) and Ex. P261 (Official Note No. 537: Report on a deceased person). The Appeals Chamber observes that para. 529 of the Trial Judgement cites Ex. P46.16 rather than Ex. P261. Ex. P46.16 records that on 14 August 2001, Ex. P261 was conveyed by the MoI to the office of public prosecutor. It is clear from the context of para. 529 that while the Trial Chamber relied on the contents of Ex. P261, it considered that the notification was effected through Ex. P46.16. The Appeals Chamber concurs but considers that Ex. P261 represents the substance of the report to the prosecutor in relation to the death of Atulla Qaili. The arguments advanced to the contrary by Boškoski are therefore rejected. *See* Boškoski Response Brief, paras 59-60.
[591] The Prosecution claims that the Trial Chamber mistakenly attributed this notification to 12 August 2001, indicating that it in fact occurred on 14 August 2001 (Prosecution Appeal Brief, fn. 103). The Appeals Chamber considers that the Trial Chamber was correct and notes that the 12 August 2001 date is consistent with the evidence of Zlatko Jaćovski. *See* Zlatko Jaćovski, T2353-2356. *See* also Ex. 1D71.
[592] Ex. 1D6. *See* Prosecution Appeal Brief, para. 65.
[593] Ex. 1D6. *See* Prosecution Appeal Brief, para. 65.
[594] In Ex. P261 his name is recorded as Atula Qailji. The Appeals Chamber observes that Zlatko Jaćovski testified that although the victim's name was recorded as "Abdulla Cajani" it was later recognised to be Atulla Qaili. *See* Trial Judgement, fn. 1368. *See* also Zlatko Jaćovski, T. 2289.
[595] Ex. P261.
[596] Ex. P261.

day was being attempted.[597] It further found that while the responsible authorities in FYROM, *i.e.* the investigative judicial authority and the public prosecutor, showed "a serious failure of functioning" at the time, the Prosecution had failed to establish "that further reporting or other action by Ljube Boškoski to satisfy his obligation under Article 7(3) of the Statute was required."[598]

241. Before addressing the substantial submissions of the parties, the Appeals Chamber will first examine whether the Prosecution has waived its right to appeal Boškoski's acquittal.

2. Alleged waiver and scope of appeal

(a) Submissions of the parties

242. Boškoski asserts that the Prosecution has waived its right to appeal his acquittal[599] because none of its submissions on appeal formed part of the Prosecution's case at trial.[600] In particular, Boškoski stresses that the significance of the Reports was not mentioned in the Indictment, challenged at trial or raised with any of the witnesses.[601] He also states that at trial, he asserted that the Reports amounted to criminal reports but the Prosecution failed to challenge these submissions or raise this matter with the relevant witnesses.[602] He further submits that the Prosecution has waived the right to argue that the Reports were unlikely to trigger an investigation into police criminal conduct, since this argument neither formed part of the Prosecution's case at trial nor was this alleged error of fact mentioned anywhere in the Prosecution Notice of Appeal.[603] Boškoski notes that no leave was sought to vary the grounds of appeal.[604]

243. In reply, the Prosecution maintains that it has consistently argued – in the Indictment, its pre-trial brief, its opening statement, its final trial brief, its closing statement and its final submissions – that Boškoski failed to report his subordinates' criminal conduct to the competent authorities.[605] The Prosecution also states it had clearly argued that the mere reporting of dead

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[597] Trial Judgement, para. 536.
[598] Trial Judgement, paras 533 and 536.
[599] *See* Boškoski Response Brief, paras 55, 59-61, 182-183, 203 and 233-235. In particular, Boškoski claims that the Prosecution waived the right to allege on appeal that: (i) it was unreasonable for the Trial Chamber to conclude that the Reports were insufficient to fulfil his duty to punish; (ii) the Reports were defective; (iii) the Reports did not amount to criminal reports; and (iv) the Reports were insufficient to trigger a criminal investigation.
[600] Boškoski Response Brief, paras 55-63, 182-183 and 203.
[601] The Appeals Chamber notes that the Boškoski Response Brief refers to Ex. P46.16 rather than Ex. P261. The Appeals Chamber recalls its determination in *supra* fn. 590 and is satisfied that Boškoski was aware that substantive notification was contained in Ex. P261 and that Ex. P46.16 merely confirms that the relevant information was conveyed to the public prosecutor. In these circumstances, the Appeals Chamber considers there can be no prejudice to Boškoski. *See* Boškoski Response Brief, para. 60. *See* also Boškoski Response Brief, paras 61-63.
[602] Boškoski Response Brief, paras 233-235.
[603] Boškoski Response Brief, paras 182 and 203. Boškoski notes that no leave was sought to vary the grounds of appeal, *ibid.*, para. 151.
[604] Boškoski Response Brief, para. 151.
[605] Prosecution Reply Brief, para. 6 (fns omitted).

bodies in Ljuboten and alleged acts of terrorism by Albanians was not sufficient to satisfy Boškoski's duty under Article 7(3) of the Statute and asserts that it is not obliged to address every argument and document in evidence.[606] The Prosecution further submits that it did not vary or add any grounds of appeal, contending that the Prosecution Notice of Appeal explicitly argues that the Reports were insufficient to satisfy Boškoski's obligation under Article 7(3) of the Statute. As such, the Prosecution argues that it was entitled to develop this ground in its appeal brief to encompass its claims that the Reports "(1) needed to mention the subordinates' alleged criminal conduct and (2) were unlikely to trigger an investigation into such conduct [...]."[607]

(b) Discussion

244. The Appeals Chamber recalls that a party is required to raise formally any issue of contention before the Trial Chamber either during trial or pre-trial;[608] failure to do so may result in the complainant having waived his right to raise the issue on appeal.

245. The Appeals Chamber observes that the Prosecution has consistently argued during pre-trial and trial that Boškoski failed to take the necessary and reasonable measures to punish his subordinates.[609] The Appeals Chamber is satisfied that, in so doing, the Prosecution effectively argued that the Reports were defective and insufficient to fulfil Boškoski's duty to punish as they did not amount to criminal reports and were therefore insufficient to trigger a criminal investigation. Thus, the Prosecution does not raise this matter for the first time on appeal.[610] Instead, it legitimately raises an issue that allegedly constitutes an error of fact made by the Trial Chamber and warrants the attention of the Appeals Chamber.

246. The Appeals Chamber further recalls that pursuant to Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought."[611] The notice of appeal does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, as this has to be

[606] Prosecution Reply Brief, para. 6. The Prosecution also avers that Rule 90(H)(ii) of the Rules only requires the Prosecution to put to the witness the nature of its case, and that this occurred, *see ibid.*, para. 8.
[607] Prosecution Reply Brief, paras 10 and 12. *See* also *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8. In the alternative, the Prosecution moves to vary its notice of appeal under Rule 108 of the Rules to encompass these new arguments. The Appeals Chamber notes that in its Decision of 19 May 2009 it was decided that this matter would be determined on the facts in the judgement. *See* Prosecution Reply Brief, para. 14; Decision on Alternative Prosecution Motion to Vary Notice of Appeal, 19 May 2009, para. 5.
[608] *Krajišnik* Appeal Judgement, para. 654; *Blaškić* Appeal Judgement, para. 222; *Čelebići* Appeal Judgement, para. 640.
[609] Indictment, paras 11, 13 and 15-17; Prosecution Pre-Trial Brief, paras 74 and 83; T. 372-376; Prosecution Final Trial Brief, paras 356, 366, 378 and 382; T. 11029, 11035-11036; T. 11155-11158.
[610] *Cf. Čelebići* Appeal Judgement, para. 640. *Furundžija* Appeal Judgement, para. 174.
[611] *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8. *See* also Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 1(c) (i), (ii) and (v).

done in an appellant's brief.[612] Instead, the notice of appeal must "focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief."[613] In the present case, the Prosecution Notice of Appeal includes the Prosecution's only ground of appeal. Furthermore, it indicates the relief sought and the substance of the alleged errors when it *inter alia* states that the Reports were insufficient to satisfy Boškoski's obligation under Article 7(3) of the Statute.[614] The allegation that the Reports were unlikely to trigger an investigation into police criminal conduct is an argument that did not need to be included in the Prosecution Notice of Appeal and that was properly made in the Prosecution Appeal Brief.

