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Tribunal Pénal International pour l'ex-Yougoslavie

# JUDGEMENT SUMMARY

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**TRIAL CHAMBER**

**The Hague, 30 June 2006**

## *PROSECUTOR V. NASER ORIĆ*
## SUMMARY OF JUDGEMENT

*Please find below the summary of the judgement today read out by Judge Agius:*

**Introduction**

Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia is sitting today to deliver its Judgement in the trial of Naser Orić.

This case deals with crimes of murder and cruel treatment of prisoners and of wanton destruction of cities, towns or villages alleged to have happened in Srebrenica in 1992 and 1993 for which the Accused was indicted on 13 March 2003.

The Accused stood trial for the following charges: first, under COUNT 1, he is charged with individual criminal responsibility under Article 7(3) of the Statute of the Tribunal ("Statute") for **murder** as a violation of the laws or customs of war pursuant to Article 3 of the Statute. Under COUNT 2, the Accused is charged with individual criminal responsibility under Article 7(3) of the Statute for **cruel treatment** as a violation of the laws or customs of war pursuant to Article 3 of the Statute. The Prosecution never alleged that these crimes of murder and cruel treatment were committed by the Accused, but only accused him pursuant to Article 7(3) of the Statute as being responsible for these crimes committed by his subordinates whilst he was holding a position of superior authority. More specifically the imputed criminal responsibility of the Accused consists in the alleged failure on his part to take necessary and reasonable steps to prevent or to punish the crimes of his subordinates.

Second, under COUNT 3 the Accused is charged with individual criminal responsibility, again under Article 7(3) of the Statute, for **wanton destruction of cities, towns or villages, not justified by military necessity** as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute in relation to all of the aforementioned attacks. Here too, the alleged responsibility is that of a superior for having failed to take the necessary and reasonable measures to prevent these crimes. Finally, under COUNT 5, the Accused is charged with individual criminal responsibility under Article 7(1) of the Statute for **wanton destruction of cities, towns or villages, not justified by military necessity** as a violation of the laws or customs of war pursuant to Article 3(b) of the Statute in relation to some of the attacks. Whereas in COUNT 3 the Accused is charged with responsibility pursuant to Article 7(3) of the Statute for crimes committed by his subordinates whilst he was holding a position of superior authority, here, in COUNT 5, the charge is brought under Article 7(1) of the Statute and alleges that the Accused instigated, as well as aided and abetted, through acts and omissions, the commission of these crimes.

Initially, the Accused was also charged with plunder of public or private property pursuant to Article 7(3) and 7(1) of the Statute (COUNTS 4 and 6 respectively). However, in its Rule 98 *bis* decision of 8 June 2005, the Trial Chamber, by a unanimous decision, acquitted the Accused of these charges upon reaching the conclusion that the Prosecution had failed to adduce evidence capable of supporting the conviction of the Accused under the same two counts.

During the trial proceedings, which commenced on 6 October 2004 and ended on 10 April 2006, the Trial Chamber was confronted with a large amount of evidence consisting of testimony and documents. It sat 196 trial days, during which it heard the *viva voce* evidence of 50 Prosecution witnesses, 29 Defence witnesses and one witness called by the Trial Chamber. In total, 625 and 1024 exhibits were tendered into evidence by the Prosecution and by the Defence respectively.

For the purpose of this hearing, we shall briefly summarise the Trial Chamber's findings and the underlying reasons for them. We emphasise, however, that this is only a summary and that it does not in

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any way form part of the Judgement of the Trial Chamber. The only authoritative account of the findings of the Trial Chamber is in the written Judgement which will be available to the Parties and the public today, after this hearing has concluded.

**Background of the Case**

Bosnia and Herzegovina was one of six constituent republics of the former Yugoslavia. In the early 1990s, tensions increased between the country's different ethnic groups. By April 1992, when armed conflict broke out in Bosnia and Herzegovina, the Bosnian Serb side heavily relied on the Serb-dominated JNA, the Yugoslav Peoples' Army, and was thus militarily far superior. By contrast, the Bosnian Muslims found themselves insufficiently prepared for the conflict as they had neither the structures nor the logistics to match the might of the Bosnian Serb forces.

Reflective of the overall situation in Bosnia and Herzegovina, tensions intensified in Srebrenica as well. Prior to the outbreak of the conflict, approximately three quarters of the 37,000 inhabitants of Srebrenica municipality were Bosnian Muslims, and one quarter was Bosnian Serb. During the early months of 1992, Serb paramilitaries arrived in the Srebrenica area and began, with the help of the JNA, to distribute arms and military equipment to the local Bosnian Serb population. On 18 April 1992, Srebrenica was forcibly taken over by the Bosnian Serbs, after most of its Bosnian Muslim inhabitants had fled. However, sporadic resistance from small groups of Bosnian Muslim men inflicted losses on the Bosnian Serb side. After one of their leaders was killed in an ambush on 8 May 1992, the Serb forces retreated from Srebrenica leaving a lot of destruction behind and the Bosnian Muslims returned to their town.

Although they had retaken Srebrenica, the town itself remained encircled by Serb forces. Between June 1992 and March 1993, Srebrenica and other isolated patches of Bosnian Muslim-held land in the area were subjected to Serb military assaults, resulting in a great number of refugees and casualties. During this time, a number of Bosnian Serb villages and hamlets were raided by Bosnian Muslims, mainly in search of food, but also to acquire weapons and military equipment. In late January or early February 1993, the Bosnian Serbs started a major offensive against Muslim-held territory in the area, taking over many villages and considerably reducing the overall size of the Srebrenica enclave. This is referred to as the Serb winter offensive in the Judgement.