247. The Appeals Chamber accordingly rejects Boškoski's claim that the Prosecution waived or otherwise forfeited its right to raise on appeal that (i) it was unreasonable for the Trial Chamber to conclude that the Reports were insufficient to fulfil Boškoski's duty to punish; (ii) the Reports were defective; (iii) the Reports did not amount to criminal reports; and (iv) the Reports were insufficient to trigger a criminal investigation.

3. Alleged factual errors concerning failure to punish responsibility

(a) Submissions of the parties

248. Under this sub-ground of appeal, the Prosecution claims that no reasonable trier of fact could have found the notifications described in the Reports sufficient to satisfy Boškoski's duty under Article 7(3) of the Statute to take the necessary and reasonable measures to punish his subordinates.[615] It maintains that the information provided by the MoI to the judicial authorities was insufficient and deficient,[616] since it failed to mention police criminal conduct[617] or identify any of the perpetrators.[618] Consequently, the notifications described in the Reports were incapable of triggering a criminal investigation into the conduct of police involved in the killings in Ljuboten on 12 August 2001 or the death of Atulla Qaili on the following day.[619]

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[612] *Mrkšić and Šljivančanin* Decision of 26 August 2008, para. 8.
[613] *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001, p. 3.
[614] Prosecution Notice of Appeal, paras 6-9.
[615] Prosecution Notice of Appeal, para. 6 (citing Trial Judgement, paras 521-522, 529 and 534-536); Prosecution Appeal Brief, paras 3, 9, 41, 51 and 74. The Appeals Chamber notes that it is not disputed that Boškoski had command responsibility over police officers, including special and reserve units. *See* Trial Judgement, paras 513-516 and 519-520.
[616] Prosecution Appeal Brief, paras 4 (citing Trial Judgement, paras 529 and 536) and 64 (citing Trial Judgement, para. 536).
[617] Prosecution Appeal Brief, paras 4, 42, 52, 63-64, 72, 77 and 85.
[618] Prosecution Appeal Brief, paras 69 and 85.
[619] Prosecution Appeal Brief, paras 9, 30, 52, 74, 76, 78, 83-84 and 86.

249. In addition, the Prosecution argues that there were additional necessary and reasonable measures that Boškoski failed to take in order to discharge his duty under Article 7(3) of the Statute. These included: (i) conducting an effective investigation into police activity in Ljuboten on 12 August 2001[620] and (ii) initiating disciplinary proceedings against subordinates suspected of criminal behaviour.[621]

250. The Appeals Chamber will first consider whether the submission of the notifications by the MoI, as described in the Reports, were sufficient to acquit Boškoski.

(i) The allegedly insufficient content of the notifications as described in the Reports

251. The Prosecution submits that the first report (Exhibit 1D6) merely recorded that the relevant authorities were alerted to the fact that "[m]embers of the NLA/KLA were killed in Ljuboten on 12 August 2001 in the context of combat activities with [FYROM] security forces."[622] It avers that no mention is made of any misconduct on the part of the police and notes the absence of any reference to the assaults or arson.[623] The Prosecution considers the second report (Exhibit P261) to be similarly deficient, disclosing only that "Atulla Qaili, against whom a criminal charge for terrorism had been filed, died at Skopje hospital on 13 August 2001, after being interviewed at Mirkovci police station."[624] The Prosecution claims that Exhibit P261 "is silent as to how or why Atulla Qaili's health deteriorated or who was responsible for his condition [...] and his ultimate death" and notes that a similar observation was made by the Trial Chamber.[625]

252. In response, Boškoski claims that the notifications as described in the Reports were sufficient to discharge his duty under Article 7(3) of the Statute to punish his subordinates. He avers that the MoI clearly informed the competent authorities that crimes may have been committed during an operation involving members of the security forces. He maintains that Exhibit 1D6 explicitly refers to "several dead bodies, *probably of murdered members* of the terrorist organization NLA."[626] Boškoski states that sufficient notice was similarly provided to the judiciary

[620] Prosecution Appeal Brief, paras 3, 7-8, 28, 30, 32-36, 41-43, 47, 49-51, 54, 62, 72 and 100.
[621] Prosecution Appeal Brief, paras 3, 7-8, 28, 30, 47-49, 55, 87, 96-98 and 100.
[622] Prosecution Appeal Brief, para. 75.
[623] Prosecution Appeal Brief, paras 64 and 66.
[624] Prosecution Appeal Brief, paras 69 and 75.
[625] Prosecution Appeal Brief, para. 69; fn. 113. *See* Trial Judgement, para. 530: "It is also the case that no information was provided to the investigative judge and the public prosecutor as to how and when Atulla Qaili suffered the fatal injuries, and no witnesses or police responsible for the detention of Atulla Qaili were identified. Nor were names of witnesses to his injuries provided."
[626] Boškoski Response Brief, para. 154 (emphasis in the original).

in relation to the death of Atulla Qaili, and he credits the police with having informed "the judiciary of the death and circumstances of [*sic*] death of A. Qaili."[627]

253. The Prosecution replies that Boškoski seeks to divert attention away from the argument that the notifications described in the Reports "were insufficient to absolve Boškoski of Article 7(3) liability" and that he attempts to mischaracterise the relevant evidence.[628] According to the Prosecution, Boškoski misquotes Exhibit 1D6 by referring to "*murdered members* of the terrorist organization NLA",[629] stating that the text relied on by the Trial Chamber excluded any reference to "murder" and merely alluded to "killed members" of the NLA "perished in combat activity."[630] The Prosecution posits that the reference to terrorists having been "killed" in combat does not suggest the commission of a crime.

(ii) The notifications described in the Reports were allegedly unable by law to trigger an investigation into the conduct of the police

254. According to the Prosecution, the information described in Exhibits 1D6 and P261 and communicated by the MoI to the judicial authorities was by law incapable of triggering an investigation into the criminal conduct of Boškoski's subordinates,[631] and therefore insufficient to satisfy Boškoski's duty under Article 7(3) of the Statute to take the necessary and reasonable measures to punish his subordinates.[632]

255. The Prosecution asserts that under FYROM law, the police is obliged to file a "criminal report" which should compile the facts and evidence collected by the police, record any measures undertaken or forensic examinations conducted by the police and, where possible, identify the perpetrators.[633] On the basis of such a report, the public prosecutor must then proceed to investigate criminal charges.[634] The Prosecution insists that no corresponding criminal reports were filed.

256. The Prosecution contends that the dearth of information provided by the MoI to the judiciary was designed to minimise the likelihood of an investigation into police misconduct. It

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[627] Boškoski Response Brief, para. 74. The Appeals Chamber notes that in his Response Brief, Boškoski raises this matter in the context of "Other Measures taken by the MoI and Minister Boškoski personally" citing other sources in support of these communications, namely: Ex. P46.16;P46.48/Ex. P261; Ex. P54.052; T. 4375-4378, 5042-5044; 8931-8932; 9027; 9181-9184. *See* Boškoski Response Brief, fn. 106. In the view of the Appeals Chamber, the sources listed do not advance his point on this matter: they principally deal with identification and are, in part, irrelevant.
[628] Prosecution Reply Brief, para. 59.
[629] Boškoski Response Brief, para. 154 (emphasis in the original).
[630] Prosecution Reply Brief, para. 61. *See* Trial Judgement, para. 431; Ex. 1D6.
[631] Prosecution Appeal Brief, paras 4, 9, 30, 52, 74, 76, 78, 83-84 and 86.
[632] Prosecution Notice of Appeal, para. 6; Prosecution Appeal Brief, paras 3, 9, 41, 51 and 74.
[633] Prosecution Appeal Brief, paras 84-85. *See* Ex. P88, Articles 140-142. *See* also Prosecution Reply Brief, para. 67.
[634] Prosecution Appeal Brief, para. 85. After a criminal report has been filed, the public prosecutor may only withdraw a prosecution in circumstances prescribed by law. *See* Ex. P88, Articles 144-146.

observes that the information described in the Reports contained language strongly suggesting that the deceased were "terrorists" killed in the fighting.[635] It further maintains the MoI's notification to the judiciary is consistent with a request to establish the identity of the deceased rather than the criminal conduct of the police.[636] It recalls that the deputy public prosecutor stated that the objective of the investigation "was not to clarify what happened at Ljuboten," but to establish the identity of the deceased.[637] According to the Prosecution, the Trial Chamber refrained from finding that an investigation into the criminal conduct of Boškoski's subordinates was in fact triggered.[638]

257. Boškoski responds that the reports filed by the MoI constituted criminal reports or supplementary criminal reports and were consequently sufficient to trigger an investigation.[639] In the alternative, he argues, there was no requirement for the notifications to be "criminal reports", either under FYROM law[640] or international law.[641] He further notes that the Trial Chamber did not make an explicit finding that the Reports were "criminal reports", nor that their legal status was relevant to its finding that they were capable, or indeed likely, to trigger an investigation.[642] Boškoski also avers that the Prosecution failed to establish that it would be reasonable to conclude that the notifications by the MoI were unlikely to trigger an investigation unless they took the form of a "criminal report".[643] He adds that the FYROM authorities were generally flexible in practice and prepared to accept either oral or written reports.[644]

258. In reply, the Prosecution maintains that under international criminal law, a superior is required to report the criminal conduct of his subordinates when it is within his material ability to

[635] Prosecution Appeal Brief, para. 79.
[636] Prosecution Appeal Brief, para. 77 (citing Trial Judgement, para. 456). *See* also Prosecution Reply Brief, para. 61.
[637] Ex. P388, para. 8. *See* Prosecution Appeal Brief, para. 77. *See* also Trial Judgement, para. 456.
[638] Prosecution Reply Brief, para. 66.
[639] Boškoski Response Brief, paras 235-236. He claims that this position was supported by the evidence of Stojanovski, which the Prosecution failed to challenge. According to Boškoski, in his evidence, Stojanovski referred to Ex. P46.16 as a document submitted to the public prosecutor's office by the MoI to supplement the "criminal report" contained in Ex. 1D6. Boškoski Response Brief, para. 235 (citing T. 9181). In the context, the Appeals Chamber considers that Ex. 1D6 is erroneously alluded to and that the Defence intended to refer to Ex. P261. *See* T. 9180. The Prosecution disagrees, stating that contrary to Boškoski's assertion, Stojanovski's testimony does not demonstrate that Ex. P46.16 supplemented Ex. 1D6 or even Ex. P261 as the "prior criminal report". Rather, the evidence of Toskovski would suggest that the criminal report which was "supplemented" by Ex. P46.16 and Ex. P261 was Ex. P31, a report filed against Atulla Qaili for terrorism. *See* Prosecution Reply Brief, para. 70; fn. 182; Ex. P261 was authored by Toskovski.
[640] Boškoski Response Brief, para. 244. He states: "Nothing in Macedonian law limits permissible reporting (or transmission of information) between police and judiciary to criminal reports and, in fact, local practice shows that such communication would take many forms (including oral notification, meetings, etc). Nor is there any evidence – or support for the proposition – that only a criminal report proper would have been capable of triggering an investigation into those events." *See* Boškoski Response Brief, para. 244 (fns omitted).
[641] Boškoski Response Brief, paras 159 and 244. He contends: "international law is indifferent to the form in which reporting is done and does not attach any criminal consequences to this fact." *See* Boškoski Response Brief, para. 159.
[642] Boškoski Response Brief, para. 243.
[643] Boškoski Response Brief, para. 245.
[644] Boškoski Response Brief, paras 116-118 and 244. *See* also T. 9092-9093.

do so: "The strict manner, wording, or form of such a report is not important but the content is." The Prosecution contends that this proposition remains unaddressed by Boškoski.[645]

(b) Discussion

259. The Appeals Chamber recalls that the assessment of whether a superior fulfilled his duty to punish under Article 7(3) of the Statute has to be made on a case-by-case basis, taking into account the circumstances of each particular situation.[646] What constitutes necessary and reasonable measures is not a matter of substantive law but of evidence.[647] Accordingly, the Trial Chamber found that:

> It has been held in the jurisprudence of the Tribunal that civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings.[648]

260. The Trial Chamber reasonably held that as the Minister of the Interior, Boškoski was responsible for ensuring that any allegations of police criminal conduct were reported to the competent authorities so that the matter could be investigated and his subordinates punished if appropriate.[649]

261. According to the findings of the Trial Chamber, Exhibit 1D6 proves that the police reported to the on-duty investigative judge on 12 and 14 August 2001 that several bodies had been found in Ljuboten and that they had probably been killed in combat with security forces earlier that day.[650] A further report, Exhibit P261, was made on 14 August 2001 to the public prosecutor following the death of Atulla Qaili the day before.[651]

262. The Appeals Chamber considers that the Trial Chamber was aware that these notifications were not fully adequate and that a failure of the functioning of the FYROM judicial and police organs existed at the relevant time and location.[652] Indeed, the Trial Chamber noted

> that there was no specific notification of destruction of houses in Ljuboten or of any mistreatment of detained villagers or suspects in Ljuboten, at Braca's house, at Buzalak checkpoint, in various

[645] Prosecution Reply Brief, para. 63.
[646] *Hadžihasanović and Kubura* Appeal Judgement, para. 33; *Blaškić* Appeal Judgement, paras 72 and 417.
[647] *Orić* Appeal Judgement, para. 177; *Hadžihasanović and Kubura* Appeal Judgement, para. 33; *Blaškić* Appeal Judgement, para. 72.
[648] Trial Judgement, para. 418. *See* also *ibid.*, para. 417 (citing, *inter alia*, *Hadžihasanović and Kubura* Appeal Judgement, paras 142 and 154).
[649] Trial Judgement, para. 536.
[650] Trial Judgement, paras 431 and 529; Ex. 1D6.
[651] Trial Judgement, paras 433 and 529; Ex. P261; Ex. P46.16.
[652] Trial Judgement, para. 536. *See* Prosecution Appeal Brief, para. 64.

> police stations, the Skopje court or in the Skopje hospital. Further, no names of potential witnesses, either residents or police, were provided to the investigative judge.[653]

In addition, the Appeals Chamber notes that Exhibit 1D6 does not refer to alleged murders but only mentions "killed members" of the NLA.

263. The Appeals Chamber also considers that the Trial Chamber did not find that the police had informed the judiciary of the circumstances of Atulla Qaili's death; instead, they simply reported the deterioration of Qaili's health condition and his subsequent death without mentioning the police misconduct that led to his demise.[654]

264. The Appeals Chamber further observes that the Trial Chamber recognised that:

> No normal police investigations were carried out on the day, before the investigative judge and the public prosecutor were notified, or thereafter, of the scenes of the deaths in the village. There were no forensic examinations of the scenes, which would have been necessary in order to enable the public prosecutor and the judiciary to conduct their investigations.[655]

265. However, the Appeals Chambers recalls that the Trial Chamber held that the notifications contained in the Reports "ought, in the ordinary course, to have led an investigative judge and the public prosecutor to conduct a proper investigation as anticipated by law in such circumstances."[656] The Trial Chamber further found that:

> [B]y law, [these notifications] should have caused a judicial investigation, supported by the public prosecutor, into each of the deaths in the course of which the investigative judge and the public prosecutor ought to have become officially aware of the allegations of the closely related misconduct of police involving cruel treatment and wanton destruction so as to be able to determine whether criminal charges were justified.[657]

266. In addition, the Appeals Chamber finds that the Reports are themselves indicative that an investigation had already been triggered by the information provided by the MoI: the first report, Exhibit 1D6 - signed by investigative Judge Ognen Stavrev - confirms that the judiciary had already begun an investigation and were acting according to the information received from the MoI. Indeed, Exhibit 1D6 shows that the investigating judge on duty was informed by the MoI at 5.30 p.m. on 12 August 2001, the same day of the events at issue. On the same evening, the investigative judge informed the deputy public prosecutor about this first notification he had received from the MoI. Two days later, on 14 August 2001 at 1.30 p.m., the MoI again notified the investigative judge "that there were several corpses in the area of the Ljuboten village" who were probably "members of the

[653] Trial Judgement, para. 431. *See* Prosecution Appeal Brief, para. 67.
[654] Trial Judgement, para. 529; Ex. P261; Prosecution Reply Brief, para. 28.
[655] Trial Judgement, para. 530. *See* also Trial Judgement, para. 536; Prosecution Appeal Brief, para. 84; Prosecution Reply Brief, paras 26, 66-67 and 69. By way of contrast, the Prosecution considers the manner in which the police properly investigated the criminal allegations against Albanian "terrorists". *See* Prosecution Reply Brief, para. 68.
[656] Trial Judgement, para. 529; Prosecution Reply Brief, para. 66.
[657] Trial Judgement, para. 536.