In the second half of 1992 and in early 1993, several tens of thousands of refugees arrived in and lived crammed inside the town of Srebrenica and its surrounding area. Conditions of life in Srebrenica were dire and horrid. There was a constant and acute shortage of food bordering on starvation and hygienic conditions were appalling. In the winter, people were living on the streets in freezing temperatures. The situation had deteriorated dramatically when in March 1993, a UNPROFOR delegation headed by French General Philippe Morillon succeeded in bringing most of the fighting to a halt and to secure some humanitarian relief. In April 1993, Srebrenica was declared a Safe Area by the Security Council of the United Nations. In the spring of 1995, the Accused was called to Tuzla and did not return to Srebrenica. The subsequent fate of Srebrenica has been the subject-matter of other judgements of this Tribunal and has not been dealt with in this case.

**Structure of the Srebrenica Military and Civilian Authorities**

By 18 April 1992, the day Srebrenica fell to the Serbs, nearly all representatives of the municipal authorities had left town. After Srebrenica was re-captured by Bosnian Muslims in May 1992, a pressing need was felt to organise an effective defence. On 20 May 1992, an informal group of Bosnian Muslim men, who had already set up individual fighting groups in the area, met in the nearby hamlet of Bajramovići to establish the "Srebrenica TO Staff". The Accused, who was present during this meeting, was elected as Commander. His appointment was subsequently confirmed by Sefer Halilović, Chief of the Supreme Command Staff of the Army of the Republic of Bosnia and Herzegovina, and by Alija Izetbegović, the President of Bosnia and Herzegovina. On 3 September 1992, the Srebrenica TO Staff was re-named the Srebrenica Armed Forces Staff. During this time and thereafter, meetings were held regularly in an attempt to achieve cohesive military activity.

Until demilitarisation in April 1993, military authority in and around Srebrenica was never incorporated under a single unitary command. During this period, initiatives such as the creation of a Sub-region and a so-called Drina Division were conceived, both intended to group together Bosnian Muslim fighters in the municipalities of Srebrenica, Zvornik, Vlasenica and Bratunac with a view to improving defence capabilities. However, the Sub-region never materialised and the so-called Drina Division did little to bring together the various fighting groups operating in the area. In the spring of 1992, fighting groups had

been formed on territorial bases and local leaders were chosen for their personal qualities, such as courage and achievement. Consequently, a number of them, including Akif Ustić, Hakija Meholjić, Ahmo Tihić and Ejub Golić, to name a few, asserted independence in the early days of the conflict and persisted in this attitude throughout the period relevant to the Indictment.

The Srebrenica Armed Forces also lacked the characteristics of a fully organised army. With few exceptions, they lacked weapons and uniforms, and fighters, for the most part, resided with their families or in makeshift accommodation. Communications both within Srebrenica and beyond were greatly impaired by the unavailability of adequate equipment, lack of electricity and the severing of phone lines.

In the summer of 1992, authorities were established in Srebrenica town in an attempt to restore law and order and to give some sense of normalcy to life in a besieged and isolated enclave. On 1 July 1992, the Srebrenica military police were established by the Srebrenica TO Staff and Mirzet Halilović was appointed its commander. He remained in this position until 22 November 1992, when he was replaced by Atif Krdžić. Also on 1 July 1992, the Srebrenica War Presidency was created, assuming all competencies of the pre-war municipal assembly, and envisaged to be the highest governmental organ on the territory of Srebrenica. Because individuals were often members of both the War Presidency and the Armed Forces Staff and attended meetings where issues of both military and civilian nature were discussed, there emerged a grey area where jurisdiction and hierarchy between the two institutions became a matter of disagreement and friction. However, it became generally accepted that the Srebrenica War Presidency was the highest authority in Srebrenica while the Armed Forces Staff gradually asserted its own jurisdiction.

The Trial Chamber assessed the crimes charged in the Indictment and the responsibility of the Accused against this very specific backdrop.

**Counts 1 and 2: Murder and Cruel Treatment**

*The Law*

Regarding the crime of murder, the Prosecution was required to prove the following elements beyond reasonable doubt:

- The person alleged to have been killed in the indictment is indeed dead;
- The death was caused by an act, or an omission notwithstanding an obligation to act, of the accused, or by a person for whose acts or omissions the accused bears criminal responsibility; and
- The act or omission was committed with an intent to kill or inflict grievous bodily harm or serious injury, in the knowledge and with the acceptance that such act or omission was more likely than not to cause death.

Regarding the crime of cruel treatment, the Prosecution was required to prove the following elements beyond reasonable doubt:

- An act, or omission notwithstanding an obligation to act, of the accused, or of a person for whose acts or omissions the accused bears criminal responsibility, causing serious mental or physical suffering, serious injury, or constituting a serious attack on human dignity; and
- The act or omission was committed with the intent to inflict serious mental or physical suffering, or cause serious injury or a serious attack upon human dignity.

*Findings Regarding Murder and Cruel Treatment*

Between 24 September and 16 October 1992, and again from 27 December 1992 to 20 March 1993, a number of Serbs were captured by Bosnian Muslim fighters and detained at the Srebrenica Police Station and, during the second time-period, also at a building behind the Srebrenica municipal building (to which I will refer as the 'Building'). While they were generally exposed to the same appalling living conditions as the local population, their condition was significantly exacerbated by the maltreatment that will now be described.