terrorist organisation NLA/KLA, perished in combat activities carried out with [FYROM] security forces on 12 August 2001".[658] Shortly thereafter, an investigation team – comprised of the investigative judge, the deputy public prosecutor and a doctor from the Institute for Forensic Medicine and Criminology – was set up and attempted to conduct an on-site investigation in Ljuboten together with officials of the MoI in charge of criminal technique.[659] The Appeals Chamber also notes that an organ of the MoI subsequently proposed to the judicial authorities that there be an exhumation in Ljuboten, although it was not until April 2002 that this exhumation was conducted at the presence of representatives of the ICTY Prosecutor.[660] In addition, a deputy public prosecutor indicated on 28 November 2001 "that the investigation into Ljuboten had already been opened, despite the lack of information necessary to do so".[661]

267. The Appeals Chamber observes that these were timely notifications and considers it to be of relevance that the information provided in the notifications "brought the deaths to the attention of the authorities responsible for the investigation of criminal offences and while suggesting one cause, left open the cause of the death."[662] The lack of detail with respect to possible criminal conduct can be explained in part by the fact that the first notification by the MoI to the investigative judge was made as early as the afternoon of 12 August 2001.[663] As noted above, the evidence also shows that since the judicial authorities had been notified, they at least attempted to conduct an on-site investigation and, subsequently, an exhumation.[664] The Prosecution does not show that no reasonable trier of fact could have found that on the basis of the above-mentioned information, the

[658] Trial Judgement, para. 431.
[659] Trial Judgement, para. 529; Ex. 1D6. The on-site investigation was not eventually conducted due to purported security problems, Trial Judgement, paras 431 and 529-530.
[660] This proposal was made on 7 September 2001, *see* Trial Judgement, para. 454. The exhumation could not be conducted earlier due to alleged security problems and lack of information concerning the victims' identities, *see* Trial Judgement, paras 455-456.
[661] Ex. 1D197, referred to in Trial Judgement, para. 456. This deputy public prosecutor also stated that the "objective was not to clarify what happened at Ljuboten [...] [but] only to carry out an exhumation, and to identify the persons buried" (Trial Judgement, para. 456, referring to Ex. P388). Boškoski also stated, regarding the several bodies found in Ljuboten, that "all that remains now is to establish whether they were from Ljuboten itself, or whether those terrorists were imported [...] from Kosovo or from other parts of the former Yugoslavia or Europe" (Trial Judgement, para. 446, referring to Ex. P362). However, other evidence suggests that the objectives of the attempted investigation included the identification of the cause of their deaths (*e.g.* Ex. 1D374 and Ex. 1D34). The Trial Chamber indeed left this question open. The Appeals Chamber considers that in any case, it is the judicial authorities' responsibility to properly determine the objectives of the investigation and that there is no evidence to suggest that Boškoski had any influence on the determination of the objectives of the investigation. The Appeals Chamber further notes that another deputy public prosecutor testified that "[a]t that time, we had no support from the Ministry of Interior for bringing police to testify" (Trial Judgement, para. 456, referring to Ex. P235, para. 13). She also stated, however, that "no efforts [were] made to talk to or interview any of the police officers which were deployed in Ljuboten [...] [because] we knew what the response of the police would be if we asked them to testify" (Ex. P235, para. 13). Furthermore, there is no allegation in the statement that Boškoski was involved in any police member's refusal to cooperate with the judicial authorities.
[662] Trial Judgement, para. 529.
[663] At this point in time and at the time of the later notification on 14 August 2001, only "rumours were circulating in media and other circles that there had been clashes with civilians, shelling by the police and a number of persons killed" (Trial Judgement, paras 434, 446, 527). The Trial Chamber did not find that Boškoski was fully aware of the specific allegations about police misconduct in Ljuboten before 26 August 2001, *see* Trial Judgement, paras 450-451.

judicial authorities "in the ordinary course" would have conducted a proper investigation. Consequently, the Appeals Chamber sees no error in the Trial Chamber's finding that the appropriate authorities were made aware of the alleged criminal conduct in Ljuboten "so that it would be investigated with a view to criminal charges and appropriate punishment".[665] Although the evidence did not confirm that Boškoski had ordered the notifications described in Exhibit 1D6, they were communicated by police officers in his ministry and he was informed that they had been made to the competent authorities.[666] He was also informed that an investigation was being attempted.[667]

268. In this context, the Appeals Chamber recalls the Trial Chamber's finding that "Boškoski was the minister of a structured, disciplined and heavily regulated ministry in a government that was functioning effectively".[668] This finding shows that Boškoski could reasonably rely on what his subordinates were doing in order to report the events to the competent authorities.[669] Furthermore, the Prosecution has not shown that the Trial Chamber was unreasonable in finding that there was no basis for concluding that Boškoski "was aware during the Indictment period of the failure of the police to perform their normal functions".[670] To the contrary, Exhibit 1D374 indicates that Boškoski was informed about the fact that members of the MoI participated in the team that was formed by the judicial authorities in order to conduct an on-site investigation in Ljuboten and that included the investigative judge and the deputy public prosecutor.[671]

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[664] Trial Judgement, paras 431 and 454-456.
[665] Trial Judgement, para. 522. *Cf. Hadžihasanović and Kubura* Appeal Judgement, paras 146-155, in which the Appeals Chamber found that since a document - which neither originated from Hadžihasanović nor his subordinates - indicated that a public prosecutor had been aware of *one of* the alleged crimes, it created a reasonable doubt as to whether Hadžihasanović's Corps initiated an investigation or criminal proceedings against the perpetrators of the alleged crimes by reporting to the judicial authorities. This reasonable doubt led the Appeals Chamber, in the specific circumstance of that case, to find that the Trial Chamber erred in concluding that it was proven beyond reasonable doubt that necessary and reasonable measures to punish the perpetrators were not taken.
[666] Trial Judgement, para. 529.
[667] Trial Judgement, paras 447, 529, 536.
[668] Trial Judgement, para. 514.
[669] *Cf.* AT. 140-141, with reference to *the United States v. Wilhelm von Leeb et al.*, "*The High Command Case*", Judgement of 27 October 1948, Military Tribunal V, Law Reports of the Trials of War Criminals, vol. XI: "The President has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must [be] a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilised nations."
[670] Trial Judgement, para. 534. The Prosecution's unsubstantiated submission that Boškoski "must have been aware that members of the police would be reluctant to effectively investigate and implicate other members of the police" (Prosecution Appeal Brief, para. 46) does not render this finding unreasonable.
[671] *See* also Ex. 1D373.

269. Regarding the Prosecution's argument that Exhibit P261 is silent on the circumstances of the death of Atulla Qaili, the Appeals Chamber recalls the Trial Chamber's finding that, on 14 August 2001, an autopsy was conducted by the Forensic Medicine Institute by order of the investigative judge, which "fully set out the extent of the severe injuries to his body and that they were caused by repeated 'dynamic dull-firm force' in the area of the head, body and limbs."[672] The Trial Chamber also found, however,

> that the autopsy protocol was not subsequently obtained by the public prosecutor or the judiciary, apparently because the "competent court failed to pay for the conducted post mortem", nor was there any attempt by them to obtain it.[673]

The Appeals Chamber is satisfied that the Trial Chamber reasonably found that the results of the autopsy should have triggered, in the ordinary course, further investigations by the competent judicial authorities as anticipated in such circumstances.[674] Furthermore, the Prosecution does not establish that the Trial Chamber erred in finding that the serious failure to adequately investigate the reports made by the police to the judicial authorities was not attributable to Boškoski, as the judicial authorities were not under his ministerial authority.[675] Thus, the Appeals Chamber also finds that the serious failure from the public prosecutor or the judiciary cannot be attributed to Boškoski.

270. The Appeals Chamber is aware of the evidence suggesting that the Reports were not sufficient to allow a reasonable trier of fact to acquit Boškoski of all charges pursuant to Article 7(3) of the Statute. In particular, the Reports did not explicitly refer to criminal police conduct and there was a serious failure to adequately investigate the matters described in the Reports. The Appeals Chamber observes, however, that the Trial Chamber carefully considered these deficiencies in light of the totality of the evidence.[676] Though the Trial Chamber held, for example, that there were further steps Boškoski could have taken to assist the investigation,[677] the Trial Chamber found that he knew that the competent judicial authorities had been notified and that an investigation was being attempted.[678] The Trial Chamber also held that there is no basis for

[672] Trial Judgement, paras 433 and 443; Ex. P54.059; Ex. P49, p. 31.
[673] Trial Judgement, para. 433. *See* also *ibid.*, para. 443.
[674] Trial Judgement, para. 536.
[675] Trial Judgement, para. 533.
[676] Trial Judgement, paras 529-536.
[677] The Appeals Chamber agrees with the Trial Chamber's finding that "[f]urther steps were open to [...] Boškoski to have ensured that he was more fully informed or to have ensured that the responsible police performed their duties so that the investigative judge and the public prosecutor were in a better position to determine what really had occurred and whether criminal charges against any of the police were justified. The evidence does not indicate that [...] Boškoski would have been strongly motivated in that way, even if he had been aware of the deficiencies of the police." *See* Trial Judgement, para. 535.
[678] Trial Judgement, para. 536.

concluding that Boškoski tried to impermissibly interfere in the investigations or that he was aware during the Indictment period of the failure of the police to perform their normal functions.[679]

271. The Appeals Chamber recalls that it will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the decision.[680] Furthermore, the Appeals Chamber has repeatedly held that it "will not lightly disturb the findings of the Trial Chamber".[681] In *Čelebići*, the Appeals Chamber found that if, in a case of circumstantial evidence, there is a conclusion which is reasonably open from the evidence, and which is consistent with the innocence of the accused, he must be acquitted.[682] Having reviewed the submissions of the parties and the relevant findings of the Trial Chamber as well as the underlying evidence, the Appeals Chamber is not satisfied that in the circumstances of this case, it was not open for a reasonable trier of fact to acquit Boškoski of failure to punish responsibility on the basis of the information given to the judicial authorities in the Reports.[683]

272. The Appeals Chamber recalls that when the Prosecution appeals against an acquittal it must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated. In this case, the Prosecution has not established that the Trial Chamber erred when it found that the Reports "ought, in the ordinary course, to have led an investigative judge and the public prosecutor to conduct a proper investigation"[684] in the events in Ljuboten. Based on this finding, the Trial Chamber held that "[i]t is not shown that [Boškoski] failed to take the necessary and reasonable measures."[685] In the circumstances of this case, the Trial Chamber did not commit a factual error when arriving at this conclusion. Consequently, it is not necessary for the Appeals Chamber to consider the two additional arguments of the Prosecution's appeal.[686]

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[679] The Trial Chambers observes that "like the investigative judge and the public prosecutor, reports reaching [...] Boškoski noted that investigation could not be undertaken in Ljuboten because of the security situation. There is no basis for concluding that he knew this to be false, or that he was aware during the Indictment period of the failure of the police to perform their normal functions." (fns omitted). *See* Trial Judgement, para. 534.
[680] *See supra* para. 13.
[681] *Jović* Appeal Judgement, para. 13; *Marijačić and Rebić* Appeal Judgement, para. 16. *See* also *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[682] *Čelebići* Appeal Judgement, para. 458.
[683] Consequently, Boškoski's submission that the Prosecution merely reargued on appeal that the Reports were intended solely as a way to identify the deceased persons is dismissed (Boškoski Response Brief, paras 152-153 and 185; Prosecution Reply Brief, paras 59-60.
[684] Trial Judgement, para. 529.
[685] Trial Judgement, para. 536.
[686] *See supra* para. 249: (i) conducting an effective investigation into police activity in Ljuboten on 12 August 2001 (Prosecution Appeal Brief, paras 3, 7-8, 28, 30, 32-36, 41-43, 47, 49-51, 54, 62, 72 and 100) and (ii) initiating disciplinary proceedings against subordinates suspected of criminal behaviour (*ibid.*, paras 3, 7-8, 28, 30, 47-49, 55, 87, 96-98 and 100).

C. Conclusion

273. On the basis of the above, the Prosecution's appeal is dismissed in its entirety.

XII. DISPOSITION

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

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

NOTING the respective written submissions of the Parties and the arguments they presented at the hearing on 29 October 2009;

SITTING in open session;

DISMISSES Johan Tarčulovski's appeal in its entirety;

DISMISSES the Prosecution's appeal in its entirety;

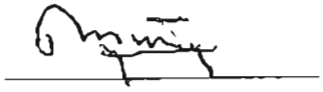
AFFIRMS the acquittal of Ljube Boškoski and the sentence imposed by the Trial Chamber against Johan Tarčulovski, subject to credit being given under Rule 101(C) of the Rules for the period Johan Tarčulovski has already spent in detention; and

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Johan Tarčulovski is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

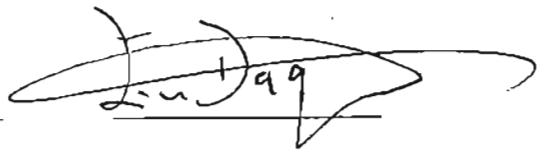
Patrick Robinson

Presiding Judge



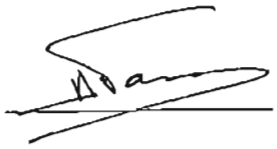
Mehmet Güney

Judge



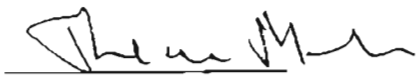
Liu Daqun

Judge



Andrésia Vaz

Judge



Theodor Meron

Judge

Judge Liu Daqun appends a separate opinion.

Dated this nineteenth day of May 2010,

At The Hague,

The Netherlands

[Seal of the Tribunal]

XIII. SEPARATE OPINION OF JUGDE LIU DAQUN

1. In this Judgement, the Appeals Chamber defers to the Trial Chamber's conclusion that "[i]t is not shown that [Boškoski] failed to take the necessary and reasonable measures" to punish his subordinates for the crimes committed in Ljuboten on 12 August 2001.[1] While I support the decision to uphold Boškoski's acquittal in accordance with the principle of *in dubio pro reo*, I am nonetheless concerned that the scope of command responsibility is gradually being eroded.[2]

2. Pursuant to Article 7(3) of the Statute, a superior is required to take "necessary and reasonable measures" to prevent or punish the commission of crimes by his subordinates in order to discharge his command responsibility.[3] What constitutes "necessary and reasonable measures" is not a matter of law, but a matter of evidence and should be determined according to the particular circumstances of the case.[4] Moreover, "necessary" measures are those measures appropriate for the superior to discharge his obligation, showing that he *genuinely* tried to prevent and punish; while reasonable measures are those reasonably falling within the *material* powers of the superior.[5]

3. It should be stressed, in my view, that a superior has a duty to take *active steps* to ensure that his subordinates are brought to justice for the commission of their offences.[6] It is on this point that I have a degree of unease in this case. The fact that a superior can effectively do nothing and still be acquitted of command responsibility is acutely troubling.[7] Arguably, such an approach undermines the very purpose of this mode of liability. However, as I have indicated above, I prefer to accord deference to the Trial Chamber's findings and uphold the acquittal.

[1] *See* Appeal Judgement, para. 235, citing Trial Judgement, para. 536.
[2] *Cf. Hadžihasanović and Kubura* Appeal Judgement, paras 146-155.
[3] *Orić* Appeal Judgement, para. 177; *Halilović* Appeal Judgement, para. 63.
[4] *Orić* Appeal Judgement, para. 177; *Halilović* Appeal Judgement, para. 63; *Blaškić* Appeal Judgement, para. 72.
[5] *Orić* Appeal Judgement, para. 177; *Halilović* Appeal Judgement, para. 63.
[6] *Cf. United States v. Wilhelm von Leeb et al.* (*The High Command Case*), Judgement, 27 October 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p. 623. *See* also *United States v. Wilhelm List et al.* (*The Hostage Case*), Judgement, 27 October 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p. 1271.
[7] *See* Trial Judgement, para. 529. In considering that "events took a different turn" the Trial Chamber appears to accept that the submission of reports to the judicial authorities was not the result of any active steps taken by Boškoski.

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

Dated this 19th day of May 2010,
At The Hague,
The Netherlands.