On 24 September 1992, **Dragutin Kukić** was captured by Bosnian Muslim fighters and transferred to the Srebrenica Police Station. The next day, he was taken to the reception room in that building, where he was beaten. After Kukić cursed the mothers of two guards who were beating him, one of them, a certain Kemo Mehmetović, known as 'Kemo', forcefully hit Kukić on the chest with a log of wood. Kukić lost any sign of life immediately and all attempts to revive him proved fruitless. The following day, Kemo disposed of Kukić's corpse in a water reservoir outside Srebrenica and fired several shots at it. For the reasons explained in the Judgement, the Trial Chamber is satisfied beyond reasonable doubt that the circumstances of Dragutin Kukić's death fulfil the elements of murder.

**Jakov Đokić** was confined in a stable in the area of Cerska under horrid conditions for almost eight months before being brought to Srebrenica in January 1993. After a short period of detention at the Srebrenica Police Station, he was transferred to the Building. At both locations, he was routinely beaten and maltreated with various objects, including sticks and rifle butts. Jakov Đokić was last seen alive on 21 March 1993. There is no direct evidence of the death of Jakov Đokić. As to circumstantial evidence, there is only vague evidence hinting that subsequently he succumbed to injuries caused by beatings while in detention. This vague evidence, however, does not reach the standard of proof required. The Judgement explains better why the Trial Chamber cannot conclude with certainty that he was killed, as alleged, while detained at the Building.

**Dragan Ilić, Milisav Milovanović, Kostadin Popović** and **Branko Sekulić** were all detained at the Srebrenica Police Station and the Building as of December 1992 or January 1993. They were routinely beaten and maltreated with various objects. Dragan Ilić died on an unspecified date between 9 February and 20 March 1993. Milisav Milovanović died in early February 1993, after repeated beatings by a youth who was allowed to enter the Building. Kostadin Popović died on or about 6 February 1993. Branko Sekulić died on or about 19 March 1993. For the reasons stated in the Judgement, the Trial Chamber is satisfied that all these incidents of killings fulfil the elements of murder.

Between 24 September and 16 October 1992, **Nedeljko Radić, Zoran Branković, Nevenko Bubanj and Veselin Šarac** were detained in a small cell at the Srebrenica Police Station. On 5 October 1992, they were joined by **Slavoljub Žikić**. Apart from being interrogated, all of them were subjected to severe beatings and other maltreatment while in confinement, sometimes resulting in bone fractures. On one occasion, some of the teeth of Nedeljko Radić were forcibly extracted by Kemo, who afterwards urinated in his mouth, purportedly to disinfect the wound. Maltreatment took place mostly at night, both inside the cell and in the reception room, and was inflicted by, or in the presence of Kemo, a certain Mrki, a certain Beli, and others, who had entered the police station from the outside. On one occasion, Slavoljub Žikić was also beaten by Mirzet Halilović, the military police commander. Žikić described the other detainees as "more like dead people than people who were still alive". All of them were eventually exchanged. For the reasons stated in the Judgement, the Trial Chamber finds that the treatment suffered by these individuals is serious enough to amount to cruel treatment within the meaning of Article 3 of the Statute, and that it was inflicted with the required intent.

Between 27 December 1992 and 20 March 1993, **Ilija Ivanović, Ratko Nikolić, Rado Pejić, Stanko Mitrović and Mile Trifunović** were confined at the Srebrenica Police Station for a few days, before being transferred to the Building, where they were interrogated and severely maltreated. Ilija Ivanović, for example, was beaten all over his body with rifle butts, metal rods and baseball bats, and was also stabbed with knives. His cheekbone was broken and he frequently lost consciousness. Five of Ratko Nikolić's ribs were broken when unidentified men stomped on him. The body weight of Rado Pejić was reduced to some 30 kilograms during his time in Srebrenica. Maltreatment occurred usually at night, both by guards and persons who entered both buildings from outside. On occasion, even Bosnian Muslim fighters participated in the maltreatment. All of these detainees were eventually exchanged. For the reasons stated in the Judgement, the Trial Chamber finds that the treatment suffered by them is serious enough to amount to cruel treatment within the meaning of Article 3 of the Statute, and that it was inflicted with the required intent.

*Responsibility of the Accused*

We shall now consider whether the Accused, Naser Orić, is criminally responsible for these crimes as a superior.

Since this is a summary, it does not go into the details of the Trial Chamber's legal assessment elaborated in the Judgement, but is limited to the following salient points.

As stated earlier the Accused is only charged with superior criminal responsibility under Article 7(3) of the Statute and not with having committed murder and cruel treatment himself.

The Trial Chamber finds that four elements must be fulfilled to establish **criminal responsibility of a superior**: **first**, an act or omission incurring criminal responsibility according to Articles 2 to 5 and 7(1) of the Statute has been committed by a principal perpetrator by acts or omissions, **second**, the accused stood in a superior-subordinate relationship with the principal perpetrator, **third**, the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so, and **fourth**, the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator.

The Trial Chamber explains in detail in the Judgement that superior criminal responsibility under Article 7(3) of the Statute is not restricted to positive acts of subordinates but includes acts of omissions and participation. Consequently, for the purpose of superior criminal responsibility under Article 7(3) of the Statute, the direct perpetrators of a crime punishable under the Statute need not be identical to the subordinates of a superior. It is only required that the relevant subordinates, by their own acts or omissions, be criminally responsible for the injuries inflicted on the victims.

At the outset, the Trial Chamber notes that none of the perpetrators of murder and cruel treatment known by name or nickname, such as Kemo, or Mrki, or Beli, were identified to be members of the Srebrenica military police. Nevertheless, based on the evidence given by Nedret Mujkanović, Bečir Bogilović, as well as on documentary evidence, including the 2001 suspect interview of the Accused with the OTP, the Trial Chamber finds that both groups of Serb prisoners detained at the Srebrenica Police Station and the Building between September 1992 and March 1993 were kept under the responsibility of the Srebrenica military police.

From the very moment it detained prisoners, the Srebrenica military police assumed all duties and responsibilities under international law relating to the treatment of prisoners in time of conflict. Yet the evidence demonstrates that Mirzet Halilović, the commander of the military police until 22 November 1992, did not exercise adequate supervision of the detention facility or the activities of the guards while carrying out their duties. To the contrary, Mirzet Halilović even contributed to the cruel treatment of the Serb detainees. The replacement of Mirzet Halilović with Atif Krdžić on 22 November 1992 did not benefit the detainees. Not one person or document refer to his presence in either of the two buildings where prisoners were kept. In addition during his term as commander, more murders and cruel treatment took place. For all the reasons stated in the Judgement, the Trial Chamber is satisfied that the Srebrenica military police, through its commanders Mirzet Halilović and Atif Krdžić, is responsible for the injuries inflicted on the victims.

The Trial Chamber is further satisfied that the Accused exercised effective control over the military police but only as of 22 November 1992. Whereas prior to this date, there is no evidence as to how, if at all, the Srebrenica Armed Forces Staff and the Accused as Commander exercised effective control over the military police, it is clear that an attempt aimed at restructuring and improving its performance was made in October and November 1992, such as with the replacement of Mirzet Halilović by Atif Krdžić. Documentary evidence shows that the new military police commander reported to Osman Osmanović, the Chief of Staff of the Srebrenica Armed Forces who reported to the Accused. Moreover, in January and February 1993, Hamed Salihović appears to have interrogated a number of Serb detainees on behalf of the Armed Forces Staff.

Based on the evidence given by witnesses Nedeljko Radić and Slavoljub Žikić, as well as on the interview of the Accused, the Trial Chamber is further satisfied that the Accused visited the Srebrenica Police Station between 24 September and 16 October 1992 on at least two occasions, that he had actual knowledge of the death of Dragutin Kukić and of the cruel treatment of the Serbs detained there at the time. However, having found that the Accused did not have effective control over the military police during that period, this knowledge becomes relevant only for the purpose of establishing his actual or imputed knowledge of the subsequent murders and cruel treatment.

As explained in the Judgement, the Trial Chamber has not found sufficiently reliable evidence that the Accused ever visited either of the two detention facilities between December 1992 and March 1993, when the second group of Serb prisoners was held there. Although the Accused was aware that Serbs were detained in Srebrenica, there is no evidence that anyone kept him informed about their condition.

Nonetheless, since the Accused was aware that incidents of murder and cruel treatment had previously occurred, the Trial Chamber finds that he was put on notice that the security and the well-being of all

Serbs detained henceforth in Srebrenica was at risk, and that this issue needed to be adequately addressed and monitored. The Accused also knew that the severe malnutrition and the psychological effects of being under siege had severely affected the judgement of people in Srebrenica several of who behaved erratically. For the reasons explained in detail in the Judgement the Trial Chamber finds that the Accused had reason to know about acts of murder and cruel treatment committed at the Srebrenica Police Station and the Building between 27 December 1992 and 20 March 1993.

However, the security and well-being of Serb prisoners disappear from the Accused's agenda after an investigation into the alleged killing of a prisoner by Mirzet Halilović and his eventual replacement with Atif Krdžić. In his 2001 interview with the Office of the Prosecutor, the Accused is reported as stating that because of the deteriorating military situation, the detention of prisoners was not on his mind, as there were others responsible for it.

The Trial Chamber holds that, as a general rule, the treatment of prisoners in armed conflict, including their physical and mental integrity, cannot be relegated to a position of importance inferior to other considerations, military or otherwise, however important they may be. This general rule is, of course, predicated on the assumption that at all times, the person entrusted with this responsibility, is in a position to fulfil this obligation. It does not, and cannot, apply when there is the impossibility to act, or when it would be utterly unreasonable to expect one to act, as in the case of a life-threatening situation. In this case, the Trial Chamber is dealing with the responsibility of a commander who could discharge such responsibilities by delegating part of them to a subordinate and enquiring from time to time, and in the absence of reports, at least require them in whatever format.

What is unacceptable for the Trial Chamber is that commanders, who like the Accused, positively know that detainees have been exposed to murder and cruel treatment, are discharged from their said obligations to protect prisoners under international law, by merely delegating the responsibilities in that regard to subordinates without further enquiries. In the present case, the evidence is unequivocal: the Accused never enquired about the fate of the Serb prisoners kept at the two detention facilities in Srebrenica from the day Atif Krdžić was appointed commander of the Srebrenica military police *in lieu* of Mirzet Halilović. In addition, he expressed and explained his lack of further involvement on the basis of his military commitments elsewhere and that there were others in charge of prisoners.

Regarding the Accused's failure to prevent or punish these crimes, the Trial Chamber rejects the Defence submission that no such measures could have been taken due to the lack of adequate means in Srebrenica at the time. The replacement of Mirzet Halilović and the investigation of his alleged killing of a Serb prisoner shows that this could be achieved, even in the absence of sophisticated structures and well-trained personnel.