Judge Liu Daqun

[Seal of the Tribunal]

XIV. ANNEX A – PROCEDURAL BACKGROUND

A. Notices of Appeal

1. On 5 August 2008, the Appeals Chamber denied Johan Tarčulovski's motion seeking an extension of time to file his notice of appeal by 9 September 2008.[1] Tarčulovski accordingly filed his notice of appeal on 8 August 2008.[2] On 2 April 2009, Tarčulovski filed an amended notice of appeal.[3]

2. The Prosecution filed its notice of appeal on 6 August 2008.[4]

B. Composition of the Bench

3. On 30 July 2008, the then President of the Tribunal ordered that the Bench in the present case would be composed as follows: Judge Fausto Pocar, Presiding; Judge Mohamed Shahabuddeen; Judge Andrésia Vaz; Judge Liu Daqun and Judge Theodor Meron.[5] Judge Pocar assigned himself as the Pre-Appeal Judge.

4. On 11 November 2008, the then President of the Tribunal assigned Judge Mehmet Güney to replace himself in the present case.[6] By an order of 17 November 2008, Judge Güney designated himself as Pre-Appeal Judge.[7] On 24 April 2009, the President of the Tribunal assigned himself to replace Judge Mohamed Shahabuddeen on the Bench.[8]

C. Assignment of Defence Counsel to Tarčulovski

5. In a decision of 10 October 2008, the Deputy Registrar withdrew the assignment of Mr. Antonio Apostolski as lead counsel and Ms. Zivković as co-counsel to Tarčulovski, further deciding to appoint Messrs. Alan M. Dershowitz, Nathan Z. Dershowitz and Antonio Apostolski as his

[1] Decision on Johan Tarčulovski's Motion for Extension of Time to File the Notice of Appeal, 5 August 2008; Tarčulovski Motion for Extension of Time to File the Notice of Appeal, 22 July 2008.
[2] Tarčulovski Notice of Appeal.
[3] Tarčulovski Amended Notice of Appeal. *See* also: Motion of Johan Tarčulovski for Leave to Present Appellate Arguments in Order Different From That Presented in Notice of Appeal, Pursuant to Practice Direction 4 and to Amend the Notice of Appeal Pursuant to Practice Direction 2, 12 January 2009 ("Tarčulovski's Motion of 12 January 2009"); Prosecution Response to Johan Tarčulovski's Motion of 12 January 2009, and Motion to Strike, 22 January 2009; Decision of 26 March 2009.
[4] Prosecution Notice of Appeal.
[5] Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 30 July 2008.
[6] Order Replacing a Judge in a Case Before the Appeals Chamber, 11 November 2008.
[7] Order Designating the Pre-Appeal Judge, 17 November 2008.
[8] Order Replacing a Judge in a Case Before the Appeals Chamber, 24 April 2009.

counsel pursuant to Rule 44(A) of the Rules.[9] Subsequently, the Deputy Registrar appointed Mr. Jordan Apostolski as counsel to Tarčulovski pursuant to Rule 44(A) of the Rules.[10]

D. Appeal Briefs

1. Tarčulovski's Appeal

6. On 1 October 2008, Tarčulovski filed a motion seeking an extension of time to file his appellant's brief, due to the fact that he had not received a Macedonian translation of the Trial Judgement.[11] The Prosecution responded on 9 October 2008, arguing that Tarčulovski had not established good cause for the requested extension to be granted.[12] The Pre-Appeal Judge denied the request on 16 October 2008.[13]

7. Subsequent to the decision of the Deputy Registrar to appoint new defence counsel, on 17 October 2008, Tarčulovski filed a motion seeking an extension of time to file his appellant's brief.[14] This was on the basis, *inter alia,* that counsel had to review the very extensive record on appeal[15] and that to require counsel to submit an appeal brief by 23 October 2008 would violate the due process rights of Tarčulovski and would damage the credibility of the Tribunal.[16] On 21 October 2008 the Prosecution responded that none of Tarčulovski's arguments provided good cause for an extension within the meaning of Rule 127 of the Rules.[17] On 22 October 2008, the Appeals Chamber, considering, *inter alia*, that new Counsel for Tarčulovski was appointed on 10 October 2008 and that the Macedonian translation of the Trial Judgement should have been ready by 1 December 2008, granted the Motion for Extension of Time in part and ordered that the appeal brief be filed by 12 January 2009.[18] The Tarčulovski Appeal Brief was eventually filed on that day.[19] On 9 April 2009, the Prosecution filed its response to the Tarčulovski Appeal Brief.[20] On 17 April

[9] Decision of the Deputy Registrar assigning counsel to Mr Tarčulovski, 10 October 2008.
[10] Decision of the Deputy Registrar assigning counsel to Mr Tarčulovski, 31 October 2008.
[11] Tarčulovski Motion for Extension of Time to File the Appellant Brief, 1 October 2008.
[12] Prosecution Response to Tarčulovski's Motion for Extension of Time to File the Appellant Brief, 9 October 2008.
[13] Decision on Johan Tarčulovski's Motion for Extension of Time to File Appeal Brief, 16 October 2008.
[14] Motion of Alan M. Dershowitz, as Appellate Counsel for Tarčulovski, for Extension of Time to File the Appellant Brief, 17 October 2008.
[15] *Ibid.*, para. 2.
[16] *Ibid.*, para. 14.
[17] Prosecution Response to Motion of Alan M Dershowitz, as Appellate Counsel for Tarčulovski, for Extension of Time to File the Appellant Brief, 21 October 2008.
[18] Decision on Johan Tarčulovski's Second Motion for Extension of Time to File Appeal Brief, 22 October 2008.
[19] Tarčulovski Appeal Brief. *See* also Book of Authorities on Behalf of Johan Tarčulovski, 12 January 2009.
[20] Prosecution Response Brief. *See* also Book of Authorities for Prosecution Response to Johan Tarčulovski's Appeal Brief, 9 April 2009.

2009, the Appeals Chamber denied Tarčulovski's motion for a two-week extension of time to file his brief in reply.[21] As a result, the Tarčulovski Reply Brief was filed on 24 April 2009.[22]

2. Prosecution's Appeal

8. The Prosecution Appeal Brief was filed on 20 October 2008.[23] Boškoski's response was filed on 1 December 2008.[24] Subsequently, the Prosecution Reply Brief was filed on 16 December 2008.[25] In the Prosecution Reply Brief, the Prosecution made an alternative request to vary its notice of appeal.[26] On 19 May 2009, the Appeals Chamber decided that it would be premature to decide this alternative request at this stage of the proceedings.[27]

3. Motion to Extend Word Limit

9. On 20 November 2008, Boškoski filed a motion seeking leave for 15,000-word extension for his brief in response pursuant to the Practice Direction on the Length of Briefs and Motions[28] and Article 21 of the Statute.[29] The Defence submitted that there were exceptional circumstances in the case that warranted the granting of such an extension and that the extension sought was both necessary and reasonable.[30]

10. The Prosecution field its response on 21 November 2008, arguing that Boškoski offered no satisfactory explanation as to why his brief in response involved issues that were so complex that a word limit of 30,000 was insufficient. The Prosecution refuted Boškoski's claim that an extension would facilitate and expedite the Appeals Chamber's considerations.[31]

11. The Pre-Appeal Judge dismissed the motion on 25 November 2008,[32] finding that Boškoski had not demonstrated the existence of exceptional circumstances requiring an enlargement of the word-limit.

[21] Decision on Tarčulovski's Urgent Motion for Extension of Time to File his Reply Brief, 17 April 2009; Tarčulovski's Urgent Motion for a Two-Week Extension of Time to File his Reply Brief, 14 April 2009.
[22] Tarčulovski Reply Brief. *See* also Book of Authorities for Reply Brief of Johan Tarčulovski, 24 April 2009.
[23] Prosecution Appeal Brief. *See* also Book of Authorities for Prosecution's Appeal Brief, 20 October 2008.
[24] Boškoski Response Brief.
[25] Prosecution Reply Brief. *See* also Book of Authorities for Prosecution's Reply Brief, 16 December 2008
[26] Prosecution Reply Brief, para. 14. *See* also Boškoski Defence Response to Prosecution Motion to Vary Grounds of Appeal in Notice of Appeal, 23 December 2008; Prosecution Response to Boškoski's Submission of 23 December 2008, 24 December 2008.
[27] Decision on Alternative Prosecution Motion to Vary Notice of Appeal, 19 May 2009.
[28] Practice Direction of the Lengths of Briefs and Motions (IT/184 Rev. 2) of 16 September 2005.
[29] Boškoski Defence Motion for Extension of Word-Limit, 20 November 2008, para. 11.
[30] *Ibid.*
[31] Prosecution Response to Boškoski's Motion for Extension of Word-Limit, 21 November 2008 para. 8.
[32] Decision on Ljube Boškoski's Defence Motion for Extension of Word Limit, 25 November 2008.