With respect to the duty to prevent crimes of subordinates, the Trial Chamber acknowledges that the Accused operated under most adverse circumstances, and not in a properly structured army with adequate means of communication between superiors and subordinates. Still, as of September or October 1992, he had been on notice that the Serb detainees kept at the Srebrenica Police Station were cruelly treated, and that one of them had been killed. The Trial Chamber, therefore, fails to understand how, notwithstanding the predicament he faced on a daily basis, the Accused could, from that time onward, safely assume that such incidents would not reoccur and that there was not even the need to, at least, seek to verify whether detainees were maltreated again. It is striking that the Accused appears not to have taken any action regarding Serb detainees after Atif Krdžić assumed command over the Srebrenica military police on 22 November 1992. Rather, the Accused repeated that, because of the deteriorating military situation, the detention of prisoners was not on his mind, as there were others responsible for it. The Trial Chamber is convinced that, had the Accused at least made an effort, he would have been able to redistribute the available resources to provide the required amount and quality of guards, if necessary also from his own fighters, to prevent re-occurrence of maltreatment. He could also ask for a report in whatever format. Between 22 November 1992 and early January 1993, the Accused was not always on the front-line and found time to attend meetings in Srebrenica, at least until the Serb winter offensive started in late January or early February 1993. Yet he did nothing of the sort. The conclusion that the Trial Chamber arrives at is that it was not impossibility that stood in the way of the Accused in preventing the maltreatment and murder of prisoners; it was his preference not to give the matter any further attention.

The Trial Chamber therefore finds that the Accused failed to take necessary and reasonable measures to prevent the occurrence of the crimes at the Srebrenica Police Station and the Building between December 1992 and March 1993.

With respect to the duty to punish, the Trial Chamber comes to a different conclusion, namely that the Accused cannot be held responsible for having failed to punish the crimes committed. The Judgement explains why the Trial Chamber comes to the conclusion that there is insufficient evidence of effective control over the military police prior to 22 November 1992, when the Accused had actual knowledge of murder and cruel treatment. Thereafter, when the Accused exercised effective control, the Trial Chamber only found that he had reason to know of the crimes. However, whereas for the duty to prevent, it suffices that the Accused was put on notice that crimes may possibly occur or reoccur, the duty to punish presupposes that crimes have in fact been committed and that a superior was aware of sufficient indications to assume their occurrence. Since such indications in the present case are absent, the Accused cannot be held responsible for having failed to take the necessary and reasonable measures to punish his subordinates for the commission of these crimes.

**Counts 3 and 5: Wanton Destruction**

*The Law*

In order to prove the crime of wanton destruction of cities, towns or villages not justified by military necessity, the Prosecution must establish the following elements beyond reasonable doubt:

- The destruction of property occurred on a large scale;
- The destruction was not justified by military necessity; and
- The perpetrator acted with the intent to destroy the property in question.

As regards the extent of the destruction, contrary to the submission of the Defence, the Trial Chamber finds that it would amount to an overtly narrow reading of the prohibition of wanton destruction to require proof of *total* destruction of a city, town or village. Rather, the destruction needs to be assessed on a case-by-case basis to establish whether it is substantial enough to rise to the crime of wanton destruction.

To constitute a crime under international law, wanton destruction must not be justified by 'military necessity'. In this context, an object shall **not** be attacked when, according to the information available to, and in the circumstances of, the person contemplating the attack, that object is **not** being used to make an effective contribution to military action. The Trial Chamber also finds that, in principle, destruction can no longer be justified by military necessity after the fighting has ceased.

*Findings Regarding Wanton Destruction*

On 21 June 1992, **Ratkovići, Gornji Ratkovići** and **Dučići** were attacked by Bosnian Muslim fighters from two nearby villages and followed by a crowd of Bosnian Muslim civilians. At the time of the attack, there were village guards as well as Bosnian Serb civilians in the Ratkovići area. The attack met with resistance only in Gornji Ratkovići. Both in Ratkovići and Gornji Ratkovići, Bosnian Muslim fighters and civilians burned property on a large scale. Further destruction was caused by a subsequent Bosnian Serb counter-attack. There is insufficient evidence to establish that Dučići was destroyed on a large scale as well.

Considering that Bosnian Muslim villages in the vicinity of Ratkovići had previously been attacked by Bosnian Serbs, also from Ratkovići, the Trial Chamber does not exclude that a military justification for the attack on Ratkovići is conceivable. However, such justification cannot extend to the resulting wanton destruction of property, especially since this was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. Consequently, the destruction of property in Ratkovići and Gornji Ratkovići on 21 June 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

On 27 June 1992, **Brađevina** was attacked by Bosnian Muslim fighters. Only some of the attackers were identified as locals from the surrounding Bosnian Muslim villages, and they were followed by a crowd of Bosnian Muslim civilians. At the time of the attack, there were 12 armed village guards in Brađevina. They, however, put no resistance to the attack. Bosnian Muslim fighters and civilians burned property in Brađevina on a large scale.

Considering that Bosnian Muslim villages in the vicinity of Brađevina had previously been attacked by Bosnian Serbs, also from Brađevina, the Trial Chamber does not exclude that a military justification for

the attack on Brađevina is conceivable. However, such justification cannot extend to the resulting wanton destruction of property, especially since this was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. Consequently, the Trial Chamber is satisfied that the destruction of property in Brađevina on 27 June 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

On 8 August 1992, **Ježestica** was attacked by Bosnian Muslim fighters from Šušnjari, Jaglići and Glogova, as well as by Bosnian Muslim fighters of the 16th Muslim Brigade from Tuzla. The fighters were followed by a crowd of Bosnian Muslim civilians. At the time of the attack, there were relatively well armed village guards as well as Bosnian Serb civilians in Ježestica. Evidence indicates that there was also Bosnian Serb military presence in the area. The attack met with some resistance, before the Bosnian Serbs withdrew. Bosnian Muslim fighters and civilians burned property in Ježestica on a large scale. Further destruction may have been caused by a subsequent Bosnian Serb counter-attack.

Considering that Bosnian Muslim villages in the vicinity of Ježestica had previously been attacked by Bosnian Serbs, also from Ježestica, the Trial Chamber does not exclude that a military justification for the attack on Ježestica is conceivable. However, such justification cannot extend to resulting wanton destruction of property, especially since this was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. Consequently, the Trial Chamber is satisfied that the destruction of property in Ježestica on 8 August 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

On 5 October 1992, **Fakovići** and **Divovići** were attacked by Bosnian Muslim fighters from Osmače, Sućeska, Kragljivoda, Žanjevo, Jagodnja, Joševa and Tokoljaki, who were followed by thousands of Bosnian Muslim civilians. The Accused participated in the attack. At the time of the attack, there were relatively well-armed village guards as well as Bosnian Serb civilians in Fakovići and Divovići. Evidence indicates that there was also Bosnian Serb military presence in Fakovići. The attack met with resistance, and Bosnian Serbs fired on the attacking Bosnian Muslims from houses. In the course of the attack, several houses began to burn. On the afternoon of 5 October 1992, a Serb counter-attack, which included shelling and bombing of the area, was launched. Subsequently, the Bosnian Muslim fighters and some of the Bosnian Muslim civilians withdrew, whereas other Bosnian Muslim civilians stayed behind to look for food and building materials.

The Trial Chamber finds that there is insufficient evidence to establish that Divovići was destroyed on a large scale. As to Fakovići, the Trial Chamber finds that although houses were damaged, no witness could confirm that it was Bosnian Muslims who set the burning houses on fire. It is likely that the destruction on a large scale in Fakovići resulted from exchange of fire between Bosnian Muslims and Bosnian Serbs and subsequent Serb shelling, and thus cannot be attributed solely to the Bosnian Muslims. Consequently, the Trial Chamber is not satisfied that the destruction of property in Fakovići and Divovići on 5 October 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

Between 14 and 19 December 1992, **Bjelovac** and **Sikirić** were attacked by Bosnian Muslim fighters from Voljevica, Biljača, Potočari, Kazani, Luljaska, Sućeska, Pale, Likari and Srebrenica Stari Grad, who were followed by thousands of Bosnian Muslim civilians. The Accused participated in the attack. At the time of the attack, there were relatively well-armed village guards as well as Bosnian Serb civilians in Bjelovac and Sikirić. Evidence indicates that there was also Bosnian Serb military presence in area. The attack met with resistance. Furthermore, at different times during 14 December 1992, two planes from the direction of Bratunac circled the area dropping bombs. In the course of the attack, several houses began to burn. Some of the houses were torched by Bosnian Muslims. In the next few days, as the fighting continued, the Bjelovac area was alternately controlled by Bosnian Muslims and Bosnian Serbs. This rendered further destruction of property possible.

The Trial Chamber finds that the damage caused to houses in Bjelovac and Sikirić likely resulted from all these circumstances. For the reasons given in the Judgement, the Trial Chamber is not in a position to know how many houses were destroyed by Bosnian Muslims, and how many were destroyed by other causes. Consequently, there is doubt whether the amount of houses destroyed by the Bosnian Muslims fulfils the large scale requirement for the crime of wanton destruction. As a result, the Trial Chamber is not satisfied that the destruction of property in Bjelovac and Sikirić between 14 and 19 December 1992 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

On 7 and 8 January 1993, **Kravica, Šiljkovići** and **Ježestica** were attacked by Bosnian Muslim fighters from Sućeska, Glogova, Biljeg, Mošići, Delići, Cerska, Skugrići, Jaglići, Šušnjari, Brezova Njiva, Osmače, Konjević Polje, Jagodnja, and Joševa. Also the Accused and members of his group of fighters participated in the attack. The fighters were followed by thousands of Bosnian Muslim civilians. At the time of the attack, there were relatively well-armed village guards and some Bosnian Serb civilians in Kravica, Šiljkovići and Ježestica. Evidence shows that there was also Bosnian Serb military presence in the area. The attack met with resistance. Bosnian Serbs fired artillery on the attacking Bosnian Muslims from houses and other buildings. Houses in the area were burning. In Ježestica, Bosnian Muslim fighters and civilians set many houses on fire, causing destruction on a large scale. In Kravica, property was also destroyed on a large scale. However, the evidence is unclear as to the number of houses that were wantonly destroyed by Bosnian Muslims, as opposed to other causes. As to Šiljkovići, there is insufficient evidence to establish that property was destroyed on a large scale.

Considering that Bosnian Muslim villages in the vicinity of Ježestica had previously been attacked by Bosnian Serbs, also from Ježestica, the Trial Chamber does not exclude that a military justification for the attack on Ježestica is conceivable. However, such justification cannot extend to the resulting wanton destruction of property, especially since this was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs. Consequently, the Trial Chamber is satisfied that the destruction of property in Ježestica on 7 and 8 January 1993 by Bosnian Muslims fulfils the elements of wanton destruction of cities, towns or villages, not justified by military necessity.

*Responsibility of the Accused*

We shall now deal with the question whether the Accused, Naser Orić, is criminally responsible for these crimes of wanton destruction in terms of Articles 7(1) and (3) of the Statute.