4. Motions to Strike

(a) Boškoski's Motion to Strike

12. On 1 December 2008, Boškoski filed a motion requesting to strike out paragraphs from the Prosecution Appeal Brief.[33] He asked the Appeals Chamber to strike out paragraphs 1, 2, 3, 9, 93 and 99 of the Prosecution Appeal Brief, and to order the Prosecution to re-file its appeal brief without the impugned paragraphs or to declare those paragraphs not to form part of this Appeal.[34] Boškoski submitted in the alternative that the Appeals Chamber should disregard the allegations therein for the purpose of the appeal.[35] The Prosecution responded on 11 December 2008, arguing that the Prosecution Appeal Brief accurately reflected the Trial Judgement and did not contain the alleged grave misstatements and misrepresentations of the judgement.[36] The Boškoski Defence subsequently filed a reply on 15 December 2008.[37] On 19 May 2009, the Appeals Chamber granted the Boškoski Motion to Strike to the extent that it requested the Appeals Chamber to take the matters raised therein into consideration when dealing with the merits of this appeal. The remainder of the Boškoski Motion to Strike was denied.[38]

(b) Prosecution's Motion to Strike

13. On 22 January 2009, the Prosecution filed a motion to strike the first two grounds of the Tarčulovski Appeal Brief, arguing *inter alia* that these grounds constituted entirely new legal and factual arguments which were outside the Tarčulovski Notice of Appeal.[39] Tarčulovski responded to the Prosecution Motion to Strike on 26 January 2009.[40] The Prosecution replied on 29 January 2009.[41] Tarčulovski filed a motion to sur-reply, along with the sur-reply itself, on 30 January 2009,[42] to which the Prosecution responded on 4 February 2009.[43] On 26 March 2009, the Appeals Chamber denied the Prosecution Motion to Strike, finding *inter alia* that any prejudice

[33] Boškoski Defence Motion to Strike Out Paragraphs From Prosecution Appeal Brief, 1 December 2008 ("Boškoski Motion to Strike").
[34] *Ibid.*, para. 33.
[35] *Ibid.*, para. 34.
[36] Prosecution Response to Boškoski Defence Motion to Strike out Paragraphs From the Prosecution Appeal Brief, 11 December 2008, para. 1.
[37] Boškoski Defence Reply *Re* Motion to Strike Parts of Prosecution Appeal, 15 December 2008.
[38] Decision on Boškoski Defence Motion to Strike out Paragraphs From Prosecution Appeal Brief, 19 May 2009.
[39] Prosecution Response to Johan Tarčulovski's Motion of 12 January 2009, and Motion to Strike, 22 January 2009 ("Prosecution Motion to Strike"), para. 4.
[40] 1) Reply of Tarčulovski on Motion 2) Response to Prosecution's Motion to Strike, 26 January 2009.
[41] Prosecution Reply to Johan Tarčulovski's Response of 26 January 2009, to Prosecution Motion to Strike, 29 January 2009.
[42] Motion to File Sur-Reply to Prosecution's Motion to Strike and Sur-Reply, 30 January 2009.
[43] Prosecution's Response to Johan Tarčulovski's "Motion to File Sur-Reply to Prosecution's Motion to Strike and Sur-Reply", 4 February 2009.

to the Prosecution as a result of the new arguments had already been cured by the Appeals Chamber's earlier decision to grant it an extension of time to file the Prosecution Response Brief.[44]

5. Motions for Provisional Release

14. On 11 December 2008, Tarčulovski filed a motion for provisional release from 22 December 2008 to 12 January 2009.[45] The Prosecution filed a confidential response on 15 December 2008,[46] arguing that Tarčulovski's submissions did not amount to special circumstances warranting provisional release pursuant to Rule 65(I)(iii) of the Rules.[47] Tarčulovski replied on 17 December 2008.[48] On 18 December 2008, the Appeals Chamber dismissed the Motion for Provisional Release, finding that Tarčulovski had not shown the special circumstances required by Rule 65(I)(iii) of the Rules.[49]

15. On 10 July 2009, Tarčulovski filed a second motion for provisional release from 25 July 2009 to 31 July 2009.[50] The Prosecution filed a response on 14 July 2009[51] and Tarčulovski filed a reply on 15 July 2009.[52] On 22 July 2009, the Appeals Chamber denied the Second Motion for Provisional Release, finding that Tarčulovski failed to show special circumstances pursuant to Rule 65(I)(iii) of the Rules.[53]

16. On 17 December 2009, Tarčulovski filed his third motion for provisional release from 25 December 2009 to 2 January 2010 in order to have his FYROM ID card and passport renewed.[54]

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[44] Decision of 26 March 2009, para. 27. *See* also Urgent Motion for Extension of Time, 13 February 2009, in which the Prosecution requested the Pre-Appeal Judge to grant an extension of time to file the Respondent's Brief until 14 days after the filing of the Appeals Chamber's decision on Tarčulovski's Motion of 12 January 2009; *see* also Decision on Prosecution's Urgent Motion for Extension of Time, 19 February 2009, where the Appeals Chamber granted the Prosecution's motion of 13 February 2009.

[45] Motion of Johan Tarčulovski for Provisional Release with Annex A through B, 11 December 2008 ("Motion for Provisional Release") (confidential).

[46] Prosecution Response to Motion of Johan Tarčulovski for Provisional Release with Annexes A through B, 15 December 2008 (confidential).

[47] *Ibid.*, para. 8.

[48] Reply of Johan Tarčulovski to Response of Prosecution to Tarčulovski's Motion for Provisional Release, 17 December 2008 (confidential).

[49] Decision on Johan Tarčulovski's Motion for Provisional Release, 18 December 2008 (confidential; a public redacted version filed on 5 May 2010), paras 10-11.

[50] Tarčulovski Motion for Provisional Release on Compassionate Grounds With Confidential Annexes A and B, 10 July 2009 ("Second Motion for Provisional Release"), made public by the Notice Changing Confidential Status of "Tarčulovski Motion for Provisional Release on Compassionate Grounds With Confidential Annexes A and B" and the Reply to the Prosecution Response to the Motion, 30 July 2009.

[51] Prosecution Response to "Tarčulovski Motion for Provisional Release on Compassionate Grounds With Confidential Annexes A and B", 14 July 2009, made public by the Notice Changing Confidential Status of Prosecution Response to "Tarčulovski Motion for Provisional Release on Compassionate Grounds With Confidential Annexes A and B" and Attached Public Filing, 24 July 2009.

[52] Reply to the Prosecution Response to Tarčulovski Motion for Provisional Release on Compassionate Grounds With Confidential Annexes A and B, 15 July 2009. As to the public character of this filing, *see supra* fn. 50 of this section.

[53] Decision on Tarčulovski Motion for Provisional Release on Compassionate Grounds, 22 July 2009.

[54] Tarčulovski Motion for Provisional Release to Meet his Legal Obligations with Annexes 1 and 2, 17 December 2009.

The Prosecution opposed this request in its response of 21 December 2009.[55] On 23 December 2009, the Duty Judge declined to deal with this request as he was not satisfied as to its urgency,[56] and on 19 January 2010, the Appeals Chamber denied it.[57]

6. Other issues

17. On 7 December 2009, Boškoski filed a confidential and partly *ex parte* motion for urgent orders regarding the disclosure of confidential material.[58] On 17 December 2009, the Prosecution filed its response in which it partly opposed the motion.[59] The Duty Judge granted the motion in part on 22 December 2009.[60]

7. Status conferences and appeal hearing

18. Status conferences were held on 1 December 2008, 18 March 2009, 16 July 2009 and 19 February 2010. The appeal hearing was held on 29 October 2009.