We shall start with the alleged individual criminal responsibility of the Accused pursuant to **Article 7(1)** of the Statute, specifically with the aspects of '**instigating**' and/or '**aiding and abetting**' and also the omission which the Prosecution attributes to him.

The Trial Chamber holds that instigating requires influencing the direct perpetrator by way of inciting, soliciting or otherwise inducing him or her, through acts or culpable omissions, to commit the crime in question. The instigation must substantially contribute to the perpetration of the crime, and the instigator must intend not only his or her conduct, but also the ultimate crime. Aiding and abetting may be constituted by an accused's contribution, through acts or culpable omissions, to the planning, preparation or execution of a completed crime, provided that the contribution is substantial enough to make the commission of the crime possible or at least easier. The aider and abettor must act with an intent to further the contribution, as well as to effect the completion of the crime by the direct perpetrator. In both modes of liability the contribution can be indirect, as well as removed in time and place from the actual commission of the crime.

The Trial Chamber examined the alleged **individual criminal responsibility of the Accused pursuant to Article 7(1)** of the Statute only in respect of the attack on Ježestica on 7 and 8 January 1993, as the elements of the crime of wanton destruction are not fulfilled with regard to the other attacks for which such responsibility has been charged.

The Trial Chamber has no doubt that the Accused was generally aware that Bosnian Serb property was destroyed by Bosnian Muslims, primarily civilians, who followed the fighters during attacks. However, the Prosecution has failed to adduce reliable evidence that he instigated wanton destruction. On the contrary, evidence indicates that the Accused opposed this conduct.

With respect to aiding and abetting, the Trial Chamber finds that the Accused, by virtue of his authority as leader of a group of fighters, had the responsibility to prevent the commission of wanton destruction by his subordinates. This duty extended to preventing wanton destruction by other fighters and civilians if the Accused knew that such wanton destruction was being or was about to be committed in the course of attacks in which his subordinates participated. As a minimum, he had a duty to prevent civilians from being present during such attacks. However, it has not been established that the Accused could have prevented wanton destruction by civilians that were present before, during and after attacks in massive numbers and who were beyond any control. With respect to fighters, the Trial Chamber is not convinced that in the particular circumstances of the attack on Ježestica on 7 and 8 January 1993, the Accused could have prevented fighters from committing destruction, or aiding and abetting civilians to commit such destruction. There is no evidence that his own fighting group had any involvement in the wanton

destruction that occurred during the attack. Furthermore, there is no sufficient evidence that the Accused had control over, or even communication with other fighting groups during the attack. In addition, although the Accused participated in the attack, there is no evidence that his presence was that of an 'approving spectator' required to hold the Accused responsible for active participation under Article 7(1) of the Statute.

In light of the above, the Trial Chamber concludes that the Prosecution failed to establish that the Accused in any way instigated or aided and abetted, pursuant to Article 7(1) of the Statute, the commission of wanton destruction not justified by military necessity in Ježestica on 7 and 8 January 1993.

The Trial Chamber examined the **responsibility of the Accused pursuant to Article 7(3)** of the Statute only in respect of the attacks on Ratkovići and Gornji Ratkovići (21 June 1992), on Brađevina (27 June 1992) and Ježestica (8 August 1992 and 7 and 8 January 1993), as the elements of wanton destruction are not fulfilled with regard to the other attacks for which such responsibility has been charged.

Regarding all four attacks, the Trial Chamber heard evidence that Bosnian Muslim fighters and civilians perpetrated acts of wanton destruction, but there is almost no evidence that would further identify these perpetrators. However, such identification is not required by law, provided that it can be established that those responsible were under the control of the superior.

With respect to the question of the existence or otherwise of effective control by the Accused over the perpetrators it has already been explained that effective control can be based on a *de jure*, as well as on a *de facto* position of authority.

We have also already explained how, on 20 May 1992, the Accused was elected as Commander of the Srebrenica TO Staff, and at the time of the attacks on Ratkovići and Gornji Ratkovići and Brađevina in June 1992 still held this position and was confirmed in it on 27 June 1992, and again on 8 August 1992. In addition, by January 1993, when Ježestica was attacked the second time, the Accused had been appointed as Commander of the Sub-Region which was proclaimed on 4 November 1992. Thus, on a *de jure* basis, the Accused was considered as superior to all Bosnian Muslim armed groups operating in the Srebrenica area during the time period relevant to Count 3 of the Indictment.

However, while the Trial Chamber finds that the Accused exercised effective control over his own fighting group from Potočari, there is insufficient evidence to establish that he *de facto* exercised effective control over the various groups of fighters participating in these attacks, not to speak of the civilians, who followed the fighters. The picture that emerges from the evidence is not one of an organised army with a fully functioning command structure, but one of local groups remaining relatively independent and voluntary and a mass of uncontrollable civilians that were present at every attack. Therefore, the Trial Chamber has come to the conclusion that regarding all four attacks under consideration, the Accused cannot be held criminally responsible under Article 7(3) of the Statute for wanton destruction of cities, towns or villages not justified by military necessity.

**Sentencing**

The Trial Chamber has examined all the Parties' submissions in their written and oral submissions when determining the sentence for the crimes of which the Accused has been found guilty. Bearing in mind that the Accused will not be convicted for the crimes of his subordinates, but only for his failure to prevent them, the Trial Chamber underlines its belief that the *sui generis* nature of superior responsibility pursuant to Article 7(3) of the Statute allows for an even greater flexibility in the determination of sentence.