[55] Prosecution Response Opposing Tarčulovski's Motion for Provisional Release with Annex, 21 December 2009. On 24 December 2009, the Prosecution filed its Supplement to Prosecution Response Opposing Tarčulovski's Motion for Provisional Release with Annex.
[56] Decision on Tarčulovski's Motion for Provisional Release of 17 December 2009, p. 3.
[57] Decision on Tarčulovski's Motion for Provisional Release, 19 January 2010.
[58] *Boškoski* Motion for Urgent Orders Regarding Disclosure of Confidential Material with *Ex Parte* Annexes A Through J, 7 December 2009 (confidential and *ex parte*). *See* also Addendum to *Boškoski* Motion for Urgent Orders Regarding Disclosure of Confidential Material With *Ex Parte* Annexes A through J, 9 December 2009 (confidential).
[59] Prosecution Response to *Boškoski* Confidential Motion for Urgent Orders Regarding Disclosure of Confidential Material, 17 December 2009 (confidential). *See* also Response of the United States of America to Decision on Boskoski Motion for Urgent Orders Regarding Disclosure of Confidential Material, 31 December 2009 (confidential).
[60] Decision on Boškoski Motion for Urgent Orders Regarding Disclosure of Confidential Material, 22 December 2009 (confidential; a public redacted version was filed on 14 May 2010). *See* also Withdrawal of the Request to the United States of America to Serve the "Decision on Boškoski Motion for Urgent Orders Regarding Disclosure of Confidential Material" of 22 December 2009 on [Redacted], 19 January 2010 (confidential; a public redacted version was filed on 5 May 2010).

XV. ANNEX B – GLOSSARY OF TERMS

A. List of Cited Court Decisions

1. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement")

BANOVIĆ

Prosecutor v. Predrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement")

BLAGOJEVIĆ AND D. JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Decision on the Admission Into Evidence of Intercept-Related Materials, 18 December 2003 ("*Blagojević and Jokić* Decision of 18 December 2003")

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement")

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-T, Decision on Prosecution's Motion for Admission Into Evidence of Documents MFI P251, P379 and P435, 10 December 2007 (confidential) ("Decision of 10 December 2007")

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different From That

Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 ("Decision of 26 March 2009")

BRALO

Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Judgement on Sentencing Appeal")

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement")

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 Februry 2002 ("*Brđanin and Talić* Order of 15 February 2002")

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998 ("*Čelebići* Decision of 4 March 1998")

ČEŠIĆ

Prosecutor v. Ranko Češić, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004 ("*Češić* Sentencing Judgement")

DELIĆ

Prosecutor v. Rasim Delić, Case No. IT-04-83-T, Judgement, 15 September 2008 ("*Delić* Trial Judgement")

ERDEMOVIĆ

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* Sentencing Judgement")

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement")

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement")

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Judgement, 16 November 2005 ("*Halilović* Trial Judgement")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement")

HARADINAJ *et al.*

Prosecutor v. Ramush Haradinaj, Idriz Baraj and Lahi Brahimaj, Case No. IT-04-84-T, Judgement, 3 April 2008 ("*Haradinaj et al.* Trial Judgement")

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

M. JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal")

JOVIĆ

Prosecutor v. Josip Jović, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 ("*Jović* Appeal Judgement")

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 Feburary 2001 ("*Kordić and Čerkez* Trial Judgement")

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement")

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KUNARAC *et al.*

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ *et al.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA *et al.*

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

LIMAJ *et al.*

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Trial Judgement")

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

MARIJAČIĆ AND REBIĆ

Prosecutor v. Ivica Marijačić and Markica Rebić, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić and Rebić* Appeal Judgement")

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-T, Judgement, 12 June 2007 ("*Martić* Trial Judgement")

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement")

D. MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević* Appeal Judgement")

MILUTINOVIĆ *et al.*

Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Case No. IT-05-87-T, Judgement, 26 February 2009 ("*Milutinović et al.* Trial Judgement")

MRĐA

Prosecutor v. Darko Mrđa, Case No. IT-02-59-S, Sentencing Judgement, 31 March 2004 ("Mrđa Sentencing Judgement")

MRKŠIĆ AND ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement")

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Decision on the Prosecution's Motion to Order Veselin Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds Contained in his Appeal Brief, 26 August 2008 ("*Mrkšić and Šljivančanin* Decision of 26 August 2008")

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a "Tuta" and Vinko Martinović, a.k.a "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement")

Prosecutor v. Naser Orić, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004 ("*Orić* Order of 21 October 2004")

POPOVIĆ *et al.*

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović et al.* Decision of 30 January 2008")

B. SIMIĆ *et al.*

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement")

Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić and Simo Zarić, Case No. IT-95-9-T, Reasons for Decision on Admission of "Variant A&B" Document, 22 May 2002 ("*Simić et al.* Decision of 22 May 2002")

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgement, 31 January 2005 ("*Strugar* Trial Judgement")

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement")

D. TADIĆ

Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 ("*Tadić* Trial Judgement")

Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997 ("*Tadić* Sentencing Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement on Sentencing Appeal")

Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision")

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgment, 29 November 2002 ("*Vasiljević* Trial Judgement")

2. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement")

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-T, Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-examination of Defence Witness Augustin Ndindiliyimana, 28 February 2006 ("*Muvunyi* Decision of 28 February 2006")

NAHIMANA *et al.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement")

NDINDABAHIZI

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement")

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

NTAGERURA *et al.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement")

NYIRAMASUHUKO

Pauline Nyiramasuhuko v. The Prosecutor, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 ("*Nyiramasuhuko* Decision of 4 October 2004")

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement")

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

B. List of abbreviations, acronyms and short references

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular the plural, and vice versa.

1996 FYROM Criminal Code	Crimianal Code of the FYROM enacted in 1996
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977
APC	Armoured Personnel Carrier
AT.	Transcript of the appeal hearing
Boškoski Defence	Counsel for the Accused Ljube Boškoski
Boškoski Response Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, *Boškoski* Defence Respondent Brief, 1 December 2008

Boškoski Response Brief (Corrigendum)	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Boškoski Defence Corrigendum to Respondent Brief, 20 January 2009
Common Article 3	Article 3 of Geneva Conventions I to IV
Ex.	Exhibit
Fn. (fns)	Footnote(s)
FYROM	Former Yugoslav Republic of Macedonia
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRC Commentary on Additional Protocols	Commentary on the Additional Protocols of Protocols 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987
ICRC Commentary on Geneva Convention IV	J. Pictet (ed.), The Geneva Conventions of 12 August 1949: Commentary, Part: IV Geneva Convention relative to the protection of civilian persons in time of war (Geneva, International Committee of the Red Cross 1958)
Indictment	*Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Second Amended Indictment, 4 April 2006
KLA	Kosovo Liberation Army
MoI	Ministry of Interior

NATO	North Atlantic Treaty Organization
NLA	National Liberation Army
OSCE	Organization for Security and Co-operation in Europe
OVR	Oddelenie za Vnatrešni Raboti, Department for Internal Affairs
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution Book of Authorities	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Book of Authorities for Prosecution Response to Johan Tarčulovski's Appeal Brief, 9 April 2009
Prosecution Appeal Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Prosecution's Appeal Brief, 20 October 2008 (confidential); public redacted version filed 3 November 2008
Prosecution Notice of Appeal	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Prosecution's Notice of Appeal, 6 August 2008
Prosecution Pre-Trial Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Prosecution's Submission of Amended Pre-Trial Brief, 4 April 2006
Prosecution Reply Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Prosecution's Reply Brief, 16 December 2008 (confidential); public redacted version filed 24 December 2008
Prosecution Response Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Prosecution Response to Johan Tarčulovski's Appeal Brief, 9 April 2009 (confidential); public redacted version filed 16 April 2009
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the Tribunal
T.	Transcript of hearings at trial in the present case. All transcript pages referred to in this Judgement are taken from the uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Tarčulovski Amended Notice of Appeal	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Tarčulovski Amended Notice of Appeal, 2 April 2009

Tarčulovski Appeal Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Brief of Johan Tarčulovski, 12 January 2009 (confidential); public redacted version filed 12 January 2009
Tarčulovski Notice of Appeal	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Tarčulovski Notice of Appeal, 8 August 2009
Tarčulovski Reply Brief	*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Reply Brief of Johan Tarčulovski, 24 April 2009 (confidential); public redacted version filed 29 April 2009
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
UN	United Nations