The Prosecution, referring to the gravity of the crimes, as well as to a number of aggravating factors, requested that the Accused be sentenced to 18 years imprisonment. The Defence submitted that any punishment would be highly inappropriate.

The Trial Chamber finds that the vulnerability of the victims is the only aggravating circumstance to be taken into consideration. However, a number of relevant mitigating circumstances have been taken into account. These are: some co-operation with the Prosecution, some expressions of remorse, the Accused's expressed readiness to surrender to the Tribunal if indicted, his young age at the time the crimes were committed, his family circumstances, acts of consideration towards Serb detainees, co-operation with SFOR, his general attitude towards the proceedings, and, most importantly, the general circumstances prevailing in Srebrenica and those particular to the Accused and to the crimes committed.

This last mitigating factor is in fact the pivotal consideration for the purpose of establishing the appropriate sentence in this case. As described throughout the Judgement, the conditions in Srebrenica during the relevant time were abysmal and deteriorated by the day. Militarily superior Serb forces had encircled Srebrenica, a threat to which the Bosnian Muslims in town were almost entirely unprepared. An unmanageable influx of refugees, critical shortages of food and other essentials, general chaos and the flight from Srebrenica of all pre-war authorities resulted in a breakdown of society in Srebrenica, including a collapse of law and order. These were the circumstances when at age 25, without any relevant military and administrative experience, the Accused found himself elected Commander of voluntary fighters who were poorly trained, did not form part of a proper army, had very few weapons at their disposal, and without an effective link to the ABiH and BiH authorities. It was a continuous uphill struggle that achieved very few results. In addition, the Accused had to rely on local leaders, some of whom not only chose to act independently, but even considered him inexperienced and scorned his authority. His situation became worse with the passage of time as the Bosnian Serb forces increased the momentum of their siege.

As stated earlier, however, there was an interval of time in December 1992 and most of January 1993, during which the Accused, not only had the duty to prevent the re-occurrence of murder and cruel treatment of prisoners, but also was not in the impossibility of fulfilling it. Nor was he reasonably impeded from carrying out this responsibility. Still, it is the conviction of the Trial Chamber that he preferred to do nothing notwithstanding that he could have prevented the re-occurrence of these crimes,. This is the only wrongdoing he has been found guilty of. However, the Trial Chamber understands that although his predicament at this time was not as bad and perilous as it was during the ensuing Serb winter offensive, it still was one which should have a strong mitigating effect in the assessment of the sentence to be inflicted against him. The Trial Chamber is finding the Accused guilty and will be sentencing him because he had reason to know that the re-occurrence of murder and cruel treatment of prisoners was possible and because he decided not to do anything about it, not even to at least try and enquire about the situation of the prisoners.

There is no other case in which the Accused was found guilty of having failed to prevent murder and cruel treatment of prisoners in such a limited manner and in such abysmal personal and circumstantial conditions as in this case. Consequently, the sentence that is being meted out reflects this uniquely limited criminal responsibility. However, the Trial Chamber emphasises the fact that the leniency of the sentence which will be imposed on the Accused does not and should not diminish from the principle that the Trial Chamber has endeavoured to articulate in this judgement, namely, that for the purpose of Article 7(3) criminal responsibility, commanders should, throughout, maintain awareness of the imperativeness required to be given to the protection of prisoners.

Finally, the Trial Chamber wishes to state that all the conclusions reached in this Judgement, legal and factual, including the sentence itself, were arrived at unanimously.

**Disposition**

Mr. Orić, would you please stand up. For the reasons summarised above, this Trial Chamber, having considered all of the evidence and the arguments of the Parties, the Statute and the Rules, and based upon the factual and legal findings as determined in the Judgement, decides as follows:

You are found **NOT GUILTY** and therefore acquitted of :

- Under **Count 1**: Failure to discharge your duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder from 24 September 1992 to 16 October 1992 pursuant to Articles 3 and 7(3) of the Statute, and failure to discharge your duty as a superior to take necessary and reasonable measures to punish the occurrence of murder from 24 September 1992 to 16 October 1992 and from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

- Under **Count 2**: Failure to discharge your duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment from 24 September 1992 to 16 October 1992 pursuant to Articles 3 and 7(3) of the Statute, and failure to discharge your duty as a superior to take necessary and reasonable measures to punish the occurrence of cruel treatment from 24 September 1992 to 16 October 1992 and from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

You are however found **GUILTY** of:

- Under **Count 1**: Failure to discharge your duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

- Under **Count 2**: Failure to discharge your duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment from 27 December 1992 to 20 March 1993 pursuant to Articles 3 and 7(3) of the Statute.

Lastly, you are found **NOT GUILTY** and therefore acquitted of the following counts:

- **Count 3**: Failure to discharge your duty as a superior to take necessary and reasonable measures to prevent or punish the occurrence of acts of wanton destruction of cities, towns, or villages, not justified by military necessity, pursuant to Articles 3(b) and 7(3) of the Statute.

- **Count 5**: Wanton destruction of cities, towns, or villages, not justified by military necessity, pursuant to Articles 3(b) and 7(1) of the Statute.

We sentence you Naser Orić to **two years of** imprisonment. According to the law of this Tribunal you are entitled to credit for the period of time you have been in custody towards the sentence which we are meting out. You were arrested on 10 April 2003. Therefore, you have been in custody for three years, two months, and 21 days. Since the imposed sentence is less than the credit to be applied for the period of time you have been in custody, the Trial Chamber ORDERS that you be released immediately from the United Nations Detention Unit after the necessary practical arrangements are made.

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